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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCELL WILLIAMS,  
Petitioner,  
v.  
TIMOTHY FILSON,  
Respondent.

No. 2:18-cv-01305 KJM KJN

FINDINGS & RECOMMENDATIONS

I. Introduction

Petitioner is a state prisoner, proceeding without counsel, with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2015 conviction for second degree robbery with use of a firearm. He was sentenced to twenty-seven years in state prison. Petitioner claims that trial counsel was ineffective for failing to obtain a ruling on prejudicial photographs and to object more fully, and contends the trial court erroneously admitted photographs of gang tattoos and firearms in violation of his due process rights. After careful review of the record, this court concludes that the petition should be denied.

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1 II. Procedural History

2 On February 27, 2015, a jury found petitioner guilty of second degree robbery (Cal. Pen.  
3 Code, § 211) with use of a firearm (Cal. Pen. Code, § 12022.53(b)). (LD 1 at 150; LD 4 at 15.)<sup>1</sup>

4 On March 20, 2015, petitioner was sentenced to twenty-seven years in state prison. (LD 1 at 177;  
5 LD 4 at 22-29.)

6 Petitioner appealed the conviction to the California Court of Appeal, Third Appellate  
7 District. (LD 7 & 9.) The Court of Appeal affirmed the conviction on July 30, 2019. (LD 10.)

8 Petitioner filed a petition for review in the California Supreme Court (LD 11), which was  
9 denied on July 19, 2017 (LD 12).

10 Thereafter, petitioner filed the original habeas petition in this court on May 21, 2018.  
11 (ECF No. 1.)

12 In an Order and Findings and Recommendations filed September 17, 2018, the  
13 undersigned recommended petitioner's motion for stay be denied and that he be ordered to file an  
14 amended petition raising only his exhausted claims. (ECF No. 7.) Shortly thereafter, petitioner  
15 filed a first amended petition. (ECF No. 8.)

16 Following the district judge's order of March 6, 2019 (ECF No. 9), adopting the findings  
17 and recommendations in full, petitioner filed the operative second amended petition for writ of  
18 habeas corpus (ECF No. 15). Respondent filed its answer on June 11, 2019. (ECF No. 21.)  
19 Petitioner did not file a reply.

20 III. Facts<sup>2</sup>

21 In its unpublished memorandum and opinion affirming petitioner's judgment of  
22 conviction on appeal, the California Court of Appeal for the Third Appellate District provided the  
23 following factual and procedural summary:

24 \_\_\_\_\_  
25 <sup>1</sup> "LD" refers to the documents lodged by respondent on July 30, 2019; specific page references  
26 are to the page numbers assigned at the time of electronic filing. "ECF" refers to the court's case  
management/electronic filing system and docket entry for this particular matter.

27 <sup>2</sup> The facts are taken from the opinion of the California Court of Appeal for the Third Appellate  
28 District in People v. Williams, No. C079293 (5/10/2017), a copy of which was lodged by  
respondent as LD 10 on July 30, 2019. (ECF No. 23.)

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On May 17, 2012, Pardip Sangha was working in a cigarette store when defendant and another man entered the store. Defendant, who was wearing a wig and sunglasses, walked to the cash register where Sangha was standing, pulled a gun from his pocket, told Sangha the gun was real, and “raised it up.” He demanded money, cigarettes, and other things from Sangha while the other man vaulted a counter and put into a bag items from the store. Sangha gave the defendant all the money that was in his register. Meanwhile, the other man repeatedly told defendant to shoot Sangha. Defendant told Sangha this was “not the first time he is doing this, he had done this before, so whatever he is saying [Sangha had] to follow.”

After the robbery, Sangha told police that “he was sure he could recognize the armed suspect.” He also told police the gun used to rob him was a “snubbed nose revolver type of handgun.”

On May 22, 2012, Detective Mike French contacted Sangha. Sangha told Detective French he recognized the gunman as defendant, a frequent customer of the store who had many tattoos on his upper torso, neck, and face. Sangha described the gun used in the robbery as a dark revolver with a brown handle and a short barrel. He later identified defendant as the gunman in a six-pack photo lineup, and identified in a photograph the gun used by defendant to rob him.

Further investigation revealed a fingerprint, left on the counter during the robbery, belonged to defendant's brother, Anton Jefferson.

A week after the robbery, defendant and Jefferson were stopped by police. Defendant was taken to the police station and placed in an interview room. It is common practice in the Sacramento Police Department for officers to leave personal items found with suspects outside of the interview room the suspect was taken to. Detective Shawn Ayers took a cell phone that was placed outside of defendant's interview room and searched it. Although Detective Ayers was at the scene of the traffic stop, he was not the person who initially found the phone. In fact, he did not know who specifically, besides stating that it was a transport officer, could have seized the phone or put it outside defendant's interview room. He also never determined who the subscriber to the phone was or had any knowledge that that was ever done. Detective Ayers denied learning that the phone did not belong to defendant and had no knowledge to dispute a claim the phone did not belong to defendant. He acknowledged that it was possible the phone belonged to someone else in the car besides defendant.

On the phone, Detective Ayers recovered 10 photographs of interest and forwarded them to Detective Mike French. One of the photographs depicted a “black snub nose revolver with a brown handle,” along with a silver semiautomatic handgun with a black grip. Another depicted two black snub nose revolvers with brown handles, one a larger caliber than the other. A third photograph was of defendant.

The People charged defendant with second degree robbery. The People further alleged defendant personally used a firearm during the

1 commission of the robbery, was previously convicted of a serious  
2 felony, and served two prior prison terms. Defendant pled not guilty.

3 Before trial began, defendant filed several motions in limine  
4 including a motion to “exclud[e] evidence of defendant's purported  
5 gang involvement or reference to defendant's gang tattoos,” and “an  
6 order excluding evidence of a cell phone.” The People argued the  
7 upper body tattoos depicted in the photograph of defendant were  
8 relevant to the victim's identification of defendant. Defendant argued  
9 the photograph was irrelevant and prejudicial because it showed  
10 defendant's gang-related tattoo and that he was making a gang sign  
11 and holding cash. These indicia of gang affiliation, he argued, were  
12 irrelevant to the People's case and highly prejudicial. The People  
13 agreed defendant's gang-affiliation was irrelevant. Defendant offered  
14 to take the photograph and block out the money and the gang sign.  
15 This would also at least partially obstruct the gang-related tattoo,  
16 which already was difficult to discern.

17 The trial court responded: “Why don't you [defense counsel], take a  
18 shot at what you think works and then we can have a further  
19 discussion about it. So I will defer the resolution of that because it  
20 sounds like with regard to the first part of it [the prosecutor] is not  
21 planning to go into the gang issue. He is simply looking at the tattoos  
22 as potential identification which would seem to the Court to have  
23 some relevance. [¶] [Defendant's Counsel]: Understood.”

24 Defendant's trial counsel went on to argue defendant's motion in  
25 limine to exclude evidence of a cell phone. Trial counsel opened by  
26 saying, “this is a motion I prepared before I had subsequent  
27 discussions with [the prosecutor]. It's my belief that there is no  
28 phone, at least that is in [defendant's] name, so I don't know what the  
29 officer is going to testify to. [¶] The phone was found in the car. It  
30 was found on [defendant]. I guess we will just have to take a wait-  
31 and-see attitude. I assume pictures from a phone that weren't in his  
32 name may still be admissible under these circumstances, but, ...”

33 Defendant's counsel further explained that at the time of the traffic  
34 stop, defendant's phone was at his house. He acknowledged again  
35 that the photographs depicting defendant and the guns were  
36 “admissible anyway” but objected to “any characterization” that the  
37 phone belonged to defendant. The prosecutor clarified that during his  
38 interview with detectives, defendant told them the only cell phones  
39 taken at the traffic stop were his brother's and his friend's.

40 The court concluded the discussion: “Sounds like the only issue here  
41 really is a foundational one, whether the phone was in the car or was  
42 on [defendant's] possession. And either way, it would seem that the  
43 photographs on the phone would still come in so long as one of those  
44 foundations is laid.

45 “Am I missing something?”

46 “[Defendant's Counsel]: For the purposes for which the photos are  
47 being introduced, I would agree, yes. If they were being introduced  
48 to establish that it was his phone and that has some other relevance,

1 I would disagree.”

2 During trial, the gun photos were first presented during Sangha's  
3 testimony. Sangha testified that he recognized one of the guns in the  
4 photos as the gun used during the robbery. Defendant's counsel did  
5 not object.

6 All three photographs were presented later during Detective Mike  
7 French's testimony. Detective French testified the photographs were  
8 e-mailed to him by Detective Ayers, who said he took the  
9 photographs from defendant's phone. No objection was made.

10 The photographs were then published to the jury without objection.  
11 Detective French described the guns depicted in the photographs  
12 admitted as exhibits 5 and 6, and identified defendant as the person  
13 in the photograph admitted as exhibit 7. The gang sign and the cash  
14 were blocked out of the photograph depicting defendant, blocking  
15 which also partially obstructed defendant's gang-related tattoo.

16 On cross-examination, defendant's trial counsel asked Detective  
17 French whether he knew in fact the photographs came from a phone  
18 that belonged to defendant. Detective French said that was what he  
19 was told by Detective Ayers but he did not know whether Detective  
20 Ayers confirmed the phone belonged to defendant. Detective French  
21 never tried on his own to determine who the owner of the phone was  
22 because the owner of the phone was not relevant to his investigation.

23 Defendant's counsel also cross-examined Detective Ayers, who  
24 testified that he did not know for certain to whom the phone belonged  
25 but assumed it belonged to defendant because it was standard in their  
26 department that when a phone is placed outside an interview room,  
27 it belongs to the individual who is in that room. Detective Ayers  
28 acknowledged he could not tell from the photos to whom the guns  
belonged, nor who took the pictures or who was holding the guns.  
He also acknowledged the phone did not contain any pictures of  
defendant holding any of the guns.

The jury found defendant guilty as charged. In a bifurcated  
proceeding, the trial court found the enhancement allegations true.  
The court later sentenced defendant to an aggregate term of 27 years  
in state prison.

(People v. Williams, slip op. at \*1-3.)

#### 23 IV. Standards for a Writ of Habeas Corpus

24 An application for a writ of habeas corpus by a person in custody under a judgment of a  
25 state court can be granted only for violations of the Constitution or laws of the United States. 28  
26 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or  
27 application of state law. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010); Estelle v. McGuire, 502  
28 U.S. 62, 67-68 (1991).

1 Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas  
2 corpus relief:

3 An application for a writ of habeas corpus on behalf of a person in  
4 custody pursuant to the judgment of a State court shall not be granted  
5 with respect to any claim that was adjudicated on the merits in State  
6 court proceedings unless the adjudication of the claim -

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

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

10 28 U.S.C. § 2254(d).

11 For purposes of applying § 2254(d)(1), “clearly established federal law” consists of  
12 holdings of the United States Supreme Court at the time of the last reasoned state court decision.  
13 Thompson v. Runnels, 705 F.3d 1089, 1096 (9th Cir. 2013) (citing Greene v. Fisher, 132 S. Ct.  
14 38, 44-45 (2011)); Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011) (citing Williams v.  
15 Taylor, 529 U.S. 362, 412 (2000)). Circuit court precedent “may be persuasive in determining  
16 what law is clearly established and whether a state court applied that law unreasonably.” Stanley,  
17 633 F.3d at 859 (quoting Maxwell v. Roe, 606 F.3d 561, 567 (9th Cir. 2010)). However, circuit  
18 precedent may not be “used to refine or sharpen a general principle of Supreme Court  
19 jurisprudence into a specific legal rule that th[e] [Supreme] Court has not announced.” Marshall  
20 v. Rodgers, 569 U.S. 58, 64 (2013) (citing Parker v. Matthews, 132 S. Ct. 2148, 2155 (2012) (per  
21 curiam)). Nor may it be used to “determine whether a particular rule of law is so widely accepted  
22 among the Federal Circuits that it would, if presented to th[e] [Supreme] Court, be accepted as  
23 correct. Id. Further, where courts of appeals have diverged in their treatment of an issue, it  
24 cannot be said that there is “clearly established Federal law” governing that issue. Carey v.  
25 Musladin, 549 U.S. 70, 77 (2006).

26 A state court decision is “contrary to” clearly established federal law if it applies a rule  
27 contradicting a holding of the Supreme Court or reaches a result different from Supreme Court  
28 precedent on “materially indistinguishable” facts. Price v. Vincent, 538 U.S. 634, 640 (2003).

1 Under the “unreasonable application” clause of § 2254(d)(1), a federal habeas court may grant the  
2 writ if the state court identifies the correct governing legal principle from the Supreme Court’s  
3 decisions, but unreasonably applies that principle to the facts of the prisoner’s case.<sup>3</sup> Lockyer v.  
4 Andrade, 538 U.S. 63, 75 (2003); Williams v. Taylor, 529 U.S. at 413; Chia v. Cambra, 360 F.3d  
5 997, 1002 (9th Cir. 2004). In this regard, a federal habeas court “may not issue the writ simply  
6 because that court concludes in its independent judgment that the relevant state-court decision  
7 applied clearly established federal law erroneously or incorrectly. Rather, that application must  
8 also be unreasonable.” Williams v. Taylor, 529 U.S. at 411. See also Schriro v. Landrigan, 550  
9 U.S. 465, 473 (2007); Lockyer, 538 U.S. at 75 (it is “not enough that a federal habeas court, in its  
10 ‘independent review of the legal question,’ is left with a “firm conviction” that the state court  
11 was “erroneous””). “A state court’s determination that a claim lacks merit precludes federal  
12 habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s  
13 decision.” Harrington v. Richter, 562 U.S. 86, 101 (2011) (quoting Yarborough v. Alvarado, 541  
14 U.S. 652, 664 (2004)). Accordingly, “[a]s a condition for obtaining habeas corpus from a federal  
15 court, a state prisoner must show that the state court’s ruling on the claim being presented in  
16 federal court was so lacking in justification that there was an error well understood and  
17 comprehended in existing law beyond any possibility for fair-minded disagreement.” Richter,  
18 562 U.S. at 103.

19 If the state court’s decision does not meet the criteria set forth in § 2254(d), a reviewing  
20 court must conduct a de novo review of a habeas petitioner’s claims. Delgadillo v. Woodford,  
21 527 F.3d 919, 925 (9th Cir. 2008); see also Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008)  
22 (en banc) (“[I]t is now clear both that we may not grant habeas relief simply because of  
23 § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by  
24 considering de novo the constitutional issues raised”).

25 The court looks to the last reasoned state court decision as the basis for the state court

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26 <sup>3</sup> Under § 2254(d)(2), a state court decision based on a factual determination is not to be  
27 overturned on factual grounds unless it is “objectively unreasonable in light of the evidence  
28 presented in the state court proceeding.” Stanley, 633 F.3d at 859 (quoting Davis v. Woodford,  
384 F.3d 628, 638 (9th Cir. 2004)).

1 judgment. Stanley, 633 F.3d at 859; Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004).  
2 If the last reasoned state court decision adopts or substantially incorporates the reasoning from a  
3 previous state court decision, this court may consider both decisions to ascertain the reasoning of  
4 the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). “When a  
5 federal claim has been presented to a state court and the state court has denied relief, it may be  
6 presumed that the state court adjudicated the claim on the merits in the absence of any indication  
7 or state-law procedural principles to the contrary.” Richter, 562 U.S. at 99. This presumption  
8 may be overcome by a showing “there is reason to think some other explanation for the state  
9 court’s decision is more likely.” Id. at 99-100 (citing Ylst v. Nunnemaker, 501 U.S. 797, 803  
10 (1991)). Similarly, when a state court decision on petitioner’s claims rejects some claims but  
11 does not expressly address a federal claim, a federal habeas court must presume, subject to  
12 rebuttal, that the federal claim was adjudicated on the merits. Johnson v. Williams, 568 U.S. 289,  
13 298 (2013) (citing Richter, 562 U.S. at 98). If a state court fails to adjudicate a component of the  
14 petitioner’s federal claim, the component is reviewed de novo in federal court. Wiggins v. Smith,  
15 539 U.S. 510, 534 (2003).

16 Where the state court reaches a decision on the merits but provides no reasoning to  
17 support its conclusion, a federal habeas court independently reviews the record to determine  
18 whether habeas corpus relief is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v.  
19 Thompson, 336 F.3d 848, 853 (9th Cir. 2003). “Independent review of the record is not de novo  
20 review of the constitutional issue, but rather, the only method by which we can determine whether  
21 a silent state court decision is objectively unreasonable.” Himes, 336 F.3d at 853. Where no  
22 reasoned decision is available, the habeas petitioner still has the burden of “showing there was no  
23 reasonable basis for the state court to deny relief.” Richter, 562 U.S. at 98.

24 A summary denial is presumed to be a denial on the merits of the petitioner’s claims.  
25 Stancle v. Clay, 692 F.3d 948, 957 & n.3 (9th Cir. 2012). While the federal court cannot analyze  
26 just what the state court did when it issued a summary denial, the federal court must review the  
27 state court record to determine whether there was any “reasonable basis for the state court to deny  
28 relief.” Richter, 562 U.S. at 98. This court “must determine what arguments or theories . . . could

1 have supported the state court’s decision; and then it must ask whether it is possible fairminded  
2 jurists could disagree that those arguments or theories are inconsistent with the holding in a prior  
3 decision of [the Supreme] Court.” *Id.* at 101. The petitioner bears “the burden to demonstrate  
4 that ‘there was no reasonable basis for the state court to deny relief.’” *Walker v. Martel*, 709 F.3d  
5 925, 939 (9th Cir. 2013) (quoting *Richter*, 562 U.S. at 98).

6 When it is clear, however, that a state court has not reached the merits of a petitioner’s  
7 claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a federal  
8 habeas court must review the claim de novo. *Stanley*, 633 F.3d at 860; *Reynoso v. Giurbino*, 462  
9 F.3d 1099, 1109 (9th Cir. 2006).

#### 10 V. Petitioner’s Claims

##### 11 A. *Ineffective Assistance of Trial Counsel (Ground One)*

12 Petitioner claims that defense counsel provided ineffective assistance when he  
13 insufficiently objected to the admission of photographic evidence displaying petitioner’s “gang  
14 tattoos and of guns.” (ECF No. 15 at 2-3.) Respondent maintains the state court’s rejection of  
15 petitioner’s claim was reasonable, thus, petitioner is not entitled to relief. (ECF No. 21 at 14-18.)

16 The last reasoned rejection of petitioner’s first claim is the decision of the California  
17 Court of Appeal for the Third Appellate District on petitioner’s direct appeal. The state court  
18 addressed this claim as follows:

19 Defendant then argues that he received ineffective assistance of  
20 counsel because trial counsel failed to “more fully object to  
admission of the evidence.” We are not persuaded.

21 “[T]o establish a claim of ineffective assistance of counsel, defendant  
22 bears the burden of demonstrating, first, that counsel's performance  
23 was deficient because it ‘fell below an objective standard of  
reasonableness [¶] ... under prevailing professional norms.’” (*People*  
24 *v. Ledesma* (2006) 39 Cal.4th 641, 745–746.) “If the record ‘sheds  
25 no light on why counsel acted or failed to act in the manner  
26 challenged,’ an appellate claim of ineffective assistance of counsel  
27 must be rejected ‘unless counsel was asked for an explanation and  
failed to provide one, or unless there simply could be no satisfactory  
28 explanation.’ ” (*Id.* at p. 746.)

First, with regard to the photograph depicting defendant's tattoos, the

1 claim was forfeited not because counsel failed to “more fully object”  
2 to the photograph but because counsel did not secure a ruling on the  
3 motion in limine. Why counsel did not feel the need to secure the  
4 ruling is apparent from the record: those portions of the photograph  
5 that trial counsel found particularly objectionable, the gang sign and  
6 the cash, were redacted from the photo before it was presented to the  
7 jury. Counsel had already achieved his stated goal—keeping the jury  
8 from seeing or hearing about the objectionable portions of the  
9 photograph. This is a reasonable basis for not pursuing a ruling or  
10 renewing the objection.

11 With regard to the gun photographs, counsel's only objection at trial  
12 was that the photographs could not be used to prove the cell phone  
13 from which they were taken belonged to defendant. Trial counsel was  
14 not asked why he did not also object to the photographs under  
15 Evidence Code section 352. It appears from the record, however, that  
16 trial counsel recognized the photographs had some relevance for  
17 identification of defendant as the robber and were admissible for that  
18 purpose. Instead of arguing that they were unduly prejudicial,  
19 counsel made the reasonable tactical decision to attack the weight of  
20 the photographs as evidence rather than their admissibility. Counsel  
21 questioned Detective Ayers extensively about his knowledge of who  
22 owned the phone and the process for determining ownership of a  
23 phone. Detective Ayers admitted that he could have determined  
24 ownership of the phone if he had applied for a warrant. Detective  
25 Ayers also testified he could not tell from the gun photographs who  
26 actually owned the guns or who was holding the guns when they were  
27 photographed, much less who took the photographs of the guns.  
28 Finally, defense counsel asked whether Detective Ayers found  
photographs on the phone of defendant with any firearms, to which  
he responded that he did not.

In sum, we conclude defendant has failed to show he received  
ineffective assistance of counsel at trial.

(People v. Williams, slip op. at \*4-5.)

#### Applicable Legal Standards

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that his  
trial counsel’s performance “fell below an objective standard of reasonableness” and that “there is  
a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding  
would have been different.” Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984).

Under the first prong of the Strickland test, a petitioner must show that counsel’s conduct  
failed to meet an objective standard of reasonableness. Strickland, 466 U.S. at 687. There is “a

1 ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable  
2 professional assistance.” Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 689).  
3 Petitioner must rebut this presumption by demonstrating that his counsel’s performance was  
4 unreasonable under prevailing professional norms and was not the product of “sound trial  
5 strategy.” Strickland, 466 U.S. at 688-89. Judicial scrutiny of defense counsel’s performance is  
6 “highly deferential,” and thus the court must evaluate counsel’s conduct from her perspective at  
7 the time it occurred, without the benefit of hindsight. Id. at 689. “[S]trategic choices made after  
8 thorough investigation of law and facts relevant to plausible options are virtually  
9 unchallengeable.” Strickland, 466 U.S. at 690.

10 The second prong of the Strickland test requires a petitioner to show that counsel’s  
11 conduct prejudiced him. Strickland, 466 U.S. at 691-92. Prejudice is found where “there is a  
12 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding  
13 would have been different.” Id. at 694. A reasonable probability is one “sufficient to undermine  
14 confidence in the outcome.” Id. at 693. “This does not require a showing that counsel’s actions  
15 ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice  
16 standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’”  
17 Richter, 562 U.S. at 112 (quoting Strickland, 466 U.S. at 693). “The likelihood of a different  
18 result must be substantial, not just conceivable.” Id.

19 Analysis

20 Petitioner cannot overcome his burden. A review of the state court decision and this  
21 record reveals neither deficiency nor prejudice.

22 Defense counsel objected to the admission of photographs. (See LD 1 at 112.) More  
23 particularly, defense counsel raised the issue on February 19, 2015:

24 [DEFENSE COUNSEL]: Your Honor, with respect to the in limine  
25 motions . . . [t]here was a cell phone that was taken from a car Mr.  
26 Williams was in. I believe the People’s evidence might be it was  
taken from Mr. Williams. I don’t think it was, but certainly taken  
from the car.

27 The phone is not admissible and he did not have a cell phone. I made  
28 my objection in regard to the in limine through the admission of the  
phone or the contents of the phone in sort of a two prong thing.

1 One, the phone was searched without a warrant and, shouldn't  
2 be any subscriber information in Mr. Williams' name.

3 The only reason I'm bring this up now is not to litigate that issue, but  
4 if the Court has any questions in that regard it might require one of  
5 the officers to come explain where he got the phone and maybe  
6 perhaps foundationally if he knows who the phone subscriber is.

7 I'm only putting that out there in case - - I don't want the middle of  
8 the afternoon there to be some big problem with addressing that in  
9 limine motion so would have to get the officer available or Mr. Miller  
10 can by way of offer of proof say this is what the officer would say or  
11 his - - give some information so we don't - - that doesn't come up as  
12 a stumbling block.

13 THE COURT: Mr. Miller, are you planning to use the phone? [¶]

14 [PROSECUTOR]: I'm not planning to use the phone. However, I  
15 am planning to use the photographs that were taken from it. The  
16 defendant here was stopped in a car along with his brother, in fact,  
17 one week after the alleged robbery in this case.

18 There was a phone taken from him during that vehicle stop a week  
19 after. The phone was taken and searched pursuant to his parole status  
20 at the time and - -

21 THE COURT: The phone was on the defendant's possession at this  
22 time?

23 [PROSECUTOR]: That is the way I read the police report. I can  
24 certainly check with the Sacramento Police Department detective  
25 who wrote that report to see if, in fact, he had a recollection of where  
26 exactly the phone was.

27 But, there was a sharing of information between the detective  
28 working the robbery and the detective who took the phone from the  
29 defendant's possession a week later.

30 And they, in fact, shared information after it was connected - - later  
31 detectives learned that the first detective in working the robbery they  
32 began to share information.

33 So, the way I read it on the traffic stop is that in fact the phone was  
34 taken from the defendant and then searched or downloaded. There  
35 was some photographs of it - - on it of one or more firearms that  
36 matched the description of the firearm used in the robbery. So that's  
37 the connection.

38 THE COURT: Mr. Grow.

39 MR. GROW: That's what I understand the People's evidence to be.  
40 I just - -

41 THE COURT: You want to be certain that in fact the phone was  
42 taken from your client's possession.

1 MR. GROW: If it's important to the Court in deciding this in limine  
2 motion with respect to that. There's some pictures probably be some  
discussion on the admissibility of the pictures, at least one of them.

3 And you know if the phone is not in fact in his name, which I do not  
4 believe that it is, there's argument to be made with respect to the  
contents of the phone.

5 THE COURT: Let me suggest this. What if Mr. Miller was to  
6 contact the officer and conclusively determine that in fact the officer  
did take the phone from your client's possession and that would do  
7 that at this point.

8 MR. GROW: For purposes of the in limine probably. It raises other  
issues that I might to be respond.

9 THE COURT: Understood. Why don't you just make that phone  
10 call, Mr. Miller, then we can deal with that on Monday if there's a  
need.

11 (LD 3 at 9-12 & ECF No. 29 at 3-6.)

12 When the issue was addressed the following Monday, the trial court deferred ruling on the issue  
13 following this exchange:

14 [THE COURT]: Number 9, excluding evidence about the gang. [¶]  
15 Is there any reason why that would come in about tattoos?

16 [PROSECUTOR]: Yes and no. Um, as it relates to the introduction  
17 of evidence of tattoos solely for the purpose of proving a gang  
affiliation, I absolutely in no way intent to do that whatsoever. I think  
18 any gang affiliation or involvement is entirely irrelevant, and I will  
admonish all of my witnesses that that is not to be discussed.

19 Um, the issue as it relates to tattoos is that the named victim in this  
20 case, who is an owner and long-time worker at the Florin cigarette  
shop, told the numerous law enforcement contacts he had contact  
21 with in respect to the robbery - - and by that I mean patrol who  
responded, detectives later, um - - has been through and through  
22 consistent that he instantly recognized the gunman in this case, who  
is alleged to be this defendant, as a former customer who would come  
23 in almost on a daily basis to his store up until about a month prior to  
the robbery. It had been roughly a month since he had last seen the  
defendant.

24 In his descriptions of the perpetrator that he gave to law enforcement,  
25 the victim indicated that he recognized the presence of upper body  
tattoos, neck tattoos and face tattoos on the subject. This will later  
26 tie in, as the Court will see, to a phone that was taken during the  
vehicle stop a week after this alleged robbery, um, where a phone  
27 was taken and later discovered to contain numerous photographs of  
Mr. Williams with upper body tattoos and other tattoos, along with  
28 photographs of firearms that the victim later identified as the one  
used in the May 17th alleged robbery.

1 So as it relates to tattoos, um, our issue here is one main tattoo that  
2 Mr. Williams has across his chest that reads quite largely "Ride  
3 Zilla". Um, Mr. Williams admitted during the May 24th traffic stop  
4 that he is a member of Ride Zilla. He is a validated member of that.  
5 Um, for purposes of this trial, I don't care about that. I don't care  
6 about that fact. I think it's irrelevant.

7 What I do think is relevant is the fact that on prior occasions this  
8 particular victim - and what you'll see in this robbery is the, um,  
9 gunman came in with a short-sleeved shirt on, sort of button up, ...  
10 the victim had indicated to law enforcement that he had previously  
11 seen the defendant come in in a tank top which, of course, would um,  
12 allow for a better view of upper body tattoos. The tattoos on the  
13 phone, um - photographs of the defendant on the phone I think are  
14 relevant to show, in fact, that, yes, um, the defendant himself has  
15 upper body tattoos.

16 The problem for 352 is that almost every photograph of the defendant  
17 on his phone that was found is holding a large wad of cash and  
18 flashing some sort of a sign. Um, I don't think any of the jurors will  
19 know necessarily what it means, but it appear to be some sort of a  
20 gang sign. So it could be inflammatory in that respect; however,  
21 balanced against the relevant of the ID issue in this case where the  
22 victim is indicating, yes, this is the person that I have seen before, he  
23 had multiple upper body tattoos, neck tattoos, etcetera, I would think  
24 that is relevant to show that, in fact, Mr. Williams does have upper  
25 body type of tattoos without any specificity.

26 Um, he indicated to law enforcement he thought maybe that the  
27 defendant had tear drop tattoos, but as to the upper body tattoos and  
28 neck tattoos, there is never a description given in any fashion. In that  
regard he ended up selecting, um, Mr. Williams out of a photo lineup  
in less than five seconds, but that is, of course, just of the face. But  
I don't believe there has ever been a description given of the upper  
body tattoos by the victim to law enforcement.

19 THE COURT: Mr. Grow?

20 MR. GROW: Um, thank you. There is kind of two parts to this issue  
21 and problems for me. [¶]-[¶]

22 Um, on the date of the robbery the surveillance photo shows an  
23 individual, you can't really make out facial features, but purportedly  
24 Mr. Williams in theory here, wearing a short-sleeved shirt. You  
25 don't see any of these upper body tattoos at all. So I'm not sure of  
26 the relevance of the witness, um, in terms of identifying, yeah, that  
27 is a customer, he also has these other tattoos that weren't visible on  
28 the day of the robbery. His observation with respect to Mr. Williams  
on the day of the robbery doesn't include these other tattoos, so that  
wasn't part of his identification of him on that day.

29 Um, but even more importantly, the photos, if you were to consider  
30 allowing the photos, it wouldn't be difficult to crop out the offending  
31 part to me which is the, you know, the gang sign and the cash. Um,  
32 I think [the prosecutor] brought the photos or perhaps the clerk has

1                   them, but you can see it wouldn't take much to crop those two things  
2                   out to make them less prejudicial because they are highly prejudicial  
                    if you have a guy with cash and gang signs.

3                   So, one, I don't think it's relevant because none of these upper body  
4                   tattoos were on display on the day of this robbery, so they are not  
                    germane to his identification on that day.

5                   THE COURT: Why shouldn't I wait until the witness testifies, see  
6                   how the testimony goes and then decide this issue? [¶]

7                   MR. GROW: I can offer this, Judge: He does say that - - the witness,  
8                   in describing Mr. Williams, says, well, at least with respect to the  
9                   photo array is - - Detective French asked him, How do you recognize  
                    Mr. Williams? He says, It's just the face. The whole face. There is  
                    no reference to these body tattoos to this part of his identification of  
                    Mr. Williams.

10                  THE COURT: The problem I'm having is this: If it goes to the issue  
11                  of identification, it's relevant. So the question becomes, the nature  
12                  of the testimony with regard to the tattoos to determine whether it is  
13                  something that is generally specific or somewhere in between and  
                    then how that fits in with the actual tattoos that the defendant has and  
                    how that fits in with the witness's testimony about the tattoos. So I  
                    somewhat need to know what that witness is going to say.

14                  MR. GROW: And as I mentioned, Judge, if the Court is inclined to  
15                  allow the photographs - -

16                  THE COURT: I think that part is easy. If, in fact, the Court allows  
17                  the photographs because of the tattoos, cropping out the gang sign  
                    and the wad of money seems like something that can be done or is it  
                    blocking the exact tattoos that are in issue?

18                  [PROSECUTOR]: I printed out one and only one .... That's the one  
19                  that I thought was the most benign. So that is the one I printed and I  
                    was going to offer.

20                  THE COURT: Do we have that here?

21                  [PROSECUTOR]: Yes. [¶]-[¶]

22                  THE COURT: Here's what I'm seeing on this particular photo: I'm  
23                  seeing the tattoos much more pronounced on the left side of the photo  
24                  immediately above the hand sign. Um, on the other side of the photo,  
25                  the right side, the defendant is holding a wad of cash. Immediately  
                    above that I see some tattoos in there, but the photograph is darkened  
                    there, so it's really hard to see much.

26                  MR. GROW: To answer your question specifically, Judge, I could  
27                  easily block those out. They are blocking tattoos anyway. So it's  
28                  just a matter of covering the gang sign, which is highly prejudicial,  
                    and the cash, which I think is not relevant and prejudicial as well. So  
                    you could simply use - cover it with a piece of paper that's cut out  
                    to match those two things and it's going to obscure the gang signs or

1           you could actually cop it and still how those tattoos.

2           THE COURT: Why don't you, Mr. Grow, take a shot at what you  
3           think works and then we can have a further discussion about it. So I  
4           will defer the resolution of that because it sounds like with regard to  
5           the first part of it [the prosecutor] is not planning to go into the gang  
6           issue. He is simply looking at the tattoos as potential identification  
7           which would seem to the Court to have some relevance.

8           (See LD 3 at 23-29 & LD 1 at 115.)

9           The Third District Court of Appeal's decision was neither contrary to, nor did it involve  
10          an unreasonable application of, the Strickland standard.

11          As the state court indicated, the record reveals that defense counsel's objection to the  
12          photograph offered by the People involved the specific depiction of petitioner holding a wad of  
13          cash and "throwing" a gang sign, in addition to displaying upper body tattoos. The gang sign and  
14          cash depicted therein were redacted and not shown to the jury. Defense counsel's representation  
15          in that regard was effective, rather than deficient.

16          That left petitioner's upper body tattoos as depicted in the photograph. The victim  
17          testified extensively to those tattoos as they related to the victim's ability to identify petitioner as  
18          the gun toting robber. (See LD 3 at 59-60, 75, 92-94.) The responding officer on the date of the  
19          robbery testified the victim described the suspect's tattoos, including heavily tattooed arms, neck  
20          and face. (LD 3 at 108.) Petitioner was known to the victim as a regular customer of the store  
21          who was extensively tattooed. (LD 3 at 53, 58-59, 72, 88, 107-08, 112, 148-49.)

22          Given that the basis for the victim's identification of petitioner as one of the two  
23          individuals who robbed him involved the victim's prior interactions with petitioner as a heavily  
24          tattooed, regular store customer and the victim having recognized petitioner through those  
25          interactions, the photograph was plainly relevant and admissible based on identification. (See  
26          Cal. Evid. Code, §§ 350, 351, 352; People v. Booker, 51 Cal.4th 141, 187 (2011) (photographic  
27          evidence is generally admissible, just as all relevant evidence is admissible unless excluded by the  
28          federal or state Constitution or by statute, and trial courts have broad discretion in determining  
29          relevance); People v. Burwell, 44 Cal.2d 16, 34 (1955) (photographs, when relevant to the issues,  
30          have evidentiary value). See Jones v. Smith, 231 F.3d 1227, 1239 n.8 (9th Cir. 2000) (citing

1 Boag v. Raines, 769 F.2d 1341, 1344 (9th Cir. 1985) (an attorney's failure to make a meritless  
2 objection or motion does not constitute ineffective assistance of counsel)); see also Matylinsky v.  
3 Budge, 577 F.3d 1083, 1094 (9th Cir. 2009) (counsel's failure to object to testimony on hearsay  
4 grounds was not ineffective where the objection would have been properly overruled); Rupe v.  
5 Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) (“the failure to take a futile action can never be  
6 deficient performance”). The Third District Court of Appeal’s determination that defense  
7 counsel’s attack as to the weight of the evidence,<sup>4</sup> rather than its admissibility, was a reasonable  
8 tactical decision was not unreasonable. Strickland, 466 U.S. at 687-90 (reasonable tactical  
9 decisions, including decisions with regard to the presentation of the case, are “virtually  
10 unchallengeable”).

11 Moreover, petitioner did not, and cannot, establish prejudice. Even assuming for the sake  
12 of argument that defense counsel’s failure to object or more fully object was a deficiency, there is  
13 no reasonable probability of a different outcome in this case.

14 The robbery was committed by two men and petitioner’s brother’s fingerprints were found  
15 at the scene of the robbery. (LD 3 at 123-24, 153, 156; see also LD 3 at 113 [gunman never made  
16 physical contact with anything in store].) Petitioner’s mother testified that petitioner and  
17 petitioner’s brother “always . . . hung out together” and were “extremely close.” (LD 3 at 100-  
18 01.) The brothers were pulled over in the company of one another a week following this robbery  
19 incident. (LD 3 at 119-22, 127, 154.) The gun described by the victim on the date of the robbery  
20 matched one of the guns depicted in a photograph admitted at trial, taken from a phone located at  
21 the time of the vehicle stop. (LD 3 at 77, 110, 151-52, 170-71.) And the jury was instructed as to  
22 the evaluation of witness testimony (LD 3 at 300-01), and clearly considered the victim’s  
23 testimony to be reliable. Weeks v. Angelone, 528 U.S. 225, 226 (2000) (the court presumes the  
24 jury followed the instructions given). The victim’s testimony did not involve only tattoos for  
25 purposes of identification; rather, the victim also testified to his familiarity with petitioner’s walk  
26

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27 <sup>4</sup> LD 3 at 173-75, 178-79, 182-85.  
28

1 or gait, facial expressions, and regular purchases of cigars.<sup>5</sup> (LD 3 at 59, 75, 89, 92, 198.)

2 In sum, the state appellate court's decision was not contrary to, or an unreasonable  
3 application of, clearly established Supreme Court authority. As a result, the undersigned  
4 recommends petitioner's claim as alleged in ground one of the second amended petition be  
5 denied.

6 B. *Admission of Certain Photographic Evidence Violated Due Process (Ground Two)*

7 Petitioner claims that the trial court abused its discretion in admitting photographs of  
8 petitioner's upper body gang tattoos and guns, violating his rights to due process. (ECF No. 15 at  
9 3-5.) Respondent contends this claim is procedurally defaulted and lacking in merit, thus  
10 precluding relief. (ECF No. 21 at 18-21.)

11 The last reasoned rejection of petitioner's claim is the decision of the California Court of  
12 Appeal for the Third Appellate District on petitioner's direct appeal. The state court addressed  
13 this claim as follows:

14 Defendant contends the trial court abused its discretion by admitting  
15 a photograph of defendant that showed his gang-related tattoos.  
16 Defendant moved in limine to exclude this photograph and the trial  
17 court deferred ruling on the motion. Defendant never reasserted the  
18 objections or pressed for a ruling when the photographs he now  
19 challenges were presented during trial. Accordingly, the issue has  
20 been forfeited. (See *People v. Ramos* (1997) 15 Cal.4th 1133, 1171  
21 [where party files a motion in limine but does not secure an express  
22 ruling from the court, argument is forfeited].)

23 Defendant further contends the trial court abused its discretion in  
24 admitting photographs of multiple hand guns, when only one of the  
25 guns was identified by the victim as the gun used in the robbery. The  
26 additional guns, defendant argues, "were not relevant and were  
27 inflammatory" and thus inadmissible under Evidence Code section  
28 352. Defendant did not raise this argument in the trial court.

In the trial court, defendant moved in limine to exclude "evidence of  
a cell phone." In support of his motion, defendant argued the  
photographs from the cell phone, including the gun photos, could not  
be used as evidence the gun belonged to defendant. He essentially  
conceded the photographs were otherwise admissible.

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<sup>5</sup> During testimony, the victim was asked whether he recognized the gunman's voice; he responded, "Kind of, yeah." (LD 3 at 199.)

1 The trial court ruled “the only real issue here is was it [defendant's]  
2 phone in terms of some kind of legal possession as opposed to having  
3 some actual or constructive possession. [The prosecutor] can at least  
4 elicit the testimony from the witnesses about the phone and we will  
5 see if there is an issue. And if there is, you can make an objection at  
6 that point.” When the gun photographs were presented, defendant  
7 raised no objections. Under these circumstances, defendant's  
8 objection to admission of the gun photographs as unduly prejudicial  
9 has been forfeited and cannot be raised on appeal. (Evid. Code, §  
10 353.

11 (People v. Williams, slip op. at \*3-4.)

#### 12 Applicable Legal Standards

13 A state court’s admission of evidence under state evidentiary law will form the basis for  
14 federal habeas relief only where the evidentiary ruling “so fatally infected the proceedings as to  
15 render them fundamentally unfair” in violation a petitioner’s due process rights. Jammal v. Van  
16 de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). “[F]ailure to comply with the state’s rules of  
17 evidence is neither a necessary nor a sufficient basis for granting habeas relief.” Id.

18 The United States Supreme Court has “defined the category of infractions that violate  
19 ‘fundamental fairness’ very narrowly.” Dowling v. United States, 493 U.S. 342, 352 (1990). The  
20 high court “has made very few rulings regarding the admission of evidence as a violation of due  
21 process.” Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009). It has opted not to hold  
22 that evidence of other crimes or bad acts “so infused the trial with unfairness as to deny due  
23 process of law.” Estelle v. McGuire, 502 U.S. at 75 & n.5 (noting that the Court “express[ed] no  
24 opinion on whether a state law would violate the Due Process Clause if it permitted the use of  
25 ‘prior crimes’ evidence to show propensity to commit a charged crime”). Moreover, the Supreme  
26 Court “has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence  
27 constitutes a due process violation sufficient to warrant issuance of the writ.” Holley, 568 F.3d at  
28 1101 (citing Carey v. Musladin, 549 U.S. at 77). In the absence of clearly established law that  
admission of even overtly prejudicial evidence constitutes a due process violation, the court  
cannot conclude that the state court’s ruling was an “unreasonable application.” Id.; see also  
Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir. 2008) (holding that because the Supreme

1 Court has expressly reserved the question of whether using evidence of a defendant’s past crimes  
2 to show that he has a propensity for criminal activity could ever violate due process, the state  
3 court did not unreasonably apply clearly established law in determining that the admission of  
4 defendant’s criminal history did not violate due process). A federal court is “without power” to  
5 grant a habeas petition based solely on the admission of evidence. Id.

6 Even setting aside the issue of clearly established federal law, “[a] habeas petitioner bears  
7 a heavy burden in showing a due process violation based on an evidentiary decision.” Boyde v.  
8 Brown, 404 F.3d 1159, 1172 (9th Cir. 2005), as amended, 421 F.3d 1154 (9th Cir. 2005). Again,  
9 “[t]he admission of evidence does not provide a basis for habeas relief unless it rendered the trial  
10 fundamentally unfair in violation of due process.” Holley, 568 F.3d at 1101. “Only if there are  
11 *no* permissible inferences the jury may draw from evidence can its admission violate due  
12 process.” Alcala v. Woodford, 334 F.3d 862, 887 (9th Cir. 2003) (emphasis in original); Houston  
13 v. Roe, 177 F.3d 901, 910 n.6 (9th Cir. 1999). “Even then, the evidence must ‘be of such quality  
14 as necessarily prevents a fair trial.’” Jammal v. Van de Kamp, 926 F.2d at 920 (citation omitted).  
15 That can only occur if the admission of the evidence had a “substantial and injurious effect or  
16 influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)  
17 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

### 18 Analysis

#### 19 *Procedural Default*

20 As to the state court’s determination that petitioner forfeited his argument by failing to  
21 reassert or press for a ruling concerning the photographs after the trial court initially deferred  
22 ruling on the issue, the claim is procedurally barred. Coleman v. Thompson, 501 U.S. 722, 749-  
23 50 (1991); Paulino v. Castro, 371 F.3d 1083, 1092-93 (9th Cir. 2004) (failure to object at trial  
24 bars federal habeas review).

25 A federal court will not review a petitioner's claims if the state court has denied relief of  
26 those claims pursuant to a state law that is independent of federal law and adequate to support the  
27 judgment. Ylst v. Nunnemaker, 501 U.S. at 801; Coleman v. Thompson, 501 U.S. at 729-30. A  
28 state court's refusal to hear the merits of a claim because of petitioner's failure to follow a state

1 procedural rule is considered a denial of relief on independent and adequate state grounds. Harris  
2 v. Reed, 489 U.S. 255, 260-61 (1989). This doctrine of procedural default is based on the  
3 concerns of comity and federalism. Coleman, 501 U.S. at 730-732.

4 Where a petitioner “failed to object to [the alleged error] at trial, his forfeiture under  
5 California law constitutes a procedural default.” Xiong v. Felker, 681 F.3d 1067, 1075 (9th Cir.  
6 2012) (noting that procedural rule must be firmly established and regularly followed and holding  
7 that contemporaneous objection rule barred review of petitioner’s claim); see also Fairbank v.  
8 Ayers, 650 F.3d 1243, 1256-57 (9th Cir. 2011) (holding that “the California Supreme Court  
9 applied an independent and adequate state procedural rule that bars federal review” based upon  
10 the lack of objection at trial); Vansickel v. White, 166 F.3d 953, 958 (9th Cir. 1999) (holding  
11 petitioner’s claim was “procedurally barred by an adequate and independent state ground”  
12 through California’s contemporaneous objection rule). The Ninth Circuit has repeatedly  
13 recognized and applied the California contemporaneous objection rule in affirming denial of a  
14 federal habeas petition on grounds of procedural default where there was a complete failure to  
15 object at trial. See, e.g., Inthavong v. Lamarque, 420 F.3d 1055, 1058 (9th Cir. 2005).

16 Petitioner makes no showing that the contemporaneous objection rule was not an adequate  
17 and independent basis for the appellate court’s decision. In addition, petitioner has not shown  
18 cause for the default or prejudice resulting from it, or that a fundamental miscarriage of justice  
19 would occur if this claim is not heard. Nor has petitioner presented any evidence establishing his  
20 actual innocence. Therefore, petitioner is procedurally barred from bringing this claim.

21 *Further Consideration*

22 Despite the procedural bar, the admission of photographs like those complained of here  
23 does not involve an unreasonable application of Supreme Court precedent, which would entitle  
24 petitioner to relief, because the Supreme Court “has not yet made a clear ruling that admission of  
25 irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant  
26 issuance of the writ.” Holley, 568 F.3d at 1101 (citing Carey v. Musladin, 549 U.S. at 77). In the  
27 absence of clearly established law that admission of even overtly prejudicial evidence constitutes  
28 a due process violation, the court could conclude that the state court’s ruling was an

1 “unreasonable application.” Id. Notably too, there is nothing in this record to indicate the  
2 admission of the photographs prevented a fair trial, nor did their admission have a substantial or  
3 injuries effect on the jury’s verdict. Jammal, 926 F.2d at 920; Brecht, 507 U.S. at 623.

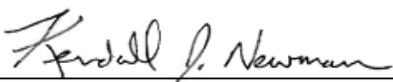
4 Because the claim is procedurally barred, and because the state appellate court's  
5 disposition of petitioner's claim was not contrary to or an unreasonable application of Supreme  
6 Court precedent, a federal district court may not grant the writ based on the trial court's admission  
7 of the photographs. Therefore, the undersigned recommends petitioner’s claim as alleged in  
8 ground two of the second amended petition be denied.

9 VI. Conclusion

10 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of  
11 habeas corpus be denied.

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

24 Dated: September 3, 2021

25   
26 \_\_\_\_\_  
KENDALL J. NEWMAN  
27 UNITED STATES MAGISTRATE JUDGE  
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