IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CORY MOSBY,

Petitioner,

v.

JAMES A. YATES,

Respondent.

/

No. C-09-1667 MMC

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On April 15, 2009, petitioner Cory Mosby ("petitioner") filed the above-titled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the validity of his state conviction. Respondent James A. Yates has filed an answer and a memorandum of points and authority in support thereof, to which petitioner has filed a reply. Having read and considered the papers filed in support of and in opposition to the petition, the Court rules as follows.

PROCEDURAL HISTORY

In September 2005, a San Mateo County jury convicted petitioner of three counts of carjacking, two counts of kidnapping, and one count of robbery, all with findings that he personally used a firearm and an assault weapon, as well as one count of assault with a firearm, with a finding of personal use of an assault weapon. (Clerk's Tr. ("CT") 547-48, 798.) Additionally, allegations of two prior convictions and a prior prison term were found

true by the trial court. (Id.) Petitioner was sentenced to a term of 31 years and four months in state prison. (CT 823-26, 830-32.)

On October 4, 2007, the California Court of Appeal affirmed the judgment. People v. Mosby, No. A112756, 2007 WL 2876099 (Cal. Ct. App. Apr. 13, 2006). (Resp't's Ex. 5.) On January 16, 2008, the California Supreme Court denied review. Cal. Supreme Ct. No. S258162. (Resp't's Exs. 6, 7.)

STATEMENT OF FACTS

The California Court of Appeal found the facts underlying petitioner's conviction to be as follows:

> [On July 29, 2004,] Bob Pierce was in the Bay Area on business. He contacted an escort service that sent Krystal Dejulio to his hotel room. While there, Dejulio received a telephone call from Ryan Hatcher, from whom she had bought marijuana a few days earlier, when she had also met [petitioner].[1] Hatcher offered Dejulio some marijuana, and Pierce agreed to go for a ride with Dejulio to get it. Following Hatcher's directions, Dejulio and Pierce drove to the Mardi Gras bar in Redwood City.
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> When Dejulio and Pierce got out of the car, they were approached by Hatcher and [petitioner], who wore a red sweatshirt with the hood up. Hatcher said they had to go "around the corner" to pick up the marijuana, and his friend would accompany them. Once they left the bar, Hatcher did not speak again. Dejulio drove, Pierce rode in the front passenger seat, and Hatcher and [petitioner] sat in the back. [Petitioner] directed Dejulio to drive to two different locations where he exited and they waited for him to return to the car.
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> After [petitioner] got back into the car at the second location, Pierce and Dejulio suddenly noticed the long black barrel of a gun sticking out above the console between the driver and passenger seats. [Petitioner] said, "I'm sorry this has to happen to you. We are just going to have to drop this off, and if everything goes as planned, then you guys will be leaving tonight. We are just going to go around the corner to drop it off." [Petitioner] told Dejulio to continue down the alley, and directed her to drive toward the hills. When Pierce said something that angered [petitioner], [petitioner] punched him in the back of the head. Dejulio told [petitioner] he could take the car and let her and Pierce out, and [petitioner] pointed the gun at the back of her head and twisted her hair around the barrel. When Dejulio told Hatcher he was at fault for allowing this to happen and remaining silent, [petitioner] screamed, "Shut the fuck up. Don't talk to him." [Petitioner] told Dejulio to shut up and keep driving: "[You're] going to drive wherever [I] want [you] to go. Bitch. And that's that." [Petitioner] also screamed at Dejulio: "Women don't talk. Men talk only. Shut up, bitch. You know, I got 36 shells in this gun. I'm not afraid to use it . . . . Let me take the safety off. Now I'm ready."

[1] Dejulio knew Hatcher by the name "JJ."

Dejulio drove as directed, and pulled into a parking lot in a dark wooded area at Canada College, facing an embankment. Dejulio was afraid she would be shot. Pierce thought he would "die in that parking lot." [Petitioner] ordered Dejulio and Pierce out of the car, and told them to walk towards the embankment in front of the car headlights. [Petitioner] demanded Pierce's wallet, and struck him on his left temple with the rifle when Pierce suggested that [petitioner] take the cash and let Pierce keep his wallet. Pierce then gave his wallet to [petitioner], who threw it toward Hatcher.

[Petitioner] told Dejulio and Pierce to take off their clothes, and Hatcher threw Pierce's clothes in a tree. [Petitioner] ordered Dejulio and Pierce to lie on the ground on their stomachs. After he pat searched Dejulio, [petitioner] ordered both victims to stand and walk to the edge of the nearby cliff. Pierce refused because he was afraid that if he did so, [petitioner] would shoot him in the back. [Petitioner] again struck Pierce in the temple with the gun and drew blood.

[Petitioner] again ordered both victims to lie face down. When Pierce raised his head and looked at [petitioner], he struck the back of Pierce's head with the gun barrel, again drawing blood. Pierce put his head down and waited to be shot. [Petitioner] ordered Dejulio and Pierce to start counting, and yelled to Hatcher to get the car ready. [Petitioner] walked backwards toward the car, holding the rifle, and got into the front passenger seat. The car drove off and was recovered at the scene of a single-car accident at 1:40 a.m. Fingerprints from the car matched [petitioner's] and Hatcher's. The gun used in the offenses was not recovered.

Once [petitioner] and Hatcher were gone, Dejulio called 911 on her cell phone. Police responded and took statements from both victims.

. . . .

Pierce described the gunman as 24 to 25 years old, white, 6 feet tall, 180 pounds, with short reddish-brown hair, facial freckles, and no facial hair. He wore a red sweatshirt with a hood, and gray sweat pants. Pierce helped another police officer retrace the crime route. They started at the Mardi Gras bar, and Pierce also took the officer to the alley behind 542 Vera Street.

Detective Eric Acha was assigned to investigate the case, and focused first on William Phillips as a suspect, based on the similarity of his tattoos to those Dejulio described previously seeing on [petitioner] and on Acha's prior contacts with Phillips near 542 Vera Street. But when shown a photo lineup including Phillips's photo, Dejulio did not make an identification. When Acha went to 542 Vera Street, he found a tank top, of the style Dejulio described the gunman as wearing, in the alley. When Acha went to the motel where Dejulio had previously met both suspects, he obtained a copy of a driver's license for Ryan Hatcher, who generally matched the description of the unarmed suspect. Acha also learned that the subscriber of the cell phone number that the gunman dialed on Dejulio's cell phone listed the same street address and date of birth as Hatcher's driver's license, although there was a different name on the account. When he ran Hatcher's name through the police computer, Acha discovered that

> Hatcher was previously contacted by police in the company of [petitioner].[2] Acha also had previous contact with [petitioner], and focused on him as the second suspect.
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> When shown a photo of [petitioner], the bartender at the Mardi Gras confirmed he was at the bar on the night of the carjacking, and wore a red hooded sweatshirt. On July 31, Dejulio made positive photo lineup identifications of [petitioner] and Hatcher as her assailants, stating she was "100 percent sure, no doubt." When Acha e-mailed the photo lineups to Pierce . . . shortly thereafter, Pierce immediately identified [petitioner] as the gunman, without any doubt.[]
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> On August 4, police executed a search warrant at the duplex at 542 Vera Street. In the garage they found two bags of ammunition compatible with use in an assault weapon, including Russian bullets developed with the AK-47. Inside one of the apartments, they found a red hooded sweatshirt. [Petitioner] was arrested and his interview with Detective Acha was videotaped. [Petitioner] admitted he and a friend named "JJ" were at the Mardi Gras bar and said that JJ had a woman and "another dude" pick them up in a car. They were "going to go get them weed or something."[3] [Petitioner] was very drunk and could not remember what happened after that, but heard "hella stories" and that "shit went crazy." [Petitioner] repeatedly offered to cooperate with police to "bring people down" in exchange for leniency in this case.
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> The trial court denied [petitioner's] motion to suppress Pierce's photo identification of him as the gunman, and concluded the lineup was not unduly suggestive, but excluded Pierce's in-court identification of [petitioner] because Detective Acha had told Pierce at the time of the preliminary hearing that he picked the right person. At trial [petitioner] argued he was falsely identified as the perpetrator.

Mosby, 2007 WL 2876099, at *1-4.

Petitioner did not testify at the trial but, rather, sought to discredit the prosecution's evidence on the issue of identity.[4] Petitioner also sought to introduce evidence to show bias on the part of the Redwood City Police Department, based on petitioner's previous

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[2] At trial, another police officer testified that he saw [petitioner] and Hatcher in the alley at 542 Vera Street a few weeks before the carjacking. The prosecution also produced photos that showed [petitioner] and others in the same alley.

[3] [Petitioner] denied having a friend named Ryan, but said the name Ryan Hatcher was familiar and that might be JJ's last name. When shown a photo [petitioner] identified Hatcher. [Petitioner] claimed another friend, Mike Borg, was also present at the Mardi Gras that evening and was wearing a sweater or something with a hood. [Petitioner] said they all got into a car driven by a girl with another man present, but [petitioner] claimed he was dropped off and later heard Borg and JJ "took some money from them or something." Earlier, [petitioner] said Borg and JJ left him at the bar for a couple of hours, and then dropped him off at a friend's house.

[4] Petitioner called one witness, a co-worker, who testified he saw petitioner at work the afternoon of the following day, July 30, 2004, and noted nothing unusual in his demeanor or behavior. (Reporter's Transcript ("RT") 1224-29).

arrest for drugs in the company of a Redwood City police officer's minor daughter. Id. at *6. The trial court excluded the evidence of bias as more prejudicial than probative and unduly consumptive of time. Id. Additionally, petitioner sought to introduce a statement made by a detective during petitioner's interview, specifically, the statement "this is a third strike for you." Id. at *7. Petitioner argued the statement was necessary to place his offers to cooperate in context, and, in particular, to counter an inference that such offers evidenced a consciousness of guilt. Id. The trial court excluded this evidence as well. Id.

DISCUSSION

A. Standard of Review

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); see also Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Additionally, habeas relief is warranted only if the constitutional error at issue had a "substantial and injurious effect or influence in determining the jury's verdict." Penry v. Johnson, 532 U.S. 782, 796 (2001) (internal citations omitted).

A state court decision is "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [its] precedent." Williams, 529 U.S. at 405-06. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." Id. at 412. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court

decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411.

The state court decision to which § 2254(d) applies is the "last reasoned decision" of the state court. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991); Barker v. Fleming, 423 F.3d 1085, 1091-92 (9th Cir. 2005). Consequently, with respect to petitioner's claims brought by the instant petition, all of which were raised by petitioner on direct appeal, the Court "looks through" the California Supreme Court's summary denial of the petition for review to the Court of Appeal's opinion denying the claims on the merits. Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) (citing Nunnemaker, 501 U.S. at 803-04).

B. Petitioner's Claims

Petitioner brings three claims, based on the following rulings: (1) the trial court's admission of Pierce's pretrial identification of petitioner from a photographic lineup; (2) the trial court's exclusion of evidence of bias against petitioner; and (3) the trial court's exclusion of evidence of petitioner's potential third strike. The Court considers each claim in turn.

1. The Pretrial Identification

Petitioner contends he "was denied his federal due process right by the admission of evidence of pretrial identification[] . . . by witness Pierce that was the product of procedures that [were] impermissibly suggestive . . . ." (Pet. at 11.) As noted, the trial court admitted Pierce's pretrial identification of petitioner, whereby Pierce selected petitioner's photograph from a photo spread.

a. Background

The Court of Appeal described the facts relevant to this claim as follows:

> [Petitioner] contends the photo lineup where Pierce identified him as the gunman was unduly suggestive and unreliable. [Petitioner] bases his argument on two characteristics of the lineup. First, he says the lineup was suggestive because he is the only subject shown to be wearing any red clothing, and Pierce described the perpetrator to be wearing a red sweatshirt. His second point about the lineup is that each subject is depicted above a seven digit number, and since the number under defendant's picture is greater than the number under the other subjects, the enumeration suggested

> [petitioner's] picture was the most recently obtained by police.
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> . . . .
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> The photo lineup where Pierce identified [petitioner] took place a few days after the robbery. Detective Acha e-mailed the photo lineup to Pierce at his office in Southern California, and faxed him an admonition form that he also read to Pierce over the phone. Detective Acha remained on the line with Pierce throughout the identification process, and stated that Pierce was fairly certain the person he identified was the gunman. Pierce testified: "As soon as that photo lineup came up, I knew exactly which one of the individuals it was. And I even pointed out that . . . this picture was not in the lineup I was shown the other night." Pierce "recognized the face right off the bat." Pierce testified he "was sure of who the gunman was. [He] was not positive as to the other defendant. [He] believed strongly, but it wasn't the same, 'I'm positive that's the guy.'"
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> Pierce testified there was nothing about the clothing of the person he identified during the photo lineup that caught his attention, and the clothing did not resemble what Pierce saw the gunman wearing on the night of the incident.
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> In the photo lineup, [petitioner] was wearing what the court described as a "reddish or rather rusty-looking shirt . . . . And then either a jacket or maybe a velour or some type of outerwear." . . . Detective Acha also testified that Pierce did not refer to the color of [petitioner's] shirt when he identified his photo in the lineup. [Petitioner] "note[s] that it is extremely unlikely that all 12 members of this or any jury would be oblivious to the gang significance of the color red, and that marking [petitioner] with this particular color was therefore grossly unfair and suggestive for that additional reason." The trial court excluded any evidence to suggest [petitioner] was associated with gang activity . . . .

Mosby, 2007 WL 2876099, at *4-5, n.8.

b. Analysis

Due process protects against the admission of evidence deriving from suggestive pretrial identification procedures. Neil v. Biggers, 409 U.S. 188, 196 (1972). "[C]onvictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Neil, 409 U.S. at 196-97. An identification procedure is impermissibly suggestive when it "emphasizes the focus upon a single individual," thereby increasing the likelihood of misidentification. See United States v. Bagley, 772 F.2d 482, 493 (9th Cir. 1985) (citing Simmons v. United States, 390 U.S. 377, 382-83 (1968).

Here, in finding Pierce's pretrial identification of petitioner as the gunman admissible, the Court of Appeal reviewed the record to determine whether the procedure used by the police was "impermissibly suggestive," See Mosby, 2007 WL 2876099, at *4 (citing People v. Blair, 25 Cal.3d 640, 659 (1979)), and determined it was not.[5] In so holding, the Court of Appeal reasoned:

> The mere fact that [petitioner's] "wearing of an item of apparel of the same color as that recalled by the witness-particularly a different item of apparel . . . does not, without more, make the lineup unduly suggestive." (People v. DeSantis, (1992) 2 Cal.4th 1198, 1223; see also, People v. Harris, (1971) 18 Cal. App. 3d 1, 6 ("[t]he mere fact that defendant was wearing the same [bright yellow] color pants worn by the robber did not make the lineup unfair").)[6]
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> Nor has [petitioner] shown that the photo lineup was unduly suggestive because his photo was labeled with a higher number than the others, even assuming that argument was not waived by [petitioner's] failure to raise it in the trial court. Unlike the case cited by [petitioner], all the photos in the lineup shown to Pierce were number. (People v. Carlos, (2006) 138 Cal. App. 4th 907, 912 (photo lineup found unduly and unnecessarily suggestive where the defendant's was the only photo labeled with a name and identification number).) [Petitioner] here cites no support for his speculation that "[a] reasonable inference . . . might be drawn . . . that [his] photo is more recent than the others, and that it is more recent because it was made specifically for this case—and thus that the actual subject of this photospread was [petitioner]." Nor does the record support [petitioner's] suggestion that Pierce drew such an inference, or that he relied in any way on the number when making his identification. Instead, the record supports the trial court's determination that Pierce identified [petitioner] in a photo lineup that was not unduly suggestive.

See Mosby, 2007 WL 2876099, at *4-5.

Based on the above, this Court finds petitioner has failed to show the Court of Appeal's determination of this claim is contrary to, or involved an unreasonable application of, clearly established federal law, nor has petitioner shown such determination was based

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[5] Although in so holding, the Court of Appeal cited to decisions of the California Supreme Court and California Court of Appeal, a state court, to avoid the "pitfalls" of AEDPA, need not cite to federal decisional law, provided "neither the reasoning nor the result of the state-court decision contradicts" United States Supreme Court authority. See Early v. Packer, 537 U.S. 3, 8 (2002).

[6] The record here does not necessarily support a finding that petitioner's attire in the photograph was the same color as the red sweatshirt worn by the perpetrator. See Mosby, 2007 WL 2876099, *5 n.8 ("In the photo line up, [petitioner] was wearing what the [trial] court described as a 'reddish or rather rusty-looking shirt. . . . And then either a jacket or maybe a velour or some other type of outerwear. . . .' Defense counsel conceded the color of defendant's shirt was 'not the football field on game day. . . .'").

on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d).

Accordingly, petitioner is not entitled to relief based on the admission of Pierce's pretrial identification of petitioner.[7]

2. Evidence of Bias

Petitioner claims he "was denied his right of confrontation . . . and his right to present a defense . . . by the exclusion of evidence of bias against him on the part of the Redwood City police department . . . ." (Pet. at 14.) As noted, the trial court excluded the proffered bias evidence as more prejudicial than probative.

a. Background

The Court of Appeal described the facts relevant for this claim as follows:

> [Petitioner] argues the trial court erred when it excluded evidence that he was previously arrested for drugs in the company of a juvenile who was the daughter of a Redwood City police officer. [Petitioner] contends his arrest in the company of a policeman's daughter biased the police against him and caused them to focus on him as a suspect in this case, instead of pursuing other possible leads.
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> In the prior incident, a deputy sheriff approached [petitioner] in a car that also held another man and a juvenile female. Marijuana and suspected ecstasy found in the juvenile female's purse were determined to have come from [petitioner]. The juvenile was released to her father, who was a member of the Redwood City Police Department. The father testified at trial that he did not tell people at work about his daughter's case, and that he was not involved in the "core investigation" of [petitioner's] case, but participated in serving one of the search warrants and helped look for [petitioner's] accomplice. He thought he learned [petitioner] was a suspect when the rest of the department was notified. Detective Acha testified he did not work with the girl's father in attempting to identify suspects in [petitioner's] case, and only told the father [petitioner] was a suspect after Pierce identified him in the e-mailed photo lineup.
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> The [trial] court . . . considered it "pure speculation . . . that [the juvenile's father], in his displeasure with [petitioner], would have or did falsely—or the Redwood City Police Department—focus on [petitioner] because of this relatively minor incident involving [petitioner] and his daughter." The court found the evidence was not "sufficiently relevant or germane to these proceedings" and "the probative value is clearly outweighed by the potential prejudicial effect, or, more importantly, an undue consumption of time." Accordingly, the [trial] court excluded the evidence pursuant to Evidence

[7] In light of its determination that the photographic lineup procedure was not impermissably suggestive, the Court of Appeal did not go on to consider the reliability of the identification independent of such procedure. See U.S. v. Givens, 767 F.2d 574, 582 (9th Cir. 1985) (describing "two-step inquiry"; noting "if the identification procedure was impermissably suggestive, we must decide whether it was nonetheless reliable") (internal quotation and citation omitted).

Code section 352.

Mosby, 2007 WL 2876099, at *6.

b. Analysis

"State and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." Holmes v. S. Carolina, 547 U.S. 319, 324 (2006). This latitude is limited, however, by a defendant's constitutional rights to due process and to present a defense. See id. Although "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury," the Constitution "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." Id. at 326. To obtain habeas relief on the basis of an evidentiary error, however, a petitioner must show not only that the error was one of constitutional dimension, but also that the error had "'a substantial and injurious effect' on the verdict." Dillard v. Roe, 244 F.3d 758, 767 n.7 (9th Cir. 2001) (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1995).

Here, citing Holmes, 547 U.S. at 328-31 and Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986), petitioner argues the exclusion of the above-described evidence of bias deprived him of his right of confrontation and to present a defense. The Court of Appeal distinguished Holmes and Van Arsdall on their facts. This Court agrees that the authority on which petitioner relies is distinguishable.

In Holmes, the Supreme Court, in finding a constitutional violation, considered a state law that precluded criminal defendants from introducing evidence of third-party guilt, regardless of its probative value, where the prosecution's case as to the perpetrator's identity was strong. 547 U.S. at 321, 331. As the Supreme Court in Holmes acknowledged, however, such evidence "may be excluded where it does not sufficiently connect the other person to the crime, as for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's

trial." Mosby, 2007 WL 2876099, at *6 (citing Holmes, 547 U.S. at 327-31). Here, in contrast to the evidence proffered in Holmes, the evidence proffered by petitioner, as the trial court found, was not "'sufficiently relevant or germane' to [the] proceedings." Mosby, 2007 WL 2876099, at *6. At best, the evidence arguably suggested an incentive on the part of the police department to investigate petitioner's association with the crime. Petitioner, however, did not dispute the facts of that investigation as recounted by the police witnesses; rather, his defense focused on endeavoring to show Pierce was mistaken and DeJulio was lying. (RT 1268-83, 1290-98.)

Petitioner's reliance on Van Arsdall likewise is unavailing. In Van Arsdall, the Supreme Court held the defendant's right of confrontation was violated where the defense sought to impeach a key prosecution witness and was not allowed to cross-examine him as to his agreement to speak with the prosecutor in exchange for dismissal of the charges against him in another matter. Van Arsdall, 475 U.S. at 678-79. Here, by contrast, as the Court of Appeal noted, "[t]he juvenile's father had minimal involvement in the investigation of [petitioner's] case," Mosby, 2007 WL 2876099, at *7, and, as discussed above, the testimony of the police witnesses was not disputed.

Consequently, petitioner has not shown the Court of Appeal was unreasonable in finding petitioner's constitutional rights were not violated by the trial court's exclusion of evidence of the prior incident, given the undue consumption of time that invariably would have resulted from the admission of such evidence and the potential for confusion of the issues thereby. See Holmes, 547 U.S. at 326 (holding "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury").

Accordingly, petitioner is not entitled to relief based on the exclusion of evidence of bias.

3. Statement Referencing Petitioner's Third Strike

Petitioner claims he was "denied his rights . . . to present a complete defense by the court's rulings on [petitioner's] interrogation by police in which the court admitted

[petitioner's] statements offering to assist police in other prosecutions but limited statements by police threatening [petitioner] with life imprisonment in this case, thereby preventing [petitioner] from placing his conduct in its true light." (Pet. at 16.) In particular, according to petitioner, the trial court erred by admitting petitioner's statements by which he offered to cooperate with police in other cases, but excluded one of two statements made by the detective to petitioner concerning the consequences he was facing, specifically, the statement "this is a third strike for you." (RT 883-884, 890-891.) Petitioner claims the excluded statement was relevant to show a reason, other than consciousness of guilt, for his offers to cooperate. Citing Crane v. Kentucky, 476 U.S. 683 (1986), petitioner argues the exclusion of the detective's reference to a "third strike" violated his due process right to present a defense. The Court of Appeal found no constitutional error.

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Crane, 476 U.S. at 690. The right to present a defense "includes, 'at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt.'" United States v. Stever, 603 F.3d 747, 755 (9th Cir. 2010) (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987)).

In upholding the exclusion of the reference to petitioner's third strike, the Court of Appeal's decision was not inconsistent with the reasoning or holding in Crane. As the Court of Appeal noted, Crane involved a case built largely upon a 16-year-old defendant's confession to murder; the defense sought to introduce evidence showing the confession was obtained under oppressive and coercive circumstances, Mosby, 2007 WL 2876099, at *7 (citing Crane, 476 U.S. at 685), and the Supreme Court concluded "the 'blanket exclusion' of evidence related to the circumstances of the minor's confession deprived him of a meaningful opportunity to present a complete defense," id. at *7 (quoting Crane, 476 U.S. at 690). Here, by contrast, as the Court of Appeal further noted, petitioner did not confess and there was no "blanket exclusion" of the circumstances surrounding petitioner's interview, either in general or as to the subject of cooperation. Id. Rather, the trial court admitted evidence showing the context of the offers, specifically, another statement, made

by the detective before petitioner offered to cooperate, in which the detective told petitioner: "I need to know what the fuck happened out there cause this is some serious shit. This is the rest of your life we're talking about here." Id.

Consequently, as the Court of Appeal found, "the jury was aware that [petitioner] knew he was facing serious consequences for his suspected involvement in these crimes." Mosby, 2007 WL 2876099, at *8. Further, as the Court of Appeal observed, "the exclusion of the detective's reference to three strikes sentencing was consistent with the court's earlier ruling that barred mention in front of the jury of possible sentencing consequences to [petitioner]." See id.; (see also CT 625 (CALJIC 17.42) ("In deliberating do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict."); CT 267 (Def.'s Proposed Jury Instructions)).

In sum, the Court of Appeal was not unreasonable in determining petitioner's constitutional rights were not violated by the exclusion of evidence similar to evidence that was admitted and where such excluded evidence "pose[d] an undue risk of . . . prejudice, [and] confusion of the issues." See Crane, 476 U.S. at 689-90 (internal quotation and citation omitted).

Accordingly, petitioner is not entitled to relief based on the exclusion of the statement referencing the third strike.

CONCLUSION

For the reasons set forth above, the petition for a writ of habeas corpus is hereby DENIED.

IT IS SO ORDERED.

Dated: February 10, 2011

MAXINE M. CHESNEY
United States District Judge