UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DERRELL DAVIS,
Petitioner,
v.
W. L. MONTGOMERY,
Respondent.

Case No. 15-cv-03366-WHO (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Derrell Davis seeks federal habeas relief from his state convictions because (1) the trial court violated constitutional rights to due process and to present a defense when it failed to give an accomplice instruction; (2) the trial court violated his right to counsel and his right to present a defense and confront witnesses when it denied a continuance; (3) defense counsel rendered ineffective assistance; (4) the trial court violated his right to due process when it admitted opinion evidence; (5) the prosecutor committed misconduct; and (6) there was cumulative error. None of these claims has merit and, for the reasons set forth below, the petition for federal habeas relief is DENIED.

BACKGROUND

In November 2008, Davis shot Ronnie Grier to death in a vehicle driven by Davis's cousin Jamerl Taylor. Davis's half-brother, Terrell Fisher, was also present in the car, but,

unlike Taylor, was uninvolved in the plan to kill Grier.

Evidence of Davis's guilt was provided by Taylor[1] and Fisher, who each testified about the murder:

> Taylor was driving; Grier was in the front passenger seat; Davis was sitting in the back behind Grier; and Fisher got in the back behind Taylor. Taylor drove them to a convenience store, where only Fisher got out and bought alcohol.
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> When Fisher got back in the car, it appeared Taylor did not want him in the car; Taylor suggested taking Fisher back to [Grier's girlfriend's] house. Davis said he, Grier, and Taylor were going to pick up some girls. Fisher wanted to stay and asked what they were going to do. Davis said Fisher could come with them. Rap music was playing loudly on a boom box in the front of the car. Davis and Grier were dancing to the beat of the music. Fisher was looking out the window. Davis tapped his shoulder and showed Fisher he was holding a gun. Davis said, 'It's loaded too.' Fisher returned to looking out the window. Fisher and Taylor heard a shot, and Fisher saw a flash. Fisher and Taylor both looked and saw Davis had the gun to Grier's head. Davis then fired a second shot. Fisher testified that, after the second shot, the gun appeared to jam. Davis moved his hand back and forth on the gun to fix the slide, and then shot a third time. Grier's head slumped forward.
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> Fisher and Taylor testified the gun Davis used appeared to be a .22 caliber semiautomatic. Both Fisher and Taylor had seen Davis with the gun before and had noticed that it jammed.
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> Taylor stopped the car on a dead-end street, kept his foot on the brake, lifted the center console, reached over Grier, and opened the passenger door. Taylor tried to push Grier's body out of the car. Taylor asked Davis for help, and Davis reached from the back seat to help push Grier's body out. Fisher also testified Taylor used a foot to push Grier out of the car. Fisher did not touch Grier. The top part of Grier's body was out of the car, and his feet were still inside. Taylor began to drive, and Grier's feet fell out, so that his body was entirely in the street. Taylor testified that, as he made a turn, the passenger door closed on its own.
>
> Fisher testified that Taylor said to Davis, 'Good shit.' Davis and Taylor clasped hands and 'gave each other some skin.' Davis told Fisher, 'I know

[1] Taylor pleaded guilty to voluntary manslaughter for his role in Grier's killing. (Ans., Ex. E at 2.)

> that was your friend, but he had to go.' Taylor looked at Fisher in the rear view mirror and told Fisher, '[Y]ou better not say shit.' Taylor testified he told Fisher not to say anything because he was afraid Davis would do something to Fisher too. Taylor thought Fisher looked shaken and afraid. Davis said, 'He ain't going to say nothing.'

(Ans., Ex. E at 3-4.)

In 2011, an Alameda County Superior Court jury found Davis guilty of first degree murder and found true various sentencing enhancements. He was sentenced to 80 years to life in state prison. (Ans., Ex. E at 1 (State Appellate Opinion, *People v. Davis*, No. A134279, 2014 WL 1694969 (Cal. Ct. App. Apr. 30, 2014) (unpublished)).) Davis's attempts to overturn his convictions in state court were unsuccessful. This federal habeas petition followed.

STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this Court may entertain a petition for writ of habeas corpus "in 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). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ 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] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

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

DISCUSSION

I. Accomplice Instruction

Davis alleges the trial court violated his trial rights by (A) failing to a give an accomplice instruction sua sponte and (B) approving the prosecutor's comment that Fisher was not an accomplice. (Pet., Dkt. No. 5 at 9.)

A. Accomplice Instruction

The relevant facts were summarized by the state appellate court:

> During closing argument, defense counsel stated: 'But when you break it down, it is as reasonable to assume that Jamerl Taylor and Terrell Fisher were the accomplices to this homicide as it is to say that Derrell Davis is. They both lied and they both lied at the same time and the same way. They admit to consulting with one another in the same way at the same time.'
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> In his rebuttal closing argument, the prosecutor stated: '[Defense counsel] stated that Terrell Fisher was an accomplice. Wrong. You will receive instructions on accomplice testimony. The accomplice instruction only applies to Jamerl Taylor. Before relying on anything Jamerl Taylor says, you must find slight corroborating evidence. [¶] If the [c]ourt . . . believed Terrell Fisher was an accomplice, you would have received an instruction saying that Terrell Fisher is an accomplice.' Defense counsel objected: 'Objection. Misstatement of law.' The court responded: 'What [the prosecutor] is saying is correct.' The prosecutor continued: 'You will not receive any statements or instructions that Terrell Fisher is an accomplice. Just because [defense counsel] says he's an accomplice does not make it so.'

> The court instructed the jury that, if anyone committed the murder, then Taylor was an accomplice to that crime, and his testimony required corroboration. (*See* CALCRIM No. 335.) The court did not give an accomplice instruction as to Fisher.

(Ans., Ex. E at 4-5.)

Davis claims the trial court interfered with his defense, a part of which was to lay blame on Fisher.[2] He alleges that he was prevented from doing so by the trial court's refusal to give an accomplice instruction under California Penal Code section 1111.[3]

The state appellate court rejected this claim because there wasn't sufficient evidence to support the giving of such an instruction:

> As the parties note, Fisher's presence at the scene of the shooting is not sufficient to establish his status as an accomplice on an aiding and abetting theory. [Citation omitted.] A person's presence at the scene of the crime and his 'intimate knowledge' of the crime, without more, only establish he was an eyewitness and not necessarily an accomplice. [Citation omitted.] Davis points to no testimony or physical evidence showing that Fisher committed the shooting, or that he intended to and did assist in the crime with knowledge of the perpetrator's criminal intent. [Citation omitted.]
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> [The state court also rejected Davis's claim that Fisher's inconsistent statements were evidence that he was an accomplice. It found that those

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[2] Davis also contends the prosecutor's comment during closing argument constitutes improper vouching. (Pet., Dkt. No. 5 at 9.) Improper vouching for the credibility of a witness occurs when the prosecutor places the prestige of the government behind the witness or suggests that information not presented to the jury supports the witness's testimony. *United States v. Young*, 470 U.S. 1, 7 n.3, 11-12 (1985); *United States v. Parker*, 241 F.3d 1114, 1119-20 (9th Cir. 2001). Davis has not shown that the prosecutor's comments constituted improper vouching. The prosecutor was not placing the prestige of the government behind any witness's credibility or suggesting that there was evidence not presented. Rather, he made a correct statement regarding the accomplice instructions. Any claim that this correct statement constitutes vouching is facially incorrect and not supported by the record. This claim is DENIED.

[3] "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Cal. Pen. Code § 1111.

> statements were relevant to his credibility, not to his criminal liability.]
>
> Davis also argues there was 'strong evidence' Fisher had a motive to kill Grier, and Taylor implicated Fisher in the killing. But Davis overstates the evidence on these points. As to Fisher's alleged motive, Davis cites Fisher's testimony that Taylor told Fisher a few nights before the shooting to watch out for Grier, because Grier might be trying to set up Fisher. Fisher testified he had no idea what Taylor was talking about, and he told Taylor he had no problem with Grier. As to Taylor's alleged implication of Fisher, Taylor wrote a note to his police interviewers saying: 'Terrell Fisher knows everything. More than me. I really don't know much. I'm serious.' Taylor brought up Fisher's name as someone the police should interview. Davis cites no evidence that Taylor accused Fisher of committing, or aiding and abetting, the shooting. The cited evidence is not sufficient to support a conclusion Fisher was an accomplice, i.e., that he could have been charged as a principal in the shooting of Grier. (*See* Pen. Code, § 1111.)
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> . . . We conclude there was 'no evidence other than speculation that [Fisher] planned, encouraged or instigated [the murder of Grier] to give rise to accomplice liability.' [Citation omitted.]

(Ans., Ex. E at 6-8.)

A state trial court's failure to give an instruction does not alone raise a ground cognizable in federal habeas corpus proceedings. *Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1988). The error must so infect the trial that the defendant was deprived of the fair trial guaranteed by the Fourteenth Amendment. *See id.* A habeas petitioner whose claim involves failure to give a particular instruction, as opposed to a claim that involves a misstatement of the law in an instruction, bears an "especially heavy burden." *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977)).

Due process requires that "'criminal defendants be afforded a meaningful opportunity to present a complete defense.'" *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir. 2006) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Therefore, a criminal defendant is entitled to adequate instructions on the defense theory of the case. *See Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 2000) (error to deny defendant's request for instruction on simple kidnaping where such instruction was supported by the evidence).

However, a defendant is entitled to an instruction on his defense theory only "if the theory is legally cognizable and there is evidence upon which the jury could rationally find for the defendant." *U.S. v. Boulware*, 558 F.3d 971, 974 (9th Cir. 2009) (internal quotations omitted).

The Constitution does not require that accomplice testimony be corroborated. *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993) ("The uncorroborated testimony of an accomplice is sufficient to sustain a conviction unless it is incredible or insubstantial on its face.")[4]

Habeas relief is not warranted here. First, there was no evidence Fisher was an accomplice, as the state appellate court described in great detail. The record shows only that he was present, not that he was criminally liable. Because there was no evidence on which a jury could rationally find Fisher was an accomplice, the trial court's refusal to give such an instruction did not violate Davis's constitutional rights. *Boulware*, 558 F.3d at 974.

Second, Davis was not prevented from using Fisher as part of his defense. Though not able to discredit Fisher by having him labeled an accomplice by the court, Davis was free to impeach Fisher with the same evidence Davis believes shows he was an accomplice.

Third, the Constitution does not require that an accomplice's testimony be corroborated. *Necoechea*, 986 F.2d at 1282. Therefore, the lack of corroboration presents no constitutional barrier to the admission or use of Fisher's testimony.

The state appellate court's rejection of Davis's claim was reasonable and is therefore entitled to AEDPA deference. This claim is DENIED.

[4] Davis's citation to *Hall v. United States*, 150 U.S. 76, 81 (1893) is not helpful. First, *Necoechea* is later in time than *Hall*, and therefore controls. Second, *Hall* is not relevant to the issue of corroborating accomplice testimony. In *Hall*, the Supreme Court upbraided a lower court for instructing the jury it could consider as evidence of guilt a prior unrelated crime of which the defendant had been acquitted. *Id.*

B. Prosecutor's Comment

At trial, the prosecutor stated that the court would have given an accomplice instruction if it had grounds to believe Fisher was an accomplice. Defense counsel objected. The trial court denied the objection by saying that the prosecutor was correct. Davis claims that the trial court violated his rights by affirming the prosecutor's statement. (Pet., Dkt. No. 5 at 9.)

The state appellate court rejected this claim because the prosecutor's statement was correct. (Ans., Ex. E at 8-9.) There was no evidence (as opposed to speculation) that Fisher was an accomplice. (*Id.*)

The constitutional right to present a complete defense includes the right to present evidence. *See Washington v. Texas*, 388 U.S. 14, 19 (1967). But the right is only implicated when the evidence the defendant seeks to admit is "relevant and material, and . . . vital to the defense." *Id.* at 16.

Habeas relief is not available on this claim. First, the state appellate court reasonably determined that the trial court's response to the prosecutor's comment did not violate Davis's trial rights. Rather, the court's affirmation ensured that the jury clearly understood the law and how to regard the lack of an instruction. Correctly instructing the jury and preventing misunderstanding cannot have been constitutional error.

Also, it was not vital to Davis's defense to establish that Fisher was an accomplice, as respondent points out. "While defense counsel did once in closing mention that Fisher might be viewed as an accomplice, her argument primarily focused on the theory that the physical evidence — particularly blood — indicated that the murder did not take place in Taylor's car the way Taylor and Fisher described it." (Ans. at 17.)

Davis's citation to *United States v. Miguel*, 338 F.3d 995 (9th Cir. 2003) is inapposite. (Pet., Dkt. No. 5 at 10.) The facts are crucially different. In *Miguel*, the district court erred when it forbade defense counsel from presenting a certain theory *in any form* to the jury. In Davis's case, defense counsel was allowed to present its theory, that is, that Fisher was an accomplice. (Ans., Ex. B, Dkt. No. 19-2 at 1774.)

The state court's rejection of Davis's claim on these facts was reasonable and is therefore entitled to AEDPA deference. The claim is DENIED.

II. Denial of a Continuance

Davis claims the trial court violated his right to a fair trial when it denied his motion for a continuance. (Pet., Dkt. No. 5 at 10.) The relevant facts are as follows. On what was supposed to be the first day of trial (Monday, May 9) defense counsel moved for a continuance on grounds that she needed another month to prepare after the prosecutor had told her the previous Friday that Taylor had agreed to plead guilty and testify against Davis. (Ans., Ex. A, Dkt. No. 16-2 at 389-390.) The trial was eventually rescheduled to start on May 18. (*Id.*, Dkt. No. 16-3 at 400.) On that day, the parties appeared and stated that they were ready to proceed. (*Id.*, Ex. B, Dkt. No. 17 at 14-15.) Jury voir dire started the next day (*id.* at 78) and opening statements were given on June 2 (*id.* at 107).

This claim was not raised on direct appeal, but rather only on collateral review to the state supreme court, which summarily denied it. (Ans., Ex. G.) When presented with a state court decision that is unaccompanied by a rationale for its conclusions, a federal court must conduct an independent review of the record to determine whether the state court decision is objectively unreasonable. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). This review is not de novo. "[W]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

To establish a constitutional violation based on the denial of a continuance motion, a petitioner must show that the trial court abused its discretion, which will be found if, after carefully evaluating all relevant factors, the denial was arbitrary or unreasonable. *See Armant v. Marquez*, 772 F.2d 552, 556 (9th Cir. 1985). The relevant factors are: (1) whether the continuance would have inconvenienced witnesses, the court, counsel, or the parties; (2) whether other continuances had been granted; (3) whether legitimate reasons existed for the delay; (4) whether the delay was the defendant's fault; and

(5) whether the denial prejudiced the defendant. *See U.S. v. Mejia*, 69 F.3d 309, 314 (9th Cir. 1995). The ultimate test remains whether the trial court abused its discretion through an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Houston v. Schomig*, 533 F.3d 1076, 1079 (9th Cir. 2008) (quoting *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)) (internal quotation marks omitted).

Habeas relief is not warranted on this claim. First, Davis's allegations are conclusory and undetailed. He fails to state, much less show, how the denial of a month's continuance adversely affected his ability to present a defense or otherwise violated his constitutional rights. Such conclusory allegations fail to "state facts that point to a real possibility of constitutional error." *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (internal quotation marks and citation omitted).

Second, a month's continuance was apparently unnecessary. Defense counsel was ready to start on May 18 and nothing in the record shows that her having less than a month adversely affected the trial or Davis's defense. In sum, there is not even the slightest indication that the trial court abused its discretion through an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Houston*, 533 F.3d at 1079.

Upon an independent review of the record, the Court concludes that the state court's rejection of this claims was not objectively unreasonable. The state court's decision is therefore entitled to AEDPA deference. Accordingly, this claim is DENIED.

III. Assistance of Counsel

At trial, the prosecutor questioned Sergeant Basa about his interrogation of Fisher, whose interviews with police were recorded. No recording or transcript of these interviews was provided to the jury.

Davis claims in a conclusory fashion that defense counsel rendered ineffective assistance when she failed to move to admit the recording of the December 15, 2008 interview of Fisher, a transcript of which is appended to the petition and appears in respondent's exhibits. (Pet., Dkt. No. 5 at 11; Ans., Ex. E, Dkt. No. 20-5 at 79.) By not

moving for its admission, defense counsel failed to impeach Fisher's testimony effectively. (*Id.*)

> The relevant facts are as follows:
>
> The record does not reflect Davis's trial counsel sought to introduce the video recording or transcript of the interview. But, in her statement of appellate issues, trial counsel stated the court's denial of Davis's 'motion to permit the jury to view multiple videotaped statements of Terrell Fisher and Jamerl Taylor was a significant restriction of cross-examination.' The trial record includes discussions between the court and counsel about a previous ruling, apparently made off the record, that Davis's counsel could not play for the jury videotapes of Taylor's pretrial interviews. The on-the-record discussion suggests counsel sought to introduce the videotapes to impeach Taylor's credibility. In these on-the-record discussions, the court and counsel do not refer to Fisher's interviews.
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> . . . .
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> Here, the jury saw no part of the interview tape, and received no part of the transcript. The prosecutor and defense counsel did elicit from Basa some testimony about the interview. On direct examination, Basa testified that, during the interview, Fisher stated Davis shot Grier three times in the back of the head, and said Taylor was a willing participant in the crime.
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> On cross-examination, defense counsel elicited that, during the first part of the interview, Fisher continued to claim he did not know what had happened to Grier. A few hours into the interview, Basa confronted Fisher, stating that, in light of other information Basa had gathered, he knew Fisher's account was not true. Fisher then told Basa he was in the car when Grier was shot.
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> On redirect, Basa testified witnesses in homicide investigations are often reluctant to speak to police, and frequently do not provide information until after being interviewed multiple times. The prosecutor referred to a few portions of the interview transcript (apparently to refresh Basa's recollection), and elicited that Fisher was an unusual witness in that he voluntarily (at Basa's request) came to the police station to be interviewed and arrived an hour early. But the prosecutor also elicited that Fisher did not acknowledge until well into the interview that he was present when Grier was killed. Fisher appeared nervous and scared during the interview, and he paused and stuttered as he told Basa about Grier's death. Fisher also told Basa he could not sleep because of what he knew about the crime.

> In closing argument, the prosecutor noted Fisher arrived early for the interview. The prosecutor stated Fisher initially lied to protect Davis because '[b]lood is thicker than water,' but Fisher was 'haunted' by what he had seen, and he finally told the truth. The prosecutor acknowledged that, even during the first portion of the interview, Fisher continued to deny knowing what happened to Grier.

(Ans., Ex. 20-21.)

The state appellate court rejected Davis's claim. In its opinion, the trial testimony did not support the idea that Fisher changed his testimony through trickery, coercion, or encouragement by the police. The testimony also defeated any attempt to show prejudice:

> The trial testimony made clear that Fisher did not admit, until well into the interview, that he was present when Grier was killed. Basa so testified, and the prosecutor noted this fact in closing argument. The jury also knew that, during the interview, Basa pushed Fisher to change his story, admit he was present when Grier was killed, and tell the officers what he knew. Basa testified that a few hours into the interview, he confronted Fisher, and stated that in light of other information the police had obtained, he knew Fisher's account was not true. Only then did Fisher tell Basa he was in the car when Grier was shot. Defense counsel also questioned Basa about whether he used suggestive or deceptive investigative techniques, such as telling witnesses he had phone records he had not yet obtained. In closing argument, the prosecutor noted Fisher and Taylor 'got squeezed by Sergeant Basa,' and '[t]he Oakland police kept pressing,' because Fisher's and Taylor's initial accounts were inconsistent with the information the police had obtained. The jury was not left with any misimpression that Fisher, without any encouragement or pressure from the police, changed his mind and decided to admit being present when Grier was shot.
>
> Moreover, the transcript of the interview does not support Davis's suggestion that Fisher was willing to change his account to conform to whatever the police wanted to hear. The transcript reveals Fisher continued to deny knowledge of certain matters, even when pressed by the officers to provide more information. After Fisher told the officers that Davis shot Grier, Basa suggested Fisher must have known of Davis's and Taylor's intentions before the shooting, or must have heard them say something about planning to shoot Grier. Basa stated it was difficult to believe Fisher had no advance knowledge, because it was unlikely someone planning a shooting would let someone with no knowledge or involvement witness it. Fisher, nevertheless, continued to deny knowing anything about a plan to shoot Grier. Fisher also repeatedly denied discussing the shooting with Davis afterwards, and stated he did not know why Davis shot Grier, despite

> Basa's suggestion Fisher must have later asked Davis why he shot Grier.
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> Fisher also provided information the officers did not appear to be seeking. As noted, Fisher implicated Taylor as a willing participant in the shooting. Fisher stated he believed Taylor knew in advance Davis was going to shoot Grier. Taylor pushed Grier's body out of the car. Taylor told Fisher weeks later that Grier 'had to go.' Davis does not argue on appeal (and the interview transcript does not show) that before Fisher implicated Taylor, the police encouraged him to do so. Contrary to Davis's suggestion on appeal, if jurors had watched the videotape of the entire interview, it is not likely they would have concluded the account Fisher gave was just an effort to tell the police what they wanted to hear.
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> For the foregoing reasons, we conclude it is not reasonably probable that, if counsel had successfully sought admission of the entire interview tape, Davis would have obtained a more favorable verdict.

(Ans., Ex. E at 22-23.)

In order to prevail on a claim of ineffectiveness of counsel, a habeas petitioner must establish two factors. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms, *Strickland v. Washington*, 466 U.S. 668, 687-68 (1984), "not whether it deviated from best practices or most common custom," *Harrington v. Richter*, 562 U.S. 86, 98 (2011) (citing *Strickland*, 466 U.S. at 690). "A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance." *Id.* at 104 (quoting *Strickland*, 466 U.S. at 689).

Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Where the defendant is challenging his conviction, the appropriate question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562

U.S. at 112 (citing *Strickland*, 466 U.S. at 693).

The standards of both 28 U.S.C. § 2254(d) and *Strickland* are "highly deferential . . . and when the two apply in tandem, review is doubly so." *Id.* at 105 (quotation and citations omitted). "The question [under § 2254(d)] is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Habeas relief is not warranted here. I have reviewed the transcript of the interrogation. Nothing in that record indicates that Fisher was threatened, promised leniency, or subjected to coercion. Nor was he told to fabricate or exaggerate his story. Fisher was certainly strongly encouraged, politely but persistently, to tell the truth. Also, on cross-examination, defense counsel thoroughly questioned Basa about the December 15 interview. The jury heard a great deal about the interview itself. The transcript shows that Basa's testimony fairly represented the contents of the interrogation.

Davis has not shown that failure to introduce a recording of the entire interrogation into evidence was either deficient or that it resulted in prejudice. The state court's rejection of his claim on these facts was reasonable and is therefore entitled to AEDPA deference. The claim is DENIED.

IV. Admission of Opinion Evidence

Davis claims the trial court violated his right to due process when it admitted portions of Basa's testimony that he regards as impermissible expert opinion testimony. According to Davis, this "urged jurors to consider Basa's opinion testimony as expert opinion that should guide and perhaps supercede [*sic*] the jury's assessment of the credibility of the evidence." (Pet., Dkt. 5 at 12.) The relevant facts are as follows:

> The prosecutor asked investigating Sergeant Caesar Basa if, during his investigation, he was 'able to exclude Terrell Fisher as the person responsible for killing Ronnie Grier.' Defense counsel objected that the question '[c]alls for opinion and conclusion.' The court responded: 'This is the investigation, so overruled, yes.' Basa answered: 'Yes, sir.'
>
> The prosecutor asked Basa, 'Did any human, witness, person, thing in the

world [tell you] that Terrell Fisher was the person who shot Ronnie Grier?' Defense counsel objected to the use of the phrase 'in the world.' The court overruled the objection, stating: 'It's a manner of speaking.' Basa answered: 'No, sir. Not in the world.'

The prosecutor elicited from Basa, without objection, that he had not obtained any information in his investigation that led him to believe Taylor shot and killed Grier. The prosecutor followed up by asking whether Basa had obtained any 'credible information' implicating Taylor as the shooter. Defense counsel objected to the use of the term 'credible,' and the court overruled the objection. Basa answered, 'No.'

The prosecutor asked Basa why he arrested Davis. Defense counsel did not object. Basa answered: 'Because the information we received was enough probable cause for us to arrest Mr. Davis.' The prosecutor followed up by asking Basa, '[C]ould you just summarize for us?' Basa responded: 'Based on the testimony of Mr. Jamerl Taylor and Mr. Terrell Fisher, who is the defendant's brother, we had enough probable cause to make an arrest.' Defense counsel objected to the use of the term 'testimony.' The court and the prosecutor clarified Taylor and Fisher were not under oath when they spoke to the police.

On redirect examination, the prosecutor asked Basa, 'As far as Terrell Fisher's demeanor or feelings for Jamerl Taylor, did Terrell Fisher in his second interview seem to be someone who was in cahoots with Jamerl Taylor?' Defense counsel objected to the question as calling for speculation. The court overruled the objection, stating Basa could give his lay opinion based on his interviews of Fisher and Taylor. Basa answered, 'No, sir.' Basa explained Fisher had stated he believed Taylor was in on the killing.

Referring to the transcript of Basa's December 18, 2008 interview of Taylor, the prosecutor asked Basa whether it refreshed his recollection as to whether he had any information 'about any person in the world wanting Ronnie Grier dead.' Defense counsel objected to the use of 'any person in the world.' The court overruled the objection, and Basa answered that the transcript of the interview refreshed his recollection that he had obtained information from Taylor that Davis wanted Grier dead.

In closing argument, the prosecutor, after arguing the physical evidence and testimony of other witnesses corroborated Fisher's and Taylor's accounts of the shooting, stated Basa had conducted a thorough investigation, including interviewing numerous witnesses. The prosecutor argued that Basa had told the jury 'that the arrows kept pointing to Derrell Davis, Jamerl Taylor, and Terrell Fisher as being the last persons with Ronnie Grier[.]' Defense

> counsel objected to the argument as '[m]isconduct,' and the court overruled the objection. In his rebuttal closing argument, the prosecutor asked a series of rhetorical questions, including, 'Why did you say Ronnie had to go? Why would your cousin say you killed Ronnie? Why was Sergeant Basa able to exclude everyone but you?' Defense counsel objected this was '[i]mproper argument'; the court overruled the objection.

(Ans., Ex. E at 9-10.)

The state appellate court rejected the claim. It was forfeited by failing to object to most of the testimony he finds impermissible. Also, it was meritless. Basa's testimony was permissible lay opinion rationally based on the witness's perception and was "helpful for the jury to understand how the investigation came to focus on Davis and resulted in his arrest more than one month after Grier's death":

> Similarly, here, to the extent the challenged portions of Basa's testimony included the opinions or conclusions he reached at different stages of his investigation (such as whether he could exclude Fisher as the shooter or whether there was probable cause to arrest Davis), those opinions were based on his perceptions and were helpful for the jury to understand how the investigation came to focus on Davis and resulted in his arrest more than one month after Grier's death. Grier's body was discovered on November 14, 2008. After Basa's initial interviews of Taylor on November 19 and Fisher on November 21 (which Basa conducted after receiving information that Taylor and Fisher might have information about Grier's death), Basa was not yet able to exclude Fisher as a person of interest in Grier's death. Police impounded Taylor's car after a traffic stop on December 10. When Basa interviewed Taylor again on December 11, Taylor stated Davis killed Grier. However, without corroboration, Basa believed this statement was not sufficient probable cause to arrest Davis. When Basa interviewed Fisher again on December 15, Fisher stated Davis shot Grier and Taylor was a willing participant in the crime. Only then did Basa believe he had probable cause to arrest Davis. Davis was arrested on December 18.
>
> Davis suggests Basa gave opinions about the state of the evidence at trial (on such questions as whether Fisher or Taylor shot Grier, or whether there was sufficient evidence of Davis's guilt), and thus 'improperly intruded on the jury's fact-finding function.' We reject this characterization of Basa's testimony. Basa did not opine about the strength of the trial evidence. Instead, he testified about the opinions he held at various points during his investigation based on the information he had obtained.

(Ans., Ex. E at 12-13.)

Furthermore, any error was harmless because the "eyewitness testimony of Fisher and Taylor that Davis shot Grier was a much more central part of the People's case than was the challenged testimony by Basa." (*Id.* at 13.)

The admission of evidence is not subject to federal review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fair trial guaranteed by due process. *Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999). Only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. *Jammal v. Van De Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

Habeas relief is not warranted here. First, Basa gave his opinion on his investigation, a matter well within his personal knowledge. He did not give his opinion on the evidence produced at trial or how the jury should view such evidence. Second, the jury could draw permissible inferences regarding why the police suspected Davis. For example, Basa found probable cause to arrest Davis only after several interviews with Taylor and finding corroborating evidence. Such opinion testimony allowed the jurors to make permissible inferences, but did not direct them to make conclusions about guilt or innocence. As the state appellate court wrote, his "opinions were based on his perceptions and were helpful for the jury to understand how the investigation came to focus on Davis and resulted in his arrest more than one month after Grier's death." (Ans., Ex. E at 12.) The state court reasonably determined that Basa's testimony did not violate Davis's due process right to a fair trial.

Third, there was no prejudice. Basa's testimony surely had little effect on jurors who had heard the direct eyewitness testimony of Taylor and Fisher regarding the shooting death of Grier.

Fourth, habeas relief would be unavailable even if the evidence were prejudicial. The Supreme Court "has not made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation." *Holley v. Yarborough*, 568 F.3d 1901, 1101 (9th Cir. 2009).

The state court's rejection of Davis's claims was reasonable and is therefore entitled to AEDPA deference. These claims are DENIED.[5]

V. Prosecutorial Misconduct

In his closing argument, the prosecutor made several statements based on Basa's testimony, most of which related to Basa's inability to find an alibi witness for Davis. Davis claims the prosecutor's comments were a misuse of Basa's testimony, which had been admitted for the limited purpose of explaining the police investigation. (Pet., Dkt. No. 5 at 12-13.) In contravention of this purpose, the prosecutor encouraged the jury to use Basa's testimony for the truth of the matter asserted. (*Id.* at 13.)

The state appellate court rejected this claim. In sum, it held that the prosecutor's remarks related to permissibly admitted evidence, which was not admitted for a limited purpose. On these facts, the prosecutor committed no misconduct. (Ans., Ex. E at 15-16.)

A defendant's due process rights are violated when a prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation and internal quotation marks omitted). Under *Darden*, the first issue is whether the prosecutor's conduct was improper; if so, the next question is whether such conduct infected the trial with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005). It is "the fairness of the trial, not the culpability of the prosecutor" that is the touchstone of the due process analysis. *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

Habeas relief is not warranted. First, there has been no showing of misconduct. The state appellate court reasonably determined that the prosecutor's comments were permissible comments on properly admitted evidence. Second, there has been no credible

[5] To the extent Davis raises a claim that counsel was ineffective for failing to object more often, it is DENIED. First, there was no deficient performance. After having her objections repeatedly denied, counsel likely thought further objection was futile. *Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("failure to take a futile action can never be deficient performance"). Second, Basa's testimony was not prejudicial, as described above. The state appellate court's rejection of this claim was therefore reasonable (CITE), and is entitled to AEDPA deference. The claim is DENIED.

showing that Davis received an unfair trial. This becomes especially clear when one considers the eyewitness testimony of Taylor and Fisher.

The state court's rejection of Davis's claim was reasonable and is therefore entitled to AEDPA deference. This claim is DENIED.

VI. Cumulative Error

Davis claims that even if the errors individually do not justify relief, the cumulative effect of all errors resulted in a fundamentally unfair trial. In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may still prejudice a defendant so much that his conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893-95 (9th Cir. 2003). Where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation. *See Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002).

Habeas relief is not warranted. Because Davis has not shown any errors, there can be no cumulative error.

The state court's rejection of Davis's claim was reasonable and is therefore entitled to AEDPA deference. This claim is DENIED.

CONCLUSION

The state court's adjudication of Davis's claims did not result in decisions that were contrary to, or involved an unreasonable application of, clearly established federal law, nor did they result in decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the petition is DENIED.

A certificate of appealability will not issue. Reasonable jurists would not 'find the district court's assessment of the constitutional claims debatable or wrong.' *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Davis may seek a certificate of appealability from the Ninth Circuit.

The Clerk shall enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.

Dated: July 19, 2017

WILLIAM H. ORRICK
United States District Judge

United States District Court
Northern District of California