

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL E. SCOTT,	)	
	)	
Petitioner,	)	No. C 06-1147 JSW (PR)
	)	
v.	)	ORDER DENYING PETITION
	)	FOR A WRIT OF HABEAS
T. FELKER, Warden,	)	CORPUS
	)	
Respondent.	)	
_____	)	

**INTRODUCTION**

Michael E. Scott, a prisoner of the State of California currently incarcerated at High Desert State Prison in Susanville, California, has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This Court ordered Respondent to show cause as to why claims raised in the petition should not be granted. Respondent filed an answer, a memorandum of points and authorities in support thereof, and exhibits. Petitioner subsequently filed a traverse in which he requested an evidentiary hearing regarding a claim of ineffective assistance of counsel. This order denies the petition for a writ of habeas corpus on the merits and denies the request for an evidentiary hearing.

**PROCEDURAL BACKGROUND**

Petitioner was convicted at a jury trial in Alameda County Superior Court on June 3, 2002, of one count of first degree murder (Cal. Penal Code §§ 187, 189), being a felon in possession of a firearm (Cal. Penal Code § 12021, subd.

1 (a)(1) , and four counts of attempting to dissuade a witness (Cal. Penal Code §  
2 136.1, subd. (a)(2)). He was sentenced to fifty-nine years and four months to life  
3 in state prison.

4 Petitioner appealed his conviction to the California Court of Appeal, First  
5 District, which affirmed the conviction in an unpublished, reasoned opinion filed  
6 March 11, 2004. On June 16, 2004, the California Supreme Court denied review.  
7 Petitioner's petitions for state habeas corpus relief were denied by the California Court  
8 of Appeal and California Supreme Court on June 2, 2005, and May 17, 2006,  
9 respectively. On February 16, 2006, Petitioner filed a petition for a writ of habeas  
10 corpus with this court. Petitioner filed an amended petition for a writ of habeas corpus  
11 on June 7, 2006.

#### 12 **STATEMENT OF THE FACTS**

13 The facts of the case are summarized from the California Court of Appeal  
14 opinion as follows:

15 Appellant was convicted of murdering Eugene Abraham  
16 and of the attempting to dissuade four persons who saw him  
commit the crime.

17 On the night of October 6, 2001, Abraham, Manuel Adrow,  
18 and Lawrence Vaughn were standing near the corner of  
19 31st Street and Martin Luther King Way in Oakland  
drinking and smoking marijuana. Vaughn left momentarily  
20 to buy more alcohol. When he was a few feet away, a car  
drove up to Abraham and Adrow. Appellant, a man named  
21 Billy Moore, and a third man got out of the car. Appellant  
walked up to Abraham and shot him three times, killing  
him.

22 The murder was witnessed by several persons who were on  
23 the street that night. Adrow and Moore both told the police  
that appellant was the shooter. Chance Grundy also told the  
24 police he saw appellant shoot Abraham. He gave three  
detailed statements about the crime. Willie Gilbert said he  
25 saw appellant jump out of Moore's car and shoot Abraham.  
He too gave the police a detailed statement about the crime.

26 Appellant was arrested and an information was filed  
27 charging him with murder (§ 187), and being a felon in

1 possession of a firearm (§ 12021, subd. (a)(1).) As is  
2 relevant here, the information also alleged appellant  
3 personally discharged a firearm and caused death within the  
4 meaning of section 12022.53, subdivisions (b), (c), and (d).

5 While appellant was incarcerated at the Santa Rita jail  
6 awaiting trial, his telephone calls, like the calls of all  
7 inmates, were recorded. Those tapes show appellant knew  
8 others had identified him as Abraham's killer.

9 On November 23, 2001, appellant told an acquaintance that  
10 the witnesses were "fittin' to get the squeeze put on their  
11 ass" and that they "better be scared."

12 On December 2, 2001, appellant told his sister that he  
13 planned to ask for a speedy trial because when the  
14 witnesses "disappear, they ain't going to be able to find  
15 them and shit, they gonna have to throw it out."

16 On January 16, 2002, during a conversation with a woman  
17 named Veronica Ward, appellant complained that Chance  
18 Grundy had "snitched" and "told everything." Later during  
19 the same conversation, appellant speculated that Grundy's  
20 actions had caused others to speak with the police.

21 "[Appellant] But it's really Chance, the one who got  
22 everybody cracked. Really Chance put Bill [Moore],  
23 Chance put Bill in the position to make him tell.

24 "[Ward] Uh.

25 "[Appellant] Chance, Chance need to sleep with the fishes  
26 with a weight tied around his neck."

27 Eleven days later, on January 27, 2002, Grundy was  
28 murdered. Someone shot him in the head.

On February 7, 2002, appellant told a man named Ron that  
he should be sure to come to his preliminary hearing  
because "I'm just trying to make sure none of my witnesses  
don't come."

During a conversation with a [woman] named Toyer Gear  
on February 15, 2002, appellant implored Gear to tell  
Moore that he should "stay under" and to "stay out of the  
way."

On February 13, 2002, Willie Gilbert was murdered. He too  
was shot in the head.

1 In March 2002, a second information was filed charging  
2 appellant and two other persons with four counts of  
attempting to dissuade a witness. (§ 136.1, subd. (a)(2).)

3 The cases against appellant were consolidated and went to  
4 trial in May 2002. Since Grundy and Gilbert had been  
murdered, and Moore apparently refused to testify, the  
5 prosecution was forced to rely primarily on the testimony of  
Adrow, who was standing next to Abraham when he was  
6 murdered. Adrow testified unequivocally that appellant shot  
Abraham. The prosecution buttressed this evidence with  
7 testimony from Deputy Sheriff Richard Rice who was  
working at Santa Rita Jail when appellant was arrested.  
8 Rice said appellant told him he needed to be transferred to a  
different part of the jail because he had “killed a 415 gang  
9 member” and was afraid of retribution. The prosecution  
presented evidence to show that Abraham had identified  
10 himself as a “415” gang member.

11 Appellant presented a mistaken identify defense. He  
pointed out many inconsistencies in Adrow's testimony and  
12 tried to show that Adrow was untrustworthy. Appellant also  
emphasized that Adrow had a criminal record and that he  
13 was drinking and smoking marijuana on the night in  
question.

14 The jury considering this evidence convicted appellant on  
all counts and found the use allegation to be true.  
15 Subsequently, the court sentenced appellant to a total of 59  
16 years 8 months to life in prison. This appeal followed.

17 *People v. Scott*, No. A099394, 2004 WL 473383, at \*1-2 (Cal. Ct. App. March 11,  
18 2004) (footnote omitted).

### 19 **STANDARD OF REVIEW**

20 This Court may entertain a petition for a writ of habeas corpus “in behalf of a  
21 person in custody pursuant to the judgment of a state court only on the ground that he is  
22 in custody in violation of the Constitution or laws or treaties of the United States.” 28  
23 U.S.C. § 2254(a). A district court may grant a petition challenging a state conviction or  
24 sentence on the basis of a claim that was “adjudicated on the merits” in state court only  
25 if the state court’s adjudication of the claim: “(1) resulted in a decision that was  
26 contrary to, or involved an unreasonable application of, clearly established Federal law,  
27

1 as determined by the Supreme Court of the United States; or (2) resulted in a decision  
2 that was based on an unreasonable determination of the facts in light of the evidence  
3 presented in the State court proceeding.” 28 U.S.C. § 2254(d).

4 Under the ‘contrary to’ clause, a federal habeas court may grant the writ if a  
5 state court arrives at a conclusion opposite to that reached by the Supreme Court on a  
6 question of law or if the state court decides a case differently than the Supreme Court  
7 has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362,  
8 412-13 (2000). “Under the ‘unreasonable application’ clause, a federal habeas court  
9 may grant the writ if a state court identifies the correct governing legal principle from  
10 the Supreme Court’s decisions but unreasonably applies that principle to the facts of the  
11 prisoner’s case.” *Williams*, 529 U.S. at 413. As summarized by the Ninth Circuit: “A  
12 state court’s decision can involve an ‘unreasonable application’ of federal law if it  
13 either 1) correctly identifies the governing rule but then applies it to a new set of facts  
14 in a way that is objectively unreasonable, or 2) extends or fails to extend a clearly  
15 established legal principle to a new context in a way that is objectively unreasonable.”  
16 *Van Tran v. Lindsey*, 212 F.3d 1143, 1150 (9th Cir. 2000) *overruled on other grounds*;  
17 *Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003) (citing *Williams*, 529 U.S. at 405-07).

18 “[A] federal habeas court may not issue the writ simply because that court  
19 concludes in its independent judgment that the relevant state-court decision applied  
20 clearly established federal law erroneously or incorrectly. Rather, that application must  
21 also be unreasonable.” *Williams*, 529 U.S. at 411; *accord Middleton v. McNeil*, 541  
22 U.S. 433, 436 (2004) (per curiam) (challenge to state court’s application of governing  
23 federal law must not only be erroneous, but objectively unreasonable); *Woodford v.*  
24 *Visciotti*, 537 U.S. 19, 25 (2002) (per curiam) (“unreasonable” application of law is not  
25 equivalent to “incorrect” application of law).

26 In deciding whether a state court’s decision is contrary to, or an unreasonable  
27

1 application of, clearly established federal law, a federal court looks to the decision of  
2 the highest state court to address the merits of the Petitioner’s claim in a reasoned  
3 decision. *LaJoie v. Thompson*, 217 F.3d 663, 669 n.7 (9th Cir. 2000).

4 The only definitive source of clearly established federal law under  
5 28 U.S.C. § 2254(d) is in the holdings of the Supreme Court as of the time of the state  
6 court decision. *Williams* 529 U.S. at 412; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th  
7 Cir. 2003). While the circuit law may be “persuasive authority” for the purposes of  
8 determining whether a state court decision is an unreasonable application of Supreme  
9 Court precedent, only the Supreme Court’s holdings are binding on the state courts and  
10 only those holdings need be “reasonably” applied. *Id.*

11 If the state court decision only considered state law, the federal court must ask  
12 whether state law, as explained by the state court, is “contrary to” clearly established  
13 governing federal law. *See Lockhart v. Terhune*, 250 F.3d 1223, 1230 (9th Cir. 2001);  
14 *see, e.g., Hernandez v. Small*, 282 F.3d 1132, 1141 (9th Cir. 2002) (state court applied  
15 correct controlling authority when it relied on state court case that quoted Supreme  
16 Court for proposition squarely in accord with controlling authority). If the state court,  
17 relying on state law, correctly identified the governing federal legal rules, the federal  
18 court must ask whether the state court applied them unreasonably to the facts. *See*  
19 *Lockhart*, 250 F.3d at 1232.

20  
21 In his petition for a writ of habeas corpus, Petitioner asserts nine<sup>1</sup> claims for  
22 relief: (1) hearsay evidence was admitted into evidence in violation of Petitioner’s  
23 Confrontation Clause rights; (2) admission of the hearsay evidence violated *Bruton v.*

---

24  
25 <sup>1</sup>Petitioner’s original petition raised ten grounds. However, the Court has  
26 determined that ground six in the original petition is duplicative of ground one. That  
27 claim is resolved under the Court’s analysis of claims one through three which are  
28 decided jointly in section I, below.

1 *United States*, 391 U.S. 123 (1968) and was not cured by a limiting instruction; (3) the  
2 trial court erred in failing to sever the dissuasion charges from the murder charge; (4)  
3 the prosecutor committed misconduct in closing argument by inviting the jury to  
4 speculate that Petitioner was responsible for the unavailability of witnesses; (5) the trial  
5 court erred by providing CALJIC No. 2.03, an instruction which provides that the jury  
6 may consider false statements by Petitioner as circumstances tending to prove  
7 consciousness of guilt; (6) the trial court erred by failing to state reasons for its rulings,  
8 in violation of Petitioner’s right to a fair trial; (7) Petitioner’s right to due process was  
9 violated because evidence of Petitioner’s bad acts (selling marijuana and being in  
10 possession of firearms) was admitted; (8) Petitioner suffered ineffective assistance of  
11 counsel in that trial counsel failed to request certain jury instructions, to interview  
12 prosecution witnesses, to locate, interview, and present certain alibi witnesses and by  
13 allowing the jury to learn of Petitioner’s prior criminal history; and (9) cumulative  
14 error.

## 15 **DISCUSSION**

### 16 **I. Admission of Out-of-Court Statements by Non-Testifying Declarants**

17 In claims one, two, three and nine in the petition, Petitioner argues that his  
18 Confrontation Clause and fair trial rights were violated because out-of-court statements  
19 by three non-testifying declarants, Billy Moore, Chance Grundy, and Willy Gilbert,  
20 identifying Petitioner as the murderer, were admitted into evidence through the  
21 testimony of Sergeant Louis Cruz.<sup>2</sup> Petitioner contends that these statements were  
22

---

23 <sup>2</sup> Just before the prosecutor began to elicit these statements from Sergeant Cruz,  
24 the trial court provide the following special jury instruction: “At this time certain  
25 evidence is being produced in this trial concerning statements made by witnesses. You  
26 are instructed that this evidence is not being allowed into evidence for the truth of the  
27 statements. The evidence is being allowed into evidence for the limited purpose of  
28 showing, if it does, the specific intent or mental state of the defendant, Michael Scott.  
You cannot and must not consider it for any other purpose. Reporters Transcript

1 hearsay, lacked any exception under state hearsay rules, were not subjected to cross-  
2 examination, and were prejudicial, in violation of his constitutional rights. In the  
3 alternative, Petitioner contends that if the statements were relevant and properly  
4 admitted for the non-truth purpose of showing Petitioner's state of mind as to the  
5 dissuasion charges, they were not cross-admissible and highly prejudicial as to the  
6 murder charge. Petitioner argues that even if the out-of-court statements were properly  
7 admitted as to the dissuasion charges, the trial court violated his rights by failing to  
8 sever the murder charge from the dissuasion charges, and failed to adequately instruct  
9 the jury to not consider the statements at all with regard to the murder charge.

10 With respect to the admission of the testimony regarding these statements, the  
11 California Court of Appeal held that:

12 The portion of Sergeant Cruz's testimony that appellant  
13 challenges was not hearsay because it was not offered for  
14 its truth, i.e., that appellant shot Eugene Abraham. Rather,  
15 as the trial court expressly told the jurors, the testimony was  
16 offered for the nonhearsay purpose of showing appellant's  
17 mental state, i.e., that he had a motive to dissuade Adrow,  
18 Moore, Grundy, and Gilbert from testifying. Since Cruz's  
19 testimony was not offered to prove the truth of the matter  
20 asserted, it was not hearsay.

21 *Scott*, 2004 WL 473383, at \*3.

22 The California Court of Appeal further concluded that the court's repeated  
23 limiting instructions to the jury, that the statements were coming in *only* for the limited  
24 purpose of showing, if they did, Petitioner's state of mind, and the prosecutor's  
25 repetition of the instructions during closing arguments, were sufficiently clear to keep

---

26 (hereinafter "RT") at 1672. Defense counsel immediately raised objections on state and  
27 federal grounds, including that the statements were hearsay and more prejudicial than  
28 probative under Cal. Penal Code § 352. RT at 1672. Sergeant Cruz then testified that  
each of the four witnesses Petitioner was charged with attempting to dissuade, Moore,  
Grundy, Gilbert, and Manuel Adrow, signed a photograph of Petitioner, identifying him  
as the person who shot Abraham. RT at 1674.



1 the jury from considering those statements for any truth purpose. *Id.* at \*4. The court  
2 found that the statements were not hearsay. As a result, the court of appeal did not  
3 further determine whether those statements were admissible under hearsay exceptions,  
4 or whether Petitioner “‘forfeited’ or ‘waived’” his Confrontation Clause claim as a  
5 result of the attempted dissuasion, as Respondent argues. *Id.* at 3.

6 **A. Hearsay**

7 **1. Legal Standard**

8 The Confrontation Clause of the Sixth Amendment provides that in criminal  
9 cases the accused has the right to “be confronted with witnesses against him.” U.S.  
10 Const. amend. VI. The federal confrontation right applies to the states through the  
11 Fourteenth Amendment. *See Pointer v. Texas*, 380 U.S. 400, 403 (1965).

12 Out-of-court statements constitute hearsay when offered in evidence to prove the  
13 truth of the matter asserted. *Anderson v. United States*, 417 U.S. 211, 219 (1974).  
14 While the Confrontation Clause does not necessarily bar the admission of hearsay  
15 statements, it may prohibit introducing evidence that otherwise would be admissible  
16 under a hearsay exception. *See Idaho v. Wright*, 497 U.S. 805, 813, 814 (1990); *see,*  
17 *e.g., Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999) (plurality) (admission of  
18 accomplice’s hearsay confession to police inculcating defendant violated Confrontation  
19 Clause).

20 The Confrontation Clause applies to all out-of-court testimonial statements  
21 offered for the truth of the matter asserted, i.e., “testimonial hearsay.” *See Crawford*,  
22 541 U.S. at 51.<sup>3</sup> While the Supreme Court has not articulated a comprehensive  
23 definition of testimonial hearsay, “[w]hatever else the term covers, it applies at a  
24

---

25  
26 <sup>3</sup>The Confrontation Clause does not bar the use of testimonial statements for  
27 purposes other than establishing the truth of the matter asserted. *Crawford*, 541 U.S. at  
28 59 n.9.

1 minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former  
2 trial; and to police interrogations." *Id.* at 68. Where non-testimonial hearsay is at issue,  
3 the states may develop evidentiary rules for its admissibility, including exemption of  
4 such statements from Confrontation Clause scrutiny altogether. *Id.* at 68.

5 In this case, Petitioner's conviction did not become final until the California  
6 Court of Appeal ruled on his direct appeal on March 11, 2004. *Crawford* was not  
7 decided until after Petitioner's conviction became final. *Crawford* announced a "new  
8 rule" not applicable on collateral review because the rule does not come within either  
9 of the exceptions to the *Teague* non-retroactivity rule for new substantive rules or  
10 "watershed rules of criminal procedure" which implicate the fundamental fairness and  
11 accuracy of the criminal proceeding. *Whorton v. Bockting*, 127 S. Ct. 1173, 1184  
12 (2007) (applying *Teague v. Lane*, 489 U.S. 288, 310-316 (1989)). Therefore, *Crawford*  
13 does not apply retroactively on collateral attack. *Id.*

14 For Confrontation Clause cases governed by pre-*Crawford* law, the legal  
15 standard is:

16 [A]n out-of-court statement against a criminal defendant was admissible  
17 at trial if two conditions were met. *See Ohio v. Roberts*, 448 U.S. 56, 65-  
18 66 (1980). First, 'in order to introduce relevant statements at trial, state  
19 prosecutors [must] either produce the declarants of those statements as  
20 witnesses at trial or demonstrate their unavailability.' [Citations.]  
21 Second, even if prosecutors succeed in demonstrating unavailability, the  
statements are only admissible if they bear 'adequate indicia of reliability.'  
The 'indicia of reliability' requirement is met if the statements fall within  
a 'firmly rooted hearsay exception' or contain 'particularized guarantees of  
trustworthiness.'"

22 *Bockting v. Bayer*, 505 F.3d 973, 978 (9th Cir. 2007). This court will apply *Roberts* to  
23 Petitioner's case, however it will look to *Crawford* for guidance with respect to matters  
24 consistent with *Roberts* which *Crawford* did not overrule.

25 Confrontation Clause claims are subject to harmless error analysis. *See United*  
26 *States v. McClain*, 377 F.3d 219, 222 (2d Cir. 2004). In the context of reviewing a state  
27

1 court conviction under 28 U.S.C. § 2254, this means that relief is in order only if the  
2 admission at issue “had substantial and injurious effect or influence in determining the  
3 jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

## 4 2. Analysis

5 In this case, as the state court found, these out-of-court statements, in which  
6 Moore, Grundy, and Gilbert identified Petitioner, were not hearsay. These statements  
7 were brought in through Sergeant Cruz’s testimony and involved out-of-court  
8 identifications of Petitioner as the person who shot Abraham. RT at 1674. Under the  
9 California Evidence Code, hearsay is defined as “evidence of a statement that was  
10 made other than by a witness while testifying at the hearing and that is offered to prove  
11 the truth of the matter stated.” Cal. Evid. § 1200(a). The statements offered into  
12 evidence through Sergeant Cruz’s testimony were not being offered for their truth.  
13 Rather, as the trial judge made clear in the special jury instruction, the testimony of the  
14 statements was offered only for the “limited purpose of showing, if it does, the specific  
15 intent or mental state of the [Petitioner] . . . . You cannot and must not consider it for  
16 any other purpose.” RT at 1672. The testimony was admitted for the limited purpose  
17 of showing Petitioner’s state of mind, specifically, that he believed the witnesses were  
18 important which is why he attempted to dissuade them from testifying. The jury was  
19 clearly instructed not to consider the testimony for its truth or any other purpose.  
20

21 There was no Confrontation Clause violation under either *Crawford* or *Roberts*  
22 here because the statements of the unavailable witnesses were not being admitted for  
23 their truth, therefore they were not hearsay. In *Roberts*, the Supreme Court specified  
24 that the “Confrontation Clause operates in two separate ways to restrict the range of  
25 admissible hearsay.” 448 U.S. at 65. These ways are that before hearsay is admitted,  
26 the unavailability of the witness must be established, and even if it has been, there must  
27 be adequate indicia of reliability with regard to the proffered statement. *Id.* The  
28



1 *Bruton* only applies to joint trials by co-defendants, and here Petitioner was separately  
2 tried. The California Court of Appeal held likewise. *Scott*, 2004 WL 473383 at \*5.

3 Addressing severance, the court held:

4 Consolidation is the preferred manner in which to try  
5 multiple charges. [Citation.] The trial court is granted the  
6 discretion to determine whether multiple charges should be  
7 tried together, and its ruling will be reversed on appeal only  
8 where the court abused its discretion. ( *Ibid.*) Refusal to  
9 sever may be an abuse of discretion where (1) evidence on  
10 the crimes to be jointly tried would not be cross-admissible  
11 in separate trials; (2) certain of the charges are unusually  
12 likely to inflame the jury; (3) a “weak” case has been joined  
13 with a “strong” or with another “weak” case, so that the  
14 “spillover” effect of aggregate evidence on several charges  
15 might alter the outcome of some or all of them; and (4) any  
16 of the charges carries the death penalty or joinder of them  
17 turns the matter into a capital case. ( *Ibid.*)

18 Here, the bulk of the evidence in the dissuasion counts, i.e.,  
19 the phone calls appellant made while he was in jail, was  
20 relevant in the murder trial because it showed  
21 consciousness of guilt. [Citation.] To the extent the jurors  
22 might have been tempted to consider in the murder case, the  
23 out-of-court statements made by Grundy, Gilbert and  
24 Moore, the court, by instruction, and the prosecutor, by  
25 argument told the jurors that was not permissible. The  
26 nature of the charges in the dissuasion counts were not  
27 likely to inflame the jurors. The underlying murder was  
28 brutal. The dissuasion counts were considerably less so.  
This was not a case where a “weak” murder case was  
bolstered by “strong” dissuasion counts. While the evidence  
that appellant had attempted to dissuade the witnesses was  
indeed strong, the same was true of murder charge. An  
eyewitness, Adrow positively identified appellant as the  
shooter. Adrow's identification was supported by appellant's  
admission to the jailer, that he [needed] to be transferred to  
a different area of the jail because he killed a “415” gang  
member and needed protection. Finally, this was not a  
capital case.

23 *Id.* at \*6 (footnote omitted).



1 2004) (denial of motion to sever trial of capital and noncapital charges based on  
2 separate incidents not a violation of due process because evidence was cross-  
3 admissible, the weight of evidence with respect to each incident was roughly equal, the  
4 evidence as to each incident was distinct, and the jury was properly instructed);  
5 *Sandoval*, 241 F.3d at 773 (given the strength of the State's case against petitioner on  
6 both sets of murders and the cross-admissibility of the evidence on each set, petitioner's  
7 trial was not actually prejudiced by the joinder).

8 Use of the out-of-court confession (or inculpatory statements) of a co-defendant  
9 who did not testify at trial violates the non-confessing defendant's right of cross-  
10 examination secured by the Confrontation Clause of the Sixth Amendment and this  
11 violation is not cured by a jury instruction that the confession should be disregarded in  
12 determining the non-confessing defendant's guilt or innocence. *Bruton v. United*  
13 *States*, 391 U.S. 123, 134-37 (1968). *Bruton* error, however, does not require reversal  
14 "if the other evidence of guilt was overwhelming and the prejudice to the defendant  
15 from his co-defendant's admission slight by comparison." *Id.* (quoting *United States v.*  
16 *Guerrero*, 756 F.2d 1342, 1348 (9th Cir.)); see *United States v. Gillam*, 167 F.3d 1273,  
17 1277 (9th Cir. 1998) (finding *Bruton* error where co-defendant's redacted admission  
18 clearly implicated defendant, but finding error harmless because of strength of  
19 government's case against defendant).

20 In *Tennessee v. Street*, 471 U.S. 409, 414 (1985), the Court held that there was  
21 no *Bruton* error where a non-testifying accomplice's statement inculpatory defendant  
22 was introduced by a sheriff's testimony for a non-hearsay purpose. The jury in *Street*  
23 was not asked to infer whether the accomplice's confession proved that the defendant  
24 participated in the murder - this would have been hearsay - but instead was pointedly  
25 instructed not to consider the truthfulness of the statement. *Id.* The assumption that  
26 jurors will follow the court's instructions fully applies when rights guaranteed by the  
27

1 Confrontation Clause are at issue. *Id.*; *see, e.g., Frazier v. Cupp*, 394 U.S. 731, 735  
2 (1969).

## 3 2. Analysis

4 As the California Court of Appeal observed, evidence in the dissuasion counts,  
5 specifically the recorded calls Petitioner made from prison, was cross-admissible under  
6 state law to the murder count. This evidence was cross-admissible because it tended to  
7 show Petitioner’s consciousness of guilt with regard to the murder as well as directly to  
8 prove his attempts to dissuade prosecution witnesses. Further, this was not a case  
9 where a weak murder count was bootstrapped to strong attempted dissuasion counts.  
10 The evidence for the murder charge was equally as strong as the evidence for the  
11 dissuasion charges. With respect to the murder charge, an eyewitness, Adrow,  
12 positively identified Petitioner as the shooter. Adrow’s identification was supported by  
13 Petitioner’s own jailhouse confession that he needed to be transferred to a different area  
14 of the jail because he killed a “415” gang member and needed protection. And this  
15 evidence was further corroborated by Jackson’s testimony placing Petitioner and  
16 Adrow at the scene of the murder. Michael Sanders’ testimony also linked Petitioner to  
17 Grundy and Moore, and provided evidence that Petitioner had access to the type of  
18 weapon (.38 revolver) used in Abraham’s murder.

19 As the California Court of Appeal observed, to the extent the jurors might have  
20 been tempted to consider in the murder case, the out-of-court statements made by  
21 Grundy, Gilbert and Moore, the trial court, by instruction, and the prosecutor, by  
22 argument, told the jurors that was not permissible. *See Scott*, 2004 WL 473383, at \*4.  
23 *Bruton* is not applicable here because Petitioner was not tried *jointly* with those who  
24 made the inculpatory statements. On the contrary, *Street* is directly on point. Here, just  
25 as in *Street*, out-of-court statements made by non-testifying accomplices were admitted  
26 for a non-truth purpose through an officer’s testimony, and the jury was pointedly  
27



1 instructed about the limited purpose of that evidence. The statements were not made by  
2 a co-defendant in a joint trial, as in *Bruton*, so *Bruton*'s concern with the jury's ability  
3 to follow the limiting instruction is inapplicable here. Rather, as in *Street*, it is assumed  
4 that the jury followed the limiting instructions issued by the Court. *Street*, 471 U.S. at  
5 414; *see also Frazier*, 394 U.S. at 735.

6 The state court's decision was not contrary to, or an unreasonable application of,  
7 clearly established federal law, as determined by the Supreme Court of the United  
8 States. Nor was the decision an unreasonable determination of the facts in light of the  
9 evidence presented in the state court proceeding.

### 10 **C. Sufficiency of Limiting Instructions**

11 Petitioner's last claim concerning the admission of out-of-court statements is  
12 that the trial court erred by not issuing to the jury a more specific limiting instruction  
13 preventing the jury from considering those statements with respect to Petitioner's  
14 mental state with regard to the murder charge. The instruction that the court issued  
15 admonished the jury that "the evidence is being allowed into evidence for the limited  
16 purpose of showing, if it does, the specific intent or mental state of the defendant,  
17 Michael Scott. You cannot and must not consider it for any other purpose. RT at 1672.

18 Petitioner argues that the trial court's failure to issue such an instruction was all the  
19 more prejudicial here because the prosecution made numerous references to the truth of  
20 the out-of-court identifications of Petitioner as Abraham's shooter in his closing  
21 arguments.<sup>4</sup> Petitioner further argues that the trial court improperly allowed these out-  
22 of-court statements to be considered by the jury in the murder count because they were  
23 cross-admissible to show Petitioner's consciousness of guilt.  
24

25 Respondent counters that there was no reasonable likelihood that the jurors

---

26  
27 <sup>4</sup> *See* Pet. Traverse at 19.

1 would consider these out-of-court statements for their truth on the murder charge. The  
2 California Court of Appeal concluded that “based on the instructions and the  
3 [prosecutor’s] argument, that the jurors would have understood [Sergeant Cruz’s]  
4 testimony was limited and could only be used to establish appellant's state of mind on  
5 the attempting to dissuade counts. There was no error.” *Scott*, 2004 WL 473383 at \*4.

### 6 **1. Legal Standard**

7 To obtain federal collateral relief for errors in the jury charge, a petitioner must  
8 show that the ailing instruction by itself so infected the entire trial that the resulting  
9 conviction violates due process. *See Estelle*, 502 U.S. at 72 (citing *Cupp v. Naughten*,  
10 414 U.S. 141, 147 (1973); *see also Donnelly v. DeChristoforo*, 416 U.S. 637, 643  
11 (1974) (“[I]t must be established not merely that the instruction is undesirable,  
12 erroneous or even “universally condemned,” but that it violated some [constitutional  
13 right].”). The instruction may not be judged in artificial isolation, but must be  
14 considered in the context of the instructions as a whole and the trial record. *See Estelle*,  
15 502 U.S. at 72. In other words, the court must evaluate jury instructions in the context  
16 of the overall charge to the jury as a component of the entire trial process. *United*  
17 *States v. Frady*, 456 U.S. 152, 169 (1982).

18 In reviewing an ambiguous instruction, the inquiry is not how reasonable jurors  
19 could or would have understood the instruction as a whole; rather, the court must  
20 inquire whether there is a “reasonable likelihood” that the jury has applied the  
21 challenged instruction in a way that violates the Constitution. *See Estelle v. McGuire*,  
22 502 U.S. at 72 & n.4. A determination that there is a reasonable likelihood that the jury  
23 has applied the challenged instruction in a way that violates the Constitution establishes  
24 only that an error has occurred, however. *See Calderon v. Coleman*, 525 U.S. 141, 146  
25 (1998). If an error is found, the court also must determine that the error had a  
26 substantial and injurious effect or influence in determining the jury's verdict, *see Brecht*  
27

1 v. *Abrahamson*, 507 U.S. 619, 637 (1993), before granting relief in habeas proceedings.  
2 *See Calderon*, 525 U.S. at 146-47.

3 A prosecutor’s mischaracterization of a jury instruction is less likely to render a  
4 trial fundamentally unfair than if the trial court issues the instruction erroneously:

5 [A]rguments of counsel generally carry less weight with a jury than do  
6 instructions from the court. The former are not evidence, and are likely  
7 viewed as the statements of advocates; the latter, we have often  
8 recognized, are viewed as definitive and binding statements of the law.  
9 Arguments of counsel which misstate the law are subject to objection and  
10 to correction by the court. This is not to say that prosecutorial  
11 misrepresentations may never have a decisive effect on the jury, but only  
12 that they are not to be judged as having the same force as an instruction  
13 from the court.

14 *Boyd v. California*, 494 U.S. 370, 384-85 (1989) (citations omitted).

## 15 **2. Analysis**

16 Here, the judge repeatedly provided a limiting instruction admonishing the jury  
17 that it could not consider the out-of-court statements for the truth. The judge instructed  
18 the jury that the testimony of the statements was offered only for the “limited purpose  
19 of showing, if it does, the specific intent or mental state of the [Petitioner] . . . . *You*  
20 *cannot and must not consider it for any other purpose.*” RT at 1672 (emphasis added).

21 On its face, this instruction does not reasonably appear to be ambiguous. On the  
22 contrary, it is quite clear how the jury was to consider the out-of-court statements, and  
23 equally as clear as to how the jury was forbidden from considering them. Further, the  
24 prosecutor reiterated the court’s instruction in his closing arguments. The prosecutor  
25 told the jury that they were not to consider what these witnesses told Sergeant Cruz as  
26 the truth, but only that the evidence shows that Petitioner believed that the witnesses  
27 were important and that he had the motive to dissuade them from testifying. RT at  
28 1924. To the extent the prosecutor’s argument mischaracterized the jury instruction or  
overemphasized the statement’s truth value, the court’s clear and unambiguous

1 instruction cured any error. This court presumes that the jury followed the judge's  
2 instructions. In *Street*, 471 U.S. 409, 415 n.6 (1985), the Court observed that the  
3 presumption that jurors follow instructions fully applies to claims invoking the  
4 Confrontation Clause.

5 The state court's decision was not contrary to, or involve an unreasonable  
6 application of, clearly established federal law, as determined by the Supreme Court of  
7 the United States. This decision was not an unreasonable determination of the facts in  
8 light of the evidence presented in the state court proceeding.

## 9 **II. Prosecutorial Misconduct**

10 Petitioner next claims that the prosecutor committed misconduct in his closing  
11 arguments by misstating the evidence. Specifically, Petitioner contends that the  
12 prosecutor's argument was "outrageously improper" because: (1) the prosecutor  
13 characterized Petitioner's conduct as "bold" and "cocky;" (2) the prosecutor suggested  
14 that Petitioner caused unavailable witnesses to disappear; and (3) the prosecutor  
15 impermissibly tied evidence from the dissuasion charge to the murder charge in order  
16 for the jury to speculate that Petitioner murdered the unavailable witnesses to keep  
17 them from testifying. Pet. at 45-47. Petitioner argues that these examples of  
18 misconduct rendered his trial unfair in violation of his due process rights.

19 Respondent argues that the prosecutor's characterization of Petitioner's conduct  
20 was supported by the evidence and within the bounds of proper vigorous argument.  
21 Further, Respondent contends that the jury would not have speculated about whether  
22 Petitioner caused the disappearance of unavailable witnesses because evidence was  
23 presented through Deputy Rice's testimony that Petitioner was incarcerated before trial.

24 The California Court of Appeal addressed this claim as follows:

25  
26 A prosecutor commits misconduct when he misstates or  
27 mischaracterizes the evidence. [Citation.] However, a  
28

1 prosecutor may engage in vigorous argument drawing what  
2 he believes to be reasonable deductions from the evidence.  
3 [Citation.] The prosecutor's argument here was not  
4 misconduct because it was well supported. The prosecution  
5 presented evidence that appellant murdered [Abraham] and  
6 then tried to cover-up the crime by dissuading witnesses  
7 from testifying against him. At one point, appellant told his  
8 sister that he planned to ask for a speedy trial because when  
9 the witnesses “disappear, they ain't going to be able to find  
10 them and shit, they gonna have to throw it out.” At another  
11 point, he said a witness needed to “sleep with the fishes  
12 with a weight tied around his neck.” Based on this evidence  
13 the prosecutor could reasonably argue that appellant was so  
14 bold and cocky he thought he could scare witnesses into not  
15 testifying. We see no misconduct.

9 Appellant also contends the passage we have quoted was  
10 misconduct because the prosecutor “invit[ed] the jury to  
11 speculate that appellant had murdered the unavailable  
12 witnesses to keep them from testifying.” “To prevail on a  
13 claim of prosecutorial misconduct based on remarks to the  
14 jury, the defendant must show a reasonable likelihood the  
15 jury understood or applied the complained-of comments in  
16 an improper or erroneous manner.” [Citation.] On appeal  
17 “we ‘do not lightly infer’ that the jury drew the most  
18 damaging rather than the least damaging meaning from the  
19 prosecutor's statements.” [Citation.] Here, the prosecutor  
20 did not state or suggest that appellant had murdered the  
21 witnesses who failed to testify. It is not reasonably likely  
22 the [jury] understood the comment as appellant suggests.

### 17 **A. Legal Standard**

18 Prosecutorial misconduct is cognizable in federal habeas corpus. The  
19 appropriate standard of review is the narrow one of due process and not the broad  
20 exercise of supervisory power. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986).  
21 A defendant's due process rights are violated when a prosecutor's misconduct renders a  
22 trial “fundamentally unfair.” *See id.*; *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (“the  
23 touchstone of due process analysis in cases of alleged prosecutorial misconduct is the  
24 fairness of the trial, not the culpability of the prosecutor”). Under *Darden*, the first  
25 issue is whether the prosecutor’s remarks were improper; if so, the next question is  
26 whether such conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101,  
27

1 1112 (9th Cir. 2005). A prosecutorial misconduct claim is decided ““on the merits,  
2 examining the entire proceedings to determine whether the prosecutor's remarks so  
3 infected the trial with unfairness as to make the resulting conviction a denial of due  
4 process.”” *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir.1995) (citation omitted).

5 Factors which a court may take into account in determining whether misconduct  
6 rises to a level of due process violation are: (1) the weight of evidence of guilt, *United*  
7 *States v. Young*, 470 U.S. 1, 19 (1985); (2) whether the misconduct was isolated or part  
8 of an ongoing pattern, *see Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987); (3)  
9 whether the misconduct relates to a critical part of the case, *see Giglio v. United States*,  
10 405 U.S. 150, 154 (1972); and (4) whether a prosecutor's comment misstates or  
11 manipulates the evidence, *see Darden*, 477 U.S. at 182.

## 12 **B. Analysis**

13 While the prosecutor in this case engaged in vigorous argument, this Court does  
14 not find that he committed misconduct that would render the trial fundamentally unfair.  
15 The prosecutor did not misstate evidence. Instead, his characterization of Petitioner as  
16 bold was supported by the evidence that Abraham’s murderer walked right up to him  
17 on the street and shot him from a few feet away; the fatal bullet entering Abraham in  
18 the chest, traveling through his heart, and exiting his back. RT at 1009-11. The fact  
19 that there were other people around Abraham at the time of the shooting further  
20 supports the prosecutor’s description that the murder was bold. Support for the  
21 argument that Petitioner was cocky was found in the admitted tape recordings of his  
22 multiple conversations in which he described witnesses against him and ways of  
23 dissuading them from testifying.<sup>5</sup> Describing a defendant who witnesses said shot his  
24

---

25  
26 <sup>5</sup>*See e.g.* Exh. C, People’s Exhibit No. (hereinafter “No.”) 63 at 4 (“I took the  
27 proper channels . . . to holler at my folks . . . . So, nigger fittin’ to get the squeeze,  
28 nigger fittin’ to get the squeeze put their ass in a minute . . . .”), No. 79 at 24 (“When he

1 victim in the chest at close range and then endeavored to scare witnesses from  
2 testifying against him as bold and cocky is not beyond the standard for proper closing  
3 argument.

4 There is no support for Petitioner’s other arguments, that the prosecutor  
5 impermissibly raised speculation with the jury that Petitioner murdered the unavailable  
6 witnesses. Under the *Darden* standard for prosecutorial misconduct, Petitioner has  
7 failed to establish that the prosecutor acted improperly. However, even if the  
8 prosecutor’s argument was found to be a bit too vigorous, Petitioner has not  
9 demonstrated that the trial was infected with unfairness. None of the classic factors for  
10 unfair trials resulting from prosecutorial misconduct are present here. The weight of  
11 the evidence against Petitioner was substantial. *See Young*, 470 U.S. at 19. The claim  
12 of misconduct concerns a very discreet section of closing arguments, and there is no  
13 claim of an ongoing pattern of misconduct throughout the trial. *See Lincoln*, 807 F.2d  
14 at 809. The claimed misconduct occurred during summation, at a time when counsel is  
15 supposed to make arguments which the jury is instructed not to consider as evidence.  
16 *See Giglio*, 405 U.S. at 154. Lastly, because the arguments that the prosecutor made  
17 were supported by evidence, they were not misstatements or manipulations of the  
18 evidence. *See Darden*, 477 U.S. at 182.

19 The state court’s finding that the prosecutor did not commit misconduct was not  
20 contrary to, or an unreasonable application of, clearly established federal law, as  
21 determined by the Supreme Court of the United States. This decision was not an  
22

23  
24 \_\_\_\_\_  
25 get ready to go to trial . . . they give him all the paperwork for whoever told on him . . .  
26 .”), 47 (“The mother fucker . . . I got all the paperwork . . . I just gotta bust Ron head  
27 he make sure he don’t let the nigger Chance or Flip Wil come man.”), No. 88 at 7 (“I  
28 got to communicate some kinda way though”), No. 93 at 8 (“I’m just trying to make  
sure none of my witnesses don’t come.”)

1 unreasonable determination of the facts in light of the evidence presented in the state  
2 court proceeding.

3 **III. CALJIC No. 2.03**

4 Petitioner claims that the court committed constitutional error when it gave a  
5 CALJIC No. 2.03 instruction to the jury. CALJIC 2.03 provides, “If you find that  
6 before this trial the defendant made a willfully false or deliberately misleading  
7 statement concerning the crime for which he is now being tried, you may consider that  
8 statement as a circumstance tending to prove consciousness of guilt . . . .”

9 Petitioner argues that this instruction rendered his trial unfair because there was no  
10 evidence that he made a false statement. The California Court of Appeal held that:

11  
12 We reject his argument for two reasons. First, the  
13 instruction had evidentiary support. The prosecutor  
14 presented evidence that while appellant was in jail, he told  
15 an acquaintance that he did not know anything about  
16 [Abraham’s] murder because he was “with a broad” that  
17 night. This arguably false statement supported the  
18 instruction.

19  
20 Second, any possible error was harmless. “It is error for a  
21 court to give an ‘abstract’ instruction, i.e., ‘one which is  
22 correct in law but irrelevant.’”[Citation.] However “[i]n  
23 most cases an error of this sort is harmless. [Citation.] This  
24 is so because the irrelevance of the instruction is shown by  
25 its own words, and the jury would see it as surplusage.  
26 [Citation.]

27  
28 Here, if the instruction in question was unsupported, the  
jurors were well equipped to determine that fact and to  
disregard it as surplusage. We see no possibility of  
prejudicial error.

*Scott*, 2004 WL 473383, at \*7-8.

**A. Legal Standard**

To obtain federal collateral relief for errors in the jury charge, a petitioner must



1 show that the ailing instruction by itself so infected the entire trial that the resulting  
2 conviction violates due process. *See Estelle*, 502 U.S. at 72 (citing *Cupp*, 414 U.S. at  
3 147); *see also Donnelly*, 416 U.S. at 643 ("[I]t must be established not merely that the  
4 instruction is undesirable, erroneous or even "universally condemned," but that it  
5 violated some [constitutional right]."). The instruction may not be judged in artificial  
6 isolation, but must be considered in the context of the instructions as a whole and the  
7 trial record. *See Estelle*, 502 U.S. at 72. In other words, the court must evaluate jury  
8 instructions in the context of the overall charge to the jury as a component of the entire  
9 trial process. *Frady*, 456 U.S. at 169.

10 A habeas petitioner is not entitled to relief unless the instructional error "had  
11 substantial and injurious effect or influence in determining the jury's verdict." *Brecht*  
12 *v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328  
13 U.S. 750, 776 (1946)). In other words, state prisoners seeking federal habeas relief  
14 may obtain plenary review of constitutional claims of trial error, but are not entitled to  
15 habeas relief unless the error resulted in "actual prejudice." *Id.* (citation omitted); *see*  
16 *e.g. Coleman v. Calderon*, 210 F.3d 1047, 1051 (9th Cir. 2000) (finding *Brecht* error  
17 where "at the very least" the court could not "say with fair assurance . . . that the  
18 judgment was not substantially swayed by the [instructional] error.") (citation  
19 omitted).

## 20 **B. Analysis**

21 Petitioner fails to demonstrate that the challenged instruction infected the entire  
22 trial in such a way as to cause the resulting conviction to violate due process. As the  
23 California Court of Appeal determined, the instruction was appropriate, rather than  
24 erroneous, because it had evidentiary support in the trial record. For instance, the court  
25 found that the jury could consider if Petitioner made a deliberately false statement  
26 when he told an acquaintance in prison that he did not know about Abraham's murder  
27

1 because he was with a broad that night. *Scott*, 2004 WL 473383, at \*7. It did not  
2 require them to do so. If the jury did not believe that Petitioner made a false statement,  
3 it would not consider this evidence as reflecting Petitioner's consciousness of guilt.  
4 Also, even if they believed that the statement was false, they were not required to find  
5 that it reflected Petitioner's consciousness of guilt. At the very worst, as Petitioner  
6 contends, the instruction would merely have been irrelevant and the jury would have  
7 ignored it. If this were the case, under *Brecht* analysis, Petitioner fails to demonstrate  
8 that the instruction had a substantial and injurious effect or influence in determining the  
9 jury's verdict.

10 The instruction at issue was either appropriate because it had evidentiary support  
11 or, at most, the instruction was irrelevant but harmless. Thus, the state court's finding  
12 was not contrary to, or an unreasonable application of, clearly established federal law,  
13 as determined by the Supreme Court of the United States. Nor was the state court's  
14 decision an unreasonable determination of the facts in light of the evidence.

#### 15 **IV. Trial's Court's Failure to State Reasons for Rulings**

16 Petitioner next claims that his right to due process was violated because the trial  
17 court failed to state reasons for its rulings. Petitioner does not argue that the rulings  
18 themselves were erroneous, but contends that the trial court's failure to state its reasons  
19 was a miscarriage of justice rendering the trial unfair. Petitioner has not identified any  
20 legal authority, which supports this as a claim under the United States Constitution.

21 The California Court of Appeal addressed this claim as follows:

22  
23 At several points during trial, the court made rulings about  
24 the admissibility of evidence under Evidence Code section  
25 352. Appellant now contends the trial court erred. He does  
26 not attack the substance of the court's rulings by arguing the  
27 court applied the law incorrectly. Instead, he challenges the  
28 procedure the court followed arguing the court violated its  
obligation to state on the record, how it balanced the  
prejudicial effect of the proposed evidence against its  
probative value.

1 We reject this argument because the court had no such  
2 obligation. While a few older decisions stated trial courts  
3 were required to make the “weighing ... explicit in the  
4 record” [citation], as Justice Mosk explained, the language  
5 in those decisions is “no longer vital.” [Citation.] The  
6 current rule is that a court is not required to state on the  
7 record the process by which it has weighed prejudicial  
8 impact against probative value. [Citation.]

9 We also reject appellant's argument that the trial court erred  
10 because it failed to explain the basis for other evidentiary  
11 rulings that were unrelated to Evidence Code section 352.  
12 Appellant has failed to cite any case that holds a court is  
13 obligated to state on the record the basis for its rulings.  
14 Absent such authority, we have no reason to conclude the  
15 trial court erred.

16 *Scott*, 2004 WL 473383 at \*8.

17 Under *Estelle*, 502 U.S. at 67, “federal habeas corpus relief does not lie for  
18 errors of state law.” (Internal citations omitted). “[I]t is not the province of a federal  
19 habeas court to reexamine state-court determinations on state-law questions. In  
20 conducting habeas review, a federal court is limited to deciding whether a conviction  
21 violated the Constitution, laws, or treaties of the United States.” *Id.* at 68. Petitioner  
22 has not established a federal claim here regarding the state court’s failure to state the  
23 reasoning behind its rulings on the record.

24 The state court’s determination of this claim was not contrary to, or an  
25 unreasonable application of, clearly established Federal law, as determined by the  
26 Supreme Court of the United States. Petitioner’s claim is thus without merit.

## 27 **V. Admission of Other Crimes Evidence**

28 Petitioner next contends that admission of other crimes evidence violated his due  
process rights. A witness, Michael Sanders, was permitted to testify that he had  
previously bought marijuana from Petitioner at the house on Thirty-Fourth Street  
between West Street and Martin Luther King. RT at 1378-80. Sanders often saw

1 Petitioner with Grundy and Moore at that house. RT at 1381. Sanders also testified  
2 that he had seen Moore ride a Yukon (allegedly the same car from which Petitioner  
3 exited before shooting Abraham) and that Petitioner and Moore were always together.  
4 RT at 1388-91. Finally, Sanders testified that the house from which he bought  
5 marijuana from Petitioner always had guns, and that within a week of Abraham's  
6 murder, Sanders saw petitioner with a revolver (the type of weapon used in Abraham's  
7 murder). RT at 1384-86.

8 At trial, defense counsel argued that the prejudicial effect of this testimony  
9 outweighed its probative value because it was irrelevant and instead it would inflame  
10 the jury against Petitioner. RT at 1306. The trial court allowed the testimony because  
11 the prosecution laid a sufficient offer of proof that Sanders: (1) saw Moore in the  
12 Yukon on the night of Abraham's murder; (2) could connect Moore with Petitioner as  
13 close compatriots; (3) had frequented Grundy's house where Petitioner sold him  
14 marijuana; (4) had seen firearms while there; and (5) one of the firearms he saw was a  
15 black .38 revolver (the type of weapon used in Abraham's murder) held by Petitioner  
16 within a week of the shooting. RT at 1304-05. Respondent contends that there is no  
17 Supreme Court law applicable to this claim and thus no habeas relief can be granted. In  
18 the alternative, Respondent argues that Petitioner fails to assert a fact-specific  
19 application of the more general principle of law relating to due process.

20 There is no reasoned state court opinion addressing this claim. When the state  
21 court decisions do not provide a reasoned opinion, as in this case, the court must  
22 "perform an 'independent review of the record' to ascertain whether the state court  
23 decision was objectively unreasonable." *Himes v. Thompson*, 336 F.3d 848, 853 (9th  
24 Cir. 2003) (internal citation omitted).

25  
26 **A. Legal Standard**

27 An error in the admission of evidence is only subject to habeas review if it is of  
28

1 such magnitude that it precludes the fundamentally fair trial guaranteed by due process.  
2 *See Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999); *Colley v. Sumner*, 784 F.2d  
3 984, 990 (9th Cir.). The inquiry is whether the admission of evidence was arbitrary or  
4 so prejudicial that it rendered the trial fundamentally unfair. *See Walters v. Maass*, 45  
5 F.3d 1355, 1357 (9th Cir. 1995); *Colley*, 784 F.2d at 990. The admission of evidence is  
6 only so unfair that it threatens to violate due process if there are no permissible  
7 inferences that the jury may draw from it and it is of an inflammatory nature. *Jammal*  
8 *v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991).

9 The United States Supreme Court has left open the question of whether  
10 admission of propensity evidence violates due process. *Estelle*, 502 U.S. at 75 n.5; *see*  
11 *also Albern v. McDaniel*, 458 F.3d 860, 866-67 (9th Cir. 2006) (state court's denial of  
12 due process claim concerning admission of petitioner's propensity for violence was not  
13 objectively unreasonable). In *Carey v. Musladin*, the Supreme Court made clear that  
14 habeas relief under § 2254 could on only be granted if the state court decision was  
15 contrary to, or an unreasonable application of, federal law, as determined by the  
16 Supreme Court, 549 U.S. 70, 74 (2006) (citing *Williams*, 529 U.S. at 412) (clearly  
17 established federal law refers to holdings of Supreme Court, as opposed to dicta).

## 18 **B. Analysis**

19 Because the United States Supreme Court has left open the question of  
20 admissibility of propensity evidence, the state court's decision to admit Sanders'  
21 testimony is not contrary to, or an unreasonable application of, federal law as  
22 determined by the Supreme Court. Further, admission of Sanders' testimony did not  
23 violate Petitioner's due process because it was not arbitrary or so prejudicial that it  
24 rendered the trial fundamentally unfair.

25  
26 "Evidence introduced by the prosecution will often raise more than one  
27 inference, some permissible, some not." *Jammal v. Van de Kamp*, 926 F.2d 918, 920

1 (9th Cir. 1991). “Only if there are no permissible inferences the jury may draw from  
2 the evidence can its admission violate due process. Even then, the evidence must ‘be of  
3 such quality as necessarily prevents a fair trial.’” *Id.* (internal citation omitted).

4 *Jammal* is instructive here. In *Jammal*, when the petitioner was apprehended he  
5 had 135,000 dollars in his trunk, which was admitted into evidence. *Id.* He was  
6 prosecuted for an earlier drug possession where he also allegedly had 47,000 dollars  
7 and a firearm. *Id.* The defense objected that such evidence was prejudicial because it  
8 branded petitioner as a high level drug dealer in the minds of the jury. *Id.* The  
9 prosecution contended that the jury was to infer from the evidence that the 47,000  
10 dollars and drugs also belonged to petitioner on the theory that defendant frequently ran  
11 around with wads of cash in his trunk, and so it was likely that he had done so on the  
12 earlier occasion. *Id.* The Ninth Circuit determined that while it was evidentiary error  
13 to admit the evidence, because there were permissible rational inferences for the jury to  
14 draw, the trial was not fundamentally unfair, and habeas relief was not appropriate. *Id.*  
15 at 921-21.

16 Likewise here, Petitioner’s claim is without merit. First, the admission of  
17 Sanders’ testimony was relevant. Sanders linked Petitioner to Scott and Grundy.  
18 Sanders’ testimony further showed that Petitioner was in possession of a black .38  
19 revolver within a week of Abraham’s murder. That demonstrated that Petitioner had  
20 access to the same type of gun used to murder Abraham. As Respondent argues, just  
21 because Sanders also happened to identify Petitioner as a marijuana dealer, it is not a  
22 likely inference for the jury to conclude that therefore he must also have committed the  
23 murder. In fact, the prosecution dispelled such an inference by arguing that Petitioner  
24 possessed his weapons for protection, not for the purpose of committing murder. RT at  
25 1918. The evidence was not especially inflammatory and the jury could reach many  
26 permissible inferences from it. There was no error.

1           **VI. Ineffective Assistance of Counsel**

2           Petitioner next claims that his counsel was ineffective.<sup>6</sup> Petitioner bases this  
3 claim on the following factors: (1) defense counsel failed to request a limiting  
4 instruction regarding Sanders’ testimony; (2) counsel failed to investigate the  
5 prosecution’s witnesses prior to trial; (3) counsel failed to keep out Petitioner’s prior  
6 conviction; and (4) counsel failed to follow up on alibi witnesses. There is no reasoned  
7 state court opinion addressing this claim.

8                   **A. Legal Standard**

9           A claim of ineffective assistance of counsel is cognizable as a claim of denial of  
10 the Sixth Amendment right to counsel, which guarantees not only assistance, but  
11 effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).  
12 *See Williams (Terry) v. Taylor*, 529 U.S. 362, 404-08 (2000). The benchmark for  
13 judging any claim of ineffectiveness must be whether counsel’s conduct so undermined  
14 the proper functioning of the adversarial process that the trial cannot be relied upon as  
15 having produced a just result. *Strickland*, 466 U.S. at 686.

16  
17           In order to prevail on a Sixth Amendment ineffectiveness of counsel claim,  
18 Petitioner must establish two things. First, Petitioner must establish that counsel's  
19 performance was deficient and fell below an “objective standard of reasonableness”  
20 under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. The relevant  
21 inquiry is not what defense counsel could have done, but rather whether the choices  
22 made by defense counsel were reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170,  
23 1173 (9th Cir. 1998). Judicial scrutiny of counsel’s performance must be highly  
24 deferential, and a court must indulge a strong presumption that counsel’s conduct falls

25  
26           

---

  
27           <sup>6</sup>Petitioner also requested an evidentiary hearing on this claim, which was  
28           previously denied as premature (docket no. 29). However, the Court has reconsidered  
          the motion here, after reviewing the merits of the claim, as set forth below.

1 within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at  
2 689.

3 Second, Petitioner must establish that he was prejudiced by counsel's deficient  
4 performance and that "there is a reasonable probability that, but for counsel's  
5 unprofessional errors, the result of the proceeding would have been different." *Id.* at  
6 694. A reasonable probability is a probability sufficient to undermine confidence in the  
7 outcome. *Id.* The *Strickland* framework for analyzing ineffective assistance of counsel  
8 claims is considered "clearly established Federal law, as determined by the Supreme  
9 Court of the United States" for the purposes of 28 U.S.C. § 2254(d) analysis.

10 It is unnecessary for a federal court considering a habeas ineffective assistance  
11 claim to address the prejudice prong of the *Strickland* test if the petitioner cannot even  
12 establish incompetence under the first prong. *See Siripongs v. Calderon*, 133 F.3d 732,  
13 737 (9th Cir. 1998). The burden to prove prejudice rests with the Petitioner.  
14 *Strickland*, 466 U.S. at 693.

15 **B. Analysis**

16 **(1) Failure to Request Limiting Instruction**

17 Petitioner claims that counsel was ineffective because he failed to request a  
18 limiting instruction regarding Sanders' testimony. Petitioner acknowledges that  
19 counsel was initially effective in vigorously objecting to the introduction of the  
20 testimony claiming both that it was irrelevant and also that its prejudicial effect  
21 outweighed its probative value. However, Petitioner contends that counsel failed to  
22 take the next rational step, requesting an instruction as to the relevance of Sanders'  
23 testimony. Pet. Attachment B at 4. Petitioner has not provided an example of any  
24 standard California jury instructions providing such an admonishment, nor has  
25 Petitioner offered any specific instruction that he contends could have been used.  
26  
27  
28



1 In evaluating claims for ineffective assistance of counsel, this court does not  
2 look at what things counsel could have done, but rather evaluate whether counsel's  
3 choices were reasonable. Here, counsel vigorously objected to Sanders' entire  
4 testimony, both out of the presence of the jury and then throughout the prosecution's  
5 direct. Defense counsel also thoroughly cross-examined Sanders, challenged his  
6 credibility, and in line with the defense theory that Petitioner was not there the night  
7 Abraham was killed, used Sanders' testimony in summation to suggest that Moore  
8 might have been the real shooter. *See, e.g.* RT at 1970. Counsel's performance fell  
9 within objective standards of reasonableness. Petitioner has not argued what jury  
10 instruction counsel could have proposed, and counsel effectively tied Sanders'  
11 testimony into his closing arguments. Because counsel's performance was not  
12 deficient, this court does not need to address its prejudicial effect.

## 13 (2) Failure to Interview Prosecution Witnesses

14 Petitioner contends that counsel failed to interview prosecution witnesses before  
15 trial and as a result a "crucial defense was withdrawn from Petitioner's case." Pet.  
16 Attachment B at 9. Aside from this bare assertion, Petitioner has not indicated what  
17 defense was withdrawn.

18 The duty to investigate and prepare a defense does not require that every  
19 conceivable witness be interviewed. *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th  
20 Cir. 1995). A claim of failure to interview a witness cannot establish ineffective  
21 assistance when the person's account is otherwise fairly known to defense counsel.  
22 *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986). When the record shows  
23 that the lawyer was well-informed and the defendant fails to state what additional  
24 information would be gained by the discovery he now claims was necessary, an  
25 ineffective assistance claim fails. *Id.* From examining the record here, it is clear that  
26 counsel's performance was not deficient. He vigorously raised objections, thoroughly  
27

1 cross-examined witnesses, and provided representation well within reasonable  
2 standards. Because Petitioner has not pointed to any specific examples demonstrating  
3 counsel's lack of preparation, this claim is without merit.

### 4 **(3) Failure to Conceal Petitioner's Criminal History**

5 Petitioner next claims that counsel erred by allowing the jury to learn of  
6 Petitioner's prior narcotics conviction. The prior was admitted as the basis for the  
7 charge that Petitioner was a felon in possession of a firearm. Citing the California  
8 Penal Code, Petitioner argues that counsel should have allowed him to plead guilty to  
9 the prior conviction, thereby eliminating mention of it to the jury. Pet. Attachment B at  
10 9 (citing Cal. Penal Code § 1025). However, as Respondent argues, the jury learned of  
11 Petitioner's prior narcotics conviction because he was charged with being a felon in  
12 possession of a firearm, not because he chose not to deny the prior for sentence  
13 enhancement purposes.

14  
15 Petitioner has not demonstrated that failure to attempt such a tactic is required to  
16 show reasonable competence on the part of counsel, nor has Petitioner demonstrated  
17 that he suffered any prejudice from the jury learning about his prior. It is not a logical  
18 inference for the jury to assume that a person with a narcotics conviction is likely to  
19 commit murder. In addition, there was ample evidence on both the murder and  
20 dissuasion charges independent of any consideration of Petitioner's prior. As for the  
21 murder count, Petitioner admitted to Deputy Rice that he killed a 415 gang member.  
22 Sanders provided identifying information about Petitioner, Grundy, and Moore, as well  
23 as showing that Petitioner had access to the murder weapon. Adrow testified as a  
24 credible eyewitness to the shooting, and his testimony was bolstered by that of Jackson.  
25 As for the dissuasion charges, the prosecution produced seventeen taped phone  
26 conversations in which Petitioner discussed his attempts to dissuade witnesses and  
27 solicited help from his partners. Also, the prosecution produced documents found in  
28

1 Petitioner's cell as well as mail at the home of one of his partner's that had witnesses  
2 contact information and instructions to dissuade them. The effect on the jury of  
3 learning about Petitioner's narcotics prior was inconsequential given the weight of the  
4 evidence, and in all likelihood unavoidable because Petitioner was charged with being a  
5 felon in possession of a firearm, requiring the prosecution to prove the element of his  
6 prior felony conviction. Petitioner has not established that counsel's performance was  
7 deficient or prejudicial for failing to prevent this evidence from being admitted. Thus,  
8 Petitioner's claim fails.

9 **(4) Failure to Follow Up on Potential Alibi Witnesses**

10 Petitioner next claims that his trial counsel provided ineffective assistance by  
11 failing to interview three potential alibi witnesses, James Palmer, Jaquari Scott, and  
12 Donisha Bruce. According to Petitioner, counsel contacted Bruce once by phone and  
13 she told him that she could come and testify on Petitioner's behalf. Counsel then made  
14 a second unsuccessful attempt to contact Bruce in order to interview her, and thereafter  
15 failed to follow through with her or make any other attempts. According to Petitioner,  
16 counsel did not attempt to contact Scott or Palmer despite having been given their  
17 contact information by Petitioner. Petitioner claims that he and Palmer were together at  
18 the time of the shooting, between 9 p.m. and 11 p.m., and then they met Bruce and  
19 Scott at a liquor store around 11 p.m. Petitioner claims that Palmer could testify to his  
20 whereabouts and also place Petitioner at the liquor store, after which time Petitioner  
21 and Scott spent the night at a motel.

22 Respondent argues that Bruce and Scott could not provide any useful or  
23 exculpatory evidence because the murder took place sometime before 11 p.m. With  
24 regard to Palmer, Respondent, citing *Dows v. Wood*, 211 F.3d 480, 486-87 (9th Cir.  
25 2000), argues that aside from Petitioner's self serving contentions, he never provided  
26 an affidavit by Palmer or the other alleged alibi witnesses before any state court or this  
27

1 court supporting the claim.

2 While the exact time of Abraham's fatal shooting is not clear, it had to occur  
3 sometime around or before 10:30 p.m. Christine Middleton, a police evidence  
4 technician, testified that she arrived to the murder scene a little after 10:30 p.m. RT at  
5 1017. Upon her arrival, paramedics were already at the scene providing medical aid.  
6 RT at 1017. Sergeant Caesar Basa, a patrol supervisor, also testified that a dispatch of  
7 the shooting went out a little after 10:30 p.m. RT at 978. Sergeant Basa arrived not too  
8 long after other officers. RT at 978. Given this testimony, Petitioner has not  
9 established that Scott or Bruce could provide Petitioner with an alibi, even if he had  
10 established that they would have testified to meeting Petitioner at a liquor store at 11  
11 p.m. and spending the night together at a motel.

12 With regard to counsel's failure to pursue Palmer as a potential alibi witness, a  
13 defense attorney has a general duty to make reasonable investigations or to make a  
14 reasonable decision that makes particular investigations unnecessary. *See Strickland*,  
15 466 U.S. at 691. A claim of negligence in conducting pretrial investigation can form  
16 the basis for a claim of ineffective assistance. *See United States v. Tucker*, 716 F.2d  
17 576 (9th Cir. 1983). However, a defendant's mere speculation that a witness might  
18 have given helpful information if interviewed is not enough to establish ineffective  
19 assistance. *See Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir.), *amended*, 253 F.3d  
20 1150 (9th Cir. 2001). To establish prejudice caused by the failure to call a witness, a  
21 petitioner must show that the witness was likely to have been available to testify, that  
22 the witness would have given the proffered testimony, and that the witnesses'  
23 testimony created a reasonable probability that the jury would have reached a verdict  
24 more favorable to the petitioner. *Alcala v. Woodford*, 334 F.3d 862, 872-73 (9th Cir.  
25 2003).

26 Aside from Petitioner's self serving speculative assertions regarding Palmer's  
27

1 potential value as a witness, he has not shown that Palmer was likely to have been  
2 available to testify, would have provided exculpatory testimony, or that Palmer's  
3 testimony created a reasonable probability that the jury would have reached a more  
4 favorable verdict. Under *Alcala*, Petitioner must show all of these factors to establish  
5 prejudice. Petitioner's speculation and conclusory assertions are not enough to prove  
6 the ineffective assistance claim. Because Petitioner has failed to prove any of the four  
7 alleged instances of ineffective assistance, this claim fails on the merits. Consequently,  
8 Petitioner's motion for an evidentiary hearing on his ineffective assistance of counsel  
9 claim is likewise DENIED, because Petitioner has not established that his allegations  
10 would establish a right to relief on the merits (docket no. 27). See, *Williams v.*  
11 *Calderon*, 52 F.3d 1465, 1484 (9th Cir. 1995); *Jeffries v. Blodgett*, 5 F.3d 1180, 1187  
12 (9th Cir. 1993).

## 13 **VII. Cumulative Error**

14 Lastly, Petitioner claims that his trial was fundamentally unfair due to the  
15 cumulative effect of each of the above claims. There is no reasoned opinion addressing  
16 this claim from the state court.

### 17 **A. Legal Standard**

18 In some cases, although no single trial error is sufficiently prejudicial to warrant  
19 reversal, the cumulative effect of several errors may still prejudice a defendant so much  
20 that his conviction must be overturned. See *Alcala v. Woodford*, 334 F.3d 862, 893-95  
21 (9th Cir. 2003) (reversing conviction where multiple constitutional errors hindered  
22 defendant's efforts to challenge every important element of proof offered by  
23 prosecution); *Thomas v. Hubbard*, 273 F.3d 1164, 1179-81 (9th Cir. 2002) (reversing  
24 conviction based on cumulative prejudicial effect of (a) admission of triple hearsay  
25 statement providing only evidence that defendant had motive and access to murder  
26 weapon; (b) prosecutorial misconduct in disclosing to the jury that defendant had  
27

1 committed prior crime with use of firearm; and (c) truncation of defense cross-  
2 examination of police officer, which prevented defense from adducing evidence that  
3 someone else may have committed the crime and evidence casting doubt on credibility  
4 of main prosecution witness); *McDowell v. Calderon*, 107 F.3d 1351, 1368 (9th Cir.)  
5 (cumulative effect of errors may deprive habeas petitioner of due process right to fair  
6 trial), *amended*, 116 F.3d 364 (9th Cir. 1997), *vacated in part by* 130 F.3d 833, 835  
7 (9th Cir. 1997) (en banc); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.  
8 1996) (prejudice resulting from cumulative effect of improper vouching by prosecutor,  
9 improper comment by prosecutor about defense counsel, and improper admission of  
10 evidence previously ruled inadmissible required reversal even though each error  
11 evaluated alone might not have warranted reversal).

12 Cumulative error is more likely to be found prejudicial when the government's  
13 case is weak. *See id.*; *see, e.g., Thomas*, 273 F.3d. at 1180 (noting that the only  
14 substantial evidence implicating the defendant was the uncorroborated testimony of a  
15 person who had both a motive and an opportunity to commit the crime). However,  
16 where there is no single constitutional error existing, nothing can accumulate to the  
17 level of a constitutional violation. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th  
18 Cir. 2002).

## 19 **B. Analysis**

20 Here, the government's case was strong. The evidence by which the jury was  
21 able to convict Petitioner for murder and attempted dissuasion of four witnesses  
22 included Adrow's eyewitness testimony, which was corroborated by Jackson's  
23 testimony, Petitioner's own jailhouse admission of killing a 415 gang member,  
24 seventeen recorded telephone conversations, and Sander's testimony linking Petitioner  
25 to his confederates and access to the type of weapon used to kill Abraham. Further,  
26 this court has not found any of the individual claims of error to be meritorious. The  
27

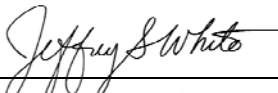
1 cumulative effect of many claims, none of which amounts to error, cannot amount to  
2 reversible error. Thus, this claim is denied on the merits.

3 **CONCLUSION**

4 After a careful review of the record and pertinent law, the petition for writ of  
5 habeas corpus is DENIED. The Clerk shall enter judgment in favor of Respondent and  
6 close the file.

7 IT IS SO ORDERED.

8  
9 DATED: December 29, 2008

10   
11 \_\_\_\_\_  
12 JEFFREY S. WHITE  
13 United States District Judge  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2 UNITED STATES DISTRICT COURT  
3 FOR THE  
4 NORTHERN DISTRICT OF CALIFORNIA  
5

6  
7 MICHAEL E SCOTT,  
8  
9 Plaintiff,

Case Number: CV06-01147 JSW

**CERTIFICATE OF SERVICE**

10 v.


11 T FELKER et al,  
12  
13 Defendant.

14  
15 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
16 Court, Northern District of California.

17 That on December 29, 2008, I SERVED a true and correct copy(ies) of the attached, by placing  
18 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
19 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office  
20 delivery receptacle located in the Clerk's office.

21 Michael E. Scott  
22 K31521  
23 P.O. Box 3030  
24 Susanville, CA 96127-3030

25 Dated: December 29, 2008

  
26 Richard W. Wieking, Clerk  
27 By: Jennifer Ottolini, Deputy Clerk  
28