UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ANTHONY W. PORTER,

Plaintiff,

v.

WILLIAM MUNIZ,

Defendant.

Case No. 14-cv-05034-TEH

ORDER GRANTING IN PART PETITION FOR WRIT OF HABEAS CORPUS

Anthony W. Porter ("Porter" or "Petitioner"), a California state prisoner, filed a pro se habeas corpus petition pursuant to 28 U.S.C. § 2254. After the Court denied Petitioner's request for appointment of counsel, it ordered Respondent to show cause why a writ of habeas corpus should not be granted. ECF No. 4. Respondent filed a timely answer, followed by a supplemental brief addressing the merits of the petition. ECF Nos. 10, 19. Petitioner retained counsel and filed a traverse. ECF No. 36. After review of the briefs and the extensive record in this case, the Court hereby GRANTS IN PART Petitioner's writ for habeas corpus. The Court holds that Petitioner did not received constitutionally adequate counsel when he entered into a sentencing agreement in 2010 and that the agreement was not entered into knowingly. The rest of Petitioner's claims lack merit or are procedurally barred.

FACTUAL BACKGROUND[1]

On March 26, 2004, Petitioner Anthony Porter was visiting Monterey County to attend the funeral of a friend, Albert Johnson. Porter was eighteen years old at the time and

[1] This background is derived from the opinion of the California Court of Appeal, Sixth Appellate District, in *People v. Porter*, No. H029031, 2006 WL 3649273 (Cal. Ct. App. Dec. 14, 2006).

was going to college in San Diego. Albert Johnson had been shot and killed in a drive-by shooting six days prior, and there was evidence that his death was gang-related.

Porter attended the funeral and a series of gatherings in Johnson's honor. The evidence shows that he got progressively more intoxicated as the day went on. Even though his blood alcohol level was never tested after his arrest, a toxicologist testified that it must have been in the range of severe intoxication. Porter testified that he left the last gathering that night after throwing up by a dumpster. He started walking to his grandmother's house when Travis Williams, who was older than Porter, offered him a ride. Porter claims he did not know Williams prior to the funeral. Williams drove Porter to Fort Ord, where the two men smoked marijuana laced with PCP, and then to Monterey. Porter threw up again, felt sick during the ride, and allegedly asked multiple times to be taken to his grandmother's house.

Williams then drove the car past the house of DeShawn Lee, who was a suspect in the killing of Albert Johnson and was in jail. Williams made a U-turn and returned to Lee's house where Kimber Lee-Roman, Latoya Choates, and Adrianne Jenkins were smoking on the porch. Porter testified that Williams told him to "get out and start talking shit" and Porter "did as he said." Ex. 2, 9 RT 2108.[2] The evidence showed that Williams was driving the car and Porter was sitting on the frame of the passenger's side window when shots were fired from the car into Lee's house. The bullets hit the house but missed the women. No one was injured.

The jury heard conflicting testimony from prosecution witnesses about whether shots were fired from the driver's side of the car, nearest the porch, or from the passenger side of the car. Lee-Roman and Jenkins testified that they saw an arm coming out on the driver's side of the car and heard gun shots seconds later. They ran inside for cover. Choates heard shots fired but was not able to identify the source of the gunfire. The only

[2] The Court first cites to the exhibit where the document is located. It then indicates the volume number, whether the document is found in the Reporter's Transcript ("RT) or the Clerk's Transcript ("CT"), and the appropriate page number within the transcript.

witness who claimed to have seen the gun was Eugenio Ramos, who was fixing a flat tire on his car about four houses away and around the corner on San Lucas Street. The victims' house was located on 1246 Sonoma Avenue in Seaside, California. Ramos testified at trial that he looked up from his car when he heard tires squeal and saw the passenger, who was sitting on the frame of an open window with his hands on top of the car, shoot a gun over the top of the vehicle. Ramos called 911 and told dispatcher the following: "white female shoot the gun. he was driving, he's wearing like a blue sweater."[3] Ex. 1, Vol. 2, 2 CT 534. At trial, he testified that he had seen "two guys" and that he meant "male" when he told the dispatcher "female." Ex. 2, Vol. 4, 4 RT 839-840.

Officer Jacqueline Maroney testified that at 11:00 pm she heard gunshots and proceeded to pursue the suspect vehicle until it crashed. Both suspects fled and were subsequently apprehended. They were both black men. She identified Porter as the passenger. A handgun was found in the area where another pursuing officer had observed the passenger's hand come out of the car and make a throwing motion. The gun's location was consistent with having been thrown out by the passenger, and Porter admitted throwing the gun out of the car. Police retrieved live rounds of ammunition from Williams' pockets that were similar to the ammunition recovered from the gun. The jury heard testimony that the gun was registered in Richmond, where Williams was from.

Detective July Stradan interrogated Porter at 2:10 am after the shooting. She testified that she smelled alcohol but did not notice any slurring of the speech, even though the transcript of the interrogation contains dozens of sections marked as "unintelligible." Ex. 1, Vol. 2, 2 CT 563. Porter consistently denied firing the shots even as the detective probed and claimed that the police had a video of the shooting.

Gunshot residue ("GSR") samples were taken from the suspects' hands and their clothing following their arrest. Prior to trial, prosecution's expert Steven Dowell tested the

[3] Judge Russell Scott of Monterey County Superior Court noted that in the audio recording of the 911 call, Ramos does not pause between the words "gun" and "he was driving." Ex. 18, Vol. 4, Ex. K at 713.

samples taken from the backs of the hands of each suspect and found no gunshot residue on either. The palm samples were not analyzed, nor was the clothing from either suspect. At trial, Porter's attorney entered into a stipulation that "no gunshot residue was found on either person." Ex. 2, Vol. 6, 6 RT 1303. Dowell testified that Porter could have been the shooter even though no gunshot residue was found on him.

On January 24, 2005, a Monterey County jury found Porter guilty of two counts of attempted willful, deliberate and premeditated murder (Cal. Penal Code §§ 187(a), 664) (counts one and two), shooting at an inhabited dwelling (*Id*. § 246) (count three), two counts of assault with a semiautomatic firearm (*Id*. § 245(b)) (counts four and five), person other than registered owner carrying loaded firearm (*Id*. § 12031(a)(2)(F)) (count six), and shooting from a motor vehicle (*Id*. § 12034(c)) (count seven). The jury found true a gang enhancement allegation (*Id.* § 186.22(b)(1)) as to each charged offense, a sentence enhancement allegation for personally and intentionally discharging a firearm (*Id*. § 12022.53(c)) with regard to the attempted murder counts, and a sentencing enhancement allegation for personal use of a firearm (*Id*. § 12022.5(a)) on the two assault counts.

PROCEDURAL BACKGROUND

On April 22, 2005, Porter moved for a new trial and sought dismissal of the charges pursuant to Penal Code § 1181(6). Judge Wendy C. Duffy of Monterey County Superior Court, who had presided over the trial, denied the motion as to the charged offenses but granted it as to the gang enhancement and premeditation and deliberation allegations. With respect to the deliberation allegations, she stressed the "uncontroverted evidence of the defendant's extreme intoxication" and stated that the court "cannot find that there was sufficient evidence that [Porter] had the ability to weigh the decision to kill or not kill the people on the porch." Ex. 2, 14 RT 3309-3310. Regarding the gang enhancements, she noted the evidence that the Albert Johnson may have been a member of the "Krazy Ass Pimps" ("KAP") and that at the funeral Porter was given a t-shirt made by Johnson's female friends with Johnson's photo and the words "Krazy Ass Pimps." She explained that

there was evidence KAP was a gang in 1994 but there was no evidence of "any cohesive gang activity after the year 2000." *Id*. at 3310. She also stated that Porter may have been friends with identified gang members when he was 14 years old or younger, presumably because of where he grew up, but that there was no evidence that "he was ever involved with any [gang members] in participating in any crime." *Id*. at 3313. Lastly, she found no "credible evidence that the shooting would have benefited the gang, the KAP gang." *Id*. at 3314.

On May 6, 2005, after ordering a new trial on the gang enhancement and deliberation allegations, Judge Duffy sentenced Porter to 25 years on the remaining counts: the lower term of 5 years for attempted murder and an additional 20 years for the enhancement regarding personal discharge of a firearm (Cal. Penal Code § 12022.53(c)). On December 28, 2005, co-suspect Travis Williams, who was charged in a separate indictment, pled no contest to one count of attempted murder (*Id*. §§ 664, 187(a)). He admitted discharging a firearm (*Id*. § 12022.53(c)) and participating in a gang (*Id*. § 186.22(b)(1).

On July 8, 2006, Porter filed a notice of appeal for the convictions that were not reversed by the trial court. On August 14, 2006, he filed a petition for writ of habeas corpus in the Court of Appeal, Sixth Appellate District, alleging two grounds for relief: (1) incompetence of counsel for failure to raise objections to the prosecution gang evidence in an Evidence Code § 492 hearing and at trial; and (2) new evidence discovered of factual innocence, specifically an admission by Williams made to his cellmate Bruce Collins that Williams fired the shots, not Porter. The Court of Appeal ordered the habeas petition to be considered with the appeal. Ex. 4. On December 14, 2006, the Court of Appeal affirmed the convictions in full and summarily denied Porter's writ petition. *People v. Porter*, No. H029031, 2006 WL 3649273 (Cal. Ct. App. Dec. 14, 2006). Porter subsequently filed a petition for review from the appeal and a petition for review from the habeas denial in the California Supreme Court, which the high court summarily denied on March 14, 2007. Exs. 9, 10.

In the meantime, on January 5, 2006, Porter moved for dismissal of the unresolved enhancements alleging a double jeopardy violation pursuant to California Penal Code § 1016(4)(5). Judge Russell D. Scott of Monterey County Superior Court denied his motion. Porter filed a writ of mandate on February 16, 2006 (Ex. 11), and the Court of Appeal reversed the trial court's ruling that retrial would constitute double jeopardy (Ex. 12). On March 18, 2008, while the prosecution's petition for review was pending in the California Supreme Court, Porter filed a habeas petition in this Court. Pet. in *Porter v. Horel*, No. 08-1496-TEH. On July 23, 2009, the high court reversed the Court of Appeal and returned the matter to the Monterey County Superior Court for partial retrial. *Porter v. Super. Ct. of Monterey Cty*., 47 Cal. 4th 125 (2009). On October 29, 2009, this Court dismissed the habeas petition as moot because the enhancements were not reinstated at the time the petition was filed and thus there was no case or controversy. The Court had previously dismissed the free-standing actual innocence claim as not cognizable on federal habeas corpus. Dkt. in *Porter v. Horel*, No. 08-1496-TEH, ECF No. 6.

Monterey County Public Defender James Eager was appointed to represent Porter on the retrial of the deliberation allegations and gang enhancements. After a number of continuances, retrial was set to begin on September 27, 2010. In preparation for retrial, Porter's counsel received permission to retest the original gunshot residue swabs taken from Porter and Williams after their arrests. On September 7, 2010, forensic expert Celia Hartnett's laboratory determined that samples from Williams' hands had particles consistent with gunshot residue on them. Ex. 16, 1 CT 218. On September 9, 2010, unaware that any of the results were available, Porter entered into a resentencing agreement. Ex. 16 at 94-97. He agreed to be resentenced to an additional nine years in state prison on the underlying convictions in exchange for the prosecution's dismissal of the premeditation and deliberation allegations and gang enhancements. Ex. 17, 2 RT 304-307. Petitioner agreed to serve a total term of thirty-four years and further "give up all rights regarding both state and federal writs and appeals." Resentencing Agreement; Ex. 16 at 95.

Resentencing was initially set for October 7, 2010, but was continued at the trial court's request to October 14, 2010. Ex. 16, 1 CT 127.

On October 4, 2010, unbeknownst to Porter and his attorney, Harnett's laboratory found particles consistent with gunshot residue on the cuffs of Williams' shirt. Ex. 16, 1 CT 218. On October 13, 2010, the night before the resentencing hearing, Porter's attorney learned for the first time that Williams' hands and clothing were positive for gunshot residue, contradicting the prosecution's evidence at trial and supporting the version of events that Porter had given all along—that he was not the shooter. Ex. 17, 3 RT 603, 605. On October 14, 2010, Porter's counsel informed the trial court of the new evidence and asked to have the sentencing hearing continued. On October 18, 2010, Harnett's laboratory completed the analysis of the samples collected from Porter's hands and reported that the results were negative. Ex. 16, 1 CT 218.

On November 3, 2010, Petitioner moved to withdraw from the resentencing agreement based in part on California Penal Code § 1018. Ex. 16, 1 CT 191. While the motion to withdraw was pending, Porter filed a habeas petition in the same trial court. Porter alleged trial counsel was ineffective for failing to test the GSR evidence and entering into a stipulation that no GSR was present on Williams or Porter, for failing to interview Ramos and confront him with the 911 tape, as well as that counsel at the agreement stage was ineffective and that the agreement was not entered into knowingly and voluntarily. On September 9, 2011, after denying Porter's motion to withdraw from the agreement, the court resentenced Porter to a term of thirty-four years. Ex. 16, 2 CT 378-81. On November 21, 2011, Porter appealed the judgment and imposition of his sentence. The trial court denied Porter's habeas petition on November 21, 2012 (*In re Anthony Porter*, No. HC 7331 (Super. Ct. of Monterey Cty., Nov. 21, 2012)), and Porter filed a petition in the Court of Appeal (Exs. 18, 19).

On May 22, 2013, the Sixth District Court of Appeal affirmed the judgment and dismissed his appeal, finding that Porter had waived his appellate rights. *People v. Porter*, No. H037619, 2013 WL 2284949 (Cal. Ct. App. May 22, 2013). It also summarily denied

the habeas petition. Ex. 21. On August 28, 2013, the Supreme Court summarily denied his petition for review from the direct appeal and his state habeas corpus petition. Exs. 24, 25. On November 12, 2014, Porter filed the present petition in federal court *pro se*. ECF No. 1.

STANDARD OF REVIEW

This Court may entertain a petition for a writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), habeas relief may not be granted "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state decision was: (1) "contrary to, or involved an unreasonable application, of clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). This AEDPA standard is applied to the "state court's 'last reasoned decision' on the claim." *Edwards v. LaMarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (quoting *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)).

A state court decision is "contrary to" Supreme Court authority if "the state court arrives at a conclusion opposite to that reached by the [Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially undistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state court decision is an "unreasonable application of" Supreme Court authority if "the state court identifies the correct governing legal principle from [the Supreme] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Id*. For the federal court to grant habeas relief, the state court's application of Supreme Court authority must be "objectively unreasonable," not merely incorrect or erroneous. *Riley v. Payne*, 352 F.3d 1313, 1323 (9th Cir. 2003) (citing *Lockyer v. Andrade*, 538 U.S. 63 (2003)). In reviewing the reasonableness of a state court's decision to which Section 2254(d)(1)

applies, a district court must rely on the record that was before the state court and presume correct determinations of factual issues made by the state court. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011).

DISCUSSION

Porter seeks habeas corpus relief on five grounds: (1) Ineffective assistance of trial counsel, Thomas S. Worthington, for his failure to investigate gunshot residue, to interview Ramos in Spanish and impeach him with a recording of his 911 call, to present evidence that Porter was weak on his left side, and to present evidence of Porter's alcohol blackouts; (2) *Brady* violation for the prosecution's presentation of false evidence regarding gunshot residue found on Williams; (3) Violation of the Fourteenth Amendment prohibition against double jeopardy for Porter's retrial on the deliberation allegations and gang enhancements; (4) Ineffective assistance of counsel at the agreement stage, James Eager, for his failure to inform Porter of available exculpatory evidence before advising Porter to enter into the resentencing agreement; and (5) Due process violation of the Fifth and Fourteenth Amendments for enforcing a resentencing agreement that was not entered into knowingly and voluntarily.

Because Porter entered into an agreement with the prosecution on September 9, 2010 that included a waiver of his rights to file a federal habeas petition, the Court must first determine whether that waiver is valid. It is undisputed that even after entering into an agreement that waives the right to pursue habeas corpus relief, a prisoner may assert an ineffective assistance of counsel claim regarding the advice he received regarding the agreement, as well as a claim challenging the voluntariness of the agreement itself. *See Washington v. Lambert*, 422 F.3d 864, 871 (9th Cir. 2005).

The Court therefore begins by reviewing Porter's claims pertaining to the 2010 resentencing agreement. For the reasons stated below, the Court concludes that Porter has met the demanding burden of demonstrating that the California Court of Appeal was objectively unreasonable in denying Porter's ineffective assistance of counsel and

voluntariness claims. Granting habeas relief on Porter's last two claims invalidates the agreement and the waiver contained therein. As a result, the Court has jurisdiction to review the remainder of Porter's claims, which the Court denies after a careful review of the record.[4]

I. Ineffective Assistance of Counsel at the Agreement Stage

Porter claims that public defender James Eager was ineffective for failing to investigate, discover, and inform Porter of favorable evidence before persuading him to enter into a resentencing agreement, which increased Porter's sentence by nine years and resulted in a waiver of his right to appellate and habeas relief.

The Sixth Amendment confers a right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Reversal is required whenever ineffective assistance of counsel ("IAC") deprives a defendant of a substantive or procedural right guaranteed under the law. *See Williams*, 529 U.S. at 390-93. The Supreme Court has held that a defendant who pleads guilty upon the advice of counsel may attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the range of competence demanded of criminal defense attorneys. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). The test that the Supreme Court developed for IAC claims challenging plea agreements applies to Porter's IAC claim because the resentencing agreement he entered into is similar in key respects to a plea agreement.[5] To prevail, a petitioner must show that: (1) counsel's representation fell below the range of competence demanded of attorneys in criminal cases; and (2) there is a "reasonable probability that, but for counsel's errors, [petitioner] would not have pleaded guilty and would have insisted on going to trial." *Id*. at 58-59.

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[4] Since Petitioner concedes that there is no evidence to support his *Brady* violation claim, the Court denies the claim without consideration. Traverse at 68 (ECF No. 36).

[5] Even though the agreement Porter signed was not a plea agreement in that Porter did not plead guilty to any of the sentencing enhancements, the Court considers it analogous to a plea agreement for the purposes of this analysis, as do the parties. Answer at 8 (ECF No. 10-1).

In addition, federal habeas relief is unavailable unless the petitioner demonstrates that the state court's rulings on both the performance and prejudice prongs of his ineffectiveness claim were "contrary to" or "involved unreasonable application of clearly established federal law." *Premo v. Moore*, 562 U.S. 115, 123 (2011).[6] The state court that issued the last reasoned decision on Porter's IAC claim pertaining to the agreement was the California Court of Appeal in *People v. Porter*, No. H037619, 2013 WL 2284949 (Cal. Ct. App. May 22, 2013).[7] *See Byrd v. Lewis*, 566 F.3d 855, 859 n.5 (9th Cir. 2009) (looking to the California Court of Appeal's decision because it was the last reasoned state court decision). Where, as here, the California Supreme Court denied review of a habeas petition without comment (*In re Anthony Porter*, No. S211940 (Cal. 2013); Ex. 25), federal courts "look through the unexplained California Supreme Court decision to the last reasoned decision," in this case the state appellate court's decision, "as the basis for the state court's judgment." *Gill v. Ayers*, 342 F.3d 911, 917 n.5 (9th Cir. 2003) (internal citations omitted). This Court's review of the Court of Appeal's holding is "doubly" deferential, because *Strickland* requires state courts to give deference to choices made by counsel, and AEDPA in turn requires federal courts to defer to the determinations of state courts. *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Even under this demanding standard of review, the Court finds that the state appellate court's conclusion that Porter's counsel at the agreement stage provided effective

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[6] Since both the performance and the prejudice components of the ineffectiveness inquiry are mixed questions of law and fact, claims of ineffective assistance require a thorough review of the record. *See Strickland*, 466 U.S. at 698. The state court's ultimate conclusion is reviewed under 28 U.S.C. § 2254(d)(1), but its underlying factual findings supporting the conclusion are clothed with the deferential protection ordinarily afforded factual findings under 28 U.S.C. § 2254(d)(2). *Lambert v. Blodgett*, 393 F.3d. 943, 978 (9th Cir. 2004).

[7] This Court reviews the Court of Appeal's opinion in *Porter*, 2013 WL 2284949, which analyzes the merits of Porter's IAC and voluntariness claims even though that state appellate opinion adjudicated Porter's petition for review on direct appeal, not his habeas petition. *See id.* at *1. Porter challenged the voluntariness of the agreement in both petitions; the Court of Appeal issued a reasoned decision only on appeal, summarily dismissing his habeas petition, presumably for the same reasons that it denied his direct appeal. Denial of Pet. for Writ, No. 039221; Ex. 21.

representation was an "unreasonable application" of clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1).

1. Deficient Performance

The state appellate court identified the correct legal principles governing the deficiency prong of the ineffectiveness claim but unreasonably applied those principles to the facts of Porter's case. The court began by reciting the standard for IAC set forth in *Strickland*, properly emphasizing reviewing courts' deference to counsel's reasonable tactical decisions. *See Porter*, 2013 WL 2284949, at *8-9. It then stated that "it was a reasonable tactical decision for counsel to recommend that defendant accept a nine-year increase in his determinate prison sentence and avoid the risk of being convicted of the unsettled charges on retrial and receiving […] three life terms with an 85-year minimum sentence." *Id*. at *9. But the fact that nine years is less than eighty-five years—without more—does not make counsel's choice a tactical one. If this were the case, defense attorneys would have no reason to ever conduct investigations in criminal cases. They could simply sit back and wait to receive plea offers from the government, which by their very nature promise defendants less time in prison than those same defendants would receive if convicted at trial. Defense attorneys could then advise their clients to enter into plea agreements regardless of their clients' protestations of innocence or the strength of the evidence against them. To conclusively label every defense counsel's recommendation that a client accept a plea deal "a reasonable tactical decision" would be to entirely abrogate some of the most basic protections afforded to criminal defendants under our Constitution.

The Supreme Court has repeatedly held that a failure to conduct a reasonable investigation may satisfy the performance prong of *Strickland*. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003). Counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. This is equally true when considering a plea agreement, as it is when preparing for trial. *Hill*, 474 U.S. at 57-58. To make a decision that is "reasonable,"

counsel must rely on facts gathered through investigation. *See Jennings v. Woodford*, 290 F.3d 1006, 1014 (9th Cir. 2002) ("[A]ttorneys have considerable latitude to make strategic decisions about what investigations to conduct *once they have gathered sufficient evidence upon which to base their tactical choices.*") (emphasis in the original).

The evidence presented to the Court of Appeal unequivocally points to counsel's failure to conduct a sufficient investigation before advising Porter to enter into a resentencing agreement. Public Defender James Eager ("Eager") was appointed to represent Porter on two sets of allegations: (1) that the crimes were committed for the benefit of a criminal street gang (Cal. Penal Code § 186.22(b)(1)), and (2) that the attempted murders were committed willfully, deliberately and with premeditation (*Id.* § 664(a)). Even though in a strict statutory sense, a jury had already found that Porter had committed an attempted murder and therefore the only question before the new jury would have been whether he acted willfully and deliberately, strong evidence that Porter did not actually commit the act of shooting would have influenced the new jury's decision on whether he acted deliberately and with premeditation. *See* Nolan Decl. In Support of Pet. Before Ct. of Appeal, Ex. 18, Vol. 2 at 77-81 (stressing the importance of the GSR evidence to Porter's original conviction and the sentencing enhancements).[8] Aware of this fact, Eager requested that samples taken from Porter's and Williams' hands and clothing be retested for gunshot residue; he himself stated that "the presence or absence of gunshot residue was relevant to the allegations [on retrial] in that it tend[ed] […] to prove or disprove that [Porter] was in fact the person who carried out the acts" (Ex. 16, 1 CT 273)

[8] At the original trial, Porter's attorney argued that because there was no GSR found on Porter, he was not the shooter. *See* Nolan Decl. ¶ 14. The problem with that theory, according to Nolan, was that the same argument could be made with respect to Williams. *Id*. The fact that there was no GSR initially found on Williams significantly undermined Porter's defense. The jury found that Porter personally discharged the firearm and found true the allegation of willfulness and deliberation. Had there been forensic evidence showing that Williams was the shooter, Nolan claims, "there is a reasonable probability that the jury would have found Porter not guilty." *Id*. ¶ 17. Such forensic evidence, with its exculpatory potential, was actually available five years later before Porter signed the resentencing agreement.

and "by default negate the pending premeditation/deliberation and benefit of the gang allegations." (Ex. 16, 1 CT 215).

It is then completely unexplainable why Eager did not wait for the completion of the gunshot residue testing before advising his client to enter into a binding agreement, which added an additional nine years to his already lengthy twenty-five year sentence. Eager was on notice that the retesting would likely produce new evidence because he knew, or should have known, that Celia Harnett, defense expert at Porter's trial in 2005, testified that the gun used at the shooting had produced considerable GSR and that it was therefore likely that Dowell's results finding no GSR on both Williams and Porter were flawed. Ex. 17, 7 RT 1815-1821. The newly discovered evidence would in turn bolster Porter's defense; in Eager's own words, "as a practical matter, the viability of [Porter's defense] depended *entirely* on the availability of independent evidence proving it was Williams – and not Porter – that shot out of the vehicle." Ex. 16, 1 CT 214 (emphasis added). And yet in a pure act of incompetence, Eagar himself foreclosed the possibility of this new evidence demonstrating that his client was not guilty of the allegations on retrial.

The Court of Appeal did not hold that Eager had conducted a "reasonable investigation," as is expected of competent defense attorneys acting as diligent advocates. *Strickland*, 466 U.S. at 691. It was clear that Eager had started an investigation but not completed it. The Court instead found that Eager had made a "reasonable decision" that would make the completion of the gunshot residue investigation unnecessary. *See Porter*, 2013 WL 2284949, at *9. The Court speculated that Eager may have advised his client to enter into the resentencing agreement on September 9, 2010 because "there could be no guarantee that the prosecution would keep [the offer] open." *Id*. But that analysis "puts the cart before the horse," to quote the Ninth Circuit in a recent decision. *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir. 2017) (internal citation omitted). It should have been Eager's investigation into the gunshot residue evidence that informed his recommendation to Porter, not the other way around. The fact that there was an offer from the government on the table could not have justified a failure to investigate crucial facts in Porter's case on

retrial. *See id*. ("Counsel cannot justify a failure to investigate simply by invoking strategy.") [9] The Supreme Court has squarely rejected "the attempt to justify [a] limited investigation as reflecting a tactical judgment." *Wiggins*, 539 U.S. 510, 521 (holding that state court opinion was an unreasonable application of *Strickland* where state court *merely assumed* investigation underlying alleged strategic decision was adequate, whereas the evidence demonstrated it was not adequate) (emphasis added); *see also Williams v. Taylor*, 529 U.S. at 396 (failure to uncover mitigating evidence was "not justified by a tactical decision" where counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background").

In this case, there is an additional piece of evidence that demonstrates the objective unreasonableness of the state court's decision.[10] The Court of Appeal was quick to assume that Eager might have been motivated to leave his investigation unfinished because of the potential expiration of the government's resentencing offer. Even if that was part of Eager's calculus, there is still no reasonable explanation for why Eager did not take a moment to check the status of the GSR tests before he advised Porter to forgo an additional nine years of his life. Had he called his own expert on September 9, 2010, he would have learned that Celia Hartnett's laboratory had already found gunshot residue on samples from Williams' hands. Ex. 16, 1 CT 218. He would have uncovered evidence that pointed to Porter's innocence of the charged allegations. Instead, he did not check whether the

[9] Circuit precedent does not constitute "clearly established Federal law," but it does constitute persuasive authority to the extent that it assists district courts to determine whether a particular state court holding is "an unreasonable application" of Supreme Court precedent. *Clark v. Murphy*, 331 F.3d 1062, 1070-71 (9th Cir. 2003).

[10] Porter's claim of ineffective assistance of counsel at the agreement stage was brought and briefed under 28 U.S.C. § 2254(d)(1). The Court grants the claim under the standard of Section 2254(d)(1) but also notes that the claim could have been brought under Section 2254(d)(2). A decision that is "based on an reasonable determination of the facts in light of the evidence" occurs where the state court has failed to weigh and consider probative evidence central to petitioner's claim. *See Taylor v. Maddox*, 366 F.3d 992, 1005 (9th Cir. 2004). Here, the Court of Appeal appears to have ignored the fact that probative GSR evidence, which could exonerate Porter of the allegations on retrial, existed at the time Eager made an uninformed recommendation to his client. The Court of Appeal's determination that Eager's decision was a tactical one, therefore, constitutes an unreasonable determination of the facts in light of the evidence presented and made part of the state-court record.

GSR results were ready until the night before Porter's sentencing hearing on October 13, 2010 and over a month after he had advised him to enter into the resentencing agreement. "The traditional deference owed to strategic judgments of counsel is not justified" where, as here, "there was not an adequate investigation 'supporting [counsel's] judgments." *Correll v. Ryan*, 539 F.3d 938, 948-49 (9th Cir. 2008).

Lastly, Eager himself admitted his actions constituted deficient performance under *Strickland*. He stated, "Porter has a legitimate claim of ineffective assistance of counsel for current defense counsel's failure to advise him not to sign the agreement and instead ask for a continuance until we could complete the gunshot residue test and definitely determine that it was co-suspect Williams – and not Porter – who fired the shots on the night in question." Ex. 16, 1 CT 268. Even though, as the state court held, counsel's proclamation of inadequacy is not determinative, it does hold evidentiary value when so clearly supported by the entirety of the record. Eager himself was unable to point to any strategic decision that could have prevented him from contacting his own expert and inquiring about the results of the testing before he instructed Porter to sign the agreement.

2. Prejudice

To establish prejudice from counsel's advice to accept a plea offer, petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *See Hill*, 474 U.S. at 57-59. Because the Court of Appeal did not address the issue of prejudice, this Court reviews the issue *de novo*. *See Rompilla v. Beard*, 545 U.S. 372, 390 (2005) (examining prejudice *de novo* where state court did not reach the issue); *Miles v. Ryan*, 713 F.3d 477, 489-90 (9th Cir. 2013) (same).

Porter has met the burden of establishing prejudice. He declared under penalty of perjury that had he known that gunshot residue was found on Williams, he "would not have agreed to be resentenced, and instead would have gone to trial." Ex. 16, 1 CT 205. A decision to reject the plea bargain would have been "rational under the circumstances"

because, as discussed above, the new GSR evidence was relevant to the allegations on retrial. *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). Judge Wendy C. Duffy, who heard all of the evidence at trial, including evidence that no GSR was found on either Porter or Williams, questioned whether there was sufficient evidence to convict Porter of the gang enhancement and willfulness allegations. Ex. 2, 14 RT 3309-3314. With the new evidence showing GSR on Williams and not Porter, the likelihood that Porter would be found guilty beyond a reasonable doubt at a retrial would have been significantly smaller. Considering that Porter had steadfastly insisted on his innocence, his declaration and the record as a whole establish that he was prejudiced by his counsel's misadvice.

In conclusion, the Court finds that counsel's failure to complete the investigation or at least inquire into its status before advising Porter to enter into a resentencing agreement, constitutes deficient performance. The state court unreasonably applied federal law to the facts of this case. Porter suffered prejudice as a result of his counsel's ineffectiveness. His request for habeas relief on the basis of this claim is GRANTED. In order to "put the defendant back in the position he would have been in if the Sixth Amendment violation never occurred," the Court hereby VACATES the resentencing agreement and all of its provisions. *Johnson v. Uribe*, 700 F.3d 413, 425-26 (9th Cir. 2012) (quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012)) (internal quotation marks omitted) (directing district court to grant conditional writ subject to state court vacating defendant's conviction and granting him a new trial). Porter's case will be returned to the state superior court for a new trial on the deliberation allegations and the gang enhancement. If the District Attorney's office is not inclined to prosecute those allegations, it should dismiss them, allowing Porter to serve the remainder of his twenty-five year sentence on the original conviction.

II. Voluntariness of the Plea Agreement

In addition to challenging the constitutionality of his counsel's recommendation to enter into a resentencing agreement, Porter challenges the resentencing agreement itself on

the ground that it was not entered into knowingly and intelligently. Having invalidated the agreement as a product of counsel's deficient performance, the Court need not rule on the second challenge to the same resentencing agreement. Nonetheless, in the interest of finality and a clear record for review, the Court opts to rule on the merits of Porter's voluntariness claim.

Due process requires that a guilty plea be both knowing and voluntary because it constitutes the waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *See Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). A habeas petitioner bears the burden of establishing that his guilty plea was not knowing and voluntary. *See Parke v. Raley*, 506 U.S. 20, 31-34 (1992). On federal habeas corpus review, as stated above, Petitioner also bears the burden of showing that the state court's adjudication of his claim resulted in a "decision that was contrary to, or involved an unreasonable application of, clearly established federal law" or in a "decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

Here, the Court of Appeal in *People v. Porter*, No. H037619, 2013 WL 2284949 (Cal. Ct. App. May 22, 2013) issued the last reasoned decision of Porter's voluntariness claim. The court found that the agreement was entered into knowingly and voluntarily because: (a) the agreement thoroughly described "the rights and opportunities defendant was waiving"; (b) the defendant "showed acute awareness of the costs and benefits to him" of entering into the agreement; and (c) defense counsel assured the court that defendant understood what he was doing. *Id*. at *6. These findings of fact by the state court are awarded deference and, in this case, are also supported by the record. And yet the crucial piece of evidence that was presented to the Court of Appeal but seemed to be entirely disregarded was that before Porter signed the agreement, he did not know that gunshot

residue had been found on Williams' hands and clothing. Nor did he know that the original GSR evidence was flawed because the prosecution's expert Steven Dowell had performed an incomplete and faulty testing of the GSR samples taken from Williams and Porter. The evidence was available at the time he signed the agreement; the only reason Porter was not privy to it was his counsel's failure to inquire into the status of the retesting. Eager failed to give his client "the tools he need[ed] to make an intelligent decision." *Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002).

The Court finds that Porter did not enter into the agreement with "sufficient awareness of the relevant circumstances," as required by federal constitutional law. *Brady*, 397 U.S. at 748. He did not have the information necessary to assess intelligently "the advantages and disadvantages of a trial as compared with those attending a plea of guilty." *Brady*, 397 U.S. at 755. As a result, his plea was unintelligent. The Court of Appeal's decision finding otherwise was an unreasonable application of clearly established federal law. Since the agreement as a whole was not entered into knowingly, the waiver of appellate and habeas rights was also not entered into knowingly. See *United States v. Portillo–Cano*, 192 F.3d 1246, 1250 (9th Cir. 1999) (internal quotation marks omitted) ("waivers of appeal must stand or fall with the agreement of which they are a part"). Finding that the waiver is invalid, the Court proceeds to reach and decide the rest of Porter's claims.

III. Double Jeopardy Violation

Porter next argues that the federal prohibition against double jeopardy should have barred retrial of the premeditation allegations and gang enhancements. He reasons that in ruling on his motion for a new trial, the original trial judge found that the evidence was legally insufficient to sustain a finding of guilt as to premeditation and deliberation, as well as gang membership. Because Porter sought a writ of mandate after his motion for dismissal on double jeopardy grounds was denied, the issue was brought first to the Court of Appeal and then to the California Supreme Court. The high court rejected Porter's

double jeopardy claim in a published opinion, *Porter v. Super. Ct. of Monterey Cty*., 47 Cal. 4th 125 (2009).

The California Supreme Court reasonably determined the facts of Porter's case as they relate to his double jeopardy claim. Porter moved for acquittal under California Penal Code § 1118.1 before his case was submitted to the jury; Judge Wendy C. Duffy of Monterey County Superior Court denied the motion. *Id*. at 133, n.3. Subsequently, after the jury found him guilty on all counts, he moved for a new trial under California Penal Code § 1181(6). In deciding his motion for a new trial under Section 1181(6), Judge Duffy was required to sit as a "thirteenth juror" and determine whether the evidence was enough to convince her that the premeditation allegation and gang enhancement were true. *Id*. Porter argues that in making this decision, she ruled that the evidence was legally insufficient and thus called for an acquittal. As the California Supreme Court held, Judge Duffy did not have the authority to grant an acquittal in connection with a Section 1181(6) motion. *Id*. Her statements on the record regarding the credibility and state of the evidence relate to her adjudication of the motion for a new trial; they do not signal an attempt to grant an acquittal on the gang enhancement and deliberation allegations. She would have granted Porter's earlier motion for acquittal had she actually found the evidence presented at trial legally insufficient. Based on these facts, the high court ruled that under state law the trial court's order granting a new trial pursuant to Section 1181(6) was not an order of acquittal barring retrial on double jeopardy grounds. A state court's interpretation of state law binds a federal court sitting in habeas corpus. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

Further, the California Supreme Court reasonably determined that retrial did not violate federal double jeopardy principles. *Porter*, 47 Cal. 4th at 135 n.4. As the court stated, Porter's federal double jeopardy claim is foreclosed by U.S. Supreme Court authority. In *Tibbs v. Florida*, the U.S. Supreme Court distinguished between two forms of reversal of a jury's verdict in criminal cases: (1) where the prosecution has failed to produce sufficient evidence to prove its case, in which case the Double Jeopardy Clause bars the prosecutor from making a second attempt at conviction; and (2) where a judge

disagrees with a jury's resolution of conflicting evidence and concludes that a guilty verdict is against the weight of evidence, in which case the Double Jeopardy Clause does not bar retrial.[11] 457 U.S. 31, 42-44 (1981). The California Supreme Court correctly determined that Porter's case falls in the second category and that his retrial did not violate the prohibition against double jeopardy. *Id*. at 132-38.

Consequently, Porter has failed to show that he is entitled to federal habeas corpus relief on double jeopardy grounds.

IV. Ineffective Assistance of Trial Counsel

Porter's last claim on habeas corpus is that his trial counsel, Thomas S. Worthington ("Worthington"), rendered ineffective assistance by: (1) failing to introduce exculpatory evidence at trial of GSR on co-suspect Williams and instead stipulating that no GSR was found on Williams; (2) failing to properly interview eyewitness Eugenio Ramos; (3) failing to present evidence that Porter had physical weakness on his left side; and (4) failing to present evidence of Porter's alcohol blackouts.

To prevail on either of the four subclaims, Porter must show that trial counsel's performance fell below an "objective standard of reasonableness" under prevailing professional norms, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S at 694. Porter also bears the burden of demonstrating that the state court which issued the last reasoned decision on his IAC subclaims applied *Strickland* to the facts of his case in an "objectively unreasonable" manner. *Riley*, 352 F.3d at 1317. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

[11] Reversal on the second ground does not mean that acquittal was the only proper verdict; instead, it means that the court disagrees with the jury's resolution of conflicting testimony. *See Tibbs*, 457 U.S. at 42. It thus has the same effect as a deadlocked jury and does not result in an acquittal barring retrial. *Id*.

After a careful review of the record, the Court finds that Porter's first two subclaims are procedurally barred and that his last two subclaims do not meet AEDPA's high bar for habeas relief.

1. IAC for Failure to Conduct Independent Testing of GSR Samples Prior to Trial and for Stipulating to the Absence of Gunshot Residue

Porter claims that his trial counsel was ineffective for stipulating to test results completed prior to trial by Steven Dowell from the Los Angeles County Coroner's office. Even though GSR samples were available from the backs of Porter's and Williams' hands, their palms, and their clothing, Dowell only analyzed the samples from the backs of their hands. Ex. 18, Ex. K at 703. Dowell found no GSR particles on either Williams or Porter. Instead of ordering a more complete test of those GSR samples by his own defense expert, Porter's trial counsel Worthington stipulated to those results at trial. Ex. 2, 6 RT 1303. Porter argues that had Worthington ordered the samples to be retested by a defense expert, Worthington could have discovered the evidence that Celia Harnett found five years later—that GSR particles were present on Williams' hands and clothing, but not on Porter's.

The last reasoned state court decision on this claim was rendered by Judge Russell Scott of the Monterey County Superior Court on November 21, 2012. *In re Anthony Porter*, No. HC 7331 (Super. Ct. of Monterey Cty., Nov. 21, 2012); Ex. 18, Ex. K. The state court denied Porter's IAC claim for counsel's failure to retest on three grounds: (1) as waived by Porter's resentencing agreement preventing him from challenging his sentence; (2) as procedurally barred for being successive and untimely; and (3) as lacking in merit. Ex. 18, Ex. K at 711-12. With respect to the procedural default, the state court reasoned that Porter should have included his GSR-related claim for relief in his first habeas petition filed on August 14, 2006 since he was aware of the basis for the claim, i.e. that there was no independent GSR testing conducted by the defense. Because Porter failed to provide an adequate explanation for failing to include the claim in his 2006 petition, the state court

concluded that it was procedurally defaulted under *In re Clark*, 5 Cal. 4th 750, 767-68 (1993).

The Court finds that the procedural bar doctrine applies in this case and bars federal review of Porter's IAC subclaim for failure to conduct GSR retesting. Federal courts may not "review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal ground and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) *overruled on other grounds by Martinez v. Ryan*, 566 U.S. 1 (2012). For a state law ground to be "independent," it must not be interwoven with federal law. *Harris v. Reed*, 489 U.S. 255, 261-62 (1989). For it to be adequate, it must be based on a state law rule that is "firmly established" and "regularly followed." *Walker v. Martin*, 562 U.S. 307, 317 (2011). Federal review is barred as long as the state court relied on the procedural bar as a separate basis for its decision, even if the state court also discussed the merits of the claim. *See Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir. 2000).

Here, the superior court relied on a procedural bar as a separate basis for its disposition of the claim. It had an independent and adequate state law ground for denial of Porter's IAC claim based on GSR retesting: Porter had violated California's law against presenting new claims for relief which were known, or should have been known, at the time he filed his first collateral attack on the judgment. *See In re Clark*, 5 Cal. 4th at 767; *see also Walker*, 562 U.S. at 321 (holding that California's practice of barring a petitioner from obtaining relief on a claim when he "substantially delayed" filing his habeas petition is an independent and adequate procedural bar). Even though the superior court also discussed the merits of Porter's claim, it indicated that it was denying relief on a few independent grounds by separating its decision into subsections entitled "Waiver," "Procedural Bar," "Merits" and then explicitly stating "relief […] is denied" under each subsection. Ex. 18, Ex. K at 711. The five-page explanation of why Porter's claim is procedurally defaulted further shows the state court's intention to expressly rely on procedural default as a separate reason for denial of Porter's IAC claim. *Id*. at 702-06.

Since the California Court of Appeal and the California Supreme Court denied Porter's habeas petition raising the same IAC subclaim without explanation (Exs. 24, 25), it is presumed that they did so on the same grounds as the superior court, thus relying at least in part on the procedural bar. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991).

Porter claims that he can meet the requirements for "cause and prejudice," one of the exceptions excusing procedural default. He is correct that if he could demonstrate cause for the default and prejudice as a result of the alleged violation of federal law, this Court would be able to review his claim on the merits. *See Coleman*, 501 U.S. at 750. However, Porter is unable to meet his burden of showing cause. Neither of his explanations for the default constitute cause under the law. His first explanation—that appellate counsel who prepared and filed the first habeas petition was ineffective—does not constitute cause because there is no constitutional right to counsel in habeas proceedings and therefore Porter cannot show that counsel who filed his first habeas petition was ineffective. *See id*. at 752-54 (suggesting that if the petitioner has no constitutional right to counsel in the proceeding where the default occurred, attorney error does not amount to cause for the default). His second explanation—that he did not know the factual basis for his IAC claim because it was only after the double jeopardy issue was litigated and the case returned to the superior court for retrial that the new GSR testing could be done—is equally unavailing. The factual basis for his claim is not the new GSR evidence discovered five years later; the factual basis for his claim is that the original GSR testing was incomplete and that his attorney erred by not requesting a retesting. Porter was aware of these facts and had he actually believed his attorney had rendered deficient performance at trial, he should have claimed so in his first habeas petition. Because there is no "objective factor external to the defense" that impeded Porter's ability to comply with the state rule against successive petitions, this Court cannot find that Porter has shown cause for the default. *Murray v. Carrier*, 477 U.S. at 478, 488 (1986).

Because Porter's IAC claim with respect to the gunshot residue testing is procedurally barred, this Court does not review its merits.

2. IAC for Failure to Properly Interview Eyewitness Ramos

Porter further claims that Worthington was ineffective for failing to interview eyewitness Ramos in Spanish and for failing to impeach him at trial with a recording of the 911 call made after the incident. Porter argues that during the 911 call, Ramos suggested that the driver was the shooter and that therefore Worthington should have impeached Ramos with the 911 call when Ramos testified at trial that it was the passenger who shot at the victims' house. He further points to evidence from a 2011 interview with Ramos, conducted by Public Defender Investigator Ferrer ("Ferrer"), that Ramos had trouble understanding English and that when interviewed in Spanish, he was clear that the passenger of the vehicle shot the weapon. Ex. 19, Vol. 2 at 133-134. Had Worthington interviewed Ramos in Spanish, Porter argues, he would have unearthed the favorable evidence later acquired by investigator Ferrer.

Both subclaims were presented to the Monterey County Superior Court in Porter's March 11, 2011 habeas petition. The court found them to be successive and untimely for the same reasons as the IAC claim related to GSR testing discussed above. *In re Anthony Porter*, No. HC 7331 (Super. Ct. of Monterey Cty., Nov. 21, 2012); Ex. 18, Ex. K at 712-716. The state court held that Porter should have presented these grounds for ineffective assistance of counsel when he filed his first habeas petition in 2006: "If there was any deficiency in trial counsel's performance related to his examination of Ramos […], the deficiency was the same in 2010 when [the second habeas petition was filed in state court] as it was in 2005 when Porter [first] petitioned for habeas corpus." *Id*. at 713.

This Court determines that the state procedural bar is valid, that the court denied Porter's claim based on adequate and independent state ground, and that Porter has not established cause and prejudice excusing procedural default. Porter attempts to show cause by claiming that the factual basis for the IAC claim was not available before 2011 because it was not until investigator Ferrer interviewed Ramos in Spanish that Porter learned of the discrepancy between Ramos' testimony in Spanish and in English. Although that is true, nothing prevented Porter's counsel at the time of the default from questioning Ramos'

proficiency in English given Ramos' testimony at trial when he appeared to have trouble distinguishing between basic words such as "male" and "female." Ex. 18, Ex. K at 714. The factual basis for the claim—Ramos' difficulty with English and the discrepancy between the 911 call and the trial testimony—was not unavailable in 2006 when Porter filed his first habeas petition; it was simply not investigated and presented to the state court. *Cf. Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (concealment by government could be cause for procedural default if it was reason for failure of petitioner's lawyers to raise jury challenge in trial court).

Porter's second basis for ineffective assistance of counsel is procedurally barred, and therefore habeas relief on that basis is DENIED.

3. IAC for Failure to Present Evidence of Physical Weakness

Porter claims that his trial counsel was ineffective for failing to present evidence of Porter's physical weakness. According to Dr. Anne Flood, a mental health expert who Worthington interviewed prior to trial and who had visited Porter in jail, Porter often rested his arm on his chest or abdomen and dragged his left foot. *See Porter*, 2006 WL 3649273, at *7. Dr. Flood thought that Porter might have suffered a stroke affecting the left side of his body. *Id*. Dr. Tom Reidy, who Worthington hired to determine if Porter had suffered a stroke or brain trauma that could manifest as weakness on his left side, could not discover any evidence to support a conclusion of brain injury. *Id.* Still, Porter argues, Worthington should have called Dr. Flood to testify about her observations of Porter.

The California Court of Appeal in *People v. Porter*, No. H029031, 2006 WL 3649273 (Cal. Ct. App. Dec. 14, 2006) rejected Porter's claim. It held that trial counsel made a reasonable decision not to introduce the theory of Porter's physical weakness because it lacked evidentiary support. *Id*. at *7. In the absence of medical proof that Porter had suffered brain injury, Dr. Flood's observations would have been of "limited probative value." *Id*. Porter admitted that he pulled himself up and sat on the frame of the window on the passenger's side. Even though Worthington could have argued that Porter was

physically able to sit in the window but not able to fire a weapon while holding himself up, Worthington's decision not to pursue this line of defense appears to have been a tactical choice made after a complete investigation into the issue. *See Jennings*, 290 F.3d at 1014 ("[A]ttorneys have considerable latitude to make strategic decisions about what investigations to conduct *once they have gathered sufficient evidence upon which to base their tactical choices.*") (emphasis in the original).

This Court cannot find that the state court's decision involved an unreasonable application of federal law or an unreasonable determination of the facts in the light of the evidence. Porter's request for habeas relief on the basis of IAC related to evidence of physical weakness is DENIED.

4. IAC for Failure to Present Evidence of Alcohol Blackouts

Lastly, Porter argues that his trial counsel was ineffective for failing to present evidence that Porter suffered from alcohol blackouts. Porter's theory is that this evidence would have bolstered his defense by showing that he was drunk, unaware of what going on around him, and incapable of forming an intent to kill.

The California Court of Appeal reasonably determined that trial counsel did not render ineffective assistance when he did not call Dr. Reidy and Dr. Flood to testify about Porter's history of alcohol blackouts. *Porter*, 2006 WL 3649273, at *8. Multiple witnesses testified that Porter had abused alcohol in the past and that he was extremely intoxicated on the day of the funeral. *Id.* A forensic toxicologist testified for the defense on the effects of alcohol consumption and the capacity of a heavy drinker to appear outwardly unimpaired even when severely intoxicated. Given the extensive testimony presented at trial of Porter's alcohol use, trial counsel could have decided that the value of Dr. Reidy's and Dr. Flood's additional testimony regarding alcohol blackouts would have been minimal. The Court of Appeal reasonably determined that Porter had not overcome "the strong presumption that [his] counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

The Court of Appeal's decision that Porter had failed to show prejudice under the second prong of *Strickland* was equally reasonable. *Porter*, 2006 WL 3649273, at *8. The Court fails to see how the result of trial would have been different had the jury been informed of Porter's alcohol blackouts. If the evidentiary value of past blackouts was to show that Porter was immature and easily influenced, the jury could have made that inference from the extensive testimony of alcohol abuse presented at trial. Any evidence that Porter may have suffered from an alcohol blackout during the night of the shooting would have directly contradicted Porter's own testimony that he remembered being in the car and shouting from the window, but not shooting the weapon.

This Court cannot find that the Court of Appeal was objectively unreasonable in applying federal law to Porter's claim. As a result, Porter's last basis for his ineffective assistance of trial counsel claim fails.

V. Petitioner May Appeal This Decision

A federal district court must issue a certificate of appealability in order for an appeal to be taken from a habeas corpus proceeding such as this one. 28 U.S.C. § 2253(c)(1). A court may only issue a certificate of appealability "if the applicant has made a substantial showing of the denial of a constitutional right." *Id*. § 2253(c)(2). The applicant does not need to show a likelihood of succeeding on the merits: "The question is the debatability of the underlying constitutional claim, not the resolution of that debate."

Although the Court has rejected Porter's double jeopardy and ineffective assistance of trial counsel claims, he has nonetheless made a substantial showing of the denial of his constitutional rights. Porter has made an especially strong showing of the denial of his Sixth Amendment right to effective assistance of counsel for his trial counsel's failures to conduct an independent and complete test of the GSR samples, to interview Ramos in Spanish, and to impeach Ramos with the 911 call. Porter put forward a significant amount of evidence requiring serious consideration. The Court finds that he has made the showing required to appeal this Order.

CONCLUSION

In light of the foregoing, the petition for a writ of habeas corpus is GRANTED IN PART AND DENIED IN PART. Porter has met the heavy burden of showing that the state appellate court was objectively unreasonable in denying his two claims challenging the validity of the resentencing agreement: that his attorney rendered ineffective assistance of counsel in instructing him to sign the agreement, and that the agreement was not entered into knowingly and intelligently. Even with the strict limits on federal habeas relief imposed by AEDPA, this Court has the authority and the obligation to remedy violations of constitutional rights, such as those that occurred in Porter's case on retrial. The resentencing agreement signed on September 9, 2010, its sentencing provisions, and the waiver of post-conviction rights are therefore VACATED. If the state wishes to retry Porter on the gang enhancement allegations (Cal. Penal Code § 186.22(b)(1)) and on the allegations that the attempted murders were willful, deliberate and premeditated (*Id.* § 664(a)), it has to do so within one hundred and twenty (120) days of this order. The Clerk shall serve this order upon Petitioner's counsel of record, Respondent, and the Monterey County County District Attorney's Office.

Porter's petition for habeas relief on the basis of ineffective assistance of trial counsel and double jeopardy is DENIED. Porter's twenty-five year sentence imposed on May 6, 2005 remains undisturbed.

IT IS SO ORDERED.

Dated: 07/17/2017

THELTON E. HENDERSON
United States District Judge

United States District Court
Northern District of California