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

LYMAN LYNN SIMS, SR.,

No. C-09-1348 TEH (PR)

Petitioner,

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS AND DENYING
CERTIFICATE OF APPEALABILITY

v.

LARRY SMALL, Warden,

Respondent.

_____/

Petitioner Lyman Lynn Sims, Sr., a state prisoner incarcerated at California State Prison in Calipatria, California, has filed a pro se writ of habeas corpus under 28 U.S.C. § 2254 challenging a criminal judgement from San Mateo County Superior Court, which, for the reasons that follow, the Court denies.

I.

In May 2006, petitioner was sentenced to forty-five years to life, plus thirty years in state prison following his various convictions which include attempted murder of a peace officer, assault on a peace officer with a semi-automatic firearm, convicted felon in possession of a loaded firearm in a public place, convicted

1 felon in possession of a firearm, and multiple counts of second
2 degree robbery and assault with a semi-automatic weapon. Doc. #7,
3 Exh. G, Vol. 13 at 1359-63. On November 26, 2007, the California
4 Court of Appeal affirmed the judgment. Doc. #7, Exh. A. On
5 February 13, 2008 the California Supreme Court denied his petition
6 for review. Doc. #7, Exh. D.

7 On March 27, 2009, petitioner filed the instant habeas
8 petition raising the following claim: a denial of his right to due
9 process because of jury instruction error. Doc. #1. On May 7,
10 2009, the Court found that petitioner stated a cognizable claim for
11 relief and ordered respondent to show cause why a writ of habeas
12 corpus should not be granted. Doc. #6. Respondent has filed an
13 Answer and petitioner has filed a Traverse. Doc. ##11 & 13.

14 II.

15 The California Court of Appeal provided the following
16 factual and procedural background of the case:

17 Two men robbed a South San Francisco Bank of America. One of
18 the men, later identified as McLane, jumped over the counter
19 and said, "this is a takeover." The other man, later
20 identified as Sims, told the tellers not to move and pointed
21 a rifle at them while McLane took money out of the cash
drawers and put it in a bag. The cash included tracking
devices that automatically activated a silent alarm when they
were removed from the cash drawers. [n.3]

22 [n.3] As the robbers fled, one of the tellers saw Sims
bend over to pick up a dropped bullet.

23 Sheriff's Deputy William Fogarty learned of the bank robbery
24 over his radio, and used an electronic tracking system to
25 identify an electronic signal from a Jeep Cherokee carrying
26 four people. Deputy Fogarty followed the Jeep until it
27 slowed down in a residential area and Sims got out holding an
assault rifle. Deputy Fogarty jumped out and ran to the back
of his patrol car. He heard two shots go over his head. He
saw Sims fire a third shot, which passed within inches of
Deputy Fogarty's right ear. Deputy Fogarty returned fire

1 several times, but did not hit Sims.

2 Sims pointed the rifle at Deputy Fogarty again, but it seemed
3 to jam and Sims fled on foot. [n.4] Deputy Fogarty ordered
4 the remaining occupants to exit the Jeep. As McLane moved in
5 the backseat of the car, a guitar case fell out. Deputy
6 Fogarty told McLane, "let me see your hands," but McLane did
7 not comply. The deputy saw something black in McLane's hands
8 that he thought was a gun and shot McLane in the thigh.

9 [n.4] Deputy Fogarty later learned that Sims had fired
10 at him a fourth time, but the rifle had misfired.

11 Backup officers arrived at the scene and found Sims hiding in
12 bushes behind a nearby housing project. When he was found
13 Sims had a large wad of currency wrapped around electronic
14 tracking devices, a 7.62 x 39 caliber live round which
15 appeared to have been misfired, and a pair of gloves in his
16 pockets. At the time Sims was arrested, and during the
17 trial, Deputy Fogarty positively identified Sims as the man
18 who shot at him.

19 When he was captured, Sims did not have a rifle. Shortly
20 thereafter, police found an SKS semi-automatic rifle in a
21 nearby homeless camp. The SKS uses only 7.62 x 39 caliber
22 cartridges. When they searched the Jeep, officers found
23 \$2,000 "shoved down in the left rear seat . . . where McLane
24 was sitting," along with a marked bill. A beige floppy hat
25 and green shirt were also found in the car, and the
26 surveilliance video from the bank showed Sims wearing similar
27 clothing during the robbery. When McLane was searched he had
28 four \$20 bills in his pocket, including three marked bills
from the bank.

No spent shell casings were initially recovered from the area
where the Jeep had stopped, but a 7.62 x 39 caliber live
round with a dented primer that indicated that the shell had
misfired was found on the sidewalk. Several days later,
police found evidence of bullet damage to a nearby garage
door and a car parked in the area. In a storm drain,
officers later found a bullet casing that an expert concluded
was fired from Sims's rifle. A neighbor also testified that
on the night of the robbery, he heard a shot that sounded
like an AK 47 rifle, and a shot that sounded like a small gun
fire. Another neighbor testified that she heard about four
gunshots, and saw a man run down the street with a "very
large" gun.

Sims was charged with attempted murder of a peace officer,
assault on a peace officer with a semi-automatic firearm,
being a felon in possession of a loaded firearm in a public
place, and being a felon in possession of a firearm.
Enhancements were also alleged for his personal use and

1 intentional discharge of a firearm. Sims and McLane were
2 jointly charged with multiple counts of second degree robbery
3 and assault with a semi-automatic weapon. Enhancements were
4 alleged for Sims's personal and intentional discharge of a
5 firearm, Sims's personal use of a firearm, and McLane's
6 knowledge that a principal was personally armed with a
7 firearm. It was also alleged that each defendant had prior
8 convictions and prior prison terms.

9 Sims and McLane were tried jointly. Sims called four
10 witnesses who each testified they heard a different number of
11 shots fired (two, three, or four). Counsel argued that the
12 only evidence of shots fired were those by Deputy Fogarty,
13 and not Sims; that Sims did not assault or attempt to kill
14 Deputy Fogarty.

15 McLane testified in his own defense that he went with Sims to
16 San Francisco to get drugs. Sims's wife and her friend
17 picked McLane and Sims up in a Jeep Cherokee, and took them
18 to an apartment complex near the Bank of America. McLane
19 walked with Sims toward the bank and thought Sims was going
20 to withdraw some money. Sims gave McLane a backpack and
21 gloves and told him to "get the money." Sims gestured to a
22 guitar case he had been carrying since McLane met him earlier
23 that day and McLane thought there "could be a weapon or gun in
24 there." McLane said he followed Sims's orders because he was
25 scared.

26 McLane admitted prior felony convictions, including false
27 impersonation and preparation of false evidence. He claimed
28 he did not know Sims had a gun until just before the two
entered the bank, and he was surprised to see it was an
automatic rifle. Based upon his testimony, McLane's lawyer
argued he should be convicted, at most, of three robberies,
and there was no evidence that assault with a semi-automatic
weapon was a natural and probable consequence of his crimes.

. . .

Both defendants were found guilty as charged, except for not
guilty verdicts on four of the nine robbery counts. The
court found true the enhancement allegations based on
defendants' prior convictions and prior prison terms. Sims
was sentenced to a term of 45 years to life, plus 30 years.
McLane was sentenced to 18 years and 4 months in prison.

Doc. #7, Exh. A at 2-5.

III.

Under the Antiterrorism and Effective Death Penalty Act of
1996 ("AEDPA"), codified under 28 U.S.C. § 2254, a federal court may

1 not grant a writ of habeas corpus on any claim adjudicated on the
2 merits in state court unless the adjudication: "(1) resulted in a
3 decision that was contrary to, or involved an unreasonable
4 application of, clearly established Federal law, as determined by
5 the Supreme Court of the United States; or (2) resulted in a
6 decision that was based on an unreasonable determination of the
7 facts in light of the evidence presented in the State court
8 proceeding." 28 U.S.C. § 2254(d).

9 "Under the 'contrary to' clause, a federal habeas court
10 may grant the writ if the state court arrives at a conclusion
11 opposite to that reached by [the Supreme] Court on a question of law
12 or if the state court decides a case differently than [the] Court
13 has on a set of materially indistinguishable facts." Williams
14 (Terry) v. Taylor, 529 U.S. 362, 412-13 (2000). "Under the
15 'unreasonable application' clause, a federal habeas court may grant
16 the writ if the state court identifies the correct governing legal
17 principle from [the] Court's decision but unreasonably applies that
18 principle to the facts of the prisoner's case." Id. at 413.

19 "[A] federal habeas court may not issue the writ simply
20 because that court concludes in its independent judgment that the
21 relevant state-court decision applied clearly established federal
22 law erroneously or incorrectly. Rather, that application must be
23 objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-76
24 (2003) (internal quotation marks and citation omitted). Moreover,
25 in conducting its analysis, the federal court must presume the
26 correctness of the state court's factual findings, and the
27 petitioner bears the burden of rebutting that presumption by clear
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1 and convincing evidence. 28 U.S.C. § 2254(e)(1).

2 In four decisions last year alone, the United States
3 Supreme Court reaffirmed the heightened level of deference a federal
4 habeas court must give to state court decisions. See Harrington v.
5 Richter, 131 S. Ct. 770, 783-85 (2011); Premo v. Moore, 131 S. Ct.
6 733, 739-40 (2011); Felkner v. Jackson, 131 S. Ct. 1305, 1307 (2011)
7 (per curiam); Cullen v. Pinholster, 131 S. Ct. 1388, 1398-1400
8 (2011). As the Court explained: "[o]n federal habeas review, AEDPA
9 'imposes a highly deferential standard for evaluating state-court
10 rulings' and 'demands that state-court decisions be given the
11 benefit of the doubt.'" Felkner, 131 S. Ct. at 1307 (citation
12 omitted).

13 When applying these standards, the federal court should
14 review the "last reasoned decision" by the state courts. Avila v.
15 Galaza, 297 F.3d 911, 918 n.6 (9th Cir. 2002) (treating state court
16 referee's report as the last reasoned state court decision where
17 report was summarily adopted by the court of appeal and petition for
18 review to California Supreme Court was denied without comment).
19 Because the California Supreme Court summarily denied relief on
20 petitioner's claim of jury instruction error, this Court looks to
21 the California Court of Appeal's November 26, 2007 written decision
22 denying petitioner's appeal when considering his claim.

23 With these principles in mind regarding the standard and
24 scope of review on federal habeas, the Court addresses petitioner's
25 claim.

26 IV.

27 Petitioner seeks habeas relief under 28 U.S.C. § 2254

1 based on an alleged denial of his right to due process when the
2 trial court used CALCRIM Nos. 220 and 222 to describe the state's
3 burden of proof without also instructing that a "lack of evidence
4 that might reasonably be expected to be present could be considered
5 by the jury in determining [whether] the prosecution had met its
6 burden of proof." Doc. #13 at 6. Petitioner contends that these
7 jury instructions limited the jurors to considering only the
8 evidence presented at trial and thereby precluded them from
9 considering any "evidentiary gaps" or lack of evidence in
10 determining whether petitioner was guilty beyond a reasonable doubt.
11 Doc. #1 at 7-8.

12 To obtain federal collateral relief for errors in the jury
13 charge, a petitioner must show that the ailing instruction "by
14 itself so infected the entire trial that the resulting conviction
15 violates due process." Estelle v. McGuire, 502 U.S. 62, 72 (1991)
16 (internal quotations and citation omitted). The instruction may not
17 be judged in artificial isolation, but must be considered in the
18 context of the instructions as a whole and as a component of the
19 entire trial process. United States v. Frady, 456 U.S. 152, 169
20 (1982) (citing Cupp v. Naughten, 414 U.S. 141, 146-47 (1973)).
21 "[T]he proper inquiry is not whether the instruction 'could have'
22 been applied in an unconstitutional manner, but whether there is a
23 reasonable likelihood that the jury *did* so apply it." Victor v.
24 Nebraska, 511 U.S. 1, 6 (1994) (emphasis in original) (citing
25 Estelle v. McGuire, 502 U.S. at 72 and n.4). Even if the
26 instruction is erroneous, habeas relief would be available only if
27 the error had a "substantial and injurious effect or influence in
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1 determining the jury's verdict." Brecht v. Abrahamson, 507 U.S.
2 619, 637 (1993) (internal quotations and citations omitted).

3 However, when an instruction relieves the prosecution of
4 its obligation to prove the defendant's guilt beyond a reasonable
5 doubt, the instructional error is structural and not subject to
6 harmless error review. See Byrd v. Lewis, 566 F.3d 855, 862 (9th
7 Cir. 2009)(citing Sullivan v. Louisiana, 508 U.S. 275, 281 (1993)).
8 The Due Process Clause of the Fourteenth Amendment protects the
9 accused in a criminal case against conviction "except upon proof
10 beyond a reasonable doubt of every fact necessary to constitute the
11 crime with which he is charged." In re Winship, 397 U.S. 358, 364
12 (1970). The Supreme Court has held that "so long as the court
13 instructs the jury on the necessity that the defendant's guilt be
14 proven beyond a reasonable doubt, the Constitution does not require
15 that any particular form of words be used in advising the jury of
16 the government's burden of proof. Rather, taken as a whole, the
17 instructions must correctly convey the concept of reasonable doubt
18 to the jury." Victor, 511 U.S. at 5 (internal citations and
19 quotations omitted).

20 In addressing petitioner's claim that the jury was not
21 properly instructed on the prosecution's burden of proof, the
22 appellate court found no due process violation, stating:

23 Sims claims the trial court erroneously instructed the
24 jury with CALCRIM Nos. 220 and 222. Instruction No. 220 is
25 the standard instruction on the prosecution's burden to prove
26 its case beyond a reasonable doubt. Instruction No. 222 is a
27 general instruction describing what is evidence. The part of
28 Instruction No. 220 that Sims challenges says that "[i]n
deciding whether the People have proved their case beyond a
reasonable doubt, you must impartially compare and consider
all the evidence that was received throughout the entire

1 trial." The part of Instruction No. 222 that he challenges
2 says "[y]ou must decide what the facts are in this case ...
3 but use only the evidence that was presented in this
4 courtroom." Sims contends that because these instructions
5 limit the jury to considering "evidence which was
6 affirmatively presented at trial, the court precluded the
7 jury from considering the absence of evidence which logically
8 would have existed had the prosecution's theory of the case
9 been correct." We cannot agree that anything in these
10 instructions could reasonably lead a jury to overlook the
11 absence of evidence on material facts when considering Sims's
12 guilt or innocence.

13 When we review a challenge to the jury instructions, we
14 consider the entire charge, not just parts of an instruction
15 or a particular instruction. (People v. Castillo (1997) 16
16 Cal.4th 1009, 1016.) Defendant must show a reasonable
17 likelihood that the jury misunderstood the instructions as a
18 whole. (People v. Cain (1995) 10 Cal.4th 1, 36-37; People v.
19 Anderson (2007) 152 Cal.App.4th 919, 938.) Sims argues that
20 the challenged parts of the instructions so limited the
21 jury's consideration of evidence to the record that jurors
22 were not free to consider the importance of other unproven
23 facts in determining his guilt. Essentially he argues that
24 the charge of attempted murder and assault on a peace officer
25 with a semi-automatic weapon were unproven because the jury
26 was not allowed to consider facts that are not in the record
27 in assessing whether the prosecution met its burden of proof.

28 Sims says there is no evidence that tied the bullet
found in the storm drain to Sims or to the incident involving
Deputy Fogarty. He says the bullet "could have been fired
earlier by a previous owner of the rifle, or it could have
rolled into the drain after falling from the open guitar case
or Sims'[s] pocket as he made his hurried escape," and that
"[t]here was no evidence tying the misfired cartridges to
Sims'[s] particular rifle." Nothing in the instructions
precluded the jury from considering an argument based upon
these claimed evidentiary gaps, and Sims's counsel argued
these omissions were critical failures of proof that
warranted an acquittal. [n.5] The problem is the jury did not
agree.

[n.5 The same is true of Sims's contentions that
"[t]here was no evidence that any witness other than [Deputy]
Fogarty heard the seven or eight shots that would have had to
have been fired under the prosecution's theory of the case,"
"no evidence on bullet trajectory[,] and no testing for trace
bullet material around the dent in the car or on the brick of
the house."]

The jury was thoroughly instructed on the People's duty
to prove each element of the charged crimes beyond a

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reasonable doubt, and Sims's counsel so reminded the jury when he concluded his argument that the prosecution failed to prove that Sims fired at Deputy Fogarty. The instructions designed to prevent the jury from improperly considering outside sources as proof of facts did not preclude the jury from considering and evaluating Sims's arguments regarding the prosecution's case and the prosecution's failure to prove the case beyond a reasonable doubt. "[T]he instructions clearly conveyed to the jury the notion that the People had the burden of proving [defendant's] guilt beyond a reasonable doubt and that the jury was required to determine whether the People had met their burden of proving all of the facts essential to establishing his guilt." (People v. Westbrooks (2007) 151 Cal.App.4th 1500, 1509.)

. . . . In this case, the court "did not tell the jury that reasonable doubt must arise from the evidence presented at trial, and, given the court's other instructions, it would not have been reasonable for the jury to interpret CALCRIM No. 220 [and CALCRIM No. 222] as stating that the jury was precluded from considering any perceived lack of evidence in determining [defendant's] guilt." (People v. Westbrooks, supra, 151 Cal.App.4th at p. 1510.)

Doc. #7, Exh. A at 5-7.

At petitioner's trial, the jury was instructed pursuant to CALCRIM NO. 220 as follows:

The fact that criminal charges have been filed against the defendants is not evidence that the charges are true. You must not be biased against the defendants just because they have been arrested, charged with crimes or brought to trial. A defendant in a criminal case is presumed to be innocent, this presumption requires that the People prove each element of a crime and allegation beyond a reasonable doubt.

Whenever I tell you that the People must prove something, I mean they must prove it beyond a reasonable doubt, unless I specifically tell you otherwise.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the trial. . .

Unless the evidence proves the defendants guilty beyond a reasonable doubt, they are entitled to an acquittal and you

1 must find them not guilty.

2 Doc. #7, Exh. G, Vol. 8 at 1211-12. The jury was also instructed
3 pursuant to CALCRIM No. 222 as follows:

4 You must decide what the facts are in this case, but use only
5 the evidence that was presented in this courtroom. Evidence
6 is the sworn testimony of the witnesses, the exhibits
admitted into evidence and anything else I told you to
consider as evidence.

7 Doc. #7, Exh. G, Vol. 8 at 1179-80.

8 Petitioner's contention that CALCRIM Nos. 220 and 222's
9 charge to consider only the evidence at trial is unconstitutional is
10 without merit. It is well established that, in assessing whether a
11 charge has been proven beyond a reasonable doubt, the jury may
12 consider only the evidence presented at trial (as opposed to
13 evidence that exists but is not presented at trial). See Victor,
14 511 U.S. at 15-16; see, e.g., Leavitt v. Arave, 383 F.3d 809, 818
15 (9th Cir. 2004)(finding accurate jury instructions on burden of
16 proof that required jury to base its decision only on evidence
17 adduced at trial).

18 Moreover, neither CALCRIM No. 220 nor CALCRIM No. 222
19 preclude the jury from considering any alleged lack of evidence.
20 Although CALCRIM No. 220 instructs the jury that it may only
21 consider evidence admitted at trial, it further instructs the jury
22 that "[u]nless the evidence proves the defendants guilty beyond a
23 reasonable doubt, they are entitled to an acquittal and you must
24 find them not guilty." Doc. #7, Exh. G, Vol. 8 at 1212. Under
25 CALCRIM No. 220, lack of sufficient evidence to prove defendant
26 guilty beyond a reasonable doubt would entitle the defendant to an
27 acquittal. Nor does CALCRIM No. 222 preclude the jury from

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1 considering a lack of evidence in determining whether petitioner had
2 been proven guilty beyond a reasonable doubt. Rather, CALCRIM No.
3 222 merely restricts the range of evidence that may be considered to
4 the evidence which was presented in the courtroom.

5 Read in conjunction with the other instructions given, the
6 California Court of Appeal reasonably found that CALCRIM Nos. 220
7 and 222 properly described the prosecution's burden of proof, namely
8 that the state bore the burden of proving petitioner's guilt beyond
9 a reasonable doubt, that the jury could only consider evidence
10 presented in the courtroom, and that if there were insufficient
11 evidence to prove petitioner guilty beyond a reasonable doubt (e.g.
12 a lack of evidence), he was entitled to an acquittal.

13 Accordingly, the Court finds that the California courts'
14 rejection of petitioner's claim of instructional error was neither
15 contrary to, nor involved an unreasonable application of, clearly
16 established Supreme Court law.

17 V.

18 Petitioner claims that the evidence presented precluded a
19 rational fact finder from making a reasonable determination that the
20 petitioner was guilty of the aforementioned charges beyond a
21 reasonable doubt.

22 A federal court collaterally reviewing a state court
23 conviction does not determine if the evidence at trial established
24 guilt beyond a reasonable doubt; instead, the court's role is to
25 determine "whether, after viewing the evidence in the light most
26 favorable to the prosecution, any rational trier of fact could have
27 found the essential elements of the crime beyond a reasonable
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1 doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in
2 original and internal citation omitted). Thus, a petitioner's writ
3 may be granted only if "no rational trier of fact could have found
4 proof of guilt beyond a reasonable doubt." Id. at 324. The
5 reviewing court must also presume that the trier of fact resolved
6 any conflicting inferences "in favor of the prosecution, and must
7 deter to that resolution." Id. at 326. Circumstantial evidence and
8 inferences drawn from that evidence may be sufficient to sustain a
9 conviction. Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995).
10 Pursuant to AEDPA, the court's inquiry is limited to whether the
11 state court's decision was "an unreasonable application of Jackson
12 and Winship" to the facts of the case. Juan H. v. Allen, 408 F.3d
13 1262, 1275 (9th Cir. 2005) (internal quotations omitted).

14 After reviewing the record and according it the "highly
15 deferential" review required by AEDPA, Felkner, 131 S. Ct. at 1307,
16 this court cannot say that no rational trier of fact could find that
17 petitioner was guilty of the aforementioned charges. Deputy Fogarty
18 positively identified petitioner at trial as the "man who fired the
19 shot." Doc. #7, Exh. G, Vol. 4 at 376. He also identified
20 petitioner during an in-field identification procedure. Id. at 413-
21 14 ("It was absolutely the same person."). Deputy Fogarty explained
22 that he was absolutely sure as to petitioner's identity because,
23 based on his training and experience, he knew to focus in on what
24 petitioner looked like and what he was wearing in case the
25 petitioner was later apprehended. Id. at 415. Deputy Fogarty
26 testified that he saw petitioner exit the vehicle with an assault
27 rifle in his hand. As Deputy Fogarty ran to position himself behind
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1 his police car, two shots were fired at Deputy Fogarty. Id. at 375.
2 When Deputy Fogarty got behind his vehicle, he turned towards
3 petitioner and saw petitioner pull the trigger and heard the bullet
4 go by his right ear. Id. at 403-04. Petitioner then turned and ran
5 in the opposite direction. Petitioner then stopped and turned back
6 to face Deputy Fogarty. At this time, petitioner raised his rifle
7 and aimed at Deputy Fogarty and "did something around the trigger
8 area." Deputy Fogarty assumed that petitioner was trying to clear a
9 jam in the gun and shoot again; Deputy Fogarty he later learned that
10 the gun had misfired Id. at 404-405.

11 Furthermore, evidence collected at the scene corroborated
12 Deputy Fogarty's testimony. A live round whose caliber matched
13 petitioner's rifle was found on the sidewalk near where Deputy
14 Fogarty had observed petitioner firing. Doc. #7, Exh. G, Vol. 6 at
15 726-27, 730. The round had a dented primer, indicating it had been
16 struck by the firing pin, but had not discharged since the bullet
17 was still a part of it. Id. at 726. There was also evidence of a
18 bullet matching petitioner's rifle lodged in the window frame of a
19 house near the shooting. Id. at 731. Another bullet matching
20 petitioner's gun was also found in petitioner's pocket when he was
21 apprehended. Id. at 741. A casing matching petitioner's gun was
22 found in a storm drain at the scene of the crime. Id.

23 Viewing this evidence in the light most favorable to the
24 prosecution, it was reasonable for the jury to find petitioner
25 guilty of the aforementioned charges. See, e.g., Jackson, 443 U.S.
26 at 324. Accordingly, the Court finds that the California courts'
27 rejection of petitioner's claim of instructional error did not
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1 result in a decision that was based on an unreasonable determination
2 of the facts in light of the evidence presented in the State court
3 proceeding.

4 VI.

5 For the foregoing reasons, the petition for a writ of
6 habeas corpus is DENIED.

7 Further, a Certificate of Appealability is DENIED. See
8 Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner
9 has not made "a substantial showing of the denial of a
10 constitutional right." 28 U.S.C. § 2253(c)(2). Nor has petitioner
11 demonstrated that "reasonable jurists would find the district
12 court's assessment of the constitutional claims debatable or wrong."
13 Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not
14 appeal the denial of a Certificate of Appealability in this Court
15 but may seek a certificate from the Court of Appeals under Rule 22
16 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the
17 Rules Governing Section 2254 Cases.

18 The Clerk is directed to enter Judgment in favor of
19 respondent and against petitioner, terminate any pending motions as
20 moot and close the file.

21 IT IS SO ORDERED.

22
23 DATED 03/26/2012



THELTON E. HENDERSON
United States District Judge

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