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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TARVEY REGO,  
Petitioner,

v.

STU SHERMAN,  
Respondent.

Case No. 14-cv-00187-VC

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS AND  
MOTION FOR EVIDENTIARY  
HEARING**

Re: Dkt. Nos. 1, 21

Rego brings this habeas petition to challenge his first-degree murder conviction. Because none of Rego's claims warrants habeas relief, the petition is denied. Rego's motion for an evidentiary hearing is also denied.

Ineffective Assistance of Counsel

To grant habeas relief based on ineffective assistance, this Court must be convinced that any reasonable judge would be compelled to conclude that the performance of Rego's trial counsel was deficient and that Rego was prejudiced as a result. *See Harrington v. Richter*, 562 U.S. 86, 102-03 (2011).

Rego contends he received ineffective assistance of counsel in a number of ways. First, he asserts his lawyer failed to present evidence suggesting that he wasn't aiding the Salas brothers in a robbery attempt when he killed Camacho. For example, Rego contends his lawyer should have presented evidence suggesting that the two men who started the robbery attempt with Ponce were not the Salas brothers. But as discussed in the opinion of the California Court of Appeal on direct review, there was also a good deal of evidence that the robbers were indeed the Salas brothers. *People v. Rego*, No. A130047, 2012 WL 2785223, at \*1, 10 (Cal. Ct. App. July 10, 2012) (unpublished). In light of that, the state courts could reasonably have concluded that the decision by Rego's lawyer to focus on imperfect self-defense, rather than focusing on the less credible

1 argument that someone other than the Salas brothers initiated the robbery attempt, was a tactical  
2 decision within the wide range of reasonableness. *See Strickland v. Washington*, 466 U.S. 668,  
3 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential.").

4 Rego also cites evidence his lawyer could have presented to show that the robbery attempt  
5 ended before Rego appeared on the scene and killed Camacho. However, such evidence was in  
6 fact presented, similar in kind to the evidence Rego now contends was omitted. And Rego's  
7 lawyer relied on the evidence that was presented when arguing to the jury that Rego was not guilty  
8 of felony murder. But as the California Court of Appeal explained on direct appeal, there was  
9 sufficient evidence to support the jury's conclusion that the robbery attempt was not over (and that  
10 Rego therefore killed Camacho in furtherance of it). *See Rego*, 2012 WL 2785223, at \*12. This  
11 Court cannot conclude that any reasonable judge would be compelled to find a Sixth Amendment  
12 violation in trial counsel's failure to present additional evidence on this point. *See Harrington*, 562  
13 U.S. at 102-03.<sup>1</sup>

14 Rego also contends his trial counsel was ineffective for failing to request an instruction on  
15 "heat of passion" and "provocation," but the contrary conclusion by the California Court of Appeal  
16 on direct review was not unreasonable, for the reasons stated by that court. *See Rego*, 2012 WL  
17 2785223, at \*9. Relatedly, it was not unreasonable for the state courts to reject Rego's argument  
18 that his lawyer was ineffective for failing to object to the prosecutor's statements about the law  
19 during closing arguments, given that the jury was correctly instructed. *See United States v.*  
20 *Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993).

21 Prosecutorial Misconduct

22 Rego contends the prosecutor engaged in misconduct by presenting misleading evidence  
23 and argument that the attempted robbery was committed by the Salas brothers and that the party  
24 guests were connected with a rival gang. But as discussed in the Court of Appeal's opinion on  
25 direct review, there was sufficient evidence that the Salas brothers initiated the robbery attempt.  
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27 <sup>1</sup> The same is true of defense counsel's failure to present video evidence of Ponce's failure to  
28 identify the Salas brothers in a lineup, because the jury was already aware that Ponce did not  
identify them as his accomplices in the attempted robbery.

1     *See Rego*, 2012 WL 2785223, at \*1, 10. And as the Court of Appeal noted with respect to the  
2     gang enhancement, what mattered is not whether the party guests actually were members of a rival  
3     gang, but whether Rego perceived Camacho to be a member of a rival gang. *Id.* at \*3 n.6. There  
4     was ample evidence of the latter. Therefore, the state courts could reasonably have concluded that  
5     Rego has not shown that testimony heard by the jury was actually false, or that the prosecutor  
6     knew or should have known it was false, or that the allegedly false testimony was material. *See*  
7     *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Hein v. Sullivan*, 601 F.3d 897, 908 (9th Cir. 2010).

8             Denial of Motion to Bifurcate and Allowing in Gang Evidence

9             Rego contends the trial court's denial of his motion to bifurcate the trial for purposes of  
10     considering the gang enhancement under Cal. Penal Code § 186.22, which resulted in the  
11     admission of prejudicial gang evidence, violated his due process right to a fair trial. But the Court  
12     of Appeal's conclusion on direct review that the trial court did not err is not unreasonable. *See*  
13     *Rego*, 2012 WL 2785223, at \*4-5. Rego certainly has not shown that any reasonable judge would  
14     be compelled to conclude that the admission of the gang evidence "was arbitrary or so prejudicial  
15     that it rendered the trial fundamentally unfair." *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir.  
16     1995).

17             Failure to Instruct Jury on Heat of Passion and Provocation

18             For the reasons stated by the California Court of Appeal on direct review, the trial court's  
19     failure to instruct the jury *sua sponte* on "heat of passion" and "provocation" likely did not  
20     constitute reversible error. *See Rego*, 2012 WL 2785223, at \*6-9. Certainly Rego has not shown  
21     that any reasonable judge would be compelled to conclude otherwise. Furthermore, that an  
22     instruction may have been incorrect under state law typically provides no basis for habeas relief.  
23     *See Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991).

24             Insufficiency of the Evidence

25             Claims based on insufficiency of the evidence "face a high bar in federal habeas  
26     proceedings." *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012) (per curiam). Rego asserts there  
27     was insufficient evidence to support a conviction for felony murder, arguing that the attempted  
28     robbery was complete before he killed Camacho. But as the California Court of Appeal explained

1 on direct review, there was evidence to the contrary. *Rego*, 2012 WL 2785223, at \*12. Rego also  
2 contends there was insufficient evidence to support a conclusion that his stabbing of Camacho was  
3 premeditated, but again the California Court of Appeal explained to the contrary on direct review.  
4 *Id.* In particular, the Court of Appeal discussed the evidence that Rego went into the kitchen to get  
5 a knife and went downstairs even though his girlfriend urged him not to. *Id.* It was not  
6 objectively unreasonable for the Court of Appeal to conclude that the evidence was sufficient to  
7 support a conclusion that Rego was guilty of felony murder and premeditated murder.

8 Court of Appeal's Opinion

9 Rego argues he was denied his right to a fair appeal by the California Court of Appeal's  
10 misreading of the record, distortion of facts, and assumptions. This claim, however, repeats many  
11 of the same arguments rejected above. The state court decision rejecting this claim was not  
12 objectively unreasonable.

13 Motion for Evidentiary Hearing

14 Rego requests an evidentiary hearing. But he fails to indicate what evidence he would  
15 present at such a hearing and how his allegations, if proven, would entitled him to relief. *See*  
16 *Williams v. Calderon*, 52 F.3d 1465, 1484 (9th Cir. 1995). His motion is therefore denied.

17 The Clerk shall enter judgment in favor of the respondent.

18 **IT IS SO ORDERED.**

19 Dated: September 24, 2015



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VINCE CHHABRIA  
United States District Judge