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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEVEN WES FARRISH,
Petitioner,
v.
STU SHERMAN, et al.,
Respondents.

Case No. [14-cv-01263-EMC](#)

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

Docket No. 18

In March 2010, a jury found Petitioner Steven Wes Farrish guilty of the murder of Tiyani Cole and the attempted murder of Dashawn Smith. *See* Docket No. 24-12 (RT at 2584-85). Mr. Farrish appealed his conviction in state court and, after his appeal was denied, filed a petition for a writ of habeas corpus with this Court. *See* 28 U.S.C. § 2254. Mr. Farrish then moved for, and was granted, a stay of proceedings in this case so that he could exhaust an additional claim in state court. After Mr. Farrish sought and was denied relief in state habeas proceedings, proceedings in this Court were reopened, and Mr. Farrish filed with this Court an amended habeas petition. The amended petition is currently pending before the Court. Having considered the papers submitted and the accompanying record evidence, the Court hereby **DENIES** Mr. Farrish’s request for habeas relief.

I. FACTUAL & PROCEDURAL BACKGROUND

Mr. Farrish was convicted based on events that took place in Richmond, California, in May 2008. The testimony at his trial has been summarized by the California appellate court in its decision *People v. Farrish*, No. A129772, 2012 Cal. App. Unpub. LEXIS 6911 (Cal. Ct. App. Sept. 24, 2012). To wit: On the afternoon of May 12, 2008, police officers were dispatched to the Hilltop neighborhood of Richmond to investigate reports of a shooting. Officers discovered the

1 body of Mr. Cole – also known as “Slim” – in the side yard of a house at 2993 Gilma.

2 Mr. Cole’s mother, Cassandra McElveen, was at the scene shortly after the shooting. As
3 she was speaking to a police officer, she saw a car drive by with Mr. Smith sitting in the front
4 passenger seat. Because she knew that Mr. Smith had been with Mr. Cole earlier in the day, she
5 alerted the officer who then stopped the car and spoke to Mr. Smith. Mr. Smith told the officer
6 that he and Mr. Cole had been walking near the intersection of Shane and Groom when Mr.
7 Farrish drove by in a black vehicle. According to Mr. Smith, Mr. Farrish stopped the car, got out,
8 and started shooting at him and Mr. Cole. Mr. Smith and Mr. Cole ran away together for a while
9 but then split up. Upon learning that Mr. Cole had been killed, Mr. Smith broke down crying. Mr.
10 Smith told Mr. Cole’s mother that Mr. Farrish had been shooting at them. Mr. Smith told the
11 police that he could pick the shooter out of a photo lineup. The police then handcuffed Mr. Smith
12 and put him in the back of a patrol car so that bystanders would not think that he was “snitching.”

13 Mr. Smith was taken to a police station where he was interviewed. His interview was
14 video recorded. During the interview, Mr. Smith stated that he and Mr. Cole had seen Mr. Farrish
15 at a local McDonald’s. Later, as Mr. Smith and Mr. Cole were walking in the Hilltop
16 neighborhood, a black car came by with Mr. Farrish in the driver’s seat and another man in the
17 passenger’s seat. Mr. Farrish got out and fired multiple shots at Mr. Smith and Mr. Cole. Mr.
18 Smith and Mr. Cole ran away together for about a block but then separated. Mr. Smith hid in a
19 back yard on Gilma. A short time later, Mr. Smith heard more gunshots. Mr. Smith had his
20 girlfriend pick him up, and they drove by the scene where he was stopped by the police.
21 According to Mr. Smith, at the time of the shooting, neither he nor Mr. Cole was carrying a gun,
22 although Mr. Cole had in the past. Mr. Smith added that Mr. Cole carried on his person a .45-
23 caliber bullet as a kind of good-luck charm.

24 At the end of the police interview, Mr. Smith identified Mr. Farrish as the shooter from a
25 photo lineup. When asked why Mr. Farrish might have shot at them, Mr. Smith indicated that it
26 was related to Mr. Farrish’s brother, Joe, being put in jail for shooting someone and Mr. Cole’s
27 brother snitching on Joe.

28 At trial, the prosecution called upon Mr. Smith to testify. In contrast to what he had told

1 Mr. Cole's mother and the police, Mr. Smith now claimed ignorance with respect to significant
2 details on the day of the shooting, including who the shooter was. The prosecution, therefore,
3 played the video-recorded interview of Mr. Smith, taken on the day of the shooting.

4 At trial, the prosecution also offered two eyewitnesses who were at or close to the scene.
5 One witness was a bus driver who had stopped her bus at the corner of Shane and Groom. She
6 saw Mr. Smith and Mr. Cole running but did not see either one carrying a gun. She also saw a
7 black car and a gun poking out the driver's side window. The car went down Gilma and she heard
8 gunshots moments later. The other witness lived on Gilma and heard gunshots as he was getting
9 into his car. He saw Mr. Smith and Mr. Cole running and then splitting up. Like the bus driver,
10 the witness did not see either one carrying a gun. The witness started to drive when he saw a
11 black car coming around the corner. The car stopped in the middle of the street, near 2993 Gilma,
12 and the witness heard gunshots.

13 The police examining the crime scene found no guns near Mr. Cole's body or along the
14 route where he and Mr. Smith had run. Near the corner of Shane and Groom, the police found one
15 spent nine-millimeter casing and an unfired .45-caliber cartridge. At 2993 Gilma, the police found
16 bullet impact points in a wooden fence and on or near the front porch, as well as some bullet
17 fragments around the house. All the bullets and holes were consistent with medium-caliber
18 ammunition, such as a nine-millimeter, and inconsistent with a .45 caliber ammunition.

19 The evening of the shooting, the police searched Mr. Farrish's residence. Among other
20 things, the police found a letter written to Mr. Farrish from his brother, Joe. The letter stated in
21 part: "I want you to be cool out there. Don't do nothin' stupid. And watch out for them suckas,
22 especially that nigga Slim [*i.e.*, Mr. Cole]."

23 Mr. Farrish was arrested early morning on May 13, 2008. Mr. Farrish's hands and clothing
24 were tested for gunshot residue. Although there were no traces of such residue on the swab taken
25 from Mr. Farrish's hands, there were particles of such residue on his shorts.

26 To explain the motive behind the shooting, the prosecution offered several witnesses,
27 including Mr. Cole's twin brother, Tavani Cole. Tavani testified that he and Mr. Cole knew Mr.
28 Farrish and Mr. Farrish's brother, Joe, through school. One day, in March 2005, Mr. Cole told

1 Tavani, Joe, and a third person (Pierre Hudson) that a man named Rashad Narcisse had paid
2 someone to beat him up. Tavani, Joe, and Mr. Hudson later drove to Mr. Narcisse's house. Joe
3 got out of the car with a gun while Tavani and Mr. Hudson left. Joe later called Tavani and said
4 that he had killed Mr. Narcisse. Subsequently, Tavani, Joe, and Mr. Hudson were arrested.
5 Tavani and Mr. Hudson agreed to plead guilty to accessory manslaughter. Tavani also agreed to
6 testify at Joe's trial but, prior to trial, Joe pled guilty.

7 According to Tavani and Mr. Cole's mother (Ms. McElveen), during the court proceedings
8 related to the 2005 murder of Mr. Narcisse, Mr. Farrish and a family friend known as Dominic
9 called Mr. Cole a snitch.

10 According to Tavani, several years later, in February 2008 (*i.e.*, a few months before Mr.
11 Cole was killed), Mr. Cole called Tavani and claimed that Mr. Farrish had tried to kill him by
12 shooting at a rental car he had been driving. Mr. Cole's girlfriend at the time (Razalyn Nickola)
13 also testified at trial about this incident, stating that Mr. Cole had also told her about Mr. Farrish
14 shooting at the rental car. Ms. Nickola eventually informed the police about the shooting, and a
15 police officer confirmed that he had seen bullet holes in the rental car.

16 The defense's case largely revolved around a self-defense theory. In support of this theory,
17 several witnesses testified, including Albert Broadway. Mr. Broadway testified that, during the
18 relevant period, he was living with his godmother (Angel Montgomery) on Groom. On the day in
19 question, Mr. Broadway and Mr. Farrish were driving in the black car to the house on Groom.
20 When they got to the intersection of Shane and Groom, they saw Mr. Smith and Mr. Cole. Mr.
21 Smith stepped off the curb and displayed a gun. Mr. Broadway thought Mr. Smith was going to
22 kill him so he crouched down in the footwell of the car. Mr. Broadway heard gunshots but he was
23 not sure who was firing. He did not see Mr. Farrish with a gun. At some point, Mr. Farrish's car
24 door opened but Mr. Broadway did not know if Mr. Farrish got out of the car. Eventually, Mr.
25 Farrish sped away, while Mr. Broadway remained crouched in the car footwell until they arrived
26 at his house on Groom.

27 Mr. Broadway admitted that he did not describe his version of the events to anyone until he
28 talked to a defense investigator about a year and a half after the shooting. However, Ms.

1 Montgomery testified at trial that, the day of the shooting, Mr. Broadway came home looking
2 shaken up and told her that somebody was trying to kill him. Ms. Montgomery also testified that,
3 in February 2008 (*i.e.*, a few months before Mr. Cole was killed), Mr. Farrish and her daughter
4 (also Mr. Farrish's girlfriend) were sitting in front of the house on Groom when a car drove by and
5 shots were fired at the house. According to Ms. Montgomery, Mr. Cole was the driver of the car.

6 Finally, a woman (Victoria Cook) who had met Mr. Cole through her former boyfriend
7 (Dominique Cole) testified that, on two occasions in 2008, she had been with Mr. Cole, and Mr.
8 Cole stated that he wanted to kill Mr. Farrish. Ms. Cook admitted that she never told the police
9 about Mr. Cole's statement and only told a defense investigator about the incidents in July or
10 September 2009 after Dominique had befriended Mr. Farrish in jail.

11 In addition to the above testimonial evidence, the defense submitted evidence showing that
12 Mr. Cole had been convicted in 2007 for possession of a concealed weapon by a person previously
13 convicted of the same crime. Also, the parties stipulated to certain facts related to a police
14 officer's search of Mr. Cole's car in 2006. The officer discovered a Colt .45 semiautomatic
15 handgun in the car, and Mr. Cole told the officer that he carried the gun because people were
16 looking to retaliate against him for a murder involving his brother (Tavani).

17 As noted above, ultimately, the jury convicted Mr. Farrish of murder (with respect to Mr.
18 Cole) and attempted murder (with respect to Mr. Smith). Mr. Farrish appealed but a California
19 appellate court denied the appeal in September 2012. *See Farrish*, 2012 Cal. App. Unpub. LEXIS
20 6911. In December 2012, the California Supreme Court summarily denied review. *See Ex. I*
21 (order).

22 In March 2014, Mr. Farrish initiated this habeas case, asserting the same basic claims as he
23 did in his direct appeal. *See Docket No. 1* (petition). Proceedings, however, were stayed so that
24 Mr. Farrish could exhaust additional claims in state court. *See Docket No. 6* (order).

25 In December 2015, Mr. Farrish filed a state habeas petition, asserting that a declaration
26 from an acquaintance (Deandre Alexander) constituted newly discovered evidence establishing
27 his actual innocence. In April 2016, a state superior court denied the state habeas petition. *See*
28 *Resp.'s Ex. J* (order). Mr. Farrish thereafter sought relief from an appellate court and the

1 California Supreme Court. Mr. Farrish’s petitions were summarily denied in each instance. *See*
2 Resp.’s Exs. L, Q (docket sheet and order).

3 Subsequently, the stay of proceedings in the pending action was lifted. *See* Docket No. 17
4 (order). In November 2016, Mr. Farrish filed an amended habeas petition. The government has
5 responded, and Mr. Farrish has filed a traverse in reply.

6 II. DISCUSSION

7 Mr. Farrish’s case is governed by the Antiterrorism and Effective Death Penalty Act of
8 1996 (“AEDPA”). Under AEDPA, habeas relief may be granted if the state court proceedings
9 “resulted in a decision that was contrary to, or involved an unreasonable application of clearly
10 established Federal law as determined by the Supreme Court of the United States” or resulted in a
11 decision that was “based on an unreasonable determination of the facts in light of the evidence
12 presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)-(2). In the instant case, Mr.
13 Farrish argues only the former – *i.e.*, that the relevant state court decision was contrary to or an
14 unreasonable application of clearly established federal law.

15 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court
16 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if
17 the state court decides a case differently than [the] Court has on a set of materially
18 indistinguishable facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

19 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if
20 the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions
21 but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A] federal
22 habeas court may not issue the writ simply because that court concludes in its independent
23 judgment that the relevant state-court decision applied clearly established federal law erroneously
24 or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. “A federal habeas
25 court making the ‘unreasonable application’ inquiry should ask whether the state court’s
26 application of clearly established federal law was ‘objectively unreasonable.’” *Id.* at 409.

27 The state-court decision to which § 2254(d) applies is the “last reasoned decision” of the
28 state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Barker v. Fleming*, 423 F.3d

1 1085, 1091-92 (9th Cir. 2005). “When there has been one reasoned state judgment rejecting a
2 federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest
3 upon the same ground.” *Ylst*, 501 U.S. at 803; *see also Harrington v. Richter*, 562 U.S. 86, 99
4 (2011) (stating that, “[w]hen a federal claim has been presented to a state court and the state court
5 has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the
6 absence of any indication or state-law procedural principles to the contrary”). When the state
7 court has denied a federal constitutional claim on the merits without explanation, the federal
8 habeas court “must determine what arguments or theories supported or . . . could have supported,
9 the state court's decision; and then it must ask whether it is possible fairminded jurists could
10 disagree that those arguments or theories are inconsistent with the holding in a prior decision of
11 [the U.S. Supreme] Court.” *Id.* at 102.

12 A. Mr. Farrish’s Arguments

13 In his habeas petition, Mr. Farrish makes the following arguments:

- 14 (1) That his rights to due process, a fair trial, and an impartial jury were violated because the
15 trial court failed to conduct an inquiry related to comments made by Juror No. 10;
- 16 (2) That his right to due process was violated because the prosecution improperly commented
17 on witness credibility during the opening statement and closing argument;
- 18 (3) That his right to due process was violated because the trial court did not instruct the jury on
19 how to evaluate evidence of third-party threats against prosecution witnesses;
- 20 (4) That his rights to due process and a fair trial were violated because the trial court
21 erroneously instructed the jury that character evidence could be used as evidence of
22 character or propensity (*i.e.*, not for a noncharacter purpose);
- 23 (5) That his rights to due process and jury unanimity were violated because the trial court
24 refused to give an instruction on “unanimity of act”;
- 25 (6) That his due process rights were violated when the trial court refused the jury’s request to
26 define the concept of “kill zone” (for the attempted murder charge); and
- 27 (7) That the state habeas court violated his right to due process by denying his petition based
28 on actual innocence without an evidentiary hearing.

1 B. Juror No. 10's Comments¹

2 Mr. Farrish's first argument is that his rights to due process, a fair trial, an impartial jury
3 were violated because the trial court failed to conduct an inquiry related to comments made by
4 Juror No. 10. *See* Am. Pet. at 2. The background for this argument is as follows.

5 Jury selection began on February 26, 2010. On that day, the trial court instructed the entire
6 venire panel that

7 [i]t will be up to you to determine what the facts are in this case, and
8 then you will base that on the evidence that is presented in this
9 courtroom and from no other place, not from the newspaper, not
from the TV, not from the Internet, not from friends or family, but
from this courtroom and this courtroom only.

10 Ex. A (RT at 225-26). The trial court further instructed that

11 [y]ou may not research this case on the Internet or anywhere else. It
12 is extraordinarily important that you not discuss this case, even the
13 nature of the charges, or anything that you have discovered, what
14 little you have discovered, about it just through the process of the
15 questionnaire or our discussions, with anyone, amongst yourselves,
16 with anyone else, because we'll start this whole process all over
again, and you can see already how much time it has taken just to
get this far. And we have done a lot of work before you even got
here. I can't stress this enough. This takes a tremendous amount of
time to give both sides a fair hearing and that's what we're about.

17 So please take this to heart. Don't discuss it with anyone. Don't do
any research. Don't go on Google about this.

18 Ex. A (RT at 232-33). The trial court repeated similar admonitions during voir dire. *See, e.g.*, Ex.
19 A (RT at 254) ("[W]e need the decision based only on the evidence presented in this courtroom,
20 not from the newspaper article, and not from the Internet."); Ex. A (RT at 254) ("The information,
21 anything that comes from outside, has not been tested."); Ex. A (RT at 268) ("[W]e're going to
22 break I'm going to remind you each and every time you leave the room, do not discuss the
23 case."); Ex. A (RT at 324) ("[W]e're going to be in recess. . . . [¶] So please remember the
24 admonitions. You may not discuss the case with anyone.").

25 On Thursday, March 4, 2010, jury selection was completed. *See* Ex. A (RT at 728, 864).

26 On Monday, March 8, 2010, the Court stated on the record (in the jury's absence) that it

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28 ¹ It appears that, at the time of the comments, Juror No. 10 was not yet impaneled on the jury and thus was also known as (Prospective) Juror No. 42. *See* Ex. A (RT at 965).

1 had received a letter, purportedly written by an anonymous juror. *See* Ex. A (RT at 892 *et seq.*).

2 The content of the letter was as follows:

3 March 10, 2010,

4 Dear Honorable,

5 All the jurors were instructed not to discuss anything related to our
6 present courtroom issue but [Juror No. 10] was freely telling his
7 lady friend about it during lunch last Tuesday [March 2]! He was
8 too opinionated about how bad the court system has been managed,
9 and other people around the restaurant tables could also hear him!

10 Is it OK to talk about our courtroom issues to just a close friend?
11 Thank you very much for reading this concern.

12 Respectfully,

13 A juror.

14 Ex. B (CT at 673).

15 To the parties, the trial court commented on the letter as follows:

16 I have received in my in-basket in chambers [an] envelope addressed
17 to me by, allegedly, an anonymous juror. I say “allegedly” because
18 there is no proof that it’s from a real juror. I am very concerned
19 about how I got there, since absolutely no one on my staff, or
20 anyone who has access to my office, says they had contact with any
21 juror, nor with the letter. . . .

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23 [The letter] came during a very narrow window of time on Thursday
24 afternoon.

25 I’m making the letter a part of the record. And it alleges that one of
26 our prospective – or one of our jury was apparently telling a lady
27 friend about something having to do with the case, although they
28 don’t know anything about the case, since we have only gone
through jury selection – and was opinionated about how bad the
court system has been managed. I don’t know what that means,
since the letter doesn’t say.

The letter is dated March 10th, which is interesting, since today is
March the 8th, and the letter was received on March the 4th.

The grammar is poor in the letter. The date it – the date of the letter
is a different font than the actual letter itself.

I don’t give the letter much credence because of all the above facts,
and because of the way it was delivered. I will note for the record
that I have told this jury a number of times that if they have any

1 questions about anything, those questions should be directed to my
2 bailiff, who has made himself available, to my bailiff or any of my
3 staff, all of whom have made themselves available. And whoever
delivered this did not avail themselves of that, which also makes me
suspicious of the validity of this, and that it came actually from a
juror.

4 What I will do is speak with Mr. – the one juror that is named here,
5 and that’s the other thing that is puzzling about this. It names the
6 juror by both first and last names, misspelling the name. The only
7 time our jurors were named out loud by both first and last names
8 [was] when my clerk read off those names when they were seated,
9 and that is the only time. And it’s not a common name. So in order
10 for someone to remember that name, they would have had to have a
11 pretty extraordinary memory, or had been writing the names down,
12 because our jurors don’t have notebooks at this point. So that’s a
13 little unusual, to say the least, since the name is hardly common.

14 So what I’m going to do is inquiry of that juror individually when,
15 that is named in the letter individually, when they come in at 1:30,
16 and then move on, depending on what he has to say.

17 But as I said, because of the content of the letter, as well as the
18 manner in which I received it, I’m not putting a whole lot of
19 credence in it. I am very concerned about how I received it and how
20 it managed to make it all it [sic] the way into my in-basket in my
21 private chambers without anyone who validly has access to my
22 chambers having any knowledge of it, or having any contact with
23 any of our jurors during that very small window of time when it
24 appeared there.

25 Ex. A (RT at 892-94).

26 Later that afternoon, the trial court did question Juror No. 10, as promised. The court
27 informed Juror No. 10 that it had received information that “you were having a conversation
28 during a lunch last Tuesday discussing the court process, and it was with a female friend.” Ex. A
(RT at 966). Juror No. 10 identified the woman as his wife and stated that (1) “[s]he comes every
day with me to the court” and that (2) he was just discussing with her “the process in general.
Nothing specific about the case.” Ex. A (RT at 967). Juror No. 10 elaborated:

Usually, just about the jury selection process, because that’s what I
was involved with. You know, about how some people had been
there a week in the main 12, and then all of a sudden they got kicked
out. So it was kind of interesting, you know, that they would be in
the 12 and then out of the 12, so I mentioned that.

Ex. A (RT at 967). Juror No. 10 also referred to discussion of “a few other things about what
people do. I mean, you know, one guy works as a math teacher at St. Mary’s here. My wife went
to St. Mary’s in Minnesota. And she even had an application to come here.” Ex. A (RT at 967).

1 When the trial court asked if Juror No. 10 had talked about “[a]nything about the case itself
2 or anything that we have discussed here in court,” Juror No. 10 responded: “Oh, you know, not to
3 Google, not to look into it in the papers. I guess it came out that it was a murder trial. That’s all.”
4 Ex. A (RT at 967). In addition, he “said they asked the question about self-defense. I didn’t say
5 one way or the other what about it. I just said somebody did ask the question about self-defense.
6 That’s all.” Ex. A (RT at 968).

7 After the questioning of Juror No. 10, the trial court denied Mr. Farrish’s motion for a
8 mistrial based on the juror’s comments and further denied Mr. Farrish’s request that Juror No. 10
9 be removed from the jury and an alternate seated instead. The trial court did agree, however, that
10 an admonishment of some kind was necessary (although it disagreed over the content of the
11 admonishment). *See* Ex. A (RT at 968) (defense counsel asking for an admonishment that
12 “whatever happened during voir dire was perfectly legal, and that’s the way the voir dire goes[;]
13 [m]y concern is that he may be holding it against the defense”). The trial court stated:

14 [I]t requires an admonishment of all the jurors. I don’t want to
15 single him out, because I think that is counterproductive at this
16 point. We’re not far enough along where I need to admonish him
17 individually and alienate him. I don’t think that he has any way of
18 attributing what I have inquired about to either side [*i.e.*, prosecution
19 or defense]. He has no idea where my questions come from.

20 Ex. A (RT at 969).

21 When Mr. Farrish expressed concern that the juror’s comments “were directed to the
22 defense use of the peremptories,” the trial court responded:

23 Well, I think both sides left people on for quite a period of time and
24 then excused them. In fact, the defense passed a number of times
25 and then the People challenged them and vice versa. . . . So I don’t
26 think there’s any pattern here that can be attributed, and my
27 questions were very neutral and deliberately neutral so that there
28 wasn’t an attribution in terms of my questioning to either side.

 At this point he acknowledged that he – of what occurred, which is
 what I was interested in. I wanted to, in a very neutral way,
 ascertain exactly what happened, what was said, what was not said.

 I’m going to admonish the jurors in a rather strong way. I think they
 have seen him come in by himself. I think he got it, since he was
 singled out by being hauled in here by himself. I’m going to bring
 all our jurors in. I’m going to state the admonishment. And it will

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also explain why we're going to take a period of time. We're going to be doing other things, they won't necessarily know that. And that will take care of it.

Ex. A (RT at 969-70).

When the jury returned to the courtroom, the trial court made the following statement to the jury:

Ladies and gentlemen, before you get comfortable, let me welcome you back. And let me start out by – this was not how I intended to start out, but let me start out by talking about an issue that I talked about a lot last week during jury selection, and it looks like I have to start out by talking about it again.

I had to start out this afternoon by speaking to one of your number about our admonishment, my admonishment, not to discuss the case with anyone. And I'm going to have to start out again.

I can't impress upon you enough and – because this has raised an issue that I'm going to have to spend some time before we start the trial now on this this afternoon.

You may not discuss this case with anyone, and even the nature of the charges, anything that does on in this courtroom. There was an interesting article in the paper about this this weekend. Cases all across the country now – or courts all across the country now are having to admonish jurors for the very first time not to Google, not to Tweet, not to Face Book, not to blog about the cases that they sit on. We have never had to do this before. Cases are having to be tried all over again from scratch, because they're being thrown out of court because of this activity.

You saw how long it took to pick a jury. . . .

It's an unfortunate reality of our world today that there's instant . . . – instant communication. There's good parts of that in our world, but there are also some consequences of that. And the consequences of that in our world here are huge. And it means that we have to start over from scratch if people don't follow the rules about that. And that includes when you are not here your discussing this case with others. And that includes talking about the nature of the case, the issues that are involved in this case that you have heard about in this courtroom.

I don't know what else to emphasize to you that you can't talk about those things with your loved ones at home, during our breaks, at work, at the store, at church, at wherever it is that you spend your time. And I know it's very hard to do. I know how interesting this stuff is for those who aren't here. And I know how persistent people can be in wanting to know about it.

The best I can tell you is tell them the Judge said no. And sometimes that shuts it down. Because for them it's the Judge said

1 no. The answer has to be no, because there's just too much at stake
for everybody involved.

2 I'm going to start adding to my regular instructions that you can't
3 Google, and you can't Tweet, and you . . . – you can't Facebook.
You can't do any of those things.

4 When the case is all over, and I have excused you, then you can do
5 all those things, but not now. . . .

6 Ex. A (RT at 971-73).

7 The trial court subsequently excused the jury and made the following comment: “All right,
8 our jury has left. From the chagrined look on Juror Number 10's face I don't think this is going to
9 be an issue anymore.” Ex. A (RT at 973).

10 After the jury returned its verdict, Mr. Farrish moved for a new trial, arguing in part that
11 the trial court should have investigated the anonymous letter more thoroughly. *See* Ex. B (CT at
12 698); Ex. A (RT at 2614) (“request[ing] at this time that we have an evidentiary hearing to
13 determine, one, who the author of the note was, and, two, whether there was any juror impropriety
14 in the note ending up in the Court's inbox”). In response, the trial court noted that there was

15 quite a bit of discussion about this on the record after that was
16 discovered. And frankly, I was not convinced that that necessarily
17 came from a juror. It appeared in my chambers mysteriously. We
18 had a lot of discussion about it. And it could have come from a
19 number of sources, not necessarily a juror. We never discovered the
source of that, and despite the fact that I brought the sheriff's
department in to investigate. I was very concerned, because jurors
had absolutely no access to my chambers. There are limited people
who have access to my chambers.

20 I chose not to highlight it at the time. There's a full record of our
21 discussions about it, and my decisions with regard to how we were
going to handle it. And my decisions at that time stand.

22 Ex. A (RT at 2620).

23 In the pending habeas petition, Mr. Farrish argues that the trial court's actions violated his
24 constitutional rights because the trial court did not investigate whether any other jurors overheard
25 what Juror No. 10 had said and, if so, make an inquiry as to whether that “outside information”
26 affected those jurors' impartiality. *See, e.g.*, Am. Pet. at 3 (arguing that “[f]ederal due process . . .
27 requires state courts to conduct sufficient inquiry to determine whether jurors will be impartial
28 despite any information they may have seen, heard, or read about a case”; also invoking the right

1 to an impartial jury).

2 On direct appeal, the state appellate court does not appear to have addressed Mr. Farrish's
3 argument to the extent it was based on federal law. Rather, the court seems to have focused
4 instead on Mr. Farrish's state law argument only. In this regard, the court held that the lower court
5 had not

6 abused its discretion. Even assuming that the note was in fact
7 written by another juror who overheard Juror No. [10's] statements,
8 there is no evidence that Juror No. [10] shared any "outside
9 information." Juror No. [10] told his wife that it was a murder trial
and mentioned that someone asked a question about self-defense.
But, this was information that any juror present during voir dire
would know.

10 *Farrish*, 2012 Cal. App. Unpub. LEXIS 6911, at *32. As for the California Supreme Court,
11 because it summarily denied Mr. Farrish's appeal, it did not address with any specificity the merits
12 of Mr. Farrish's federal argument.

13 As noted above, when a state court has denied a federal constitutional claim on the merits
14 without explanation, the federal habeas court "must determine what arguments or theories
15 supported or . . . could have supported, the state court's decision; and then it must ask whether it is
16 possible fairminded jurists could disagree that those arguments or theories are inconsistent with
17 the holding in a prior decision of [the U.S. Supreme] Court." *Harrington*, 562 U.S. at 102.

18 Here, the government correctly notes that there is no Supreme Court precedent holding that
19 a trial court has an obligation to hold a hearing on potential juror bias anytime an issue regarding
20 impartiality is raised. *See Sims v. Rowland*, 414 F.3d 1148, 1153 (9th Cir. 2005) (stating that "the
21 Supreme Court has not yet decided whether due process requires a trial court to hold a hearing *sua*
22 *sponte* whenever evidence of juror bias comes to light"). Indeed, the Ninth Circuit has expressly
23 stated that prior Supreme Court cases "do not stand for the proposition that any time evidence of
24 juror bias comes to light, due process requires the trial court to question the jurors alleged to have
25 bias." Rather, we concluded that when read in combination, these [prior Supreme Court] cases
26 provide 'a flexible rule.'" *Id.* at 1155 (emphasis added); *see also Tracey v. Palmateer*, 341 F.3d
27 1037, 1044 (9th Cir. 2003) (stating that "[a]n evidentiary hearing is not mandated every time
28 there is an allegation of jury misconduct or bias[;] [r]ather, in determining whether a hearing must

1 be held, the court must consider the content of the allegations, the seriousness of the alleged
2 misconduct or bias, and the credibility of the source”).

3 Especially given the flexible approach, this Court cannot say that it was objectively
4 unreasonable for the trial court not to conduct an inquiry into whether other jurors overheard Juror
5 No. 10’s comments. Concern about juror impartiality was significantly undercut by several facts:
6 (1) that Juror No. 10’s statements did not constitute “outside information” as they referred to
7 matters to which the other jurors were already exposed to (including but not limited to the use of
8 peremptories) and (2) that Juror No. 10’s statements were not about the merits of the case (as
9 underscored by the fact that they were made while jury selection was still taking place).
10 Moreover, even if the anonymous letter were to be credited, at best, Juror No. 10 had engaged in
11 limited editorializing, *see* Ex. B (CT at 673) (letter, claiming that Juror No. 10 “was too
12 opinionated about how bad the court system has been managed”), and that was only about the
13 court process itself, and not the merits of the case. Accordingly, Mr. Farrish’s request for habeas
14 relief, as related to Juror No. 10’s statements, is denied.

15 C. Prosecutor’s Statements Regarding Witness Credibility

16 Mr. Farrish argues next that he is entitled to habeas relief because his right to due process
17 was violated when the prosecutor (1) improperly vouched for the credibility of Mr. Smith (a
18 prosecution witness and alleged victim with respect to the attempted murder charge) and (2)
19 improperly expressed his opinion that Mr. Broadway (a defense witness) was lying. As discussed
20 below, the Court does not find either argument persuasive.

21 1. Mr. Smith’s Credibility

22 With respect to Mr. Smith’s credibility, Mr. Farrish criticizes the prosecutor for comments
23 made during both the opening statement and closing argument. In his opening statement, for
24 example, the prosecutor discussed the video-recorded interview of Mr. Smith, taken on the day of
25 the shooting:

26 Needless to say this was an important person for the police to
27 interview. So they take him back to the Richmond police station,
28 where he is asked to give them the details of what had happened. I
wish it was not necessary, but unfortunately in this area of town it is
necessary, to surreptitiously videotape folks who are witnesses. And

1 this is no exception. [Mr.] Smith was videotaped as he was giving
his statement to the Richmond police department.

2 And he tells them pretty much a synopsis of exactly what I have told
3 you. There's no fabricating, there's no lying, there's no need to pull
it out of him, he's obviously shook.

4 Ex. A (RT at 1019-20). According to Mr. Farrish, this comment constituted improper vouching
5 for Mr. Smith's credibility in violation of Mr. Farrish's due process rights.

6 Then, during closing argument, the prosecutor again focused on the video-recorded
7 interview – especially in light of Mr. Smith's trial testimony where he claimed that he did not
8 remember significant details on the day of the shooting, including who the shooter was:

9 What about [Mr.] Smith? I mean, he's an actual witness, right?
10 Okay. Certainly, we want to hear what he has to say. [Mr.] Smith.
11 Before we just write off [Mr.] Smith, let's understand [Mr.] Smith
12 for a second. There is no way that you're going to get [Mr.] Smith
13 to come in here to court and give you any kind of cooperative
14 answers, as long as it's a public courtroom and you have got
15 Dominique and D Dog and the boys [*i.e.*, friends and/or associates
of Mr. Farrish] all hanging out in the back, there's just no way. And
I understand that. . . . There's a reason why the kid has to be taken
down there [to the police station] in handcuffs. There's a reason
why they videotape it. The rule of law is that we have to put [Mr.]
Smith on and let him say what he's going to say, and then, and only
then, can we show you the truth in that videotape.

16 Ex. A (RT at 2474-75). When defense counsel objected, the trial court overruled the objection
17 but, nevertheless, instructed the jury that “this is closing argument. As I have explained to you,
18 the attorneys argue their cases. The arguments aren't evidence.” Ex. A (RT at 2475).

19 The prosecutor then continued:

20 If you look at his videotape he is non-reflective. It is uncontrived.
21 Words are not being put into his mouth. He is giving a narrative
22 response, and he's giving a response at a point when he is
emotional. There isn't time for him to think up a story. Two years
haven't gone by.

23 Ex. A (RT at 2475). The prosecutor added:

24 Where we take witnesses that we have a pretty good idea, we know
25 that, come down the line, they're going to be have a lot of pressure,
and quite frankly, they're going to be uncooperative. So they're
26 videotaped. And when they're videotaped we put them on the stand
and then we play the videotape.

27 . . . It's the videotape that you need to look at. And it's in evidence.
28 But if you look at the video you can see, as I said, that he's
uncontrived. He's not spinning his wheels. He's not thinking up

1 answers. It's essentially unreflective. And I put to you that if [Mr.]
2 Smith had a gun [on that day], in reality, if we were talking about
3 real reality, [Mr.] Smith never would have come back. And [Mr.]
4 Smith never would have talked to the police. And if he had a gun
5 you would have seen him acting the fool on that videotape.

6 But no, he did come back, and he gave answers in a narrative form
7 by asking him what happened. And if you look at it, if you look at
8 it, you will see at some point Detective Johansen asked him, did
9 [Mr. Cole] have a gun? Now, [Mr. Smith] doesn't know what's out
10 there. [He] doesn't know what they found. But he asked – he was
11 asked, did [Mr. Cole] have a gun. He said, no, he didn't have a gun,
12 he had a bullet.

13 And then, quite honestly, hiding nothing, he is frank in saying, yeah,
14 [Mr. Cole] got arrested a couple of times with guns. And he stopped
15 carrying them, because he didn't want to get that trigger locked or
16 something. That's right out of his mouth. So he carried the bullet.

17 Ex. A (RT at 2475).

18 On direct appeal, Mr. Farrish argued that the above comments by the prosecutor
19 constituted improper vouching for the credibility of Mr. Smith in violation of Mr. Farrish's due
20 process rights. The state appellate court disagreed, stating that

21 [t]he prosecutor did not improperly vouch for [Mr.] Smith. Rather,
22 the prosecutor simply asked the jury to infer that [Mr.] Smith's
23 statements to police were credible because of [Mr.] Smith's
24 observable demeanor and the fact that he made them so shortly after
25 the shooting. The prosecutor also asked the jury to understand [Mr.]
26 Smith's trial testimony, which did not incriminate [Mr. Farrish], as
27 explained by the fact that his police interview had been circulating
28 in the neighborhood. The prosecutor did not suggest that his belief,
that [Mr.] Smith told the police the truth, was based on his own
personal investigation rather than the evidence presented at trial.
The challenged remarks were fair comment on the evidence

Farrish, 2012 Cal. App. Unpub. LEXIS 6911, at *41.

29 In evaluating the state appellate court's decision, the Court takes into account that, under
30 Supreme Court authority, a prosecutor can engage in "improper advocacy" and that argument must
31 be confined to "record evidence." *United States v. Young*, 470 U.S. 1, 7, 10 (1985) (noting that
32 "[p]rosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on
33 the defendant's guilt and offering unsolicited personal views on the evidence"). Thus, the Ninth
34 Circuit has explained that, while

35 prosecutors must have reasonable latitude to fashion closing
36 arguments, and thus can argue reasonable inferences based on the
37 evidence, *including that one of the two sides is lying*[,] . . . a

1 prosecutorial statement may nevertheless be considered
2 impermissible vouching *if it places the prestige of the government*
3 *behind the witness* by providing personal assurances of a witness's
4 veracity.

5 Vouching of that sort is dangerous precisely because a jury may be
6 inclined to give weight to the prosecutor's opinion in assessing the
7 credibility of witnesses, instead of making the independent judgment
8 of credibility to which the defendant is entitled.

9 *United States v. Weatherspoon*, 410 F.3d 1142, 1144 (9th Cir. 2005) (internal quotation marks
10 omitted and emphasis added).² Nevertheless, the Supreme Court has underscored that, to violate
11 due process, a prosecutor's remarks must "so infect[] the trial with unfairness as to make the
12 resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

13 In the instant case, it was not unreasonable for the state court to conclude that the
14 prosecutor did not even put the prestige of the government behind Mr. Smith's police interview
15 testimony (as opposed to his trial testimony); instead, the prosecutor argued that the jury should
16 credit Mr. Smith's police interview testimony (over his trial testimony) based on evidence
17 presented at trial – *e.g.*, the fact that Mr. Smith agreed to be interviewed by the police in the first
18 place, how he acted during the interview, and the fact that the interview close in time to the
19 shooting. Moreover, the prosecution did not imply it knew facts beyond those presented to the
20 jury; thus, the prosecutor did not "infect the trial with unfairness." Under these circumstances,
21 habeas relief is not warranted.

22 2. Mr. Broadway's Credibility

23 With respect to Mr. Broadway (a defense witness), Mr. Farrish contends that the
24 prosecutor engaged in misconduct by improperly opining on his lack of credibility during closing
25 argument. The prosecutor made the following comments regarding Mr. Broadway during his
26 opening closing argument:

27 Well, let's just look at [Mr.] Broadway for a second. [Mr.]
28 Broadway's testimony is tailored. Tailored in this sense means that
he's geared his testimony to fit. I find it incredible, absolutely

² Also, a prosecutor's vouching for the credibility of a witness "can convey the impression that
evidence not presented to the jury, but known to the prosecutor, supports the charges against the
defendant." *Weatherspoon*, 410 F.3d at 1147-48 (internal quotation marks omitted and emphasis
added).

1 incredible, that somebody can come in here and claim that they saw
2 one thing [*i.e.*, Mr. Smith displaying a gun], and then have no
3 perception, no witnessing of anything else. And that one thing is the
4 one thing that they want to use to help the defendant. What am I
5 talking about? Well, he says, I saw [Mr.] Smith with a gun. Now,
6 we had a big demonstration. He had it like this. Wow, sounds like
7 he's a pretty perceptive guy. He has got a good memory. Really.
8 Because according to him he ducks down in the wheel well and has
9 no memory of anything whatsoever after that. Really?

10 Now, is that a [sic] end all, be all point? No. Witnesses can
11 forget and get things wrong and still have an innocent
12 misrecollection. Is that the case with [Mr.] Broadway? Absolutely
13 not. [Mr.] Broadway wasn't even in the car. [Mr.] Broadway
14 doesn't even know how the incident went down. [Mr.] Broadway is
15 coming in here and he's going to say one thing, and then to insulate
16 himself from being able to be cross-examined, to insulate himself
17 from how stupid his story is, he's going to say, I don't know
18 anything after that. Great. Except that is not believable.
19 There is an instruction where the Judge advises that if a witness has
20 been willfully false you should disregard him, unless you believe
21 from all the circumstances other parts of his testimony. [Mr.]
22 Broadway has been more than willfully false. [Mr.] Broadway is
23 lying.

24 Ex. A (RT at 2503-04).

25 Defense counsel then gave her closing argument and, with respect to Mr. Broadway, stated
26 as follows:

27 [Mr.] Broadway. Let's talk about him for a second. He came here
28 to tell you that [Mr.] Smith had a gun. You are to consider all facts
and circumstances surrounding someone's testimony when
evaluating that testimony. [Mr.] Smith said in his taped interview
that there was a passenger in the car.

29 *Do you think that anybody who wasn't telling the truth would*
30 *subject themselves to having the prosecution suggest they were an*
31 *aider and abettor? Subject themselves to criminal prosecution for*
murder? To come to court and lie? No.

32 [Mr.] Broadway risked prosecution to come here and tell you what
33 he saw. Now, nobody would subject themselves. You had heard ad
34 nauseam, ad nauseam, nobody will come testify, snitch. Nobody
35 will come testify. That's right, because they're going to be told
they're aiders and abettors. They could be threatened with
prosecution. And if they're not threatened with prosecution, they're
going to be killed from the streets. Those are the risks that [Mr.]
Broadway came to tell the truth. You can take that into account.

36 Ex. A (RT at 2517-18) (emphasis added).

37 In his rebuttal closing argument, the prosecutor responded to the above defense comments
38 on Mr. Broadway. The prosecutor stated:

1 Let's look at a couple of things that the defense attorney said for a
2 second.

3 First of all, Mr. Broadway. Mr. Broadway comes in here, and we
4 have some high theater here where I'm asking him a question. It's
5 the same question I have been asking him, that is, tell us something,
6 besides your one perception that [Mr.] Smith had a gun. And he
7 says, Aw, I want to talk to my lawyer. And his court appointed
8 counsel walks up there and we have a little talk. That's some high
9 theater right there.

10 The fact of the matter is the lawyer knows, [Mr.] Broadway knows
11 that there's no way [Mr.] Broadway can ever be prosecuted. You
12 know why? *Because ethically we can't prosecute him. You know*
13 *why? Because [Mr.] Broadway is lying. I can't prosecute*
14 *somebody that I know is lying.*

15 Ex. A (RT at 2542) (emphasis added).

16 Defense counsel objected, stating that the prosecutor "can't state his opinion of
17 somebody's truth or veracity. That's for the jury and it's misconduct." Ex. A (RT at 2542).

18 Although the trial court overruled the objection, it instructed that, "as I have explained . . . , this is
19 closing argument. You will determine what the facts are. I have given you the law that applies in
20 this case." Ex. A (RT at 2542-43).

21 The prosecutor then continued:

22 If ethically I would put somebody on trial that I did not believe
23 committed a crime, not only would that be something horrible for
24 me to do, but let's figure out what [Mr.] Broadway's defense
25 attorney would say. Wow, he was lying to cover up for his buddy.
26 And you know what, that would be a pretty good defense, wouldn't
27 it?

28 Ex. A (RT at 2543).³

On direct appeal, Mr. Farrish argued that the prosecutor's statements regarding Mr. Broadway constituted misconduct. The state appellate court acknowledged that the prosecutor's statements about Mr. Broadway were "more troubling" compared to his statements about Mr. Smith. *Farrish*, 2012 Cal. App. Unpub. LEXIS 6911, at *39. Notably, the prosecutor had not

³ In his amended petition, Mr. Farrish asserts that the prosecutor was saying that "he could not prosecute defense witness [Mr.] Broadway for perjury." Am. Pet. at 4. However, as indicated by the above excerpts from the record, the prosecutor was clearly referring to prosecution of Mr. Broadway for aiding and abetting murder.

1 simply asked the jury to infer that Mr. Broadway “was lying because of the inherent incredibility
2 of [his] testimony or because [he] was a friend of [Mr. Farrish”]; rather, the prosecutor went
3 “beyond” that and told the jury that

4 he could not ethically prosecute [Mr.] Broadway as an aider and
5 abettor to murder because he did not believe the testimony.
6 Although that opinion may have been based on the evidence, the
7 problem is that the prosecutor was, in effect, *invoking the reputation*
8 *of the district attorney’s office* to assure the jury that he would not
9 prosecute the innocent.

8 *Id.* at *41 (emphasis added).

9 The court, however, noted that the situation before it was different from that presented in
10 another case – where prosecutorial misconduct was found because (1) “the prosecutor invoked the
11 prestige of her office to implicitly assure the jury that the *defendant* [*i.e.*, not a witness] would not
12 have been charged without sufficient evidence of his guilt” and (2) “the prosecutor made *more*
13 *than just the one suggestion* to the jury that she had additional evidence of [the defendant’s] guilt
14 that had not been presented.” *Id.* at *43 (emphasis in original and added). Nevertheless, the state
15 appellate court stated, “[e]ven if we were to accept that the prosecutor’s remarks in this case were
16 misconduct, they were not prejudicial.” *Id.* at *44. First, the trial court “admonished the jury to
17 decide the case on the evidence.” *Id.* Second, it was “not reasonably probable that a result more
18 favorable to [Mr.] Farrish would have been reached if the prosecutor had not engaged in [the]
19 single instance of misconduct” – not only because Mr. Broadway’s testimony was “inherently
20 suspect when he asserted that he could remember essentially nothing other than [Mr.] Smith
21 having a gun” but also because Mr. Smith’s contrary testimony “was corroborated by the physical
22 evidence [*i.e.*, no gun was found near Mr. Cole’s body or on the route where he and Mr. Smith
23 ran] and the testimony of [two third-party eyewitnesses] that neither [Mr.] Smith [nor Mr. Cole]
24 had a gun.” *Id.* at *45-56.

25 The state appellate court’s conclusion that any prosecutorial misconduct was not
26 prejudicial was not unreasonable. As the government points out, a prosecutor’s

27 “[i]mproper argument does not, per se, violate a defendant’s
28 constitutional rights.” “[I]t is not enough that the prosecutor’s
remarks were undesirable or even universally condemned.” Rather,

1 “[t]he relevant question is whether the prosecutors’ comments ‘so
2 infected the trial with unfairness as to make the resulting conviction
3 a denial of due process.’”

4 *Runnigeagle v. Ryan*, 686 F.3d 758, 781 (9th Cir. 2012). In *Runnigeagle*, the Ninth Circuit took
5 note of a Supreme Court case (*Darden*, 477 U.S. at 168) which held that improper statements by a
6 prosecutor did not deprive the defendant of a fair trial “in part because of the substantial evidence
7 against [the defendant], and because the trial court instructed the jury that the arguments made by
8 counsel were not evidence.” *Runnigeagle*, 686 F.3d at 781. Here, there was an admonition by the
9 trial court and, more important, there was substantial evidence against Mr. Farrish, most notably
10 (as the state appellate court underscored) independent evidence that corroborated Mr. Smith’s
11 version of the events (as expressed during the police interview) over Mr. Broadway’s.

12 D. Evidence of Third-Party Threats Made to Prosecution Witnesses

13 According to Mr. Farrish, habeas relief is also warranted because his due process rights
14 were violated when the trial court failed to provide certain instructions to the jury on how to
15 evaluate evidence of third-party threats against prosecution witnesses.

16 Several prosecution witnesses discussed or referenced threats in their trial testimony. For
17 example:

- 18 • *Mr. Smith*. Mr. Smith testified, *inter alia*, that a copy of the police report on the shooting
19 – which had his name on it – was given to him by somebody on the street. *See* Ex. A (RT
20 at 1089). He testified that it made him “[k]ind of angry” to get the police report from
21 somebody on the street. Ex. A (RT at 1089). Mr. Smith equivocated as to whether the fact
22 of his testifying made him worried about his family’s safety, *see* Ex. A (RT at 1090, 1092)
23 (at first, stating that “I worry about it, but I don’t – I don’t see nothing really – no real
24 punishment happening towards them that I would be worried about”; later admitting that
25 he told the police that he could not risk his family); however, he conceded that some
26 people were not “coming around” him because of the police report and that he was worried
27 about people knowing that he was testifying. *See* Ex. A (RT at 1090-92). When defense
28 counsel objected to this line of questioning, the trial court overruled the objection, stating
that “[t]his goes to attitude towards testifying.” Ex. A (RT at 1089); *see also* Ex. A (RT at

- 1 1090) (“Goes to attitude toward testifying.”). Mr. Smith denied that anyone had actually
2 threatened him because he was testifying. *See* Ex. A (RT at 1092).
- 3 • *Ms. McElveen (Mr. Cole’s mother)*. Ms. McElveen testified about, *inter alia*, animosity
4 between her family and Mr. Farrish’s (including their circle of friends). For example, in
5 2005, when court proceedings were ongoing against Joe (Mr. Farrish’s brother) for his
6 involvement in the murder of Mr. Narcisse, there was an incident outside the courtroom in
7 which Mr. Cole “was called a snitch, and the guys [about fifteen total] were trying to jump
8 him and we got into verbal confrontations.” Ex. A (RT at 1156). The person who called
9 Mr. Cole a snitch was a man named Dominic. *See* Ex. A (RT at 1157). Both Dominic and
10 Mr. Farrish were involved with the “jumping” of Mr. Cole. *See* Ex. A (RT at 1157-59).
11 Ms. McElveen further testified that, sometime in 2008, apparently while court proceedings
12 were ongoing against Mr. Farrish, Dominic threatened her, saying that “that’s what my son
13 get, the nigger is six feet under and your ass is going to be six feet under also.” Ex. A (RT
14 at 1161). Dominic was in the courtroom while Ms. McElveen was testifying. *See* Ex. A
15 (RT at 1159-60). Finally, Ms. McElveen testified that she had had a conversation with Mr.
16 Smith prior to trial during which he stated that he did not want to testify because a police
17 report “had gotten out into the street and [was] circulating around [the neighborhood].”
18 Ex. A (RT at 1168). The trial court specified that Ms. McElveen’s testimony about Mr.
19 Smith was “merely . . . evidence of Mr. Smith’s state of mind and his attitude towards
20 testifying. For that purpose only.” Ex. A (RT at 1167).
- 21 • *Tavani (Mr. Cole’s brother)*. Tavani testified, *inter alia*, that he had received threats
22 regarding his testifying in the case: “I received phone calls [about three] saying I’d be
23 killed.” Ex. A (RT at 1435). He also testified that he reported the calls to the District
24 Attorney’s Office. *See* Ex. A (RT at 1436). The trial court instructed that jury that “[t]his
25 testimony . . . goes to this witness’s attitude towards testifying, not necessarily for the truth
26 of the statements, but as to the witness’s attitude towards testifying and coming to court.”
27 Ex. A (RT at 1435). Tavani clarified that Mr. Farrish himself had never threatened him.
28 *See* Ex. A (RT at 1444).

1 According to Mr. Farrish, “the jury should have been instructed that the evidence [of]
2 threats could only be considered for [the] purpose” of “explain[ing] the prosecution witnesses’
3 reluctance to testify.” Am. Pet. at 7. Mr. Farrish contends that, without a limiting instruction, “the
4 jurors would probably have inferred that [he] had directed the . . . attempts to intimidate witnesses
5 and suppress their testimony, an improper purpose absent evidence to that effect.” Am. Pet. at 7.
6 Mr. Farrish further contends that a certain instruction, CALCRIM No. 371, Alternative C,⁴ should
7 have been given to the jury, as that instruction informs the jury that “absent evidence that [a
8 defendant] knew of or approved the suppression attempts by third persons, the jury could not use
9 that testimony against [the defendant],” in particular, “to infer a consciousness of guilt from such
10 threats.” Am. Pet. at 8.

11 On direct appeal, the state appellate court did not find Mr. Farrish’s argument compelling,
12 explaining that

13 no one requested that the jury be instructed as to when
14 consciousness of guilty could be inferred from attempts to suppress
15 evidence. Such a purpose was never suggested by the prosecutor.
16 Instead, the trial court explained to the jury, on several occasions,
17 that such evidence was only to be used to help explain the
18 witnesses’ state of mind.

17 *Farrish*, 2012 Cal. App. Unpub. LEXIS 6911, at *51. The court acknowledged that, “[o]n one
18 occasion, when [Ms.] McElveen testified regarding Dominic’s threat to her, the jury was not
19 immediately admonished regarding the limited purpose for which such testimony could be
20 considered.” *Id.* at *52. But the court concluded that, “even if this constituted error, any such
21 error was harmless” because “the case against [Mr. Farrish] was strong. It is not reasonably
22

23 ⁴ CALCRIM No. 371, Alternative C, provide as follows:

24 If someone other than the defendant tried to create false evidence,
25 provide false testimony, *or conceal or destroy evidence*, that
26 conduct may show the defendant was aware of (his/her) guilt, but
27 only if the defendant was present and knew about that conduct, or, *if*
28 *not present, authorized the other person’s actions*. It is up to you to
decide the meaning and importance of this evidence. However,
evidence of such conduct cannot prove guilt by itself.

1-300 CALCRIM 371 (emphasis added).

1 probable the jury would have reached a different verdict absent the error.” *Id.*

2 The Court is not unsympathetic to Mr. Farrish’s contention that the failure to instruct along
3 the lines of CALCRIM No. 371, Alternative C, was problematic, particularly with respect to Ms.
4 McElveen’s testimony that a specific person – Dominic – had threatened her in or about 2008.
5 *Compare Farrish*, 2012 Cal. App. Unpub. LEXIS 6911, at *51 (discussing state court opinion
6 where threat was made by an unidentified person). The fact that Dominic was apparently a good
7 friend of Mr. Farrish, and one who had previously engaged in joint effort with Mr. Farrish in
8 “jumping” Mr. Cole in 2005, might lead to an inference that the 2008 threat made by Dominic was
9 at the behest of Mr. Farrish. Moreover, even the state appellate court noted that there was no
10 limiting instruction by the trial court with respect to this specific testimony by Ms. McElveen.

11 Nevertheless, under the AEDPA standard, the Court must evaluate the state appellate
12 court’s conclusion for unreasonableness, and, here, it was not objectively unreasonable for the
13 state appellate court to ultimately conclude that, even if there were a due process violation, the
14 error was harmless because the evidence against Mr. Farrish was substantial. Under *Brecht v.*
15 *Abrahamson*, 507 U.S. 619 (1993), habeas relief is proper “only if the failure to give the . . .
16 instruction ‘had a substantial and injurious effect or influence in determining the jury’s verdict.’”
17 *Id.* at 637; *cf. Clark v. Brown*, 442 F.3d 708, 726 (9th Cir. 2006) (concluding that the failure to
18 give a jury instruction violated due process but asking whether the violation was “harmless”). As
19 indicated above, Mr. Farrish’s primary defense at trial was self-defense but that argument was
20 severely undercut by the testimony of Mr. Smith, who testified that neither he nor Mr. Cole was
21 carrying a weapon at the time, and Mr. Smith’s testimony was corroborated both by the physical
22 evidence (*i.e.*, no gun was found) as well as the testimony of two independent third-party
23 eyewitnesses.

24 E. Character Evidence

25 Mr. Farrish asserts that habeas relief is warranted because his rights to due process and a
26 fair trial were violated when the trial court erroneously instructed the jury that character evidence
27 could be used as evidence of propensity.

28 Mr. Farrish’s argument relates to California Evidence Code §§ 1101 and 1103.

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- Section 1101 provides in relevant part that, “[e]xcept as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.” Cal. Evid. Code § 1101. In other words, “[e]vidence of a person’s character, also known as propensity evidence, is inadmissible to prove conduct in conformity with that character trait.” *People v. Villatoro*, 54 Cal. 4th 1152, 1170 (2012) (Corrigan, J., dissenting); *see also People v. Carter*, 36 Cal. 4th 1114, 1147 (2005) (stating that “[c]haracter evidence is not admissible to show conduct on a specific occasion[;] [t]his type of evidence sometimes is referred to as evidence of criminal disposition or propensity”).
 - Section 1103 is one of the exceptions identified in § 1101. It has two relevant parts: one related to a victim of a crime and one related to the accused of a crime.
 - Section 1103(a) provides in relevant part that, “[i]n a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is,” *e.g.*, “[o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character. Cal. Evid. Code § 1103(a)(1).
 - In turn, under § 1103(b), if “evidence that the *victim* had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (a) of subdivision (a),” then “evidence of the *defendant’s* character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character.” *Id.* § 1103(b).
- In the instant case, Mr. Farrish offered evidence that Mr. Cole, in particular, had a

1 character for violence – *e.g.*, that, in February 2008, Mr. Farrish and his girlfriend were sitting in
2 front of his godmother’s house on Groom when a car drove by, which Mr. Cole was driving, and
3 shots were fired at the house.

4 Based on the defense evidence of Mr. Cole’s character for violence, the prosecution,
5 relying on § 1103(b), introduced evidence of Mr. Farrish’s character for violence, more
6 specifically, that, in 2006, Mr. Farrish pulled a gun on a third party as part of a robbery undertaken
7 with three other people. Before the prosecution introduced this evidence, the trial court instructed
8 that the evidence was for a limited purpose only and that it would later give instructions as to what
9 that limited purpose was. *See Ex. A* (RT at 2265, 2292). However, the trial court failed to give
10 such an instruction, thus prompting the jury to ask the court about the limited purpose during its
11 deliberations. *See Ex. B* (CT at 658) (jury question) (“On 3/25, during rebuttal case, in morning,
12 Josh Atkinson, Walter Welsch, & Hill testified about S. Farrish pulling gun at a party. The Judge
13 indicated this testimony was for a limited purpose, which she would explain later. She never did.
14 For what purpose was this testimony allowed?”).

15 Because the judge presiding over the trial was not available, another judge was called upon
16 to answer the jury’s question. The judge responded to the question with an instruction that was a
17 modified version of CALCRIM No. 1191, which is the pattern instruction on evidence of prior sex
18 crimes admitted under California Evidence Code § 1108.⁵ The instruction given to the jury was as

19 _____
20 ⁵ The current version of CALMCRIM No. 1191A, which addresses evidence of an uncharged sex
21 offense, provides as follows:

22 The People presented evidence that the defendant committed the
23 crime[s] of <insert description of offense[s]> that (was/were) not
24 charged in this case. (This/These) crime[s] (is/are) defined for you
25 in these instructions.

26 You may consider this evidence only if the People have proved by a
27 preponderance of the evidence that the defendant in fact committed
28 the uncharged offense[s]. Proof by a preponderance of the evidence
is a different burden of proof from proof beyond a reasonable doubt.
A fact is proved by a preponderance of the evidence if you conclude
that it is more likely than not that the fact is true.

If the People have not met this burden of proof, you must disregard
this evidence entirely.

1 follows:

2 The People presented evidence that the defendant has a violent
3 character.

4 You may consider this evidence only if the People have proved by a
5 preponderance of the evidence that the defendant in fact has a
6 character for violence. Proof by a preponderance of the evidence is
7 a different burden of proof from proof beyond a reasonable doubt.
8 A fact is proved by a preponderance of the evidence if you conclude
9 that it is more likely than not that the fact is true.

10 If the People have not met this burden of proof, you must disregard
11 this evidence entirely.

12 If you decide that the defendant has a violent character, you may,
13 but are not required to, conclude from that evidence that the
14 defendant was disposed or inclined to commit crimes of violence,
15 and based on that decision, also conclude that the defendant was
16 likely to commit and did commit murder and attempted murder as
17 charged here. If you conclude that the defendant has a character for
18 violence, that conclusion is only one factor to consider along with
19 all the other evidence. It is not sufficient by itself to prove that the
20 defendant is guilty of murder or attempted murder. The People must
21 still prove each charge and allegation beyond a reasonable doubt.

22 Ex. B (CT at 654).

23 The state appellate court rejected Mr. Farrish’s contention, on direct appeal, that the above
24 instruction violated his right to due process. It cited in support a decision issued by the California
25 Supreme Court, in which that court stated: ““We cannot say that, in providing for the jury to obtain
26 a balanced view of the possible violent tendencies of both the victim and the defendant, the
27 Legislature ran afoul of any fundamental conception of justice embodied in the federal
28 Constitution”” – particularly because the defendant has ““the choice whether evidence of his or her

29 If you decide that the defendant committed the uncharged
30 offense[s], you may, but are not required to, conclude from that
31 evidence that the defendant was disposed or inclined to commit
32 sexual offenses, and based on that decision, also conclude that the
33 defendant was likely to commit [and did commit] <insert charged
34 sex offense[s]>, as charged here. If you conclude that the defendant
35 committed the uncharged offense[s], that conclusion is only one
36 factor to consider along with all the other evidence. It is not
37 sufficient by itself to prove that the defendant is guilty of <insert
38 charged sex offense[s]>. The People must still prove (the/each)
(charge/ [and] allegation) beyond a reasonable doubt.

1 violent propensity will be admissible.” *Farrish*, 2012 Cal. App. Unpub. LEXIS 6911, at *64
2 (quoting *People v. Fuiava*, 53 Cal. 4th 622 (2012)). Furthermore, the defendant’s character for
3 violence “must be relevant to a material issue in the trial,” *id.*, and a trial court retained discretion
4 to bar such character evidence for undue prejudice. *See id.* at *65. The state appellate court also
5 underscored that “the jury was instructed that evidence of [Mr. Farrish’s] violent character was not
6 sufficient by itself to prove [his] commission of the charged offenses, and that the People must
7 still prove each charge beyond a reasonable doubt,” and so “the jury could not have interpreted the
8 instructions as authorizing a guilty verdict based solely on proof of the uncharged conduct. Nor
9 could a reasonable jury have interpreted the instructions as authorizing conviction of the charged
10 offenses based on a preponderance of the evidence standard.” *Id.* at *66-67.

11 The state appellate court’s conclusion was not objectively unreasonable. This is especially
12 so because “the United States Supreme Court has never held that the introduction of
13 propensity . . . evidence violates due process.” *Maldonado v. Frauenheim*, No. 15-cv-03002-
14 EMC, 2017 U.S. Dist. LEXIS 47059, at *46 (N.D. Cal. Mar. 29, 2017) (citing various Ninth
15 Circuit cases relying on *Estelle v. McGuire*, 502 U.S. 62 (1991)); *see also Alberni v. McDaniel*,
16 458 F.3d 860, 866-67 (9th Cir. 2006) (stating that “[w]e cannot conclude that the Nevada Supreme
17 Court acted in an objectively unreasonable manner in concluding that the propensity evidence
18 introduced against [the defendant] did not violate due process, given that *Estelle* expressly left this
19 issue an ‘open question’”). Moreover, it was not unreasonable for the state appellate court to find
20 no due process violation given that – as the court itself noted – evidence as to the defendant’s
21 character for violence could be admitted only if the defendant first chose to implicate the victim’s
22 character for violence. Accordingly, habeas relief on the ground of an allegedly improper
23 instruction on propensity evidence is not warranted.

24 F. No Instruction on “Unanimity of Act”

25 Mr. Farrish’s next contention is that he is entitled to habeas relief because his rights to due
26 process and jury unanimity were violated when the trial court refused to give an instruction on
27 “unanimity of act.” The instruction that Mr. Farrish asked the trial court to give was CALCRIM
28 No. 3500 which provides as follows:

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The defendant is charged with *<insert description of alleged offense>* [in Count] [sometime during the period of ____ to ____].

The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.

2-3500 CALCRIM 3500.

Mr. Farrish asserts that this instruction was warranted based on the following:

- (1) There were two possible crimes scenes – *i.e.*, the fatal shot could have been fired at Groom (where the shooting began) or it could have been fired at Gilma (where Mr. Cole’s body was eventually found).⁶
- (2) Based on Mr. Broadway’s testimony that Mr. Smith displayed a gun first, Mr. Farrish “likely had the right to fire in self-defense at the Groom crime scene,” but not at the Gilma crime scene where “the evidence indicated that [Mr.] Cole was running away while being fired upon.” Am. Pet. at 12.
- (3) Therefore, it is possible that some jurors found Mr. Farrish guilty because the fatal shot was fired *at Groom* and Mr. Farrish was not acting in self defense, while other jurors found Mr. Farrish guilty because, even though Mr. Farrish was acting in self-defense at Groom, he fired the fatal shot *at Gilma* while Mr. Cole was running away (with no self-defense option being available here).⁷

As the trial court noted, Mr. Farrish’s basic position here is that the jury had to be unanimous about which bullet caused Mr. Cole’s death – *i.e.*, one shot at Groom or one shot at Gilma. *See* Ex. A (RT at 2368-69).

The state appellate court was not persuaded by Mr. Farrish’s argument. It

⁶ According to Mr. Cole, the fatal shot could have been fired at Groom since a jury could have found that Mr. Cole was shot there and then “managed to run 217 feet to Gilma and climb over a fence before dying.” Am. Pet. at 12.

⁷ Given this argument, Mr. Farrish seems to be challenging here only the charge of murder (as to Mr. Cole) only and not the charged of attempted murder (as to Mr. Smith). This is also supported by the appellate brief that he filed in state court. *See* Ex. D (Op. App. Br. at 91).

1 agreed with the trial court that the jury was not required to agree
2 unanimously on which bullet killed [Mr. Cole]. There were not two
3 distinct murders. Although there were two crime scenes, there was
4 only a single discrete criminal event – the murder of [Mr. Cole] –
5 regardless of which bullet in the sequence of shots actually killed
6 him. Whether the fatal bullet was fired on Groom or on Gilma only
7 concerns the way in which the crime was committed. No unanimity
8 instruction is required ““where multiple theories or acts may form
9 the basis of a guilty verdict on one discrete criminal event.””

6 *Farrish*, 2012 Cal. App. Unpub. LEXIS 6911, at *70-71.

7 The state appellate court’s conclusion was not objectively unreasonable.

8 In the ordinary case, a general unanimity instruction suffices to
9 instruct the jury that they must be unanimous on whatever
10 specifications form the basis of the guilty verdict. A specific
11 unanimity instruction is required only when it appears that ““there is
12 a genuine possibility of jury confusion or that a conviction may
13 occur as the result of different jurors concluding that the defendant
14 committed different acts.””

12 *United States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999). Here, Mr. Farrish makes a “different
13 acts” argument, but it was not unreasonable for the state appellate court to hold that (1) Mr.
14 Farrish glossed over the distinction between (a) different *acts* and (b) different *means* to
15 accomplish a criminal act and that (2) which bullet killed Mr. Cole fell into the category of
16 different means. *See United States v. Gonzalez*, 786 F.3d 714, 716-17 (9th Cir. 2015) (rejecting
17 defendant’s argument that the trial court should have instructed the jury that it must unanimously
18 agree on the facts that constituted the conspiracy to murder; acknowledging that “different jurors
19 may have concluded that different particular overt acts” with respect to the conspiracy, but stating
20 that “no unanimity problem would arise because the differences of opinion on a particular overt
21 act . . . are ones only of means”). *See, e.g., United States v. Ruiz*, 710 F.3d 1077, 1080-82 (9th
22 Cir. 2013) (“find[ing] no error in the district court’s failure to give a specific unanimity
23 instruction”; the defendant was charged with possession of a firearm and ammunition during one
24 ten-minute period on one night in one location, and, “[w]hile numerous witnesses testified that
25 [the defendant] possessed the shotgun and ammunition at different times throughout that ten
26 minute period, the jurors were free to convict on whichever evidence they believed supported [his]
27 guilt beyond a reasonable doubt, even if they failed to reach agreement on which pieces of
28 evidence were ultimately persuasive”); *United States v. Morsette*, 653 F. App’x 499, 503 (9th Cir.

1 2016) (concluding no plain error where trial court gave only a general and not a specific unanimity
2 instruction; stating that, “[w]hen the government argues that the defendant employed several
3 ‘means’ to accomplish a criminal act, . . . a general unanimity instruction may be sufficient” and,
4 here, “[t]he government alleged that [the defendant] used several means to embezzle, steal or
5 convert the RBHB’s funds – it did not charge each improper transaction as a separate crime”).

6 *United States v. Echeverry*, 719 F.2d 974 (9th Cir. 1983), a case cited by Mr. Farrish in his
7 petition, is not to the contrary. There, there were potentially different acts at issue (instead of
8 different means) because there was evidence that there was a conspiracy to distribute drugs on
9 different *dates*. See *United States v. Echeverry*, 698 F.2d 375, 377 (9th Cir. 1983) (“We have no
10 means by which we may be certain that some portion of the jury, in casting a guilty ballot, did not
11 envision a December conspiracy and fail to find enough evidence to believe that there was a June
12 conspiracy, while other jurors envisioned a June conspiracy and not a December conspiracy. We
13 are not free to hypothesize whether the jury indeed agreed to and was clear on the duration of a
14 single conspiracy or of multiple conspiracies.”). Because different dates and different conspiracies
15 were involved, the case is inapposite.

16 G. Definition of “Kill Zone”

17 Mr. Farrish contends next that his due process rights were violated when the trial court
18 refused the jury’s request to define the concept of “kill zone” for the attempted murder charge
19 (*i.e.*, the attempted murder of Mr. Smith).

20 The instruction on attempted murder stated in relevant part as follows:

21 CALCRIM 600. ATTEMPTED MURDER (Pen. Code, §§ 21a,
22 663, 664)

23 The defendant is charged in Count Two with attempted murder.

24 To prove that the defendant is guilty of attempted murder, the
People must prove that:

25 1. The defendant took at least one direct but ineffective step
26 toward killing another person;

27 AND

28 2. The defendant intended to kill that person.

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A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or “kill zone.” In order to convict the defendant of the attempted murder of [Mr.] Smith, the People must prove that the defendant not only intended to kill [Mr.] Cole but also either intended to kill [Mr.] Smith, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill [Mr.] Smith or intended to kill [Mr.] Cole by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of [Mr.] Smith.

Ex. B (CT at 629).

As Mr. Farrish notes, “[t]he prosecution’s theory of attempted murder of [Mr.] Smith was not [because Mr. Farrish] . . . specifically targeted [Mr.] Smith but because he fired at a ‘kill zone’ and intended to kill everyone within that zone.” Pet. at 14; *see also* Ex. A (RT at 2504-05 (prosecutor arguing to jury in closing argument, “You just told us that he was trying [to] kill [Mr.] Cole, and you have charged [Mr.] Smith as a victim of attempted murder”; explaining that there is a “zone of risk” – “if the bystander is in the zone of risk, then that’s attempted murder on the bystander”).

During deliberations, the jury asked: “What is the definition of a ‘kill zone’?” Ex. B (CT at 660). The trial court’s response was: “The term ‘kill zone’ is defined in CALCRIM 600 as a particular zone of harm. I cannot provide a more specific definition. As noted in the instructions, terms not specifically defined are to be given their ordinary meaning. This is a factual issue for the jury to decide.” Ex. B (CT at 660).

Mr. Farrish argues that the trial court could have provided a more specific definition – *i.e.*, CALJIC 8.66.1 – and that failure to do so violated his due process rights. CALJIC 8.66.1 provides as follows:

“A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. [This zone of risk is termed the ‘kill zone.’] The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim’s vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a [‘kill zone’][zone of risk] is an issue to be decided by you.”

People v. Stone, 46 Cal. 4th 131, 137-38 n.1 (2009) (quoting CALJIC No. 8.66.1). Thus, Mr.

1 Farrish’s argument boils down to the position that the trial court should have explained to the jury
2 that “kill zone” had to do with the vicinity of Mr. Cole. *See* Am. Pet. at 14 (“Had the court
3 provided the jury with this proper instruction, it would have correctly focused the jury on deciding
4 at what times [Mr.] Smith was in [Mr.] Cole’s ‘vicinity,’ and whether [Mr. Farrish] was firing
5 shots at [Mr.] Cole at those times.”). According to Mr. Cole, “[l]eaving the zone completely
6 undefined permitted the jury to use its own definition of a kill zone, which may or may not have
7 been correct.” Am. Pet. at 15.

8 The state appellate court did not find Mr. Farrish’s argument compelling:

9 [Mr. Farrish] complains that the trial court did not provide the
10 definition of “kill zone” provided in CALJIC No. 8.66.1. But, our
11 Supreme Court has instructed that the “‘kill zone’ theory ‘is not a
12 legal doctrine requiring special jury instructions Rather, it is
13 simply a reasonable inference the jury may draw in a given case: a
14 primary intent to kill a specific target does not rule out a concurrent
15 intent to kill others.’”

16 In any event, although the trial court did not use the precise words
17 used in CALJIC No. 8.66.1, we think the instructions given to the
18 jury make clear that a “kill zone” is the vicinity in which the
19 defendant intends to kill anyone present.

20 *Farrish*, 2012 Cal. App. Unpub. LEXIS 6911, at *80. The court also indicated that it was highly
21 unlikely – as suggested by Mr. Farrish – that the jury could have found attempted murder of Mr.
22 Smith based on the shots that Mr. Farrish fired at Mr. Cole on Gilma because “the prosecutor
23 made clear, in his argument, that ‘[t]he attempted murder is for the shots on Groom,’” where,
24 undisputedly, Mr. Cole and Mr. Smith were in close proximity to one another (*i.e.*, before they
25 split up). *Id.* at *81.

26 The state appellate court’s reasoning here was not an unreasonable application of clearly
27 established federal law. As a preliminary matter, it is not clear that “vicinity” (the basic term for
28 which Mr. Farrish advocated) is any more precise than “zone of harm” (the term used to explain
kill zone in the instruction given to the jury). Moreover, the trial court correctly noted that the
parameters of a kill zone is a factual question, and therefore additional specificity with respect to
definition of the term is not clearly possible or helpful (in fact, may even be harmful). *See People*
v. Pham, 192 Cal. App. 4th 552, 559 (2011) (“The question – which is a factual one for the jury to

1 decide – is whether, based on the particular evidence in the case, it can be inferred that defendant
2 had the concurrent intent to kill not only his intended target but others in the target’s vicinity.”).
3 Mr. Farrish fails to establish that the state court violated clearly established federal law by
4 concluding that the failure to instruct did not impinge on his right to due process.

5 H. Actual Innocence

6 Finally, Mr. Farrish contends that that the state habeas court violated his right to due
7 process by denying his petition based on actual innocence without even an evidentiary hearing.
8 Mr. Farrish’s claim of actual innocence was based on a declaration submitted by a friend,
9 Deaundre Alexander. In his declaration, Mr. Alexander testified, *inter alia*, that:

- 10 • Mr. Cole was a member and leader of a “crew” known as TNA. Alexander Decl. ¶ 3.
- 11 • Tavani (Mr. Cole’s brother) was also a member of TNA, as was Mr. Hudson – the two
12 individuals who, along with Mr. Farrish’s brother, Joe, were involved in the murder of Mr.
13 Narcisse. *See* Alexander Decl. ¶¶ 4-6.
- 14 • Mr. Farrish “was angry that TNA had turned on his brother and made it known that TNA
15 was a bunch of snitches,” which “ruined the reputation of TNA.” Alexander Decl. ¶ 8.
- 16 • In response, TNA “started telling everyone that they would ‘come after’ [Mr. Farrish and]
17 made threats against him and his family.” Alexander Decl. ¶ 9.
- 18 • Two months before the May 2008 shooting, Mr. Cole talked to Mr. Alexander about Mr.
19 Farrish’s disparagement of TNA. After Mr. Alexander stated that he was “siding with”
20 Mr. Farrish, Mr. Cole told Mr. Alexander that should give Mr. Farrish ““some space”” and
21 that he was ‘on him,’” which meant that “TNA was looking to follow through with their
22 threats and silence [Mr. Farrish] by shooting him and that [Mr. Alexander] should stay
23 away from [Mr. Farrish].” Alexander Decl. ¶ 10. Mr. Alexander told Mr. Farrish about
24 the conversation and tried to give Mr. Farrish “a gun because [he] knew [Mr. Cole] had an
25 AR-15.” Alexander Decl. ¶ 10. But Mr. Farrish did not like to carry guns – in fact, had
26 accidentally shot himself in the leg when handling one. *See* Alexander Decl. ¶ 11.
- 27 • The day that Mr. Cole was killed, Mr. Alexander “again spoke to [Mr. Farrish] about [Mr.
28 Cole] and how [Mr. Alexander] believed [Mr. Cole] was looking to shoot [Mr. Farrish].”

1 Alexander Decl. ¶ 13.

2 According to Mr. Farrish, the declaration of Mr. Alexander establishes that Mr. Farrish “is
3 factually innocent of the first degree murder charge [or at most is guilty of a lesser offense]
4 because he shot Mr. Cole in self-defense”; “no reasonable juror would have convicted him in light
5 of this new evidence” because it reflected that Mr. Farrish was “aware of numerous threats against
6 his life, when he shot Mr. Cole” and that Mr. Cole was armed at the time of the shooting and was
7 actively seeking out Mr. Farrish. Am. Pet. at 16-17, 19. Mr. Farrish asserts that he is entitled to
8 habeas relief because the state court did not issue an order to show cause (which it should have
9 because the contents of the declaration, if accepted as true, established a prima facie case of actual
10 innocence or guilt of a lesser offense) and further failed to “order an evidentiary hearing on the
11 issue.” Am. Pet. at 20, 22.

12 The state habeas court apparently found an order to show cause or evidentiary hearing
13 unnecessary because, although “[r]eading the habeas petition and the Declaration of Alexander in
14 a vacuum[,] one might easily be persuaded of the reasonableness of [Mr. Farrish’s] perception of
15 both the imminence of danger on the day he fired at [Mr. Cole] and the need to resist with the
16 degree of force applied[,] . . . the actual facts before the jury belie any such facile interpretation.”
17 Ex. J (Order at 7). The full record reflected that “both [Mr. Farrish] was trying to shoot and kill
18 [Mr.] Cole and that [Mr.] Cole and [Mr.] Smith, in turn, were trying to kill [Mr. Farrish]. In other
19 words, these individuals were individually and collectively engaged in a blood feud based on past
20 personal disputes between them . . .” Ex. J (Order at 7).

21 The state habeas court added that it found no merit to Mr. Farrish’s assertion that he could
22 have presented a better self-defense theory with the Alexander declaration because “there is no
23 reason to believe that the currently articulated augmented defense based on [the] Declaration is
24 anything more than cumulative of the self-defense claim made at [the] jury trial.” Ex. J (Order at
25 10).

26 The state habeas court’s denial of post-conviction relief was not unreasonable. First,
27 “[g]iven the lack of a holding from the U.S. Supreme Court that there is a constitutional right to
28 release based upon a showing of actual innocence, the [court’s] rejection of [Mr. Farrish’s] claim

1 cannot be said to be ‘contrary to, or an unreasonable application of, clearly established Federal
2 law, as determined by the Supreme Court of the United States.’” *Gonzalez v. Gipson*, No. 14-cv-
3 04995-EMC, 2016 U.S. Dist. LEXIS 70803, at *35 (N.D. Cal. May 31, 2016); *see also*
4 *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013) (noting “[w]e have not resolved whether a
5 prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence”); *DA’s*
6 *Office v. Osborne*, 557 U.S. 52, 71 (2009) (stating that whether a federal constitutional right to be
7 released upon proof of actual innocence “is an open question”); *Garnett v. Neven*, 408 Fed. Appx.
8 47, 47 n.1 (9th Cir. 2011) (stating that “the Supreme Court has not clearly established whether a
9 freestanding claim of actual innocence exists”).

10 But even if a federal habeas claim could be predicated on a freestanding actual innocence
11 claim, *see Jones v. Taylor*, 763 F.3d 1242, 1246 (9th Cir. 2014) (stating that “[w]e have not
12 resolved whether a freestanding actual innocence claim is cognizable in a federal habeas corpus
13 proceeding in the non-capital context, although we have assumed that such a claim is viable”); *see*
14 *also Moore v. Arnold*, No. 16-01666 EJD (PR), 2016 U.S. Dist. LEXIS 97601, at *5 (N.D. Cal.
15 July 26, 2016) (stating that “it appears that a noncapital prisoner can state a freestanding actually
16 innocence claim in federal habeas based on the Ninth Circuit’s recent decisions”), “the threshold
17 showing for such an assumed right would necessarily be extraordinarily high.” *Murray v.*
18 *Hubbard*, No. C-11-2943 EMC (pr), 2012 U.S. Dist. LEXIS 131716, at *4 (N.D. Cal. Sept. 14,
19 2012). “[A] habeas petitioner asserting a freestanding innocence claim must go beyond
20 demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent.”
21 *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997).

22 The Alexander declaration, added to the other evidence of self-defense presented at trial,
23 does not support probable innocence on the part of Mr. Farrish. As the government emphasizes,
24 Mr. Alexander never claimed to have any personal knowledge of the shooting. The main
25 witnesses who had personal knowledge or at least who claimed personal knowledge were Mr.
26 Smith (a prosecution witness) and Mr. Broadway (a defense witness). Mr. Smith’s trial testimony,
27 of course, was belied by his more specific police interview testimony; and Mr. Smith’s testimony
28 in the police interview – that Mr. Smith and Mr. Cole were not carrying any weapons on the day at

1 issue – was in fact corroborated by physical evidence (no guns were found at the scene) and the
2 testimony of two independent third-party eyewitnesses. Mr. Farrish protests that the Alexander
3 declaration, unlike the other self-defense evidence tendered at trial (*e.g.*, “specific instances where
4 Mr. Cole and TNA members attacked [him]”), is special and noncumulative because it “goes
5 directly to [his] understanding of the threats made against him by Mr. Cole.” Am. Pet. at 18-19.
6 But even accepting that understanding, that does not detract from the fact that there was
7 substantial evidence that, on the day of the shooting, neither Mr. Smith nor Mr. Cole had a gun.

8 **III. CONCLUSION**

9 For the foregoing reasons, the Court denies Mr. Farrish’s amended petition for habeas
10 relief. In addition, the Court declines to issue Mr. Farrish a certificate of appealability. This is not
11 a case in which “jurists of reason would find it debatable whether the petition states a valid claim
12 of the denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Clerk is
13 instructed to enter judgment and close the file.

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15 **IT IS SO ORDERED.**

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17 Dated: September 14, 2017

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20 EDWARD M. CHEN
21 United States District Judge
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