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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

XAIVER S. WILLIAMS,
Petitioner,
v.
L.S. McEWEN,
Respondent.

No. 2:12-cv-00899 JAM CKD P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding pro se with a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges his 2008 judgment of conviction in the Sacramento County Superior Court for assault with a firearm, discharging a firearm at an inhabited dwelling, second-degree murder, and several special allegations, for which he was sentenced to a state prison term of seventy-two years to life. He asserts nine claims challenging his conviction and sentence as violative of his Constitutional rights. (ECF No. 5 (“Ptn.”).) Respondent has filed an answer to the petition, (ECF No. 23), and petitioner has filed a traverse, (ECF No. 33). Upon careful consideration of the record and the applicable law, the undersigned will recommend that the petition be denied.

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1 **BACKGROUND**

2 I. Factual Background

3 In its affirmation of the judgment on appeal, the California Court of Appeal, Third
4 Appellate District, set forth the relevant factual background as follows:

5 **The Consolidation of the Cases**

6 In case No. 05F06418, the People filed a complaint on July 11,
7 2005, charging defendant with assault with a firearm on July 7,
8 2005. (The offense of discharging a firearm into an inhabited
9 dwelling was not alleged at this time.) In case No. 05F11333, the
10 People filed a complaint charging defendant with murder on
11 December 22, 2005, which is not in the record. After preliminary
12 hearings were conducted and defendant was held to answer in both
13 cases, the People filed a consolidated information.

14 **Preliminary hearings**

15 **Case No. 05F06418**

16 Sacramento Police Officer Yul Alameda testified that around 7:45
17 p.m. on July 7, 2005, he took a brief statement from Marlon Leon,
18 the victim, at his residence on Stoddard Street in Sacramento
19 County, and then later did a more complete interview at the
20 hospital.

21 Officer Alameda found Leon sitting in the threshold of the open
22 front door of his home; his right foot, and its big toe in particular,
23 was bloody. There were shell casings in the roadway in front of
24 the house and two or three bullet holes a few feet to the side of the
25 front door.

26 Around 10:00 p.m., Officer Alameda interviewed Leon at the
27 hospital. Leon said that earlier that day he and Iris Luna had
28 driven from his house to a nearby fast-food restaurant. He saw a
group of five or six Black males there, including Joey Smith.
Smith put his hand in his front waistband area. As Leon pulled out
of the parking lot and looked back in his rearview mirror at the
group, he saw Smith raise his shirt and display what appeared to be
the grip of a handgun. After Leon reached home, he saw the group
walking down the street toward his house. They tried to provoke
him to come out to the street. As he started to walk inside, he saw
two members of the group, Smith and "Sandman," shooting toward
the house and aiming at him. ("Sandman," whose real name Leon
did not know, was 16 or 17 years old, stood around five feet nine

1 inches tall, and weighed 160 pounds.) A shot hit Leon's right big
2 toe. The group then ran off. Leon claimed he did not fire any
shots or even have a gun.

3 Sacramento Police Officer Mario Valenzuela testified that in the
4 early morning of July 8, 2005, he obtained a statement from a
suspect in the shooting, "Sandman" (defendant).

5
6 Defendant claimed that Leon and an associate of Leon's named Sir
Byron had the habit of assaulting defendant when they crossed
7 paths with him. On July 7, as defendant walked with friends down
Stoddard Street past Leon's house, Leon brandished a revolver at
8 defendant and his group.

9 Defendant did not say what his friends did then. He did say,
10 however, that an older male acquaintance, whose name he did not
know but whom he called an "OG," FN2 came by, put a handgun
11 on the hood of a car, and said something like, "[I]f he [defendant]
wanted to use it, he could, but he [the O.G.] wasn't going to hand it
12 to him. He [defendant] would have to pick it up himself."

13 [FN2: As the People's gang expe[r]t testified at trial, "O.G." is a
14 standard abbreviation for "original gangster," meaning a senior
gang member who makes decisions for the gang and gives orders
15 to junior members. Defendant testified, however, that to him the
term meant "old guy" (or "older adult male") and had nothing to
16 do with gangs, though it might have done so in the past.]

17 According to defendant, Leon called Sir Byron, who came over.
18 Meanwhile, Leon brandished his weapon at defendant, his friends,
and children in the vicinity. Defendant heard Leon fire a shot. In
19 response, defendant picked up the gun from the car hood and fired
several rounds toward Leon and Sir Byron. He ran away, throwing
20 the gun into someone's front yard along the way. At the time of
the shooting, he was not aware of anyone there (aside from himself
21 and Leon) having a gun.

22 **Case No. 05F11333**

23 At the preliminary hearing, David Wong, who had accompanied
24 the victim on the date of the crime, and Calvin Williams, who had
accompanied defendant, testified, as did Sacramento Police
25 Detective Thomas Higgins. FN3 Wong and Williams portrayed
the incident as a classic gang confrontation, but differed as to who
26 started it.

27 [FN3: Neither Wong nor Williams was available at trial. Their
28 preliminary hearing testimony was read to the jury during the

1 People's case-in-chief. So far as the record shows, Williams was
2 not related to defendant. Wong is Hispanic on his mother's side
and identifies with that ethnicity for gang purposes.]

3 Wong testified:

4 Around noon on December 22, 2005, Wong was with Danny
5 Valdez, his 17-year-old cousin, in the "Freeport" neighborhood of
6 Sacramento. FN4 After leaving an acquaintance's house, where
7 they had two or three beers apiece, they walked toward a park
8 down the street. Neither was under the influence of alcohol or
drugs. Neither had weapons. Valdez was wearing a white T-shirt,
a red hat, and blue jeans.

9 [FN4: According to Detective Higgins, the neighborhood is called
10 Freeport Manor.]

11 At the corner of 38th Avenue and McLaren Avenue, Wong and
12 Valdez encountered defendant, whom Wong did not know but had
13 seen in the neighborhood. Defendant was standing in the middle
14 of the street; a Black male unknown to Wong was walking behind
15 defendant, at least 30 feet back. Defendant was staring at Wong
16 and Valdez and mumbling. They crossed the street to find out
17 what he wanted.

18 Defendant said: "[Y]ou are in my hood" (or something similar).
19 He also told Wong: "I know you, but I don't know your cousin."
20 Defendant pushed his fist into Valdez's chin. Wong stepped
21 between them and told defendant not to do that. Raising his fist to
22 Wong, defendant told him: "[S]tay out of my area."

23 The man who had been walking behind defendant (i.e., Williams)
24 came running up to the left of Wong. Expecting Williams to hit
25 him, Wong turned that way. Defendant and Valdez then started
26 fighting, with defendant's back toward Wong. Wong could not see
27 who threw the first punch. When Wong turned back the other way,
28 Williams hit him in the face. Wong slipped and fell. As he started
to get up, he heard, but did not see, two shots fired. Then he saw
Valdez hit the ground.

Defendant was holding a smoking silver gun that looked like a .38
revolver, standing over Valdez and pointing the gun at him.
Defendant then put the gun in the front of his pants and ran off
with Williams down McLaren Avenue. Valdez subsequently died
of his injury.

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Having been granted use immunity, Williams testified:

He was under 18 years old. He had suffered a juvenile adjudication for theft.

He encountered defendant in the neighborhood on the morning of December 22, 2005. They shared a 40-ounce beer at an acquaintance's house, but did not drink anything else or do any drugs.

After leaving, they walked to and from a Walgreen's on Freeport Boulevard, three or four blocks from the house. Defendant walked ahead of Williams, who was text messaging as he walked. When defendant reached the intersection of 38th Avenue and McLaren Avenue, Williams was in midblock, at least 30 feet behind.

Williams saw two Hispanic-looking strangers approaching defendant at the intersection, apparently trying to block defendant's path. One said something like "[W]hatch [sic] you looking at[?]" The other was trying to hold him back from attacking defendant. The first man (Valdez) was face-to-face with defendant; the second man (Wong) was face-to-face with Williams. Defendant did not do or say anything challenging; he asked the strangers to go on and leave him alone. Williams did not see any guns, but the strangers' outfits might have hidden weapons.

Valdez said something in Spanish about a gang. Defendant replied, "[T]his Freeport." Valdez "was just like [']F[___] Freeport. Man, this is Norte['] and then just socked him." FN5

[FN5: Williams claimed he had never heard the term "Freeport Crips." He was not a member of that gang and did not know if defendant was. He had heard that "Norte" is a gang.]

Wong hit Williams, who retaliated; Wong fell, then got up immediately and came at Williams again. Williams could not see the fight between defendant and Valdez after the first punch.

As Wong came after Williams again, Williams heard one shot; he did not see who fired and did not know if anyone had been hit. He ran to his grandmother's house a couple of blocks away; defendant caught up with him at the door. Williams's sister opened the door to them. Williams's mother, who lived nearby, came in, saying she had heard about the shooting. Defendant and Williams claimed ignorance.

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Defendant got a ride from Williams’s mother. Williams did not go along. He did not know where she was going to drop defendant off.

The police interviewed Williams about the shooting that evening. Confronted with the interview transcript during the preliminary hearing, Williams claimed he did not remember saying that “Sandman” told Williams, “I can’t believe I just shot . . . this dude” and urged Williams not to tell anyone about it. Williams also claimed he did not remember saying that Wong might have been trying to break up a fight between defendant and the victim, or that Williams heard two gunshots, or that he did not know defendant.

Detective Higgins testified:

Around 6:20 p.m. on December 22, 2005, Detective Higgins interviewed Earnest Ware about an incident that had occurred at approximately 2:45 p.m. outside the home of Ware’s cousin on McLaren Avenue. FN6 While watching television there, Ware heard arguing outside and went to the front door, which was open behind a closed security door.

[FN6: Ware testified at trial that the house actually belonged to his wife’s cousin, who was not there that day.]

As Ware opened the security door and looked out, he saw someone falling and spinning backwards; then he saw another person pull a chrome or silver handgun out of his waistband and fire two shots at the first person. The shooter was a light-skinned Black or mixed-race male, 5 feet 10 or 5 feet 11 inches tall, weighing 150 to 160 pounds, with bushy hair pulled back into a ponytail, wearing a dark sweater or jacket and blue jeans with white spots on them.

After the victim fell, the shooter’s friend said, “[L]et’s go.” They “trotted” past the house. Ware called 911.

Detective Higgins showed Ware two photographic lineups, one including defendant, the other including Calvin Williams. Ware could not identify Williams, but said defendant looked like the shooter.

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Trial evidence

We first recount the evidence pertaining specifically to each incident, then follow with the gang expert testimony.

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Counts one and two

Prosecution case

Marlon Leon testified:

On July 7, 2005, he was 23 years old and on informal probation. FN8 He and defendant, whom he knew as “Sandman,” were once friends, but had not been for some time before that date. Leon had done nothing to create problems; people in the neighborhood just stopped getting along.

[FN8: He did not specify the offense for which he was on probation at that time.]

In July 2005, Leon was staying in his grandmother’s house on Stoddard Street with his girlfriend, Iris Luna. Defendant had visited him there when they were still friends.

On the afternoon of July 7, 2005, Leon and Luna decided to go to A & W, a nearby fast-food restaurant. Leon drove Luna’s white rental car and she rode as a passenger.

At the A & W parking lot, Leon saw defendant’s friend Joey Smith, with whom Leon had “problems.” Luna told Leon that Smith was reaching down as if to pull something out of his sock. Fearing trouble, Leon did not go into the restaurant.

Leon drove next door to the Airway Market, where he saw defendant with three to five friends. Defendant and another man were running out of the store. Leon saw one [member] of the group using a cell phone and another holding a gun.

Leon yelled something to them because he thought they were about to jump him. Then he hopped back in the car and drove to his grandmother’s house, “doing a hundred all the way[.]” He owned a gun, but did not have it in the car.

Leon and Luna ran into the house. Leon grabbed a cordless phone and called his best friend, Sir Byron (a person a little older than himself), who did not get along with defendant’s group. Leon wanted Sir Byron’s help because defendant and his group had come running up there; there were “like 30 people in front of my house.” All the neighbors were also outside.

Leon went to the garage to get a .38 revolver, which he set down in the hallway by the front door. Sir Byron was still on the phone, but never reached the scene.

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Leon and Luna went outside to confront the crowd, which included defendant, Joey Smith, and Calvin Williams; it also included a female who was calling out Luna to fight, egged on by the others. They were standing by the white rental car Leon had parked on the street. Amending his prior testimony, Leon now recalled getting two guns from the garage, one of which (a .38 revolver) he was holding as he went outside; the other was for Luna, but he did not remember if she had picked it up or if it was still in the hallway.

Smith ran up onto the driveway. Leon told him to get away before something happened. Leon did not see Smith with a gun at any time during the incident.

A neighbor urged Leon to go inside. As Leon tried to do so, shots were fired from defendant's position. Leon saw defendant pull out a gun and shoot toward Leon and the house. He did not see anyone else with a gun.

The last shot hit Leon in his big toe, breaking three bones. It took him four to six months afterward to walk correctly. He was still in pain.

After being shot, Leon walked inside, then came back out and fired one or two shots, aiming toward defendant. The crowd took off running.

Leon was reluctant to testify because he still had "problems on the street" with defendant's friends. Recently, defendant's brother had confronted him several times in the neighborhood, threatening to kill him one day. Defendant had called him a snitch and thrown rocks at his car.

Leon admitted a felony conviction for assault with a deadly weapon in 2005. FN9 During his time on the stand, he was also shown to have made numerous prior inconsistent statements to the police and others.

[FN9: He did not testify as to his sentence for this offense.]

Luna testified, telling roughly the same story Leon had told. FN10 Like him, she was impeached with prior inconsistent accounts.

[FN10: Her account differed on three points: (1) she did not mention any challenge to her to come out and fight; (2) she saw Smith as well as defendant firing; and (3) she saw only one gun in the house, although Leon had tried to get her to testify that there were two.]

1 Officer Mario Valenzuela testified at trial, stating that the police
2 had not found the gun defendant used.

3 Sacramento Police Officer Denise Wong testified that she found
4 ten .40-caliber shell casings on the street outside the victim's
5 house, and two spent bullet rounds, one on the street and one in the
6 trunk of a parked white Hyundai; she also saw three bullet holes on
7 the outside of the house. FN11 Inside the house, there was a spent
bullet round close to the front door. There was blood in the front
doorway and on the front step. In the driveway, there was a parked
brown Chevrolet with body damage, leaking gasoline.

8 [FN11: A firearms expert opined that all the shell casings came
9 from a single .40-caliber weapon, while the spent bullets came
10 either from a single .40-caliber weapon or from two similar ones.
11 (He also opined that a .40-caliber weapon can fire smaller-caliber
ammunition, but was not specifically asked about .38-caliber
ammunition.) A forensic investigator testified that the shell
12 casings and bullet rounds did not produce latent prints.
13 Defendant and Leon were tested for gunshot residue, but the tests
did not yield highly probative results.]

14 **Defense case**

15 The defense called police officers and the prosecutor's investigator
16 to show Leon's and Luna's prior inconsistent statements.

17 Defendant testified on his own behalf as follows:

18 In July 2005 he was 16 years old. He lived just outside the
19 Freeport Manor neighborhood, but had lived in it for years, and his
20 grandmother still did. He knew gang members there and
"associated" with them as an acquaintance, but was not in a gang.
21 He had been called "Sandman," his present nickname, since he was
little.

22 On July 7, 2005, defendant and a few friends, including Williams,
23 were at the market when Leon drove up in a white car with Luna
and yelled at them. After words were exchanged, he drove off,
24 saying, "I'll kill you."

25 Defendant and his friends walked toward the house of a friend's
26 grandmother, a route which happened to take them past Leon's
residence. There were five or six in the group, including a 12-
27 year-old. Defendant did not have a gun.

28 As they passed Leon's residence, Leon was standing on the
sidewalk; he threw his hands up as if to challenge them, then

1 walked away toward his parked Chevrolet in the driveway. Two of
2 defendant's friends started walking toward Leon, followed by
3 defendant. A few neighbors were outside.

4 Leon opened the driver's-side door of the Chevrolet and pulled out
5 a revolver and a cell phone. He walked up to his porch, where
6 Luna was already standing. As Leon and defendant's group
7 argued, Leon waved the gun back and forth toward them. More
8 people from the neighborhood "just started popping up," including
9 some defendant knew only by street name, such as "O.G.s and
10 things like that." Defendant went to the back of the rental car Leon
11 had parked on the street.

12 Smith ran up onto Leon's lawn. Leon pointed his gun at Smith and
13 told him to back up; Smith returned to the street. Someone threw a
14 beer can at the porch. Smith ran to the passenger side of the
15 Chevrolet in the driveway and began to kick it, while Williams and
16 his sister kicked the rental car in the street. By now there were 20
17 to 25 people in front of the house, including children and
18 neighbors.

19 Leon fired a shot at Smith. Leon then got a bat and held it under
20 his arm, still holding his gun in one hand and pointing it at the
21 crowd as he talked on his cell phone.

22 As defendant stood by the rental car, "an O.G.-this dude who we-
23 everybody in the neighborhood referred to as O.G.-old adult male"
24 said he had a handgun that he would not give to defendant, but
25 defendant could use it; "O.G." then put a semiautomatic on the car.
26 "O.G." was Black and in his 40's, about defendant's height and
27 weighing around 180 pounds, with braided hair; defendant had
28 seen him more than 10 times in the neighborhood riding a bike, but
did not know his name or where he lived. After putting the gun
down, "O.G." "took off." FN12

[FN12: On cross-examination, defendant admitted that "O.G." at
one time "[p]robably" meant "original gangster," but claimed that
it no longer did. Since 2005 he had heard the term used only to
mean "older people."]

Just then, Leon fired at defendant. In a "quick reaction," defendant
picked up the gun from the car and fired toward Leon until the gun
ran out of ammunition. He aimed not at Leon but "above him."
He did not know whether any of his shots hit Leon.

The rest of the crowd started running when the shots began. Once
out of ammunition, defendant did the same. As he ran, he threw
the gun into someone's yard on McLaren Avenue.

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Count three

Prosecution case

The jury heard the preliminary hearing testimony of Williams and David Wong, who were unavailable at trial.

Earnest Ware testified that while watching TV at his wife’s cousin’s house on McLaren Avenue on December 22, 2005, he heard noise outside. As it continued, he opened the front security door and looked out. He saw four males outside, two Hispanic and two Black (one of whom was “like albino kind of looking”), facing each other and arguing loudly. (He could not identify anyone in the courtroom with certainty as one of the four; however, he saw one person who was light-complected, like one of those at the scene.) He could not hear what they were arguing about. He did not see any physical conflict.

One of the young Hispanic males stepped back; then two shots were fired and he went down. The gunman put the weapon back into his pocket or his waist.

Ware went inside and called 911. As he spoke on the phone, he heard one of the Black males holler, “[C]ome on, let’s go,” then saw them cross in front of the security door and run across the lawn. The other Hispanic male was hollering, “Call an ambulance.”

Ware was interviewed by Detective Higgins, who showed him a photo lineup in which he was able to identify the shooter.

Brian Bagerly, who lived in the area of the crime scene, heard the sound of a backfire on the afternoon of December 22, 2005, but did not think anything of it. As he drove up to the scene, he saw one boy holding another, screaming, “[H]elp me. My cousin’s been shot.” Bagerly called 911 on his cell phone. He did not see any guns or anyone leaving the scene.

Sacramento Police Officer Dustin Smith and other officers at the scene did not find any guns. Receiving a report of suspects in a white Ford Explorer in the area of Zelda Way, Officer Smith found and detained a female Black adult and two other subjects.

Marian Vanhook, the mother of Williams, testified that on the afternoon of December 22, 2005, she picked up her daughter from school in her white Ford Explorer, then drove to her grandmother’s house on Zelda Way to pick up her son. As she neared her grandmother’s house, she noticed that police officers had blocked

1 off a nearby street. She asked a young man walking down the
2 street what had happened and was told someone had been killed.
3 When she arrived at her grandmother's house she was upset to find
4 defendant there with her son because defendant had been having
5 trouble with men in the neighborhood and she did not want
6 Williams hanging out with him. She asked if they knew about
7 what had happened. They said they did not. She told Williams she
8 was taking him home with her and asked defendant if she could
9 drop him off somewhere because he could not stay there. He said
10 yes and directed her to an apartment complex near Florin Road and
11 Greenhaven Drive where he said he was going to visit a friend; he
12 got out there. Williams was not with them because he had stayed
13 behind to pack clothes. FN13 She did not see any guns on
14 defendant. After she dropped him off, she returned to the Zelda
15 Way house, where the police contacted her; they searched the
16 Explorer, but did not find any weapons.

17 [FN13: Shown items of clothing in an exhibit, Vanhook identified
18 a blue hat as her son's.]

19 Forensic pathologist Dr. Mark Super opined that Danny Valdez
20 died of a single wound from a gunshot which entered at the neck,
21 went through the right carotid artery, fractured the second vertebra
22 in the neck, cut the spinal cord, causing an acute subarachnoid
23 hemorrhage, then exited from the back of the neck. Soot on
24 Valdez's chin and around the wound showed that the shot had been
25 fired from close range or a position possibly "loosely in contact"
26 with the skin. The trajectory of the bullet showed that it had
27 moved slightly upward through the body. The evidence was
28 consistent with Valdez taking a step backward while looking down
to his right as the shot was fired. Valdez also had abrasions on his
hands that could have come from a fistfight.

29 **Defense case**

30 Sacramento Police Officer David Topaz testified that when
31 questioned at the scene, David Wong smelled heavily of beer.

32 Sacramento Police Officer Frank Woo testified that items of
33 clothing seized at the scene included a red cap and a blue cap. The
34 blue cap said "Freeport" on the back and "Cali Kal" on the front.
35 FN14

36 [FN14: Kal is a short form of Williams's first name.]

37 Forensic laboratory analysts testified that blood samples from
38 Valdez's autopsy showed cocaine metabolite in his system and a
blood-alcohol content of .13 percent. Based on the blood samples

1 and the preliminary hearing transcripts, a clinical
2 neuropsychologist opined that the substances in Valdez's system
3 on December 22, 2005, could have caused him to feel paranoid and
to act aggressively and recklessly.

4 Defendant testified as follows:

5 He met Williams at someone's house in the neighborhood on the
6 morning of December 22, 2005; then they went to another
7 acquaintance's house and stayed a few hours, sharing a 40-ounce
8 beer. After that, they walked out to do an errand, with Williams
9 lagging behind because he was text messaging. Williams was still
behind as they approached the corner of 38th Avenue and McLaren
Avenue.

10 Defendant was dressed in a black coat, blue jeans, and a black knit
11 cap; Williams was wearing dark clothes, including the blue cap
introduced as an exhibit. FN15 Defendant did not have a gun.

12 [FN 15: Defendant did not state what kind of hairstyle he was
13 wearing that day.]

14 Two individuals approaching (Valdez and David Wong) caught
15 defendant's attention because they were talking loudly and looking
16 at him continuously. They crossed the intersection and cut him
off, getting right in front of him. Valdez was wearing the red hat
introduced as an exhibit and a big fluffy coat.

17 As they walked up to defendant, Valdez said: "What you are
18 looking at?" (Sic.) Defendant said: "[W]hat do you mean what
19 I'm looking at?" Valdez said: "[T]his is Norte." Defendant knew
20 this referred to a Mexican gang called Norteños, but did not
21 understand why Valdez was saying this to him; it made him mad
and caused him to think the two of them were about to start
something.

22 Defendant said: "[Y]ou're in my neighborhood. You're in
23 Freeport." FN16 Valdez and David Wong spoke to each other in
24 English; Wong said he knew defendant, but defendant did not
25 remember ever seeing him. Because Valdez had gotten up in his
26 face, defendant put his hands up and said, "[B]ack up out of my
space"; he did not touch Valdez. Wong told defendant to get his
hands out of Valdez's face. Defendant was mad, but did not lose
his temper. By this time, Williams was reaching the scene.

27 [FN16: On cross-examination, defendant denied that he was trying
28 to "represent" (i.e., proclaim gang membership) as a Freeport Crip:
"I was telling him where he was at." He assumed that when

1 Valdez said, “[T]his is Norte,” he was referring to the
2 neighborhood, not “representing” as a Norteño, because “I have
3 family members who are northerners too.” He thought that after
4 they had exchanged information about the neighborhood, they
5 would go about their business. However, when asked why he had
6 answered Valdez by saying, “[Y]ou’re in my neighborhood, this is
7 Freeport,” he replied: “I can’t tell you why[.]”]

8 As defendant looked at Wong, Valdez punched him in the face.
9 Defendant fell. From this point, he could not see what was going
10 on between Williams and Wong.

11 Valdez bent over defendant, trying to get on top and continuing to
12 swing. As defendant tried to get back up, he saw Valdez pull out a
13 revolver and hold it in his hand.

14 Defendant grabbed for the gun, pushing up on Valdez’s hand with
15 both of his own. As they struggled for the gun, a single shot went
16 off. Defendant did not know who pulled the trigger—“[i]t just
17 happened too quick.” Because defendant was pushing the gun up,
18 the shot went away from him and toward Valdez. The impact
19 separated them; defendant stepped back and Valdez fell backward.
20 Valdez let go of the gun, but defendant’s hand was still on it.

21 Defendant put the gun in his pocket and ran down McLaren
22 Avenue, with Williams in front of him. They reached Williams’s
23 grandmother’s house and went in.

24 Defendant said to Williams: “I think he got shot.” Williams
25 described his own fight and asked if defendant had seen it;
26 defendant said “no.” Williams asked if defendant had shot the
27 victim; defendant said, “I just seen him fall.” Defendant then told
28 Williams not to talk about it because defendant was scared and did
not know what might happen.

After Williams’s mother arrived, she asked if defendant needed a
ride; he said he did and directed her to a friend's residence at an
apartment complex. He denied knowing about what had happened
when asked by Williams’s mother. They reached his destination in
five or 10 minutes; she dropped him off and left. He threw the gun
in a garbage bin at the complex.

The next day, defendant learned he was a suspect. After hiding out
for two weeks because he was afraid, he turned himself in at his
church.

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1 **Gang evidence**

2 Sacramento Police Detective Steven Hansen, an expert on Black
3 gangs who had also been trained as to Hispanic gangs, explained
4 that the main Black gangs in Sacramento are the Bloods and Crips.
5 Crips identify with the color blue, Bloods with the color red. If a
6 Crip calls a fellow Crip “Cuz,” it is a term of endearment, but if he
7 calls a Blood “Cuz,” it is a challenge or an act of aggression. If a
8 Blood walks through a Crip neighborhood wearing red, it is an act
9 of aggression. Freeport Manor is claimed by the Freeport Crips.

10 The main Hispanic gangs in Sacramento are the Norteños, who
11 identify with the color red and the letter N, and the Sureños, who
12 identify with the color blue. “Norte,” an abbreviation of Norteño,
13 is sometimes yelled out by Norteño members.

14 The Sacramento Police Department confirms or validates a person
15 as a gang member if he meets any two of 11 criteria, such as
16 admission of gang membership, wearing of gang-related clothing,
17 gang tattoos, and involvement in gang-related crimes. Not all gang
18 members have been confirmed; some “slip under the radar.”

19 The highest-status Crips—“O.G.’s” or original gangsters—are the
20 “shotcallers” or decision makers, while others are “soldiers” who
21 must “put in work” for the gang to gain respect and climb the
22 ladder. Some O.G.’s started out with the gang in the early 1980’s,
23 but a younger person can also become an O.G.

24 Status, or “respect,” is “of the utmost importance” to gang
25 members, both within their gang and outside it. It is gained by
26 “intimidating and instilling fear within the community and rival
27 gang members.” If a gang member is successfully challenged, or
28 “disrespected,” he will lose respect within his gang. The ultimate
 means to gain status is murder.

 A typical challenge is “if someone’s throwing out [i.e.,
 provocatively announcing] where they are from”—“letting this
 other person know, hey, you’re not dealing with only me. You’re
 dealing with . . . all Crips.” Someone who enters a neighborhood
 claimed by a gang must receive its consent to conduct business
 there; denial of consent is a sign of disrespect. If one is
 disrespected in front of witnesses, the word will spread quickly.

 Gangs often seek to intimidate witnesses from testifying in court.
 To be labeled a “snitch” is dishonorable in gang culture; it can also
 be fatal. Someone who testifies against a gang member can have
 “problems on the street” afterward.

1 Detective Hansen had investigated defendant, including review of
2 the preliminary hearing transcripts, classification reports from the
3 juvenile hall probation department, and a similar report from the
4 Sacramento Sheriff's Department. In Detective Hansen's opinion,
although the Sacramento Police Department has not confirmed
defendant as a Crip, he is one.

5 Jail classification forms are used to make sure that inmates are not
6 endangered by being housed with members of rival gangs. An
inmate gets to pick where he wants to be assigned.

7 The classification reports from the juvenile hall probation
8 department, dated July 2005 and January 2006, showed that after
9 defendant's interviews he was classified as a Crip member. FN17
10 An incident report from May 2006 described a fight with a fellow
11 inmate who, according to defendant, was "disrespecting
12 [defendant's] hood" and "told [defendant] that he was not a real
13 Crip." The sheriff's department classification report, dated
February 2007, said: "[S]eparate [defendant] from Bloods." And
on a classification form dated June 2007, defendant "basically
admitted to being a Crip per him."

14 [FN17: Jennifer Yoshida, a Sacramento County juvenile probation
15 officer, testified that defendant's classification forms showed him
16 to be an "admitted Crip associate," which was not necessarily the
17 same thing as a member. For classification purposes, the
department did not care whether an inmate was an associate or a
member because the need to separate him from inmates affiliated
with rival gangs would be the same in either case.]

18 David Wong was confirmed as a Norteño in 2003 by the
19 Sacramento Police Department. A MySpace photograph of Danny
20 Valdez shows him wearing a red hat bearing the letter N and a red
21 sweater bearing the number 14 (both signifying Norteño
affiliation), and (along with another person) holding up fingers
indicating the same number.

22 The prosecutor gave Detective Hansen the following hypothetical:
23 Two persons, at least one of whom is associated with the Norteños,
24 and one of whom is wearing a red hat that says "Sacramento,"
observe a Crip member and his friend, who is wearing a blue hat
25 that says "Cali Kal"; a staring match or "mugging match" ensues;
one group yells, "[W]hat are you looking at?"; the Crip says,
26 "[Y]ou're in my hood. . . . [S]tay out of my area"; he adds, "This is
Freeport"; one of the other individuals responds, "F[] Freeport,
27 man. This is Norte"; a physical conflict ensues; finally, the Crip
pulls out a gun and fatally shoots one of the opposing individuals.
28 Based on these facts, Detective Hansen opined the incident was

1 gang-related: the wearers of opposing colors came in contact,
2 leading to mutual statements of aggression or “disrespect,” and
3 deadly violence inevitably followed.

4 People v. Williams, No. C058205, 2010 WL 2224675, at *1-11 (Cal. Ct. App. June 4, 2010), also
5 attached as Exhibit A to Respondent’s Answer (ECF No. 23). The facts as set forth by the Court
6 of Appeal are presumed correct, 28 U.S.C. § 2254(e)(1), and are consistent with the
7 undersigned’s review of the record.

8 II. Procedural Background

9 On January 14, 2008, following a consolidated trial, a jury in the Superior Court of
10 Sacramento County (“Superior Court”) found petitioner guilty of committing assault with a
11 firearm (Cal. Pen. Code § 245(a)(2)) (“Count One”), discharging a firearm at an inhabited
12 dwelling (Cal. Pen. Code § 246) (“Count Two”), and murder in the second degree (Cal. Pen.
13 Code § 187(a)) (“Count Three”). (2CT at 314-17.¹) The jury also found several special
14 allegations to be true, including that petitioner personally used a firearm in the commission of
15 Count One (Cal. Pen. Code § 12022.5(a)), that he proximately caused death or great bodily injury
16 by personally and intentionally discharging a firearm in the commission of Counts Two and
17 Three (Cal. Pen. Code § 12022.53(d)), and that he was free on bail during the commission of
18 Count Three (Cal. Pen. Code § 12022.1). (Id.)

19 On February 15, 2008, the Superior Court sentenced petitioner to an aggregate term of
20 seventy-two years to life in state prison. (2CT 385-88.) As to Count One, the court imposed a
21 sentence to be served concurrently with Count Two. (Id.) As to Count Two, the court imposed a
22 sentence of five years for the underlying offense and an additional twenty-five years-to-life for
23 the firearm enhancement. (Id.) As to Count Three, the court imposed a consecutive sentence of
24 fifteen years-to-life for the underlying offense, an additional twenty-five years-to-life for the

25
26 ¹ Respondent lodged nineteen documents with the court (“Lod. Docs.”). (See ECF No. 24.)
27 “CT” refers to the Clerk’s Transcript on Appeal, which was lodged in two volumes. (See Lod.
28 Doc. 1.) “RT” refers to the Reporter’s Transcripts, which respondent lodged in eight volumes.
(Lod. Doc. 4.) “ART” refers to the Augmented Reporter’s Transcripts, which was lodged in a
single volume. (Lod. Doc. 5.)

1 firearm enhancement, and an additional two years for the out-on-bail enhancement. (Id.)

2 Petitioner appealed his conviction to the California Court of Appeal, Third Appellate
3 District (“Court of Appeal”). (Lod. Doc. 8.) His appeal consisted of two claims: the Superior
4 Court’s refusal to sever the trial of Counts One and Two from the trial of Count Three denied
5 petitioner his rights to due process and a fair trial, and his sentence violated the Eighth
6 Amendment’s prohibition against cruel and unusual punishments. (Id.) The Court of Appeal
7 rejected both claims and affirmed the judgment in a written opinion on June 4, 2010. (Williams,
8 2010 WL 2224675.)

9 Petitioner then filed a petition for review in the California Supreme Court. (Lod. Doc.
10 12.) His petition restated the same two claims that the Court of Appeal had rejected in its
11 affirmance of the judgment. (Id.) On August 11, 2010, the California Supreme Court denied the
12 petition for review without comment or citation. (Lod. Doc. 13.)

13 On August 10, 2011, petitioner filed a petition for a writ of habeas corpus in the Superior
14 Court. (Lod. Doc. 14.) That petition raised the arguments contained in Claims One through
15 Seven in the pending federal habeas petition. (Id.) On October 7, 2011, the Superior Court
16 issued an order denying the petition. (Lod. Doc. 15.) The Superior Court explained that Claims
17 One through Six were barred because petitioner could have raised them on direct appeal but failed
18 to do so. (Id.) The Superior Court denied Claim Seven on the merits. (Id.)

19 On October 31, 2011, petitioner filed a petition for a writ of habeas corpus in the Court of
20 Appeal. (Lod. Doc. 16.) That petition also raised the arguments contained in Claims One
21 through Seven in the pending federal habeas petition. (Id.) The petition indicated—incorrectly—
22 that petitioner had not “filed any other petitions, applications, or motions with respect to this
23 conviction, commitment, or issue in any court.” (Id. at 4.) The Court of Appeal denied the
24 petition on November 4, 2011. (Lod. Doc. 17.) The single-sentence order denying the petition
25 cited just two cases: In re Steele, 32 Cal. 4th 682, 692 (2004), and In re Hillery, 202 Cal. App. 2d
26 293 (1962). (Id.)

27 On December 12, 2011, petitioner filed a petition for writ of habeas corpus in the
28 California Supreme Court. (Lod. Doc. 18.) That petition also raised the arguments contained in

1 Claims One through Seven in the pending federal habeas petition. (Id.) Petitioner again
2 incorrectly stated that he had not “filed any other petitions, applications, or motions with respect
3 to this conviction, commitment, or issue in any court.” (Id. at 4.) The California Supreme Court
4 denied the petition without comment or citation on April 11, 2012. (Lod. Doc. 19.)

5 On May 2, 2012, petitioner filed the pending federal habeas petition. (Ptn.) Respondent
6 filed an answer on February 19, 2013. (ECF No 23.) Petitioner filed a traverse on July 3, 2013.
7 (ECF No. 33.)

8 **STANDARDS GOVERNING HABEAS RELIEF UNDER THE AEDPA**

9 The statutory limitations of federal courts’ power to issue habeas corpus relief for persons
10 in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective
11 Death Penalty Act of 1996 (AEDPA). The text of § 2254(d) states:

12 An application for a writ of habeas corpus on behalf of a person in
13 custody pursuant to the judgment of a state court shall not be
14 granted with respect to any claim that was adjudicated on the merits
in State court proceedings unless the adjudication of the claim—

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

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

19 Section 2254(d) “does not require a state court to give reasons before its decision can be
20 deemed to have been ‘adjudicated on the merits.’” Harrington v. Richter, ___ U.S. ___, 131 S.
21 Ct. 770, 785 (2011). Rather, “when a federal claim has been presented to a state court and the
22 state court has denied relief, it may be presumed that the state court adjudicated the claim on the
23 merits in the absence of any indication or state-law procedural principles to the contrary.” Id. at
24 784-85. But that presumption “may be overcome when there is reason to think some other
25 explanation for the state court’s decision is more likely.” Id. at 785. For example, “where . . . the
26 last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a
27 later decision did not silently disregard that bar and consider the merits.” Ylst v. Nunnemaker,
28 501 U.S. 797, 803 (1991). “If the claim was not ‘adjudicated on the merits’ by the state court, the

1 review is to be de novo.” Amado v. Gonzalez, ___ F.3d ___, 2014 WL 3377340, at *6 (9th Cir.
2 July, 11, 2014) (citing Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)).

3 But when a claim has been “adjudicated on the merits,” § 2254(d) makes clear that
4 AEDPA applies. The Supreme Court has set forth the operative standard for federal habeas
5 review of state court decisions under AEDPA as follows: “A state court’s determination that a
6 claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on
7 the correctness of the state court’s decision.” Harrington, 131 S. Ct. at 786 (quoting Yarborough
8 v. Alvarado, 541 U.S. 652, 664 (2004)). Accordingly, “a habeas court must determine what
9 arguments or theories supported or . . . could have supported[] the state court’s decision; and then
10 it must ask whether it is possible fairminded jurists could disagree that those arguments or
11 theories are inconsistent with the holding in a prior decision of [the Supreme] Court.”
12 Harrington, 131 S. Ct. at 786. “For purposes of § 2254(d)(1), ‘an unreasonable application of
13 federal law is different from an incorrect application of federal law.’” Id. at 785 (quoting
14 Williams v. Taylor, 529 U.S. 362, 410 (2000)). “Evaluating whether a rule application was
15 unreasonable requires considering the rule’s specificity. The more general the rule, the more
16 leeway courts have in reaching outcomes in case-by-case determinations.” Harrington, 131 S.
17 Ct. at 786. Emphasizing the stringency of this standard, which “stops short of imposing a
18 complete bar of federal court relitigation of claims already rejected in state court proceedings[,]”
19 the Supreme Court has cautioned that “even a strong case for relief does not mean the state
20 court’s contrary conclusion was unreasonable.” Id. (citing Lockyer v. Andrade, 538 U.S. 63, 75
21 (2003)).

22 The undersigned also finds that the same deference is paid to the factual determinations of
23 state courts. Under § 2254(d)(2), factual findings of the state courts are presumed to be correct
24 subject only to a review of the record which demonstrates that the factual finding(s) “resulted in a
25 decision that was based on an unreasonable determination of the facts in light of the evidence
26 presented in the state court proceeding.” It makes no sense to interpret “unreasonable” in §
27 2254(d)(2) in a manner different from that same word as it appears in § 2254(d)(1)—that is, the
28 factual error must be so apparent that “fairminded jurists” examining the same record could not

1 abide by the state court factual determination. A petitioner must show clearly and convincingly
2 that the factual determination is unreasonable. See Rice v. Collins, 546 U.S. 333, 338 (2006).

3 The habeas corpus petitioner bears the burden of demonstrating the objectively
4 unreasonable nature of the state court decision in light of controlling Supreme Court authority.
5 Woodford v. Viscotti, 537 U.S. 19 (2002). Specifically, the petitioner “must show that the state
6 court’s ruling on the claim being presented in federal court was so lacking in justification that
7 there was an error well understood and comprehended in existing law beyond any possibility for
8 fairminded disagreement.” Harrington, 131 S. Ct. at 786-87. “Clearly established” law is law
9 that has been “squarely addressed” by the United States Supreme Court. Wright v. Van Patten,
10 552 U.S. 120, 125 (2008). Thus, extrapolations of settled law to unique situations will not qualify
11 as clearly established. See e.g., Carey v. Musladin, 549 U.S. 70, 76 (2006) (established law not
12 permitting state sponsored practices to inject bias into a criminal proceeding by compelling a
13 defendant to wear prison clothing or by unnecessary showing of uniformed guards does not
14 qualify as clearly established law when spectators’ conduct is the alleged cause of bias injection).
15 The established Supreme Court authority reviewed must be a pronouncement on constitutional
16 principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules
17 binding only on federal courts. Early v. Packer, 537 U.S. 3, 9 (2002).

18 **PETITIONER’S CLAIMS**

19 Petitioner’s federal habeas petition raises nine claims: (1) “the trial court erred when it
20 failed to suppress extra-judicial statements made to police officer Valenzuela;” (2) petitioner was
21 denied due process and a fair trial because neither the prosecutor nor the Superior Court granted
22 David Wong immunity; (3) the inconsistent jury verdicts necessitated a new trial; (4) the evidence
23 is insufficient to sustain petitioner’s second-degree murder conviction; (5) the sentence
24 enhancement imposed pursuant to California Penal Code² section 12022.53(d) is invalid because
25 the prosecution failed to prove subdivision (e)(1) of that statute; (6) the sentencing judge
26 incorrectly believed that Penal Code section 12022.1 required imposition of consecutive life
27

28 ² All subsequent references to “Penal Code” are to the California Penal Code.

1 terms; (7) petitioner received ineffective assistance of appellate counsel; (8) a single trial joining
2 Counts One and Two with Count Three denied petitioner due process and a fair trial; and (9)
3 petitioner’s sentence of seventy-two years-to-life violates the Eighth Amendment’s prohibition on
4 cruel and unusual punishments. (Ptn. 7-8.³)

5 **PROCEDURAL ISSUES**

6 I. Fair Presentation of Claims

7 A state prisoner must exhaust available state court remedies before a federal court may
8 consider granting habeas corpus relief. See 28 U.S.C. § 2254(b)(1)(A); O’Sullivan v. Boerckel,
9 526 U.S. 838, 842 (1999). But see 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas
10 corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the
11 remedies available in the courts of the State.”). To satisfy the exhaustion requirement, a
12 petitioner must “fairly present” his federal claims to the state courts. Duncan v. Henry, 513 U.S.
13 364, 365 (1995) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)) (internal quotation marks
14 omitted).

15 Respondent argues that petitioner “did not fairly present [Claims] One through Seven to
16 the Court of Appeal or the California Supreme Court because he misrepresented to both courts
17 that he had not previously sought relief from a lower court.” (ECF No. 23 at 26.) Respondent
18 does not provide any citation in support of this argument, which clearly fails under the United
19 States Supreme Court’s standard for fair presentation. “A claim has been ‘fairly presented’ if the
20 petitioner has described both the operative facts and the federal legal theory on which his claim is
21 based.” Baldwin v. Reese, 541 U.S. 27, 33 (2004).

22 Here, despite misrepresenting that he had not previously sought relief from a lower court,
23 petitioner’s habeas petitions to the state appellate courts—each of which totaled thirty-nine
24 pages—explicitly described both the operative facts and the federal legal theories on which his
25 claims were based. (See Lod. Docs. 16 and 18.) The petitions therefore fairly presented his
26 claims in Claims One through Seven to the state appellate courts, and petitioner has satisfied the
27

28 ³ Page number citations are to the pagination assigned via the court’s electronic filing system.

1 exhaustion requirement.

2 II. Standard of Review

3 A. Claims One through Six

4 No state court has adjudicated Claims One through Six on the merits. As noted above,
5 there is a presumption that a state court has adjudicated a claim on the merits when the claim has
6 been presented to the court and the court has denied relief. See Harrington, 131 S. Ct. at 784-85.
7 Here, petitioner presented Claims One through Six to the Superior Court, the Court of Appeal,
8 and the California Supreme Court in his habeas petitions, and each of those courts denied relief.
9 Thus, the presumption is applicable to Claims One through Six.

10 But Harrington makes clear that the presumption “may be overcome when there is reason
11 to think some other explanation for the state court’s decision is more likely.” Id. at 785 (citing
12 Ylst, 501 U.S. at 803). Here, the presumption is overcome because there is reason to think that
13 the state courts more likely denied the petitions—at least with respect to Claims One through
14 Six—on state procedural grounds than on the merits. See Lambert v. Blodgett, 393 F.3d 943, 969
15 (9th Cir. 2004) (explaining that an adjudication on the merits is a “decision finally resolving the
16 parties’ claims . . . that is based on the substance of the claim advanced, rather than on a
17 procedural, or other, ground.” (quoting Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001))).

18 The Superior Court explicitly denied Claims One through Six on state procedural grounds.
19 (See Lod. Doc. 15 (explaining that those claims were barred under In re Harris, 5 Cal. 4th 813,
20 829, 21 Cal. Rptr. 2d 373 (1993), because they were part of the record and could have been raised
21 on direct appeal)). The Court of Appeal—albeit for a different reason—also did not reach the
22 merits of Claims One through Six. (See Lod. Doc. 17.) The Court of Appeal’s order cites just
23 two cases, both of which permit a court to deny a habeas corpus petition without reaching the
24 merits. See In re Steele, 32 Cal. 4th 682, 692, 10 Cal. Rptr. 3d 536 (2004) (“a reviewing court
25 has discretion to deny without prejudice a habeas corpus petition that was not filed first in a
26 proper lower court”); In re Hillery, 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759 (1962) (“[T]his
27 court has discretion to refuse to issue the writ . . . on the ground that application has not been
28 made therefor in a lower court in the first instance.”)

1 There is also reason to think that the California Supreme Court did not deny petitioner’s
2 claims on the merits. First, in his petition to the California Supreme Court, petitioner
3 misrepresented that he had not filed any petitions related to his conviction in any other court. The
4 California Supreme Court may have, like the Court of Appeal, exercised its discretion under In re
5 Steele and In re Hillery and dismissed on procedural grounds without reaching the merits.
6 Second, because the last reasoned opinion addressing Claims One through Six (the Superior
7 Court’s order) explicitly found that those claims were procedurally barred, there is a presumption
8 that the California Supreme Court did not silently disregard that bar and consider the merits. See
9 Ylst, 501 U.S. at 803 (“where . . . the last reasoned opinion on the claim explicitly imposes a
10 procedural default, we will presume that a later decision did not silently disregard that bar and
11 consider the merits”); Cannedy v. Adams, 706 F.3d 1148, 1159 (9th Cir. 2013) (“[Harrington]
12 does not change our practice of ‘looking through’ summary denials to the last reasoned
13 decision—whether those denials are on the merits of discretionary review.”), as amended, 733
14 F.3d 794 (9th Cir. 2013), cert. denied, 134 S. Ct. 1001 (2014); see also Johnson v. Williams, ____
15 U.S. ____, 133 S. Ct. 1088, 1094 n.1 (2013) (“Consistent with our decision in Ylst, the Ninth
16 Circuit ‘look [ed] through’ the California Supreme Court’s summary denial of Williams’ petition
17 for review and examined the California Court of Appeal’s opinion, the last reasoned state-court
18 decision to address Juror 6’s dismissal.”). There is no indication that the California Supreme
19 Court’s unexplained order, which upheld the Superior Court’s rejection of Claims One through
20 Six, rested upon a different ground than the procedural bar cited by the Superior Court. See Ylst,
21 501 U.S. at 80 (“Where there has been one reasoned state judgment rejecting a federal claim, later
22 unexplained orders upholding that judgment or rejecting the same claim rest upon the same
23 ground.”). The California Supreme Court’s summary denial, like the Superior Court and Court of
24 Appeal orders, is therefore not on the merits.

25 Thus, the presumption of adjudication on the merits is “overcome.” As the Ninth Circuit
26 recently reconfirmed, “[i]f the claim was not ‘adjudicated on the merits’ by the state court, the
27 review is to be de novo.” Amado v. Gonzalez, ____ F.3d ____, 2014 WL 3377340, at *6 (9th Cir.
28 July, 11, 2014) (citing Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)). Because no state

1 court adjudicated Claims One through Six on the merits, this court reviews them de novo.

2 B. Claims Seven through Nine

3 Petitioner included Claim Seven in each of his state habeas petitions. Because the
4 California Supreme Court summarily denied the petition, this court must look through that
5 judgment to the last reasoned-state court decision on the merits. Cannedy, 706 F.3d at 1159. The
6 Superior Court order is the only reasoned-state court decision addressing Claim Seven on the
7 merits. Accordingly, this court looks through to and reviews the Superior Court’s analysis of
8 Claim Seven under § 2254(d).

9 Section 2254(d) review is also appropriate for Claims Eight and Nine. Petitioner raised
10 those claims in his direct appeal and the Court of Appeal addressed them in a reasoned decision.
11 See Williams, 2010 WL 2224675. Thus, this court reviews the Court of Appeal’s analysis of
12 Claims Eight and Nine under § 2254(d).

13 **DISCUSSION**

14 I. Claim One: Petitioner’s Statements to Officer Valenzuela

15 Petitioner claims that “the trial court erred when it failed to suppress extra-judicial
16 statements made to police officer Valenzuela.” (Ptn. 14.) In support of his claim, petitioner
17 contends: (1) he did not expressly waive his Miranda rights in writing before making the
18 statements, (2) the statements were involuntary, (3) the trial court failed to consider the totality of
19 the circumstances to determine if the statements were voluntary, (4) Officer Valenzuela
20 committed perjury at the preliminary hearing, and (5) Officer Valenzuela admitted to having
21 elicited inculpatory identification information before informing petitioner of his Miranda rights.
22 (Ptn. 14-17.)

23 A. Background

24 Officer Valenzuela testified at the suppression hearing that he obtained petitioner’s
25 telephone number from petitioner’s mother the morning after the shooting.⁴ (ART 3-5.) Officer
26 Valenzuela then called petitioner and told him that he needed petitioner to sign an agreement

27 _____
28 ⁴ Petitioner suggests that his mother provided Officer Valenzuela petitioner’s phone number
because Officer Valenzuela misrepresented his rank by claiming to be a sergeant. (Ptn. 15.)

1 stating that petitioner and Leon would leave each other alone. (ART 5-6, 34.) This “ruse” was
2 effective: as petitioner approached his mother’s apartment to sign the waiver, officers detained
3 and placed petitioner in the back seat of a patrol car. (ART 6-8, 34.) In the patrol car Officer
4 Valenzuela asked petitioner—before advising him of his Miranda rights—questions about his
5 identity, including questions about the moniker “Sandman.” (ART 8.) Officer Valenzuela
6 advised petitioner of his Miranda rights as follows:

7 You have the right to remain silent.

8 Do you understand?

9 Anything you say may be used against you in court.

10 Do you understand?

11 You have the right to the presence of an attorney before and during
12 any questioning.

13 Do you understand?

14 If you cannot afford an attorney, one will be appointed for—free of
15 charge before any questioning if you want.

16 Do you understand?

17
18 (ART 9-10.) According to Officer Valenzuela, petitioner “stated that he understood each and
19 every one” of those rights. (ART 10.) Petitioner appeared to understand and did not ask any
20 questions about his rights. (Id.)

21 Officer Valenzuela, without asking if petitioner wished to waive his Miranda rights, began
22 asking petitioner questions about the incident. (ART 10, 13) Petitioner willingly answered the
23 questions without reluctance; he appeared awake, calm, quiet, and unemotional, and he did not
24 display any indications of illness or intoxication. (ART 11-12.) Petitioner then provided a
25 statement in which he admitted firing several shots at Leon. (2RT 427-28.)

26 The trial court denied petitioner’s motion to suppress his statement to Officer Valenzuela
27 upon finding that petitioner had waived his Miranda rights.

28 ////

1 The question here is not whether [petitioner] was advised of his
2 rights because the court finds that he was. The question is whether
3 he waived those rights before the interrogation took place.

4 There's no doubt from the evidence here that there's no express
5 waiver of the rights summarized. He did not specifically say nor
6 was he specifically asked if he waived his constitutional rights.

7 ...

8 The evidence is that he was in custody at the time that he was
9 Mirandized approximately ten minutes after he was placed in the
10 patrol unit. He appeared to understand what was being said to him.
11 He did not ask any questions about his rights. He didn't appear
12 confused. He said he understood. There was nothing coercive
13 about this situation other than the usual stress of being taken into
14 custody and handcuffed and being transported. He did not appear
15 to be reluctant to answer at all.

16 Based on the totality of the circumstances it does not appear to this
17 court that [petitioner's] statement was the product of coercion or
18 a[n] involuntary waiver of his constitutional rights.

19 It does appear that there was an implied waiver here and that it was
20 free and voluntary.

21 (RAT 47, 49-50.)

22 Similarly, in denying petitioner's habeas petition, the Superior Court addressed the
23 argument that the failure to challenge the admissibility of petitioner's statements to Officer
24 Valenzuela amounted to ineffective assistance of appellate counsel:

25 As to the first issue, whether counsel should have argued that
26 petitioner's Miranda rights had been violated, "[i]n reviewing
27 Miranda issues on appeal, [an appellate court] accept[s] the trial
28 court's resolution of disputed facts and inferences as well as its
evaluations of credibility if substantially supported, but
independently determine[s] from undisputed facts and facts found
by the trial court whether the challenged statement was legally
obtained." A Miranda warning is adequate even when there is no
express waiver of rights. (Berguis v. Thompkins (2010) ___ U.S.
___, 130 S.Ct. 2250, 2261.) Waiver may be implied when, after
having received a proper warning, a defendant submits to
questioning. There is no requirement that police obtain a parent's
consent before interrogating a minor.

////

1 In evaluating whether to challenge the Miranda warning petitioner
2 received, counsel would have recognized that the appellate court
3 would not redetermine credibility. It would not decide that the
4 officer was untruthful when the court and jury had found
5 otherwise. Thus, the evidence showed that a Miranda warning was
6 given. There was no requirement that petitioner expressly waive
7 his rights. And there was no requirement as to parental consent.
8 Counsel would also recognize that petitioner could not testify as to
9 the conversation between the officer and his mother because
10 petitioner was not present. His testimony would be hearsay. Thus,
11 counsel had no ground for a Miranda challenge and was not
12 ineffective in omitting this challenge from the appeal.

13 (Lod. Doc. 15 at 2 (some citations omitted).)

14 B. Waiver

15 1. Standard

16 In Miranda, the United States Supreme Court held that “the prosecution may not use
17 statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the
18 defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege
19 against self-incrimination.” Miranda v. Arizona, 384 U.S. 436, 444 (1966). To this end,
20 custodial interrogation must be preceded by advice to the potential defendant that he or she has
21 the right to consult with a lawyer, the right to remain silent, and that anything stated can be used
22 in evidence against him or her. Id. at 473-74.

23 But a defendant may waive his Miranda rights, and such a waiver need not be express.
24 Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) (“An ‘implicit waiver’ of the ‘right to remain
25 silent’ is sufficient to admit a suspect’s statement into evidence.” (quoting North Carolina v.
26 Butler, 441 U.S. 369, 376 (1979))). “[W]aiver of Miranda rights may be implied through ‘the
27 defendant’s silence, coupled with an understanding of his rights and a course of conduct
28 indicating waiver.’” Thompkins, 560 U.S. at 384 (quoting Butler, 441 U.S. at 373). Stated
differently: “Where the prosecution shows that a Miranda warning was given and that it was
understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the
right to remain silent.” Thompkins, 560 U.S. at 384; see also Hurd v. Terhune, 619 F.3d 1080,
1088 (9th Cir. 2010) (“Thompkins makes clear that a criminal defendant must affirmatively and

1 unambiguously invoke his right to remain silent if he wishes to cut off police interrogation.”).

2 Thus, “[t]he waiver inquiry has two distinct dimensions: waiver must be voluntary in the
3 sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or
4 deception, and made with a full awareness of both the nature of the right being abandoned and the
5 consequences of the decision to abandon it.” Thompkins, 560 U.S. at 382 (internal quotation
6 marks omitted); see also Moran v. Burbine, 475 U.S. 412, 421 (1986). The Supreme Court
7 employs a totality-of-the-circumstances approach to determine whether a defendant has waived
8 his Miranda rights, “even where interrogation of juveniles is involved.” Fare v. Michael C., 442
9 U.S. 707, 725 (1979). This approach requires inquiry into all the circumstances surrounding the
10 interrogation, including evaluation of “the juvenile’s age, experience, education, background, and
11 intelligence, and into whether he has the capacity to understand the warnings given him, the
12 nature of his Fifth Amendment rights, and the consequences of waiving those rights.” Id.

13 2. Analysis

14 Petitioner contends that the trial court should have suppressed his statement to Officer
15 Valenzuela because petitioner did not provide “expressed written” waiver of his Miranda rights.
16 (Ptn. 15.) He also suggests that any implied waiver of his Miranda rights was invalid because (1)
17 Officer Valenzuela misrepresented his rank to petitioner’s mother and used a ruse to trick
18 petitioner into detention and arrest, and (2) petitioner was “a naïve sixteen year old unfamiliar
19 with the criminal justice system and uneducated to his right to remain silent during his custodial
20 questioning,”⁵ (Ptn. 15-17.)

21 ⁵ Petitioner also contends that Officer Valenzuela’s failure to notify petitioner’s parents of
22 petitioner’s Miranda rights requires suppression of the inculpatory statements. (Ptn. 15.) See
23 United States v. Doe, 170 F.3d 1162, 1168 (9th Cir. 1999) (explaining that although such a failure
24 “is not a due process violation, it may serve as an independent basis for suppression.”).
25 Petitioner’s contention is not relevant to the waiver inquiry under Thompkins, and, in any event,
26 does not warrant habeas relief. Petitioner fails to recognize that Doe is of no consequence or
27 relevance to his conviction. See Doe, 170 F.3d at 1167 (holding that “[18 U.S.C.] § 5033 requires
28 the government to inform [a] juvenile’s parents of the juvenile’s Miranda rights”) (emphasis
added). Doe concerned a federal statute, not the United States Constitution. Moreover, that
federal law is irrelevant to petitioner’s conviction. Section 5033 is part of the Federal Juvenile
Delinquency Act, which applies only to “violations of a law of the United States committed by a
person prior to his eighteenth birthday . . .” 18 U.S.C. § 5031 (emphasis added). Section 5033
and Doe are inapplicable because petitioner was charged, tried, and convicted of violations of

1 Petitioner’s emphasis on “expressed written” waiver suggests he does not understand what
2 Thompkins makes clear: an individual may waive his or her Miranda rights implicitly.
3 Thompkins, 560 U.S. at 384. The trial court judge explained this point of law when denying
4 petitioner’s motion to suppress, (ART 50), as did the Superior Court judge when denying
5 petitioner’s state habeas petition, (Lod. Doc. 15 at 2). Application of Thompkins leads the
6 undersigned to the same conclusion that the two state court judges explicitly arrived at: petitioner
7 implicitly waived his rights.

8 The totality of the circumstances indicates that petitioner’s statement to Officer
9 Valenzuela was the product of a free and deliberate choice rather than intimidation, coercion, or
10 deception. Petitioner fails to explain how his consumption of alcohol before his arrest rendered
11 his waiver involuntary. Moreover, his emphasis on Officer Valenzuela’s alleged
12 misrepresentation of rank to petitioner’s mother and the “ruse” that led to petitioner’s arrest is of
13 no relevance to the waiver inquiry. The alleged misrepresentation of rank—a misrepresentation
14 made not to petitioner but to his mother—is irrelevant because it occurred outside the presence of
15 petitioner and he had no knowledge of it. See Moran v. Burbine, 475 U.S. 412, 422 (1986)
16 (“Events occurring outside of the presence of the suspect and entirely unknown to him surely can
17 have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.”).
18 Similarly, petitioner fails to explain how the ruse—the falseness of which petitioner must have
19 recognized when handcuffed and placed in the back of a patrol car upon arriving at his mother’s
20 apartment—affected his decision to waive his Miranda rights. The ruse resulted in nothing more
21 than petitioner’s arrest; it did not compel or coerce him to confess. See Illinois v. Perkins, 496
22 U.S. 292, 297 (1990) (“Ploys to mislead a suspect or lull him into a false sense of security that do
23 not rise to the level of compulsion or coercion to speak are not within Miranda’s concerns.”). As

24
25 state law, not federal law. Habeas relief is therefore not warranted on the ground that Officer
26 Valenzuela failed to notify petitioner’s parents of petitioner’s Miranda rights. See Burunda v.
27 Williams, 2:08-cv-015633-JCM-PAL, 2012 WL 474503, at *4 (D. Nev. Feb. 14, 2012) (“[Cases
28 that the petitioner relied on his habeas petition] concern application of the Federal Juvenile
Delinquency Act in federal criminal proceedings. Petitioner was convicted in Nevada state court
under Nevada state law. Federal decisions regarding the application of a federal statute in a
federal criminal trial are irrelevant.”).

1 the trial court judge observed: “There was nothing coercive about this situation other than the
2 usual stress of being taken into custody and handcuffed and being transported. He did not appear
3 to be reluctant to answer at all.” (ART 49.) In sum, the totality of the circumstances indicates
4 that petitioner’s statement to Officer Valenzuela was the product of a free and deliberate choice
5 and not intimidation, coercion, or deception.

6 The totality of the circumstances also indicates that petitioner understood his Miranda
7 rights when he made the statements to Officer Valenzuela. Petitioner now emphasizes that he
8 was “a naïve sixteen year old unfamiliar with the criminal justice system and uneducated to his
9 right to remain silent during his custodial questioning.” (Ptn. 15.) But Miranda does not require
10 any familiarity with the criminal justice system beyond a reading of the warnings—which
11 petitioner admits he received. While petitioner now claims he was “uneducated to his right to
12 remain silent,” Officer Valenzuela explicitly informed him of that right; according to Officer
13 Valenzuela, petitioner stated that he understood that and the other Miranda rights. As the trial
14 court judge explained: “[Petitioner] appeared to understand what was being said to him. He did
15 not ask any questions about his rights. He didn’t appear confused. He said he understood.”
16 (ART 49.) The undersigned also finds that those facts indicate petitioner understood his rights.
17 Thus, while petitioner’s age and naiveté are relevant to the waiver inquiry, the totality of the
18 circumstances indicates that petitioner understood his Miranda rights.

19 The totality of the circumstances indicate that Officer Valenzuela informed petitioner of
20 his Miranda rights, that petitioner understood those rights, that petitioner’s statement was not
21 coerced, and that petitioner therefore implicitly waived his rights. See Thompkins, 560 U.S. at
22 385 (finding waiver where there was no basis to conclude that the defendant did not understand
23 his rights and that “he chose not to invoke or rely on those rights when he did speak”).

24 B. Involuntary Statements

25 1. Standard

26 “A confession must be suppressed, even absent a Miranda violation, if the totality of the
27 circumstances demonstrates that the confession was involuntary.” DeWeaver v. Runnels, 556
28 F.3d 995, 1002-03 (9th Cir. 2009). However, the Ninth Circuit has observed that a defendant’s

1 statement was “likely voluntary” if obtained after Miranda warnings and a valid waiver. Id. at
2 1003; see also Missouri v. Seibert, 542 U.S. 600, 608-09 (2004) (“[G]iving the warnings and
3 getting a waiver has generally produced a virtual ticket of admissibility.”). In determining
4 whether a statement or confession was involuntary and obtained in violation of the principles of
5 due process of law protected by the Fifth and Fourteenth Amendments, a court examines whether
6 a defendant’s will was overborne by the circumstances surrounding the giving of the statement or
7 confession. Dickerson v. United States, 530 U.S. 428, 434 (2000); see also Doody v. Ryan, 649
8 F.3d 986, 1014 (9th Cir. 2011) (en banc) (applying Dickerson). A court considers the totality of
9 all the surrounding circumstances, including the characteristics of the accused and the details of
10 the interrogation. Dickerson, 530 U.S. at 434.

11 2. Analysis

12 Officer Valenzuela informed petitioner of his Miranda rights and petitioner provided a
13 valid waiver of those rights. Based on these facts alone, petitioner’s statements to Officer
14 Valenzuela were “likely voluntary.” See DeWeaver, 556 F.3d at 1003.

15 Petitioner’s argument that the statements were involuntary rests on the same factual basis
16 as his argument that his waiver was involuntary: (1) Officer Valenzuela misrepresented his rank
17 to petitioner’s mother and used a ruse to trick petitioner into detention and arrest, (2) petitioner
18 was “a naïve sixteen year old unfamiliar with the criminal justice system and uneducated to his
19 right to remain silent during his custodial questioning,” and (3) Officer Valenzuela made no
20 attempt to notify petitioner’s parents of petitioner’s Miranda rights. Such facts, just as in the
21 Miranda waiver analysis, do not establish involuntariness.

22 Officer Valenzuela’s alleged misrepresentation of rank—made outside of petitioner’s
23 presence and before the questioning took place—could not possibly have affected petitioner’s
24 decision to provide the statements. Similarly, the ruse had concluded with petitioner’s arrest and
25 thus was not a circumstance surrounding “the giving of the statement.” Dickerson, 530 U.S. 434.
26 Officer Valenzuela’s failure to inform petitioner’s parents of petitioner’s rights under Miranda is
27 also irrelevant to determining whether petitioner’s will was “overborne by the circumstances.”
28 Id. Petitioner’s age and education, however, are certainly relevant to inquiry. But that does not

1 mean that petitioner was incapable of voluntarily providing statements to law enforcement. There
2 is simply no indication that Officer Valenzuela or any other law enforcement officer coerced or
3 placed even slight pressure on petitioner. As the trial court judge noted: “There was nothing
4 coercive about this situation other than the usual stress of being taken into custody and
5 handcuffed and being transported. He did not appear to be reluctant to answer at all.” (ART 49.)

6 Thus, petitioner’s claim that his statement was involuntary does not warrant habeas relief.

7 C. The Trial Court’s Evaluation of Voluntariness

8 Petitioner contends that the trial court judge failed to “look at the totality of the
9 circumstances” in determining whether his statements to Officer Valenzuela were voluntary.
10 (Ptn. 15.) But the trial court judge explicitly found “[b]ased on the totality of the circumstances it
11 does not appear to this court that [petitioner’s] statement was the product of coercion or a[n]
12 involuntary waiver of his constitutional rights.” (ART 50 (emphasis added).) The analysis
13 preceding that conclusion indicates that the trial court did in fact base the ruling on the totality of
14 the circumstances. Accordingly, petitioner’s claim that the trial court judge failed to consider the
15 totality of the circumstances in determining whether petitioner’s statements to Officer Valenzuela
16 were voluntary does not warrant habeas relief.

17 D. Officer Valenzuela’s Purported Perjury

18 Petitioner contends that Officer Valenzuela committed perjury by providing inconsistent
19 testimony. (Ptn. 15-16.) Specifically, petitioner contends that Officer Valenzuela’s preliminary
20 hearing testimony—in which he stated that petitioner was reluctant to make potential inculpatory
21 statements—conflicts with his testimony at a later hearing in which denied any reluctance. (Ptn.
22 15-17.) Petitioner argues that the trial court failed to consider his reluctant behavior or the
23 discrepancy in Officer Valenzuela’s purportedly perjured testimony when denying the motion to
24 suppress. (Ptn. 15-16.)

25 But there is no inconsistency in Officer Valenzuela’s testimony. Officer Valenzuela
26 testified at the preliminary hearing:

27 Q: Did you speak to [petitioner] about a shooting that occurred at
28 1448 Stoddard Street?

1 A: Yes, I did.

2 Q: Before speaking to him about that, did you ask [petitioner] if he
3 had a nickname or moniker he went by?

4 A: Yes, I did.

5 Q: Did [petitioner] respond?

6 A: Initially, he was reluctant, but he did state that his nickname
7 was Sandman.

8

9 (ICT 69.) At the subsequent suppression hearing, Officer Valenzuela was twice asked if
10 petitioner was reluctant to answer questions about “the incident.” (ART 10-11 (emphasis
11 added).) Officer Valenzuela replied that petitioner was not reluctant and willingly answered such
12 questions. (Id.) Officer Valenzuela’s statement at the preliminary hearing—that petitioner was
13 initially reluctant to reveal his nickname—is not inconsistent with his statement at the suppression
14 hearing—that petitioner was not reluctant in answering questions about “the incident.”
15 Petitioner’s nickname is a separate topic distinct from his shooting at Leon. Because Officer
16 Valenzuela did not provide inconsistent testimony, each of petitioner’s arguments resting on the
17 alleged inconsistency necessarily fail and do not warrant habeas relief.

18 E. Identification Information

19 Petitioner argues that Officer Valenzuela “admit[ted] to having elicited [] inculpatory
20 identification information before Mirandizing [] petitioner” (Ptn. 16.) Officer Valenzuela
21 did in fact testify that he asked petitioner about his nickname before reading petitioner his
22 Miranda rights. (ART 38-39.) However, Ninth Circuit precedent makes clear that Officer
23 Valenzuela’s question about petitioner’s moniker did not violate Miranda. See United States v.
24 Washington, 462 F.3d 1124, 1133 (9th Cir. 2006).

25 In Washington, FBI agents asked the defendant “a series of background questions”—
26 including questions about his gang moniker and gang affiliation—before reading him his Miranda
27 rights. Id. at 1129. On appeal, the defendant argued that the question about his gang moniker
28 amounted to an interrogation, and thus required Miranda warnings. The Ninth Circuit first stated

1 the general rule: “routine gathering of background biographical information, such as identity,
2 age, and address, usually does not constitute interrogation.” Id. at 1132. The Ninth Circuit then
3 reasoned that because police routinely ask suspects their names after being told that the person is
4 a suspect, “the question about [the defendant’s] gang moniker was routine gathering of
5 background information, not interrogation.” Id. at 1133. The defendant’s statement about his
6 gang moniker—despite preceding the Miranda warnings—was therefore admissible.⁶

7 Under Washington, Officer Valenzuela’s question about petitioner’s “Sandman” moniker
8 was simply “routine gathering of background information, not interrogation.” Petitioner’s
9 inculpatory response—despite preceding the Miranda warnings—was therefore admissible. His
10 claim does not warrant habeas relief.

11 F. Conclusion on Claim One

12 None of petitioner’s Miranda claims warrant habeas relief.

13 II. Claim Two: Wong’s Immunity

14 Petitioner contends that he was denied due process and a fair trial because neither the
15 prosecutor nor the court granted David Wong immunity. (Ptn. 20.) In support of his argument,
16 petitioner contends: (1) Wong “wasn’t under [the] threat of self-incrimination”; (2) the
17 prosecutor failed to disclose to the jury that, unlike Wong, Calvin Williams had received use
18 immunity for his testimony at the preliminary hearing; (3) the trial court erred in admitting the
19 transcript of Wong’s testimony from the preliminary hearing; and (4) petitioner presented good
20 cause for continuing the jury trial until after Wong’s sentencing in an unrelated criminal case.

21 (Ptn. 20-24.)

22 A. Background

23 Wong testified at petitioner’s preliminary hearing but invoked his Fifth Amendment right
24 to be free from self-incrimination and refused to answer any questions when called at petitioner’s

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26 ⁶ The defendant in Washington also argued that the agents already had most of his background
27 information, including his gang moniker, and that the only reason the agents asked him about
28 such information was to obtain incriminating admissions. The Ninth Circuit rejected this
argument, explaining that “police routinely confirm booking information such as names and
addresses.” Washington, 462 F.3d at 1133 n.1.

1 trial. (See 3RT 630-51.) The prosecutor refused to offer Wong immunity in exchange for his
2 testimony at trial. (3RT 638.) Wong’s preliminary testimony was read to the jury at petitioner’s
3 trial. (3RT 775-858.) Calvin Williams’s preliminary hearing testimony was also read to the jury
4 due to his unavailability at the time of trial. (3RT 664-775.)

5 B. Threat of Self-Incrimination

6 Petitioner contends that Wong was not “under [the] threat of self-incrimination.” (Ptn. 21-
7 22.) The privilege against self-incrimination under the Fifth Amendment is invoked properly
8 when there are “‘substantial hazards of self-incrimination’ that are ‘real and appreciable,’ not
9 merely ‘imaginary and unsubstantial,’” and “the existence of such a hazard is generally
10 determined from ‘examination of the questions, their setting, and the peculiarities of the case.’”
11 United States v. Rendahl, 746 F.2d 553, 555 (9th Cir. 1984) (quoting United States v. Neff, 615
12 F.2d 1235, 1239 (9th Cir. 1980)).

13 Petitioner’s counsel advanced at trial the very argument that petitioner presents in his
14 habeas petition. (See 3RT 633-38.) The trial court judge rejected the argument after allowing the
15 prosecutor and petitioner’s counsel to pose questions to Wong, and after reviewing the elements
16 of the assault and gang enhancement that Wong was awaiting sentencing on. (3RT 638-49.) As
17 the trial court judge explained: “It appears that the answers to the questions that have been posed
18 to Mr. Wong by both the people and the defense in this case could result in answers which would
19 lead to a - - certainly a possibility that his answers could incriminate him.” (3RT at 649.) The
20 undersigned also finds that the threat of Wong making incriminating statements while testifying
21 at petitioner’s trial was real and appreciable, and petitioner fails to demonstrate a deprivation of
22 his constitutional rights from the trial court judge’s finding the same.

23 C. Immunity for Defense Witnesses

24 1. Standard

25 As a general rule, “[a] criminal defendant is not entitled to compel the government to
26 grant immunity to a witness.” United States v. Westerdahl, 945 F.2d 1083, 1086 (9th Cir. 1991).
27 However, under certain circumstances, immunity for defense witnesses might be “necessary to
28 protect and enforce a defendant’s due process right to a fair trial.” United States v. Lord, 711

1 F.2d 887, 892 (9th Cir. 1983). The Ninth Circuit has identified those circumstances:

2 For a defendant to compel use immunity the defendant must show
3 that: (1) the defense witness's testimony was relevant; and (2)
4 either (a) the prosecution intentionally caused the defense witness
5 to invoke the Fifth Amendment right against self-incrimination
6 with the purpose of distorting the fact-finding process; or (b) the
7 prosecution granted immunity to a government witness in order to
8 obtain that witness's testimony, but denied immunity to a defense
witness whose testimony would have directly contradicted that of
the government witness, with the effect of so distorting the fact-
finding process that the defendant was denied his due process right
to a fundamentally fair trial.

9 United States v. Straub, 538 F.3d 1147, 1162 (9th Cir. 2008); see also United States v. Wilkes,
10 744 F.3d 1101, 1104-09 (9th Cir. 2014) (applying Straub).

11 1. Analysis

12 Petitioner's proffer of favorable testimony that he would have elicited from Wong at trial
13 satisfies Straub's relevancy requirement. Specifically, petitioner contends his attorney would
14 have elicited the following information from Wong: Wong and the victim were black belts in the
15 martial art of tae kwon do and had taken lessons since they were three years old; Wong's
16 validated gang status, propensity to carry concealed weapons, and pending plea bargain for
17 assault with a deadly weapon and gang enhancement; Wong's alcohol and cocaine intoxication
18 levels as reported in Officer Topaz's report and trial testimony; and the inconsistency between
19 Wong's inability to describe the struggle between petitioner and the victim and his clear
20 description of the gun. (Ptn. 22-23.)

21 But petitioner's claim fails on the second prong of Straub. With respect to part (2)(a) of
22 the Straub standard, Petitioner does not even allege that the prosecution intentionally caused
23 Wong to invoke the right against self-incrimination, let alone that the prosecution acted with the
24 purpose of distorting the fact-finding process. "Undue prosecutorial interference in a defense
25 witness's decision to testify arises when the prosecution intimidates or harasses the witness to
26 discourage the witness from testifying, for example, by threatening the witness with prosecution
27 for perjury or other offenses." Williams v. Woodford, 384 F.3d 567, 601-02 (9th Cir. 2002).
28 Here, the prosecution of Wong's separate gang-related offense does not amount to undue

1 prosecutorial interference. That Wong entered a plea agreement in that case suggests that the
2 prosecution sought a conviction not to intimidate, harasses, or discourage Wong from testifying,
3 but because Wong had engaged in criminal activity.

4 Petitioner similarly fails to establish part (2)(b) of the Straub standard. The prosecution
5 did in fact grant immunity to one witness, as Calvin Williams testified at the preliminary hearing
6 pursuant to an immunity agreement. Moreover, Calvin Williams’s testimony “directly
7 contradicted” Wong’s testimony in that they provided differing accounts of factual circumstances,
8 such as who instigated the confrontation and how many shots petitioner fired. See Wilkes, 744
9 F.3d at 1105 (“We have found direct contradictions where witnesses offer differing accounts of
10 factual circumstances.”). But petitioner’s argument fails to satisfy the other components of part
11 (2)(b) of the Straub standard.

12 First, Wong was not a “defense witness”; he testified without immunity at the preliminary
13 hearing that petitioner was the cause of the confrontation and its escalation to deadly violence.
14 Second, denying Wong immunity at trial did not have the effect of “so distorting the fact-finding
15 process that [petitioner] was denied his due process right to a fundamentally fair trial.” See
16 Straub, 538 F.3d at 1161-1162 (“A survey of our opinions suggests that in the majority of cases
17 where a defendant seeks to compel immunity for a witness . . . there will have been no distortion
18 of the fact-finding process, and the district court may deny immunity on [that] bas[i]s.”).
19 Although Wong did not testify at petitioner’s trial, he did testify at the preliminary hearing.
20 Petitioner not only had the opportunity to cross-examine Wong at that preliminary hearing, but
21 did in fact do so. (See 2CT 442-83.) Moreover, the prosecution’s decision to grant immunity to
22 Calvin Williams did not have the effect of distorting the fact-finding process, as Calvin William’s
23 immunized testimony was actually helpful to petitioner’s defense.⁷ Thus, neither the prosecutor’s

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25 ⁷ Calvin Williams claimed that Wong and Valdez started the confrontation, that Valdez threw the
26 first punch, that he heard only one gun shot, and that he did not know who pulled the trigger.
27 Williams, 2010 WL 2224675, at *3. The prosecution presumably granted immunity to Calvin
28 Williams expecting him to testify consistent with his interview with the police on the evening of
the shooting (in which he allegedly stated that Wong may have been trying to break up a fight
between petitioner and Valdez, and that “Sandman” said “I can’t believe I just shot . . . this dude”
before asking him not to tell anyone about the incident.). Id.

1 offer of immunity to Calvin Williams nor his refusal to extend the same to Wong distorted the
2 fact-finding process or deprived petitioner of a fundamentally fair trial. Cf. Straub, 538 F.3d at
3 1162 (finding a distortion of the fact-finding process where the prosecution granted immunity and
4 other incentives to eleven of the defendant’s co-conspirators while denying immunity “to the one
5 witness who had testimony that, if believed, would make the government’s key witness both a
6 perjurer and possible the actual perpetrator of the crime.”). Habeas relief is not warranted on this
7 claim.

8 D. Disclosing to the Jury that Calvin Williams had Received Immunity

9 Petitioner complains that when telling the jury during closing arguments that Calvin
10 Williams and Wong were “in the same boat,” (SRT 1893-94), the prosecutor failed to mention
11 that Calvin Williams had received use immunity for his testimony, (Ptn. 22).

12 First, petitioner misinterprets the prosecutor’s statement that Calvin Williams and Wong
13 were “in the same boat.” A more reasonable interpretation of the statement is that both witnesses
14 were unable to provide a complete account of the altercation between petitioner and Valdez due
15 to the fact that they were fighting with each other. Second, petitioner does not provide any
16 authority for his suggestion that a prosecutor has an obligation to reveal to the jury that a witness
17 has testified pursuant to an immunity agreement, or that a breach of that obligation violates the
18 United States Constitution. Cf. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that “the
19 suppression by the prosecution of evidence favorable to an accused upon request violates due
20 process where the evidence is material either to guilt or to punishment”); Amado, 2014 WL
21 3377340, at *9 (“The prosecution is trusted to turn over evidence to the defense”) (emphasis
22 added). The transcripts from the preliminary hearing make clear that the prosecutor complied
23 with his obligation under Brady and disclosed the immunity agreement to petitioner’s counsel; on
24 cross-examination, petitioner’s counsel asked Calvin Williams several questions about the
25 immunity agreement. (See RT 220.) Though petitioner’s counsel abandoned the topic when
26 Calvin Williams stated that he did not understand the terms of the immunity agreement, the line
27 of questioning indicates that defense counsel was aware of the agreement. Petitioner’s counsel
28 was just as capable of raising the issue to the jury as the prosecutor; the failure of either to do so

1 did not violate petitioner's constitutional rights.

2 Thus, the prosecutor's failure to inform the jury that Calvin Williams testified at the
3 preliminary hearing pursuant to an immunity agreement does not warrant habeas relief.

4 E. Admitting Wong's Preliminary Hearing Testimony

5 Petitioner contends that the trial court erred in admitting into evidence the transcript of
6 Wong's testimony from the preliminary hearing. (Ptn. 23.)

7 The Confrontation Clause of the Sixth Amendment, made applicable to the states through
8 the Due Process Clause of the Fourteenth Amendment, requires that a criminal defendant be
9 afforded the right to confront and cross examine witnesses against him. See Pointer v. Texas, 380
10 U.S. 400, 403 (1965). But testimonial statements of a witness absent from trial are admissible if
11 (1) the witness is unavailable at the time of trial and (2) the defendant had a prior opportunity to
12 cross-examine the witness. Crawford v. Washington, 541 U.S. 36, 59 (2004). Here, Wong was
13 unavailable at the time of petitioner's trial because he had invoked his Fifth Amendment right to
14 be free from self-incrimination. Additionally, petitioner not only had the opportunity to, but did
15 in fact cross-examine Wong at the preliminary hearing. (See 2CT 442-83.) Thus, admission of
16 the preliminary hearing transcripts did not violate the Constitution and does not warrant habeas
17 relief.

18 Petitioner also challenges the trial court's exclusion of the video and transcript of Wong's
19 police interview. The trial court excluded those items on the grounds that Wong was unavailable
20 to testify at petitioner's trial, Wong was not confronted with the video or transcript at petitioner's
21 preliminary hearing, and neither the video nor the transcript was admitted at the preliminary
22 hearing. (3RT 656.) Because petitioner fails to elaborate on his conclusory assertion that the
23 exclusion of those items violates due process, habeas relief is not warranted.

24 F. Petitioner's Motion to Continue Trial Until After Wong's Sentencing

25 Petitioner also contends that the trial court erred in denying his motion to continue the jury
26 trial until after Wong's sentencing because petitioner presented good cause for the continuance.
27 (Ptn 24.) Wong had pled no contest to assault with a deadly weapon and a gang enhancement for
28 an incident occurring on January 24, 2007, and sentencing for that offense was scheduled for

1 December 13, 2007, just nine days after the start of petitioner’s trial. (3RT 631-32.)

2 1. Standard

3 Trial courts are accorded broad discretion on matters regarding continuances. Morris v.
4 Slappy, 461 U.S. 1, 11-12 (1983); Hernandez v. Holland, 750 F.3d 843, 858 (9th Cir. 2014).

5 While there are “no mechanical tests for deciding when a denial of a continuance is so arbitrary as
6 to violate due process,” Ungar v. Sarafite, 376 U.S. 575, 589 (1964), the Ninth Circuit has
7 identified several factors relevant in determining whether the trial court abused its discretion in
8 denying a requested continuance. See Armant v. Marquez, 772 F.2d 552, 556-57 (9th Cir. 1985)
9 (identifying the following factors: the degree of diligence by the petitioner prior to seeking the
10 continuance; whether the continuance would have served a useful purpose; the inconvenience that
11 the continuance would have caused the court or the government; and the amount of prejudice
12 suffered by the petitioner). “At a minimum, however, in order to succeed the [petitioner] must
13 show some prejudice resulting from the court’s denial.” Id.

14 2. Analysis

15 The trial court’s denial of petitioner’s motion to continue was not so arbitrary as to violate
16 due process, as petitioner has not shown that he was prejudiced by the trial court’s exercise of
17 discretion. In addition to the reasons provided by the trial court when denying petitioner’s
18 motion, (see 3RT 658), petitioner fails to appreciate that Wong’s proffered testimony at
19 petitioner’s trial could be used against Wong in cases beyond the charge that Wong was awaiting
20 sentencing on at the start of petitioner’s trial. More succinctly: Wong might not have ever
21 testified at petitioner’s trial. Thus, petitioner was not prejudiced by the trial court’s denial of his
22 motion to continue the trial until Wong’s sentencing because Wong might not have testified at
23 petitioner’s trial even after receiving his sentence. Because petitioner has not shown prejudice, he
24 has not established that the trial court’s denial of his continuance motion was so arbitrary as to
25 violate due process.

26 G. Conclusion on Petitioner’s Immunity Arguments

27 Thus, habeas relief is not warranted on any of petitioner’s claims based on the
28 prosecutor’s and trial court’s refusal to grant Wong immunity.

1 III. Claim Three: Petitioner’s Motion for a New Trial

2 Petitioner argues that the trial court erred in denying his motion for a new trial. (Ptn. 27.)
3 According to petitioner, because the jury found not true that he personally inflicted great bodily
4 injury upon Leon in Count One, it was factually impossible for petitioner to personally discharge
5 a firearm which proximately caused bodily injury to Leon in Count Two—an allegation which the
6 jury found true. (Ptn. 28.) Because these findings are irreconcilable, petitioner argues, the trial
7 court should have granted his motion for a new trial. (Id.)

8 Petitioner’s argument is without merit. “We need not decide whether the verdicts were
9 actually inconsistent, for it is well-established that inconsistent verdicts may stand, even when a
10 conviction is rationally incompatible with an acquittal, provided there is sufficient evidence to
11 support a guilty verdict.” United States v. Suarez, 682 F.3d 1214, 1218 (9th Cir. 2012) (internal
12 quotation marks and bracketing omitted). Here, there is sufficient evidence to support the jury’s
13 finding as to the Count 2 allegation. On direct appeal of the conviction, the Court of Appeal
14 summarized Leon’s testimony at petitioner’s trial:

15 A neighbor urged Leon to go inside. As Leon tried to do so, shots
16 were fired from defendant’s position. Leon saw defendant pull out
17 a gun and shoot toward Leon and the house. He did not see
18 anyone else with a gun.

18 The last shot hit Leon in his big toe, breaking three bones. It took
19 him four to six months afterward to walk correctly. He was still in
20 pain.

21 Williams, 2010 WL 2224675, at *5. Iris Luna also testified at trial that she saw petitioner firing a
22 gun. Id. at 6. Additionally, Officer Valenzuela testified that, the day after the incident, petitioner
23 admitted to having fired several shots at Leon after picking up a gun off the hood of a nearby car.
24 Id. at *2. And petitioner himself testified at trial that he shot at Leon until he ran out of
25 ammunition. Id. at *7. This testimony from four different witnesses is sufficient to support the
26 jury’s finding that, with respect to Count Two, petitioner personally discharged a firearm which
27 proximately caused bodily injury to Leon. Thus, even if there were an inconsistency in the
28 verdicts, the verdicts may stand under Suarez. Claim Three does not warrant habeas relief.

1 IV. Claim Four: Sufficiency of the Evidence

2 Petitioner contends that the evidence is insufficient to sustain his second-degree murder
3 conviction. (Ptn. 32.) His habeas petition restates the evidence presented at trial and his version
4 of events (i.e., that Valdez produced the gun and, after a struggle for control of the weapon, “the
5 trigger [was] pulled inadvertently striking Valdez in the neck causing his death”). (Id.)

6 A. Standards

7 1. Challenges to the Sufficiency of Evidence

8 The Fourteenth Amendment prescribes: “No state shall . . . deprive any person of life,
9 liberty, or property, without due process of law.” U.S. Const. amend XIV, § 1. As such, “the
10 Fourteenth Amendment protects a defendant in a criminal case against conviction ‘except upon
11 proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
12 charged.’” Jackson v. Virginia, 443 U.S. 307, 315 (1979) (quoting In re Winship, 397 U.S. 358,
13 364 (1970)). Accordingly, “[a] federal court has a duty to assess the historic facts when it is
14 called upon to apply a constitutional standard to a conviction obtained in a state court.” Jackson,
15 443 U.S. at 318. “[R]eview of the constitutional sufficiency of evidence to support a criminal
16 conviction” requires a reviewing court to conduct a two-step inquiry: “First, a reviewing court
17 must consider the evidence presented at trial in the light most favorable to the prosecution.”
18 United States v. Nevils, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (en banc). “Second, after
19 viewing the evidence in the light most favorable to the prosecution, the reviewing court must
20 determine whether this evidence, so viewed, is adequate to allow ‘any rational trier of fact [to
21 find] the essential elements of the crime beyond a reasonable doubt.’” Id. at 1164 (quoting
22 Jackson, 443 U.S. at 319).

23 2. Murder

24 “Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.”
25 Cal. Pen. Code § 187(a). Malice may be express or implied. Cal. Pen. Code § 188. “Express
26 malice is an intent to kill.” People v. Gonzalez, 54 Cal. 4th 643, 653, 142 Cal. Rptr. 893 (2012).
27 “Malice is implied when a person willfully does an act, the natural and probable consequences of
28 which are dangerous to human life, and the person knowingly acts with conscious disregard for

1 the danger to life that the act poses.” Id.; see also People v. Knoller, 41 Cal. 4th 139, 160, 59 Cal.
2 Rptr. 3d 157 (2007) (“In short, implied malice requires a defendant’s awareness of engaging in
3 conduct that endangers the life of another—no more, no less.”). “A person who kills unlawfully
4 with implied malice is guilty of second degree murder.” Gonzalez, 54 Cal. 4th at 653; see also
5 Cal. Pen. Code § 189 (listing different means by which murder may be committed and explaining
6 that “[a]ll other kinds of murders are of the second degree”).

7 “Manslaughter, a lesser included offense of murder, is an unlawful killing without
8 malice.” People v. Elmore, 59 Cal.4th 121, 133, 172 Cal. Rptr. 3d 413 (2014). “Two factors may
9 preclude the formation of malice and reduce murder to voluntary manslaughter: heat of passion
10 and unreasonable self-defense.” Id. “Self-defense, when based on a reasonable belief that killing
11 is necessary to avert an imminent threat of death or great bodily injury, is a complete justification,
12 and such a killing is not a crime.” Id. “A killing committed when that belief is unreasonable is
13 not justifiable. Nevertheless, ‘one who holds an honest but unreasonable belief in the necessity
14 to defend against imminent peril to life or great bodily injury does not harbor malice and commits
15 no greater offense than manslaughter.’” Id. (quoting People v. Flannel, 25 Cal. 3d 668, 672, 160
16 Cal. Rptr. 84 (1979)). With respect to heat of passion, “[t]he provocation which incites the
17 defendant to homicidal conduct in the heat of passion must be caused by the victim, or be conduct
18 reasonably believed by the defendant to have been engaged in by the victim.” People v. Lee, 20
19 Cal. 4th 47, 59, 82 Cal. Rptr. 2d 625 (1999); see also People v. Carasi, 44 Cal. 4th 1263, 1306, 82
20 Cal. Rptr. 3d 265 (2008) (“To satisfy this test, the victim must taunt the defendant or otherwise
21 initiate the provocation.”).

22 B. Analysis

23 Petitioner contests the sufficiency of the evidence with respect to his second-degree
24 murder conviction. Thus, the inquiry is whether the evidence, viewed in the light most favorable
25 to the prosecution, is adequate to allow any rational trier of fact to find (1) an unlawful killing of
26 a human being or fetus and (2) malice aforethought.

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1 1. Unlawful Killing

2 There is no dispute that Valdez was killed. However, petitioner suggests that the killing
3 was not unlawful because “the trigger [was] pulled inadvertently” and petitioner acted in self-
4 defense. (Ptn. 32.) There is substantial evidence indicating otherwise: Wong testified that he
5 heard two shots fired and saw petitioner standing over and pointing at Valdez a smoking silver
6 gun that looked like a .38 revolver; Ware testified that the victim stepped back before the gunman
7 fired two shots and put the gun back into his pocket or waist; and a forensic pathologist also
8 testified that the physical evidence was consistent with Valdez taking a step backward while
9 looking down to his right as the shot was fired. Williams, 2010 WL 2224675, at *2-8.
10 Additionally, as the Court of Appeal observed on direct appeal: “at trial Ware testified that after
11 defendant fired the shots ‘he put the pistol back in his pocket or his waist’ (italics added),
12 logically implying that it was there to begin with.” Id. at *13.

13 Wong’s testimony is also sufficient evidence upon which the jury could find that
14 petitioner did not kill in the heat of passion, as Wong testified that it was petitioner that provoked
15 the fight and became the aggressor. (See 2CT 430-37.) See People v. Oropeza, 151 Cal. App.
16 4th 73, 83, 59 Cal. Rptr. 3d 653 (2007) (“A defendant may not provoke a fight, become the
17 aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to
18 reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden
19 quarrel or in the heat of passion.”).

20 The evidence also supports a finding of malice. The forensic pathologist testified that
21 Valdez was shot in the neck and that the shot had been fired from close range or a position
22 loosely in contact with the skin. Williams, 2010 WL 2224675, at *8. This testimony and that
23 identified in the preceding paragraph, viewed in the light most favorable to the prosecution, is
24 adequate to allow a rational trier of fact to find that petitioner acted with the deliberate intention
25 to end Valdez’s life. See People v. Smith, 37 Cal. 4th 733, 747, 37 Cal. Rptr. 3d 163 (2005)
26 (“[A] rational jury could find . . . that defendant acted with the intent to kill both the baby and the
27 mother when he shot at them with a large-caliber bullet from close range knowing each was
28 directly in his line of fire.”).

1 Thus, the evidence viewed in the light most favorable to the prosecution was adequate to
2 allow a rational trier of fact to find that petitioner killed Valdez, with malice, and that the killing
3 was unlawful. The evidence was therefore sufficient to support each element of the second-
4 degree murder conviction. Thus, Claim Four does not warrant habeas relief.

5 V. Claim Five: Penal Code Section 12022.53(e)(1)

6 Petitioner also argues that the additional twenty-five years-to-life sentence enhancement
7 he received under Penal Code section 12022.53(d) violates the Fourteenth Amendment because
8 the prosecution failed to plead and prove Penal Code section 12022.53(e)(1). (Ptn. 40.)
9 Petitioner received an additional twenty-five years-to-life enhancement under section
10 12022.53(d), which mandates such a sentence when a defendant “personally and intentionally
11 discharges a firearm and proximately causes great bodily injury” while committing, inter alia,
12 murder. Cal. Pen. Code § 12022.53.

13 First, the Superior Court explained on habeas review:

14 Subsection (e) allows aiders and abettors in gang-related crimes to
15 be convicted under the statute. Subsection (d), on the other hand,
16 mandates a 25-to-life enhancement for personal discharge of a
17 firearm causing death or great bodily injury. Subsection (d) has
nothing to do with aiding and abetting, and petitioner was not
charged as an aider or abettor to the murder.

18 (Lod. Doc. 15 at 3.) Second, petitioner’s complaint is of an application of state law, and “it is not
19 the province of a federal habeas court to reexamine state-court determinations on state-law
20 questions.” Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also Roberts v. Hartley, 640 F.3d
21 1042, 1046 (9th Cir. 2011) (“A state’s misapplication of its own laws does not provide a basis for
22 granting a federal writ of habeas corpus.”). Petitioner fails to articulate how the statute or the
23 sentence enhancement that the sentencing judge imposed pursuant to the statute deprived him of
24 due process. Accordingly, Claim Five does not warrant habeas relief.

25 VI. Claim Six: Petitioner’s Consecutive Life Terms Under Penal Code Section 12022.1

26 Petitioner argues that the trial court erred in believing that it was required to impose
27 consecutive life terms under Penal Code section 12022.1, thereby depriving petitioner of due
28 process. (Ptn. 8, 44.) His habeas petition quotes the sentencing judge: “A commitment to state

1 prison is mandatory and is justified by the facts of this case, and mandatory consecutive sentences
2 are required pursuant to 12022.1(e).” (Ptn. 45.) According to petitioner, “the court had authority
3 to grant the petitioner a dismissal on the Penal Code 12022.1 (out on bail enhancement) pursuant
4 to Penal Code section 1385” (Id.)

5 First, according to the Superior Court on habeas review, the trial court “was correct in
6 stating that the sentence for the crime committed while defendant was out on bail was required to
7 be consecutive to the prior crime. The court had no basis for striking one of the convictions.”
8 (Lod. Doc. 15 at 3.) Second, petitioner’s complaint is of an application of state law, and “it is not
9 the province of a federal habeas court to reexamine state-court determinations on state-law
10 questions.” Estelle, 502 U.S. at 67-68; Roberts, 640 F.3d at 1046. Petitioner fails to articulate
11 how the statute or the consecutive sentence that the sentencing judge imposed pursuant to the
12 statute deprived him of due process. Accordingly, Claim Six does not warrant habeas relief.

13 VII. Claim Seven: Adequacy of Appellate Counsel

14 Petitioner also contends that his appellate counsel failed to raise meritorious grounds in
15 the direct appeal, thereby rendering ineffective assistance of appellate counsel. (Ptn. 8, 47.)
16 Specifically, he contends that appellate counsel’s failure to argue Claims One through Six was
17 without legitimate strategic purpose. (Ptn. 47.)

18 A. Standard

19 “The due process clause of the fourteenth amendment guarantees a criminal defendant the
20 right to the effective assistance of counsel on his first appeal as of right.” Miller v. Keeney, 882
21 F.2d 1428, 1431 (9th Cir. 1989) (citing Evitts v. Lucey, 469 U.S. 387 (1985)). Courts review
22 claims of ineffective assistance of appellate counsel under the standard set forth in Strickland v.
23 Washington, 466 U.S. 668 (1984). Moormann v. Ryan, 628 F.3d 1102, 1106 (9th Cir. 2010).

24 First, the petitioner must show that counsel’s performance was objectively unreasonable,
25 which in the appellate context requires the petitioner to demonstrate that counsel acted
26 unreasonably in failing to discover and brief a merit-worthy issue. Id. In assessing an ineffective
27 assistance of counsel claim, “[t]here is a strong presumption that counsel’s performance falls
28 within the wide range of professional assistance.” Kimmelman v. Morrison, 477 U.S. 365, 381

1 (1986) (citation omitted). Similarly, there is a strong presumption that counsel “exercised
2 acceptable professional judgment in all significant decisions made.” Hughes v. Borg, 898 F.2d
3 695, 702 (9th Cir. 1990) (citation omitted).

4 The petitioner must also show prejudice, “which in this context means that the petitioner
5 must demonstrate a reasonable probability that, but for appellate counsel’s failure to raise the
6 issue, the petitioner would have prevailed in his appeal.” Moormann, 628 F.3d at 1106. A
7 reasonable probability is “a probability sufficient to undermine confidence in the outcome.”
8 Strickland, 466 U.S. at 669; see also Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000).

9 As both prongs of the Strickland test must be satisfied to establish a constitutional
10 violation, failure to satisfy either prong requires that an ineffective assistance claim be denied.
11 See Strickland, 466 U.S. at 697; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) (“Failure to
12 satisfy either prong of the Strickland test obviates the need to consider the other.”).

13 When reviewing ineffective assistance of counsel claims under AEDPA’s deferential
14 standard of review, “[t]he pivotal question is whether the state court’s application of the
15 Strickland standard was unreasonable[,]” which is a different question from “asking whether
16 defense counsel’s performance fell below Strickland’s standard.” Harrington, 131 S. Ct. at 785.

17 The Strickland standard is a general one, so the range of reasonable
18 applications is substantial. Federal habeas courts must guard against
19 the danger of equating unreasonableness under Strickland with
20 unreasonableness under § 2254(d). When § 2254(d) applies, the
question is not whether counsel’s actions were reasonable. The
question is whether there is any reasonable argument that counsel
satisfied Strickland’s deferential standard.

21 Id. at 788 (citations omitted).

22 B. Analysis

23 AEDPA applies to petitioner’s claim of inadequacy of appellate counsel. Although the
24 California Supreme Court issued a summary denial, this court can look through that denial to the
25 Superior Court’s decision denying petitioner’s habeas petition to determine if it involved an
26 unreasonable application of law or unreasonable determination of the facts. The Superior Court
27 reviewed each of the claims that petitioner contends his appellate counsel should have raised and
28 found that “[n]one . . . presented valid grounds for appeal, and counsel had no reason to raise

1 them.” (Lod. Doc 15 at 1-3.) The undersigned has reviewed each of those claims de novo and
2 found that they are all without merit. Because each of the claims that petitioner contends
3 appellate counsel should have raised are without merit, petitioner cannot demonstrate appellate
4 counsel’s actions prejudiced petitioner. Accordingly, petitioner has not satisfied § 2254(d), and
5 his claim of ineffective assistance of appellate counsel should be rejected.

6 VIII. Claim Eight: Severance

7 Petitioner contends that the trial court erred in denying his motion to sever the Count
8 Three murder charge from the “unrelated” other counts, and that the joinder so prejudiced
9 petitioner that it requires reversal of his convictions. (Ptn. 8, 80-93.) AEDPA applies to this
10 claim because, while the California Supreme Court summarily denied the petition, the Court of
11 Appeal denied the claim on the merits on direct appeal. Accordingly, this court reviews the Court
12 of Appeal decision to determine whether the denial was contrary to or an unreasonable
13 application of clearly established federal law or an unreasonable determination of the facts.

14 A. Federal Law

15 “Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder [] rise[s]
16 to the level of a constitutional violation only if it results in prejudice so great as to deny a
17 defendant his Fifth Amendment right to a fair trial.” United States v. Lane, 474 U.S. 438, 446 n.8
18 (1986). Thus, “[t]he simultaneous trial of more than one offense must actually render [a habeas]
19 petitioner’s state trial fundamentally unfair and hence, violative of due process before relief
20 pursuant to 28 U.S.C. § 2254 would be appropriate.” Featherstone v. Estelle, 948 F.2d 1497,
21 1503 (9th Cir. 1991) (quoting Tribbitt v. Wainwright, 540 F.2d 840, 841 (5th Cir. 1976)).

22 B. The Court of Appeal Opinion

23 The Court of Appeal found that petitioner failed to show he was prejudiced by the trial
24 court’s failure to sever Counts One and Two from Count Three:

25 Defendant contends the trial court prejudicially abused its
26 discretion by denying his severance motion because (1) the
27 offenses were not connected together in their commission; (2) the
28 evidence was not cross-admissible; (3) evidence admitted in
support of counts one and two suggested defendant had a

1 propensity for violence, impacting the evidence used to convict
2 defendant on count three, in derogation of the Evidence Code; and
3 (4) the unfair joinder of the counts allowed the People to try two
4 weak, unrelated cases together. FN18 We conclude the trial court
acted reasonably within its discretion in denying the motion and
the joinder of the counts did not prejudice defendant.

5 [FN18: Defendant does not renew his pretrial argument that the
6 disparity in gravity of the alleged offenses weighed against joinder.
7 His appellate argument here about improper “propensity”
8 evidence, though not found in his pretrial briefing, was raised
orally in limine. (See below.)]

9 There is a statutory preference for consolidating trial of separately
10 charged offenses if “connected together in their commission,” or if
11 they constitute “different statements of the same offense or two or
12 more different offenses of the same class of crimes or offenses.” (§
13 954; see Alcala v. Superior Court (2008) 43 Cal.4th 1205, 1220
14 (Alcala)). Because consolidation serves the important purposes of
efficiency and judicial economy, the burden is on the defendant to
show that these considerations “are outweighed by a substantial
danger of undue prejudice.” (People v. Bean (1988) 46 Cal.3d 919,
939, fn. omitted.)

15 Offenses are “of the same class” for purposes of joinder if they
16 possess common characteristics. (People v. Leney (1989) 213
17 Cal.App.3d 265, 269 (Leney)). They are “connected together in
18 their commission” if they share a “common element of
19 substantial importance” (Alcala, supra, 43 Cal.4th at p. 1218,
20 italics omitted)-a requirement which may be satisfied “even
21 though the offenses charged do not relate to the same transaction
22 and were committed at different times and places against different
23 victims.” [Citation.]” (Leney, supra, 213 Cal.App.3d at p. 269.)

24 Whether the conditions for joinder exist is a pure question of law
25 which we review independently. (People v. Alvarez (1996) 14
26 Cal.4th 155, 187-188.) However, our standard of review for the
27 grant of a consolidation motion or the denial of a severance motion
28 is abuse of discretion. (People v. Osband (1996) 13 Cal.4th 622,
666 (Osband)).

Consolidation may be an abuse of discretion if (1) the evidence is
not cross-admissible, (2) the joined charges are inflammatory, (3) a
weak case is joined with a strong case, and (4) one of the crimes is
punishable by death. (Osband, supra, 13 Cal.4th at pp. 666-667.)
Cross-admissibility is not required for consolidation, but suffices
to negate prejudice. (Id. at p. 667.)

1 If joinder was proper under section 954, the defendant must make a
2 clear showing of prejudice to demonstrate abuse of discretion. We
3 assess the trial court’s ruling based on the record when the ruling
4 was made. However, if in hindsight it proves that consolidation
5 resulted in gross unfairness depriving the defendant of due process
6 of law, we would be required to find prejudice. (Alcala, supra, 43
7 Cal.4th at p. 1220; People v. Zambrano (2007) 41 Cal.4th 1082,
8 1130, disapproved on another ground in People v. Doolin (2009)
9 45 Cal.4th 390, 421.)

7 **The trial court’s ruling**

8 Defendant does not and cannot dispute the offenses charged here
9 were “of the same class of crimes”: all were assaultive offenses
10 allegedly committed with firearms. That fact alone justifies
11 joinder. (§ 954; Alcala, supra, 43 Cal.4th at p. 1220; Leney, supra,
12 213 Cal.App.3d at p. 269.)

13 Furthermore, the offenses were also “connected together in their
14 commission” (§ 954) because they had more than one “common
15 element of substantial importance[.]” (Alcala, supra, 43 Cal.4th
16 at p. 1219.) Both incidents occurred in the neighborhood
17 defendant and his gangster acquaintances claimed as their own
18 even after defendant had moved away. Defendant allegedly
19 brought a gun to each crime scene, but claimed he acquired both
20 guns by happenstance on the spot. Each time, Calvin Williams
21 accompanied and actively assisted him. And each time, verbal
22 conflicts quickly escalated to deadly force. This is more than
23 enough to satisfy this prong of section 954. (See Leney, supra, 213
24 Cal.App.3d at p. 269.)

25 Furthermore, as the trial court found, defendant’s story about
26 getting his gun on July 7 from an “O.G.” (a term usually meaning
27 “original gangster,” i.e., a senior gang member) made the gang
28 expert testimony offered as to count three cross-admissible as to
counts one and two. Thus, though cross-admissibility is not
required for joinder, the cross-admissibility of this evidence
suffices to negate prejudice from joinder. (Osband, supra, 13
Cal.4th at p. 667.) Contrary to defendant’s apparent view, the
cross-admissibility criterion does not require that all the evidence
in one case must be cross-admissible in the other.

Finally, the evidence before the trial court when it ruled on the
severance motion did not show that counts one and two were
stronger or weaker than count three. As to both incidents,
interested witnesses had given conflicting accounts. Physical
evidence in both incidents tended to inculcate defendant, but did
not conclusively prove guilt. There was disinterested and

1 apparently credible eyewitness evidence as to count three, but not
2 as to counts one and two. On the other hand, defendant’s claim as
3 to the first incident that someone he called an “O.G.” (but who was
4 not an “original gangster,” even though that is what the
5 abbreviation normally stands for) had furnished defendant a gun
6 for no apparent reason, then disappeared, was so implausible as to
7 suggest consciousness of guilt, but he had made no statement about
8 the second incident. In short, as the trial court found, the
9 evidentiary strengths and weaknesses of the two cases were
10 roughly in balance.

11 For all of the foregoing reasons, the trial court’s denial of
12 defendant’s severance motion was well within its discretion.

13 **Prejudice in light of the whole record**

14 **Propensity evidence**

15 Seeking to establish prejudice from joinder in hindsight (*cf. Alcala*,
16 *supra*, 43 Cal.4th at p. 1220; *People v. Zambrano*, *supra*, 41 Cal.4th
17 at p. 1130), defendant asserts: “[T]he admission of evidence in
18 support of counts 1 and 2 had no purpose vis-a-vis count 3 except
19 the inadmissible purpose of suggesting [defendant] had a
20 propensity or the disposition to commit a crime of violence.” FN19
21 Defendant cites the prosecutor’s remarks in closing argument that
22 because defendant, a Crip, carried and fired a gun in the first
23 incident, the jury could conclude that he did so in the second
24 incident as well. However, although evidence of defendant’s gang
25 ties was not directly relevant to counts one and two because
26 Marlon Leon was not shown to belong to a rival gang and
27 defendant’s acts appeared motivated by a strictly personal feud, the
28 gang evidence was relevant to show defendant’s motive and intent
 as to count three (Evid.Code, § 1101, subd. (b)); thus it could not
 have been prejudicial as to that count. And if the jury believed
 defendant’s testimony, it would have concluded he did not carry a
 gun on either occasion and would have discounted the prosecutor’s
 remarks. If the jury did not believe defendant’s testimony as to the
 first occasion, it was not because the counts were joined but
 because defendant’s story about how he got the gun on that
 occasion was unbelievable.

[FN19: Defendant’s written severance motion in the trial court did
not argue that joinder would violate Evidence Code section 1101.
As defendant points out, however, trial counsel belatedly raised
this theory during argument in limine.]

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1 **“Spillover” effect**

2 Defendant also asserts that in light of the whole record, joinder
3 “created a ‘spillover’ effect in which the inflammatory evidence
4 from count 3 became propensity evidence as to counts 1 and 2, and
5 vice-versa.” This point is unpersuasive because defendant
6 supports it by improperly characterizing the evidence most
7 favorably to himself.

8 First, defendant states as to count three: “[T]he sole issue was,
9 who pulled [out] the gun?” Defendant asserts that the only
10 evidence on this point came from himself and eyewitness Earnest
11 Ware. Then he asserts that Ware testified at the preliminary
12 hearing that he saw defendant pull out the gun, but at trial Ware
13 “said only that he saw Valdez step back and then saw [defendant]
14 fire two shots.” Defendant’s second point is doubly erroneous.
15 First, Ware did not testify at the preliminary hearing, and Detective
16 Higgins’s testimony in that proceeding, which conveyed Ware’s
17 account indirectly, was not before the jury. Second, at trial Ware
18 testified that after defendant fired the shots “he put the pistol back
19 in his pocket or his waist” (*italics added*), logically implying that it
20 was there to begin with. FN20

21 [FN20: Defendant concludes that because the jury requested a
22 readback of Ware’s testimony, the case as to count three was close.
23 Even if so, it was not necessarily because the jury doubted that
24 defendant pulled out the gun. Rather, the close question appears to
25 have been whether his conduct was first degree murder, as the
26 prosecutor argued, or second degree murder, as the jury ultimately
27 found.]

28 Furthermore, defendant’s claim that (1) Valdez pulled out the gun
29 while hovering over defendant, (2) defendant pushed Valdez’s
30 hand up with his own hands from below, (3) the gun went off as
31 they struggled, and (4) Valdez fell backward only after the gun
32 fired did not square with either Ware’s account of the sequence of
33 events or the pathologist’s finding that the fatal shot was fired with
34 the gun very close to or touching Valdez’s neck as he stepped
35 backward. The jury evidently resolved this conflict against
36 defendant.

37 Lastly, to decide whether defendant’s claim that Valdez pulled out
38 the gun was credible, the jury had to put it in the context of
39 defendant’s entire story about the incident. This included the
40 ludicrous assertion that when Valdez blocked his path and said
41 “Norte” to him and he replied with “Freeport,” he thought they
42 were merely exchanging geographical information about the
43 neighborhood and would then go about their business. If the jury

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disbelieved that, as any reasonable jury would, it was unlikely to believe anything else defendant said about the incident.

For all of these reasons, we conclude the jury’s verdict on count three did not depend on any speculative “spillover effect” from the other counts.

Defendant’s reverse “spillover” argument as to counts one and two is just as inappropriately weighted in his favor. He asserts: “[I]n those charges a credibility contest even more beneficial to the defense presented itself”—the contest between his credibility and Leon’s. Although Leon’s credibility was seriously impeached by his prior inconsistent statements, his admitted felony conviction, and his apparent attempt to persuade Iris Luna to testify falsely, defendant’s claim that he was the more credible of the two is untenable. Nothing Leon said defied credulity as much as defendant’s story about the “O.G.” If the jury disbelieved that story, it could not reasonably have credited anything else defendant said about the July 7 incident that rested only on his word.

Defendant finally asserts he was prejudiced from joinder in that the jury did not convict him of the gravest possible charges as to either incident, finding only second degree murder as to count three and rejecting the allegation as to count one that he personally inflicted great bodily injury. On the contrary: the fact that defendant obtained relatively lenient verdicts as to both incidents is strong evidence that the joinder of the charges did not prejudice him. (See People v. Soper (2009) 45 Cal.4th 759, 784 (Soper).) FN21

[FN21: In defendant’s reply brief, he asserts that “the balancing test set forth in our Supreme Court’s new Soper case” compels a finding in his favor. However, Soper cites the same factors justifying consolidation as the earlier decisions on this issue. (Soper, supra, 45 Cal.4th at pp. 774-775.) As we have documented, all of those factors are present here. Thus, even assuming Soper created a new “balancing test,” it does not change the result.

Defendant’s reply brief also relies on People v. Earle (2009) 172 Cal.App.4th 372, in which the court reversed a conviction on one count due to improper joinder under the Soper test. However, since the joinder issue in each case depends on the facts of that case, comparisons between different cases with different facts are unhelpful.]

Williams, 2010 WL 2224675, at *11-14.

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1 C. Analysis

2 After reviewing the Court of Appeal’s analysis of petitioner’s severance claim, the
3 relevant portions of the record, and relevant Supreme Court precedent, it is clear that the decision
4 to deny the claim is not contrary to, nor does it involve an unreasonable application of clearly
5 established federal law as determined by the Supreme Court of the United States. Petitioner
6 simply has not established that the joinder of Counts One and Two with Count Three at trial
7 prejudiced him so greatly that he was denied his due process right to a fair trial. The Court of
8 Appeal decision is not based upon an unreasonable determination of the facts.

9 Considering these facts, the failure to sever Counts One and Two from Count Three did
10 not render petitioner’s trial fundamentally unfair. For these reasons petitioner’s claim should be
11 rejected.

12 IX. Claim Nine: Cruel and Unusual Punishment

13 Petitioner’s final claim is that the trial court erred in sentencing petitioner to “what is
14 essentially” a term of life without the possibility of parole. (Ptn. 8, 94-99.) He contends that,
15 under a proportionality review, petitioner’s sentence clearly violates state and federal prohibitions
16 under the Eighth Amendment. (Id.)

17 AEDPA applies to this claim because, although the California Supreme Court summarily
18 denied petitioner’s argument, the Court of Appeal denied the claim on the merits on direct appeal.
19 Accordingly, this court’s review of the Court of Appeal decision is limited to whether the denial
20 was contrary to or an unreasonable application of clearly established federal law or an
21 unreasonable determination of the facts.

22 A. Court of Appeal Opinion

23 The Court of Appeal summarized, analyzed, and ultimately rejected petitioner’s Eighth
24 Amendment claim:

25 Defendant contends that his sentence of 72 years to life in prison
26 (consisting of seven years determinate followed by 65 years
27 indeterminate) constitutes cruel and unusual punishment under the
28 United States Constitution and cruel or unusual punishment under
the California Constitution. We disagree. Even assuming that this

1 contention is not forfeited for failure to raise it in the trial court
2 (see People v. Williams (1998) 17 Cal.4th 148, 161-162, fn. 6;
3 People v. Saunders (1993) 5 Cal.4th 580, 589, fn. 5; but see People
4 v. Norman (2003) 109 Cal.App.4th 221, 229; People v. DeJesus
5 (1995) 38 Cal.App.4th 1, 27), it fails on the merits.

6 **The federal claim**

7 Under the proscription of “cruel and unusual punishment” in the
8 Eighth Amendment to the United States Constitution (applicable to
9 the states via the Fourteenth Amendment), a “‘narrow
10 proportionality principle’ . . . ‘applies to noncapital sentences.’”
11 (Ewing v. California (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108,
12 117] (lead opn. of O’Connor, J.), quoting Harmelin v. Michigan
13 (1991) 501 U.S. 957, 996-997 [115 L.Ed.2d 836, 866].)

14 Objective factors guiding the proportionality analysis include “(i)
15 the gravity of the offense and the harshness of the penalty; (ii) the
16 sentences imposed on other criminals in the same jurisdiction; and
17 (iii) the sentences imposed for commission of the same crime in
18 other jurisdictions.” (Solem v. Helm (1983) 463 U.S. 277, 292.)
19 But only in the rare case where the first factor is satisfied does a
20 reviewing court consider the other two factors. (Harmelin v.
21 Michigan, supra, 501 U.S. at p. 1005 [115 L.Ed.2d at pp. 871-872]
22 (conc. opn. of Kennedy, J.).)

23 Defendant cannot get past the first proportionality factor. He was
24 convicted of second degree murder, assault with a firearm, and
25 discharge of a firearm at an inhabited dwelling, all extremely grave
26 crimes of violence. The jury also found multiple enhancements:
27 defendant personally used a firearm as to count one, proximately
28 caused great bodily injury or death by personally and intentionally
discharging a firearm in the commission of counts two and three,
and committed the offense charged in count three while on bail on
the other charges. Thus, the gravity of defendant’s offenses is
extreme.

Defendant asserts that his crimes were “mitigated by the manner in
which they arose and were carried out.” Even assuming defendant
may raise this argument for the first time on appeal, it fails. As to
count three, he cites only his own story about how the
confrontation began, which the jury was not required to credit. As
to the other counts, the jury evidently found, contrary to
defendant’s testimony, that he and his associates were the
aggressors. In any event, offenses as to which the jury found
multiple enhancements true cannot reasonably be called
“mitigated.”

1 At sentencing, trial counsel argued for leniency as to the
2 determinate term because defendant was youthful when he
3 committed the crimes (16 at the time of the first incident, 17 at the
4 time of the second) and had no prior criminal record. Defendant
renews these points on appeal. But the trial court could reasonably
find them insignificant given the nature of the offenses.

5 Defendant's sentence did not violate the Eighth Amendment to the
6 United States Constitution.

7 Williams, 2010 WL 2224675, at *14-15.

8 B. Analysis

9 After reviewing the entire file in this matter, the undersigned finds that petitioner is barred
10 from obtaining habeas relief under 28 U.S.C. § 2254(d). The Court of Appeal correctly identified
11 that the touchstone of any Eighth Amendment claim concerning the length of a sentence is
12 proportionality between crime and sentence. The Court of Appeal's conclusion that petitioner's
13 sentence is not grossly disproportionate to his crime and criminal history is not contrary to, nor
14 does it concern an unreasonable application of any Supreme Court authority. See Lockyer v.
15 Andrade, 538 U.S. 63, 77 (2003) (upholding the constitutionality of two consecutive twenty-five
16 years-to life sentences under the Three Strikes Law following convictions for stealing video
17 tapes); Ewing v. California, 538 U.S. 11, 30-31 (2003) (upholding the constitutionality of a
18 twenty-five years-to-life sentence for theft of golf clubs under California's Three Strikes Law);
19 Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (upholding the constitutionality of a life without
20 parole sentence for possessing a large quantity of cocaine). Further, the decision is not based on
21 an unreasonable determination of the facts.

22 Petitioner also suggests that his sentence of seventy-years to life is unconstitutional under
23 Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455 (2012), because it is essentially life without the
24 possibility of parole and he was under the age of eighteen when he committed the offenses.
25 Petitioner misreads Miller. In Miller, the Supreme Court held "the Eighth Amendment forbids a
26 sentencing scheme that mandates life in prison without possibility of parole for juvenile
27 offenders." 132 S. Ct. at 2469 (emphasis added). The Court explicitly stated that it was not
28 holding that the Eighth Amendment requires "a categorical bar on life without parole for

1 juveniles.” Miller made clear that a sentencing judge may still sentence a juvenile to life without
2 parole in homicide cases, so long as the sentencing judge “take[s] into account how children are
3 different” Id. Petitioner was not sentenced to life without the possibility of parole; rather,
4 he received a sentence of seventy-two years to life. Moreover, because of his second-degree
5 murder conviction, the sentencing judge could have—consistent with Miller and the United States
6 Constitution—imposed a sentence of life without the possibility of parole, so long as the judge
7 considered how children differ from adult offenders. Thus, petitioner’s sentence is not
8 unconstitutional under Miller.

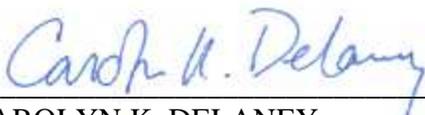
9 For these reasons, petitioner’s Eighth Amendment claim should be rejected.

10 **CONCLUSION**

11 For all the reasons explained above, none of petitioner’s claims warrant habeas relief.
12 Accordingly, IT IS RECOMMENDED that the petition for writ of habeas corpus be denied and
13 the case closed.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 “Objections to Magistrate Judge’s Findings and Recommendations.” If petitioner files objections,
19 he shall also address whether a certificate of appealability should issue and, if so, why and as to
20 which issues. A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the
21 applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. §
22 2253(c)(3). Any response to the objections shall be filed and served within fourteen days after
23 service of the objections. The parties are advised that failure to file objections within the
24 specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951
25 F.2d 1153 (9th Cir. 1991).

26 Dated: August 26, 2014

27 
28 CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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