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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RAFAEL DIAZ CASIQUE,

No. C 11-3449 SI (PR)

Petitioner,

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

v.

GREG LEWIS,

Respondent.

_____ /

INTRODUCTION

This is a federal habeas corpus action filed by a pro se state prisoner pursuant to 28 U.S.C. § 2254. For the reasons stated herein, the petition is DENIED.

BACKGROUND

On March 3, 2006, a jury found petitioner guilty of the first-degree murder of Michael Lee. The jury also found true the enhancement allegations that petitioner used a handgun during the commission of the murder and inflicted great bodily injury on his victim. The jury sentenced petitioner to state prison for fifty years to life. The events leading to petitioner’s conviction are detailed below.

1 The victim, Lee, used and sold methamphetamine, engaged in identity theft and was a member
2 of the Norteno gang. In February 2001, he lived in Fremont with his girlfriend, Audra Silva, Stanley
3 Adams and Adams' girlfriend, Cherise. Petitioner was a leader of the Decoto criminal street gang based
4 in Union City. One of the primary activities of the Decoto gang was the sale of methamphetamine.
5 Petitioner and Lee had numerous mutual friends.

6 Anita Romero, a Norteno affiliate, lived in the Paradise Trailer Park in San Leandro and sold
7 methamphetamine there. Steven Ijames also lived in the Paradise Trailer Park, across from Romero.

8 On the evening of February 3, 2001, Lee arranged to purchase methamphetamine from Romero.
9 He enlisted Adams to drive him and Silva to Romero's trailer to pick up the drugs. They smoked
10 methamphetamine prior to departure.

11 Upon arrival at the Paradise Trailer Park, Adams parked his vehicle on the street. Lee exited the
12 vehicle and went to Romero's trailer about 30 feet away. On the way to the trailer, Lee encountered his
13 friend, Ijames. They both entered Romero's trailer but she wasn't there. Ijames walked out to go to a
14 liquor store.

15 As Adams and Silva waited in the vehicle, they noticed two people walk up beside it. These two
16 people walked to Romero's trailer, where they engaged in a hostile conversation with a third person.
17 Adams and Silva then heard gunshots and saw sparks coming from the front porch of the trailer. At
18 trial, Adams and Silva identified petitioner as the shooter. At the time, they did not know who the
19 victim was.

20 The three men on the porch then walked back to the parked vehicle. Adams and Silva heard
21 someone say, "Maybe next time you'll pay me my fucking money," before one last shot was fired at the
22 rear of the vehicle. They then looked back and realized that the shooting victim was Lee as he slumped
23 down and leaned against the rear window. Adams and Silva ran out of the vehicle to assist Lee. They
24 asked, "Who did this to you," and twice Lee replied "Joker from Decoto."

25 Lee staggered across the road to Ijames' trailer before he collapsed on the front porch. Silva
26 called 911 as Ijames arrived at his trailer.

27 Ijames testified that as he was walking to the store, he heard gunshots and immediately returned
28 to the trailer park. An ambulance and police vehicles arrived soon thereafter.

1 Deputy Richard Slofkosky testified that he arrived at the Paradise Trailer Park just after midnight
2 to find Lee face down in front of unit 59. He noticed that Lee’s clothes were soaked in blood. He asked
3 Lee if he knew he had been shot. Lee said yes. Lee indicated he knew who shot him and then said
4 “Joker.” When Lee repeated “Joker,” Slofkosky asked what street he lived on. Lee said he did not
5 know, but that he was from Decoto. Slofkosky asked Lee why Joker had shot him. Lee said, “I owed
6 him money.” Lee was transferred to a hospital, where he died.

7 Petitioner was tried in Alameda County. Following his conviction, petitioner filed an appeal
8 with the State Court of Appeal. His appeal was denied. *People v. Casique*, No. A113636, 2009 WL
9 1508463 (May 29, 2009). The Supreme Court of California subsequently denied petitioner’s Petition
10 For Review.

11 Petitioner subsequently filed a habeas petition in the Supreme Court of California. The petition
12 was denied without comment.

13 Petitioner filed the instant federal habeas petition on July 13, 2011. Claims II and VIII of the
14 petition were dismissed on April 5, 2012. Respondent filed an answer on June 22, 2012. Petitioner filed
15 a traverse on August 6, 2012.

17 DISCUSSION

18 Pursuant to the Anti-Terrorism and Effective Death Penalty Act (“AEDPA), a district court may
19 not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed
20 on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision
21 that was contrary to, or involved an unreasonable application of, clearly established Federal law, as
22 determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on
23 an unreasonable determination of the facts in light of the evidence presented in the State court
24 proceeding.” 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). If the state court
25 did not reach the merits of a claim, federal review of the claim is de novo. *Nulph v. Cook*, 333 F.3d
26 1052, 1057 (9th Cir. 2003).

27 A federal court must presume the correctness of the state court’s factual findings. 28 U.S.C.
28 § 2254(e)(1). The state court decision implicated by 2254(d) is the “last reasoned decision” of the state

1 court. See *Ylst v. Nunnemaker*, 501 U.S. 797, 803–04 (1991); *Barker v. Fleming*, 423 F.3d 1085,
2 1091–92 (9th Cir. 2005).

3 Habeas relief is warranted only if the constitutional error at issue had a “substantial and
4 injurious effect or influence in determining the jury’s verdict.” *Penry v. Johnson*, 532 U.S. 782, 796
5 (2001).

6
7 **A. Claim I**

8 Petitioner alleges that the admission of Deputy Slofkosky’s testimony constituted error under
9 *Crawford v. Washington*, 541 U.S. 36 (2004). Under *Crawford*, out-of-court statements that are
10 testimonial in nature must be excluded under the Confrontation Clause unless the declarant is
11 unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 68.
12 Petitioner contends that *Crawford* compels the exclusion of Slofkosky’s testimony stating that in
13 response to questions at the crime scene, Lee told him that he had been shot by “Joker from DeCoto”
14 because he owed Joker money.

15 The state court rejected petitioner’s claim on the grounds that Slofkosky’s statements were not
16 testimonial. *Casique*, 2009 WL 1508463 at *14-16. The court explained that “[s]tatements are not
17 testimonial when made in the course of police interrogation under circumstances objectively indicating
18 that the primary purpose of the interrogation is to enable police assistance to meet an ongoing
19 emergency.” *Id.* at 15. The court concluded as follows:

20 We are [] persuaded that the few questions and answers were designed primarily to deal
21 with the existing emergency, not to establish or prove past facts for prosecutorial use.
22 (*Davis*, supra, 547 U.S. 813, 828.) The officer was attempting to ascertain the essential
23 nature of the situation. (*People v. Pedroza*, supra, 147 Cal.App.4th 784, 793.) He did
24 not solicit a description of the events or seek to discover any details of the shooting. The
25 information gathered by Deputy Slofkosky assisted the immediate law enforcement
26 response to the ongoing crisis. (*People v. Romero*, supra, 44 Cal.4th 386, 422; *People*
27 *v. Pedroza*, supra, at ¶. 793-794.) Identification of the suspect and discovery of his
28 possible whereabouts could have facilitated his prompt apprehension by the police, and
also served to determine if the shooter continued to pose an immediate danger to the
public. An inquiry into the reason for the shooting was designed to learn if there may
be other potential victims in need of urgent protection from the shooter. The
superficiality of the momentary inquiry by the deputy indicates that he was seeking to
aid the victim and respond to the current situation, not to facilitate a subsequent
conviction in a court of law. (*People v. Brenn*, supra, 152 Cal.App.4th 166, 177.) We
find that admission of the victim's nontestimonial statements to Deputy Slofkosky did
not violate defendant's right to confrontation, and hence we find no failure by counsel

1 to adequately represent defendant. (*People v. Romero*, supra, 44 Cal.4th 386, 421-422;
2 *People v. Romero* (2007) 149 Cal.App.4th 29, 39.)

3 *Id.* at 16.

4 The Court finds the state court’s determination that Slofkosky’s statements were not testimonial
5 but instead, were intended to enable the police to respond to an emergency, was reasonable. The state
6 court’s decision is supported by *Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011), in which the United
7 States Supreme Court held that statements made by a gunshot wound victim to first-responders
8 identifying the shooter and describing the circumstances of the shooting were nontestimonial. The
9 Court found that “the most important instances in which the [Confrontation] Clause restricts the
10 introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-
11 court interrogation of a witness to obtain evidence for trial.” *Id.* As in *Bryant*, the context of
12 Slofkosky’s questioning of Lee was distinct from a situation where evidence is gathered for trial.
13 Rather, Slofkosky’s questioning aimed to enable police to meet an ongoing emergency.

14 Petitioner fails to establish that the state court’s decision constituted an unreasonable application
15 of *Crawford*, or that the state court unreasonably determined the facts. Petitioner’s claim lacks merit
16 and is denied.

17 **B. Claim III**

18 Petitioner alleges that the trial court erred by admitting evidence of his membership in the
19 Decoto Norteno street gang. This evidence included testimony from Ralph Castillo, an affiliate of the
20 Norteno street gang in Hayward, as well as expert testimony from Union City Police Sergeant Gloria
21 Lopez-Vaughn.

22 The state court rejected petitioner’s claim on the grounds that probative value of the gang
23 membership evidence outweighed its prejudicial effect. *Casique*, 2009 WL 1508463 at *19. The
24 evidence was probative of the identity of the shooter in that it established that “Joker from Decoto” was,
25 in fact, petitioner, *id.* at *18, and was also probative of motive – it helped establish that Lee was shot
26 for his non-payment of debt. *Id.* Finally, the evidence helped explain other witnesses’ fear of
27 retribution and reluctance to assist the investigation of Lee’s murder. *Id.*

1 The admission of evidence is not subject to federal habeas review unless a specific constitutional
2 guarantee is violated or the error is of such magnitude that the result is a denial of the fundamentally fair
3 trial guaranteed by due process. *See Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999); *Colley v.*
4 *Sumner*, 784 F.2d 984, 990 (9th Cir.), *cert. denied*, 479 U.S. 839 (1986). The Supreme Court “has not
5 yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due
6 process violation sufficient to warrant issuance of the writ.” *Holley v. Yarborough*, 568 F.3d 1091, 1101
7 (9th Cir. 2009) (finding that trial court’s admission of irrelevant pornographic materials was
8 “fundamentally unfair” under Ninth Circuit precedent but not contrary to, or an unreasonable application
9 of, clearly established federal law under 28 U.S.C. § 2254(d)).

10 The Court concludes that the admission of the gang evidence was not so prejudicial that it
11 infected the fairness of petitioner’s trial. *See Kernan*, 197 F.3d at 1031. Moreover, petitioner has failed
12 to demonstrate that the state court decision rejecting petitioner’s claim constituted an unreasonable
13 application of clearly established federal law. Petitioner’s claim lacks merit and is denied.

14
15 **C. Claim IV**

16 Petitioner alleges that the trial court erroneously admitted hearsay testimony from Audra Silva
17 regarding a statement made to her by her friend, Melissa Maya. Silva testified that after the shooting,
18 Maya confirmed petitioner’s identity as the Joker. She further testified that Maya told her that “she
19 knows who Joker from Decoto is and that she owed him money in the past and that . . . he’ll shoot
20 anybody, like, he doesn’t care if you’re a mother or if you have kids or whatever. He’ll shoot you if you
21 owe him money.” *Casique*, 2009 WL 1508463 at *19. Petitioner alleges that these prejudicial hearsay
22 statements were admitted in violation of his right to due process.

23 The state court rejected petitioner’s claim on the grounds that probative value of the Maya’s
24 statement to Silva outweighed its prejudicial effect. *Casique*, 2009 WL 1508463 at *19-20. Finding
25 that the evidence was admitted to explain Audra Silva’s initial reluctance to answer police questions and
26 to cooperate in the investigation, and that as such, Maya’s statement was very probative, the state court
27 found that the trial court’s limiting instructions properly directed the jury to consider the evidence “just
28 for the witness’s state of mind.” in that it explained witnesses’ reluctance to identify petitioner as the

1 shooter. *Id.* at *20.

2 The admission of Maya's statement to Silva was not so prejudicial that it infected the fairness
3 of petitioner's trial. *See Kernan*, 197 F.3d at 1031. Moreover, petitioner has failed to demonstrate that
4 the state court decision rejecting petitioner's claim constituted an unreasonable application of clearly
5 established federal law. Petitioner's claim lacks merit and is denied.

6
7 **D. Claim V**

8 Petitioner alleges that the admission of old photographs of him dressed in a blue uniform
9 recognizable as prison garb violated his right to due process. He asserts that the photographs effectively
10 informed the jury that he had previously been sentenced to prison and were unduly prejudicial.

11 The state court denied petitioner's claim, finding that the photographs, although cumulative,
12 corroborated other evidence establishing petitioner's identity as the shooter. *Id.* at *21. Observing that
13 the trial court had found that the photos would not identify petitioner as an inmate, the court concluded
14 that their admission did not violate due process. *Id.*

15 This Court concludes that the admission of the photographs was not so prejudicial that it infected
16 the fairness of petitioner's trial. *See Kernan*, 197 F.3d at 1031. Also, as in the previous claims,
17 petitioner has failed to demonstrate that the state court decision rejecting petitioner's claim constituted
18 an unreasonable application of clearly established federal law. Petitioner's claim lacks merit and is
19 denied.

20
21 **E. Claim VI**

22 Petitioner alleges that the trial court's admission of Norteno affiliate Ralph Castillo's testimony
23 that on several occasions, he observed petitioner in possession of a handgun violated his right to due
24 process. He asserts that that the handgun was unrelated to the charged offense and was prejudicial.

25 The state court denied petitioner's claim, finding that petitioner's "possession of guns of the
26 same caliber as the murder weapon raises at least some inference of his guilt." *Casique*, 2009 WL
27 1508463 at *22. The court acknowledged that the probative value of this testimony was not compelling,
28 but was sufficient to justify admission of the evidence. *Id.*

1 This Court concludes that evidence of petitioner’s gun possession gave rise to a reasonable
2 inference of his guilt. Accordingly, the admission Castillo’s testimony regarding petitioner’s gun
3 possession was not so prejudicial that it infected the fairness of petitioner’s trial. *See Kernan*, 197 F.3d
4 at 1031. Petitioner’s claim lacks merit and is denied.

5
6 **F. Claim VII**

7 Petitioner alleges that the trial court erroneously admitted portions of Ralph Castillo’s prior
8 extrajudicial statements to Sergeant Dudek as prior consistent statements in violation of petitioner’s
9 right to due process. At trial, Castillo admitted that he had previously testified that petitioner did not
10 tell him that Lee was selling drugs for him, but asserted that he had been “in error,” and that he had, in
11 fact, previously truthfully told Dudek that petitioner had admitted killing Lee for failure to repay a
12 \$2,000 drug debt. Petitioner asserts that Castillo was improperly permitted to bolster his testimony with
13 self-serving statements.

14 The state court rejected this claim on the grounds that Castillo’s statements were properly
15 admitted for rehabilitation purposes after the defense contested Castillo’s credibility by implying that
16 he was fabricating evidence in order to obtain favorable treatment in his own criminal case. *Casique*,
17 2009 WL 1508463 at *23. The court found that the prosecution was entitled to present evidence
18 establishing that Castillo’s testimony was consistent with statements he made before he entered any
19 agreements with the government. *Id.*

20 This Court concludes that the admission of Castillo’s prior statements was proper and did not
21 infect the fairness of petitioner’s trial. *See Kernan*, 197 F.3d at 1031. Petitioner’s claim lacks merit and
22 is denied.

23
24 **G. Claim IX**

25 Petitioner alleges that trial counsel provided ineffective assistance by failing to call eyewitness
26 Tammy Gonzalez, “who saw the perpetrators at the time of the murder, neither of whom was petitioner.”
27 Pet’n at 6a. The Supreme Court of California denied this claim without comment when it ruled on ruled
28 on petitioner’s state habeas petition. Resp’s Exh. I.

1 Claims of ineffective assistance of counsel are examined under *Strickland v. Washington*, 466
2 U.S. 668 (1984). In order to prevail on a claim of ineffectiveness of counsel, the petitioner must
3 establish two factors. First, he must establish that counsel’s performance was deficient, i.e., that it fell
4 below an “objective standard of reasonableness” under prevailing professional norms, *id.* at 687–68,
5 “not whether it deviated from best practices or most common custom,” *Harrington v. Richter*, 131 S.
6 Ct. 770, 788 (2011) (citing *Strickland*, 466 U.S. at 650). “A court considering a claim of ineffective
7 assistance must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’
8 of reasonable professional assistance.” *Richter*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 689).
9 Second, he must establish that he was prejudiced by counsel’s deficient performance, i.e., that “there
10 is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding
11 would have been different.” *Strickland*, 466 U.S. at 694. A reasonable probability is a probability
12 sufficient to undermine confidence in the outcome. *Ibid.* Where the defendant is challenging his
13 conviction, the appropriate question is “whether there is a reasonable probability that, absent the errors,
14 the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 695. Overall, “the standard
15 for judging counsel’s representation is a most deferential one.” *Richter*, 131 S. Ct. at 788.

16 Petitioner’s ineffective assistance claim fails because he fails to provide an affidavit outlining
17 Gonzalez’s contemplated testimony, or establishing that she would have testified at trial. *Allen v.*
18 *Woodford*, 395 F.3d 979, 1002 n.2 (9th Cir. 2005), *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000),
19 *United States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988). Petitioner’s claim is speculative.
20 Accordingly, it lacks merit and is denied.

21
22 **H. Claim X**

23 Petitioner alleges that his trial counsel provided ineffective assistance by failing to present
24 evidence that “Joker” paraphernalia, including a Joker statue, seized from his residence “more than three
25 years after the murder were family knickknacks, entirely unrelated to any drug symbols or gang
26 affiliation.” Pet’n at 6a. The Supreme Court of California denied this claim without comment when
27 it ruled on ruled on petitioner’s state habeas petition. Resp’s Exh. I.

28 As in the previous claim, petitioner fails to provide an affidavit from a family member or other

1 witness who would testify that the Joker paraphernalia were, in fact, family knickknacks. Moreover,
2 petitioner fails to demonstrate any inconsistency between the paraphernalia in fact being family
3 knickknacks, and his gang membership and drug affiliation – both could be true. Petitioner thus fails
4 to establish a reasonable likelihood that the presentation of the missing evidence would have changed
5 the outcome of his trial. *Strickland*, 466 U.S. at 694. Petitioner’s claim lacks merit and is denied.

6
7 **I. Claim XI**

8 Petitioner alleges that stringent security measures during trial, including the wandering of court
9 spectators with a metal detector in full view of the jurors, violated his right to due process. The
10 Supreme Court of California denied this claim without comment when it ruled on ruled on petitioner’s
11 state habeas petition. Resp’s Exh. I.

12 The use of security measures can deny a defendant his right to a fair trial if the scene presented
13 to jurors is “inherently prejudicial.” *Holbrook v. Flynn*, 476 U.S. 560, 572 (1986). If the defendant fails
14 to show actual prejudice, however, the inquiry is over. *Id.*

15 Here, petitioner fails to demonstrate that the wandering of spectators was inherently prejudicial.
16 While certain security measures such as shackling, or requiring a defendant to wear prison garb at trial,
17 focus the jury’s attention on the defendant’s dangerousness and have been found to be prejudicial, other
18 measures, such as the presence of armed guards in the courtroom, are commonplace – jurors might
19 easily believe that the guards are there to protect against disruption. *Id.* at 567-69. Petitioner has failed
20 to establish that the wandering of spectators presented an unacceptable risk of “impermissible factors
21 coming into play,” and branded him with an “unmistakable mark of guilt.” *Id.* at 571.

22 Petitioner’s claim lacks merit and is denied.

23
24 **CONCLUSION**

25 The state court’s adjudication of petitioner’s claims did not result in a decision that was contrary
26 to, or involved an unreasonable application of, clearly established federal law, nor did it result in a
27 decision that was based on an unreasonable determination of the facts in light of the evidence presented
28 in state court proceedings. Accordingly, the petition is **DENIED**. The Clerk shall enter judgment in

1 favor of respondent and close the file.


2 Furthermore, a certificate of appealability will not issue. Reasonable jurists would not “find the
3 district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529
4 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from the Court of Appeals.

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6 **IT IS SO ORDERED.**

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8 Dated: January 10, 2013



SUSAN ILLSTON
United States District Judge

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