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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANIEL ALEM,
Plaintiff,

v.

ERIC ARNOLD,
Defendant.

Case No. [3:15-cv-03649-WHO](#)

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

Re: Dkt. No. 1

INTRODUCTION

Petitioner Daniel Alem (“petitioner”) seeks federal habeas relief from state court convictions for attempted second degree robbery, attempted murder, and assault with a semiautomatic firearm. Alem challenges his convictions on the grounds that the CALCRIM No. 1600 instruction on robbery, modified to include a “safe haven” instruction, lessened the prosecutor’s burden of proof in violation of Alem’s Sixth Amendment and due process rights. Because the state court that reviewed Alem’s claim reasonably applied the test for constitutional error stemming from instructional error, his petition is DENIED.

BACKGROUND

I. Procedural Background

On June 26, 2012, an Alameda County jury found petitioner guilty of one count of attempted murder (Cal. Pen. Code § 187(a)), one count of attempted robbery (Cal. Pen. Code § 211), and one count of assault with a semi-automatic firearm (Cal. Pen. Code § 245(b)). Respondent’s Answer to the Court’s Order to Show Cause (“Answer”), Ex. 1, Clerk’s Transcript (“CT”) at 213-216 (Dkt. No. 12-1). He received a sentence of 32 years to life: seven years for attempted murder, two years for attempted robbery, six years for assault with a semi-automatic

1 firearm, and 25 years to life for a section 12022.53(d) enhancement. CT at 231; Pet. at p-1 (Dkt.
2 No. 1). In February 2014, the California Court of Appeal affirmed the judgment. Answer, Ex. 6,
3 Opinion of the California Court of Appeal (“CCA Op.”) (Dkt. No. 12-11 at 75). In April 2014,
4 Alem filed a petition for review with the California Supreme Court. Answer, Ex. 7 (Dkt. No. 12-
5 11 at 85). The California Supreme Court denied review in May 2014. Answer, Ex. 8 (Dkt. No.
6 12-11 at 128). This federal habeas petition followed, raising the same issues raised in his direct
7 appeal.

8 **II. Factual Background**

9 **A. The Facts of the Case**

10 The evidence before the state court included statements and testimonies made by Alem, the
11 victim Natsagdorj Gantumur, the police, and third-party witnesses, including one eye witness.
12 Based on the evidence, the California Court of Appeal summarized the facts of the case as
13 follows:

14 *A. Prosecution Case*

15 Natsagdorj Gantumur, a native of Mongolia who came to the United
16 States in 2001, was walking at 11:00 p.m. on December 1, 2010. He
17 was on Madison Street in Oakland, going to visit a friend. At the
18 time, he was texting on his cell phone. Defendant approached
Gantumur and grabbed the cell phone from him, running away.
Gantumur had not dropped his phone before the snatch by
defendant.

19 Gantumur chased after defendant, yelling, “Give me back my
20 phone.” He caught up with defendant at the intersection of 15th and
21 Madison Streets. As Gantumur confronted defendant, defendant
turned, facing Gantumur and pulled gun [sic] from his jacket. He
pointed the weapon at Gantumur.

22 Thinking defendant was going to shoot him, Gantumur grabbed the
23 hand holding the weapon, pushing it away from his torso. Once
24 Gantumur physically moved the hand down to defendant’s side,
defendant began firing the weapon. With this, Gantumur pushed
defendant to the ground and Gantumur fell on top of him.

25 Defendant kept firing the gun. Gantumur began hitting him in the
26 face with his fist while using his other hand to restrain the hand
27 holding the weapon. Eventually, defendant stopped firing because
28 the weapon was empty. Gantumur knew this when he heard the
clicking sound of the weapon. When this happened, Gantumur
grabbed the gun from defendant and punched him in the face. The
two men both stood up and defendant asked for his gun back.

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Gantumur noticed he had been wounded on his left side from the gun fire. He saw his cell phone on the ground in pieces and picked them up. In fact, Gantumur returned the weapon to defendant, who took it and then ran north on Madison Street.

When Gantumur was interviewed by the police at the hospital, he provided an account of the incident. In his statement he indicated he chased defendant after the phone was taken. According to the police statement, when Gantumur caught up with defendant, he took his phone back. Defendant started to fight him so Gantumur punched defendant. Only then did defendant pull out his gun. Gantumur did acknowledge being handed a copy of his statement at the hospital for review but he was suffering from the injury at the time; he was not concerned about the order of the narrative in the police report. Gantumur, when he testified, disagreed with the chronology contained in the police statement.

[...]

B. Defense Case

Defendant testified he was going to a friend's house when Gantumur came up to him. Gantumur dropped his cell phone near defendant. Defendant picked it up and handed it to Gantumur. As he picked it up, Gantumur began yelling, "Give me my phone, give me my phone." Defendant asked Gantumur, "Dude, why are you tripping?" With this remark, Gantumur punched defendant in the eye. Gantumur charged at defendant and the two men fell to the ground, with Gantumur hitting defendant in the face. To protect himself, defendant pulled out his gun and fired warning shots. He only

intended to scare Gantumur.

As he got up, Gantumur grabbed the weapon from defendant. Defendant asked for the gun back as he picked Gantumur's phone up off the ground. Accepting his phone from defendant, Gantumur returned the gun to him. Defendant then walked away from the scene. As he left, defendant tossed the gun in the bushes. Defendant was concerned the police might find the gun on his person.

When he was arrested by Officer Martin, defendant did not advise him he had been assaulted by another person. At the police station, defendant spoke with Officer Phong Tran. Tran asked defendant how he injured his eye, to which defendant replied that someone tried to rob him.

Defendant acknowledged he purchased the gun approximately one year before the incident with Gantumur. He carried two magazines because he might find it necessary to reload the weapon quickly.

The defense maintained there was no trespassory taking here. Rather, defendant simply picked up Gantumur's phone from the ground. Gantumur then became suddenly hostile and started hitting defendant. This triggered the need for defendant to pull out his gun in self-protection. His counsel requested and received defense instructions on the scope of self defense.

1 CCA Op. at 2-5 (Dkt. No. 12-11 at 77-80).

2 **B. The Trial Court’s Jury Instructions**

3 In the trial court, the judge indicated that she was going to advise the jury pursuant to
4 CALCRIM No. 1600, the robbery jury instruction. The prosecutor requested that the court advise
5 the jury that the “application of force or fear may be used when taking the property or when
6 carrying it away.” Answer, Ex. 2, Reporter’s Transcript (“RT”), at 806 (Dkt. No. 12-8 at 139).
7 The prosecutor also asked the court to instruct the jury that “a theft or robbery remains in progress
8 until the perpetrator has reached a place of temporary safety,” arguing that it was “essential to this
9 case that the jury understand for the use clause that the robbery is still ongoing while the defendant
10 remains on the scene before he has reached a place of safety.” RT at 806-807. At first, the court
11 observed that “pinpoint evidence is typically not allowed when the circumstances of the case do
12 not suggest a need for further clarification.” RT at 807. Defense counsel objected to the proposed
13 instructional language for the same reason. RT at 809. However, after reviewing additional case
14 law regarding the requested instruction, the court concluded that “the cases really do speak to the
15 fact that the crime of robbery is continuing to occur until the perpetrator is safe.” RT at 818.
16 Thus, the court advised the jury pursuant to CALCRIM No. 1600, with the additional pinpoint
17 language:

18 To prove the crime of robbery, the People must prove, one, that the
19 defendant took property that was not his own;

20 Two, the property was taken from another person’s possession and
immediate presence;

21 Three, the property was taken against that person’s will;

22 Four, the defendant used force or fear to take the property or prevent
23 the person from resisting;

24 And [five], when the defendant used force or fear to take the
property, he intended to deprive the owner of it permanently;

25 The defendant’s intent to take the property must have been formed
26 before or during the time he used force or fear. If the defendant did
not form this required intent until after using the force or fear, then
27 he did not commit robbery.

[...]

28 *The application of force or fear may be used either when taking the*

1 *property or when carrying the property away.*

2 *And the crime of robbery remains in progress, ladies and gentlemen,*
3 *until the perpetrator has reached a place of temporary safety.*

4 RT at 909 (emphasis added).¹

5 **C. The Appellate Court’s Opinion**

6 The appellate court found that the instruction given by the trial court was “a correct
7 statement of the pertinent law needed to decide this case.” CCA Op. at 7 (Dkt. No. 12-11 at 82).

8 The court provided:

9 We begin our assessment of the court’s instruction with the
10 understanding the crime of robbery is a continuing offense. (*People*
11 *v. Gomez* (2008) 43 Cal.4th 249, 254 (*Gomez*)). As such the crime
12 continues until all the elements are satisfied. (*Ibid.*) Asportation or
13 carrying the property of the victim away is an element of the crime.
14 It continues until the suspect reaches a place of temporary safety
15 with the property. (*Id.* at p. 255; *People v. Flynn* (2000) 77
16 Cal.App.4th 766, 772.)

17 Additionally, the element of “force or fear” need not arise only in
18 the act of taking the property of another. Carrying away another’s
19 property in itself may satisfy the evidence of “force or fear” if that is
20 when this particular element takes place during the robbery act. “A
21 robbery is not completed at the moment the robber obtains
22 possession of the stolen property. The crime of robbery includes the
23 element of asportation, the robber’s escape with the loot being
24 considered as important in the commission of the crime as gaining
25 possession of the property. . . . [A] robbery occurs when defendant

26 _____
27 ¹ The appellate court described the trial court’s deliberation over adding the “safe haven”
28 language:

29 The trial court at first was not inclined to add additional language to
30 CALCRIM No. 1600. She believed the incident at trial was all part
31 of the continuous act of taking Gantumur’s phone. The force was
32 ongoing. There was no need for the clarification sought by the
33 prosecutor. The defense agreed with the court’s observation,
34 stating, “I object to it [the modification of CALCRIM No. 1600] for
35 the reasons you stated”; i.e., it was unnecessary and repetitive.
36 However, the court decided to take the matter under submission.

37 After review, and before instructing the jury, the judge indicated the
38 cases do include the transportation of the property to a place of
39 safety within the scope of robbery. She noted, “The crime of
40 robbery remains in progress until the perpetrator has reached a place
41 of temporary safety.” When the court announced the reasons for
42 giving the modification based on her review of the case law, defense
43 counsel expressed no objection.

44 CCA Op. at 5-6 (Dkt. No. 12-11 at 80-81).

1 uses force or fear in resisting attempts to regain the property . . .
2 regardless of the means by which defendant originally acquired the
3 property.” (*People v. Estes* (1983) 147 Cal.App.3d 23, 27-28
4 (*Estes*); *People v. Anderson* (1966) 64 Cal.2d 633, 638.)

5 In our case, the evidence is uncontradicted defendant obtained
6 possession of Gantumur’s cell phone without permission; he
7 snatched it from his hand. As the defendant ran away with the
8 stolen property, Gantumur chased him. When Gantumur caught up
9 with him, defendant turned around and pointed the handgun at his
10 torso. The struggle then followed. In other words, in his escape to a
11 place of safety, when confronted by the victim of the theft,
12 defendant evidenced “force or fear” by brandishing the firearm at
13 Gantumur. Under *Gomez* and *Estes*, the element of “force or fear”
14 was satisfied during the asportation of the stolen property. (See also
15 *People v. Villa* (2007) 157 Cal.App.4th 1429, 1433.) Once the two
16 men struggled after Gantumur was confronted by defendant with the
17 weapon, the victim sustained serious wounds from the discharge of
18 the weapon, such evidence only magnifying the “force or fear”
19 element for robbery.

20 CCA Op. at 7-8 (Dkt. No. 12-11 at 82-83).

21 The appellate court also discussed Alem’s reliance on *People v. Hodges*, 213 Cal.App.4th
22 531 (2013) and found that *Hodges* was distinguishable:

23 In his briefing, defendant relies on the recent case *People v. Hodges*
24 (2013) 213 Cal.App.4th 531 (*Hodges*). We find *Hodges* inapposite
25 to the issues in this case. Simply stated, *Hodges* involved a grocery
26 store shoplifting scenario where the guard approached the suspect
27 who was entering his car. The guard advised the suspect he had not
28 paid for the items and needed to return to the store. Hodges claimed
he lost the receipt but told the guard he did not want the items and
tossed the goods at the guard’s partner who had now approached.
(*Id.* at pp. 535-536.) Hodges also pushed the partner back, causing
the security officer to land against another car. Again, the pushing
and relinquishment of the groceries took place after Hodges
announced he did not want the goods from the store. (*Id.* at p. 536.)

During argument, counsel for Hodges contended evidence of “force
or fear” was absent in the case because his client had relinquished
the property before any pushing or tossing of groceries had taken
place. The court refused to advise the jury regarding the impact of
abandonment of the property before the evidence of “force or fear”
is present. (*Hodges, supra*, 213 Cal. App. 4th at p. 537.) During
deliberations, the jury sent out a specific question on the effect of
abandoning the stolen property before the first instance of force or
fear occurred. The court, over objection by defense counsel, advised
the jury the incident in the parking lot, even with the abandonment
of the stolen property by Hodges, could be viewed as a continuation
of the robbery because the accused had not reached a place of
temporary safety. (*Id.* at p. 538.) This was erroneous. (*Id.* at pp.
542-543.)

Under our facts, the prosecution’s theory was the taking here

1 escalated into a robbery because defendant never offered to return
2 the victim's cell phone. Instead, he threatened to keep it at
3 gunpoint. The defense focused on defendant's courteous efforts to
4 hand over Gantumur's dropped phone and the aggressive reaction of
5 the owner. The defense did not develop a theory of abandonment of
6 a trespassory taking as was presented in *Hodges*. Instead,
7 defendant's focus was on misunderstanding and then self-defense.
8 The jury's verdict, after proper instructions, was based on their
9 assessment of the evidence. Also, they had the benefit of the
10 testimony of both Gantumur and defendant in reaching the verdict.

6 CCA Op. at 8-9 (Dkt. No. 12-11 at 83-84).

7 LEGAL STANDARD

8 Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal
9 district court may entertain a petition for writ of habeas corpus "in behalf of a person in custody
10 pursuant to the judgment of a State court only on the ground that he is in custody in violation of
11 the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may
12 not be granted with respect to any claim that was adjudicated on the merits in state court unless the
13 state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved
14 an unreasonable application of, clearly established Federal law, as determined by the Supreme
15 Court of the United States; or (2) resulted in a decision that was based on an unreasonable
16 determination of the facts in light of the evidence presented in the State court proceeding." 28
17 U.S.C. § 2254(d).

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

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

1 application of clearly established federal law was “objectively unreasonable.” *Id.* at 409.
2 The Due Process Clause requires the prosecution to prove every element charged in a criminal
3 offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). Any jury
4 instruction that “reduce[s] the level of proof necessary for the Government to carry its burden... is
5 plainly inconsistent with the constitutionally rooted presumption of innocence.” *Cool v. United*
6 *States*, 409 U.S. 100, 104 (1972).

7 To obtain federal collateral relief for errors in the jury charge, a petitioner must show that
8 the deficient instruction by itself so infected the entire trial that the resulting conviction violates
9 due process. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The instruction may not be judged in
10 artificial isolation, but must be considered in the context of the instructions as a whole and the trial
11 record. *Id.* In other words, the court must evaluate jury instructions in the context of the overall
12 charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152,
13 169 (1982) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)); *Prantil v. California*, 843 F.2d
14 314, 317 (9th Cir. 1988).

15 DISCUSSION

16 Alem asserts that the trial court’s jury instructions “violated [his] Sixth Amendment and
17 due process rights to a fair trial,” Pet. at p-10, but focuses his argument on an alleged deprivation
18 of due process. Pet. at m-3. As such, I presume that Alem asserts a claim for relief under the due
19 process clause of the Fourteenth Amendment.

20 “[T]he Due Process Clause protects the accused against conviction except upon proof
21 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
22 charged.” *In re Winship*, 397 U.S. at 364. To grant habeas relief, the federal court must find that
23 “the ailing instruction by itself so infected the entire trial that the resulting conviction violates due
24 process.” *Estelle*, 502 U.S. at 72. That is not the case here. The California Court of Appeal
25 reasonably determined that “the instruction given by the trial court in this case was a correct
26 statement of the pertinent law needed to decide this case.” CCA Op. at 7 (Dkt. No. 12-11 at 82).

27 Alem first asserts that the “safe haven” instruction was unwarranted because the evidence
28 shows that he, like the defendant in *Hodges*, relinquished the owner’s property before any force or

1 fear was used. Pet. at m-3 to m-4. Alem then argues that the “safe haven” instruction
2 “‘eviscerated’ the fourth and fifth elements requiring that the defendant use force or fear to
3 effectuate the taking or prevent resistance and also that the use of force occur while the defendant
4 intended to permanently deprive the owner of the property.” Pet. at m-4. “Because of the
5 erroneous instruction, the jury believed it could find petitioner guilty of attempted robbery even if
6 he had returned the cell phone, as he had yet to reach a place of safety.” *Id.* He alleges that “[t]his
7 error was not harmless beyond a reasonable doubt, and clearly contributed to [his] conviction.”
8 Pet. at m-6 to m-7. According to Alem, the jurors should have been instructed that “if petitioner
9 had returned the cell phone to Mr. Gantumur, as much of the evidence suggests, he could not be
10 found guilty of robbery.” Pet. at m-8.

11 Alem then turns to his conviction for attempted murder. He states, “[t]he issue of whether
12 a robbery was ongoing at the time petitioner used force was an extremely important factor in the
13 determination of whether petitioner was acting in self-defense at the time he fought with Mr.
14 Gantumur.” Pet. at m-10. “[T]he trial court’s instruction improperly told the jury that petitioner
15 was engaged in a robbery until he reached a place of safety.” *Id.* Because “ample evidence...
16 suggests that Mr. Gantumur and not petitioner was the initial aggressor... [i]t cannot be said
17 beyond a reasonable doubt that the jury would have rejected petitioner’s claim of self-defense, had
18 they been properly instructed as to the relevant law.” *Id.*

19 Respondent begins by pointing out that Alem does not challenge the validity of the “safe
20 haven” instruction, but rather argues that the instruction should not have been given at all.
21 Answer at 13. Respondent then distinguishes *Hodges*, “in *Hodges*, evidence of the defendant’s
22 attempt to return the property prior to the use of force was uncontroverted.” *Id.* Respondent also
23 points out that Alem “asserts no theft occurred at all.” *Id.* Thus, “petitioner’s claim of handing
24 the phone to Gantumur could not constitute a surrender of stolen goods prior to the use of force as
25 in *Hodges*.” *Id.*²

26 _____
27 ² The only contention that Alem makes in his Traverse is that *Hodges* is applicable even if Alem
28 alleged that no theft occurred. Traverse at 4. Alem states that *Hodges* was not decided until after
his trial court conviction and that the jury instruction was improper under *Estes*, the controlling
law at the time. *Id.* “[I]t was not until *Hodges* that the California court addressed the effect of a

I. THE COURT OF APPEAL REASONABLY DETERMINED THAT THE SAFE HAVEN INSTRUCTION WAS PROPER

The California Court of Appeal reasonably determined that “the instruction given by the trial court in this case was a correct statement of the pertinent law needed to decide this case.” CCA Op. at 7 (Dkt. No. 12-11 at 82). The trial court considered the conflicting evidence concerning when Gantumar retrieved his phone and when the force occurred, researched the applicable case law, and concluded that the “safe haven” instruction was proper. RT at 806–818 (Dkt. No. 12-8 at 139). If a court is presented with conflicting evidence, it may properly give the “safe haven” instruction as long as there is substantial evidence to support it. *See, e.g., People v. Marshall*, 15 Cal. 4th 1, 39 (1997); CALCRIM Nos. 3146, 3261; *People v. Cavitt*, 33 Cal. 4th 187, 208 (2004)). Respondent states, “[A]bsent uncontroverted evidence showing intent to surrender the stolen property as in *Hodges*, the safe haven instruction was applicable... Thus, the jury instruction was supported by substantial evidence and was properly given.” Answer at 16.

Hodges is clearly distinguishable from this case. As the appellate court and respondent correctly note, the only reason the “safe haven” instruction was rejected in *Hodges* was because there was uncontradicted evidence that the defendant relinquished the stolen goods before using force or fear. *See Hodges*, 213 Cal. App. 4th at 536. *Hodges* focused on the legal impact of the defendant’s undisputed surrender of the goods prior to the use of force. *Id.* at 542. Here, there is conflicting testimony as to when Alem evidenced force or fear, or if he did so at all. CCA Op. at 83 (“[T]he prosecution’s theory was the taking here escalated into a robbery because defendant never offered to return the victim’s cell phone. Instead, he threatened to keep it at gunpoint. The defense focused on defendant’s courteous efforts to hand over Gantumar’s dropped phone and the aggressive reaction of the owner.”). In light of the evidentiary dispute and the differences between the defense theories in *Hodges* and this case, the appellate court reasonably concluded that *Hodges* was inapplicable.³

defendant surrendering possession of the property *before* he used force.” *Id.* Thus, Alem alleges that *Hodges* requires that his conviction be overturned.

³ Petitioner makes much of the fact that *Hodges* came out after petitioner’s conviction. *See* Traverse (Dkt. No. 19-1). But the *law* cannot change the *facts* of this case: petitioner presented his version of events (i.e., Gantumar dropped the phone, Alem picked it up and attempted to

1 The “safe haven” instruction was proper because it was supported by substantial evidence
 2 and a reasonable interpretation of state law. *People v. Marshall*, 15 Cal. 4th 1, 39 (1997) (finding
 3 a trial court may give a requested instruction “if it is supported by substantial evidence”) (citations
 4 omitted); *Estelle*, 502 U.S. at 67-68 (“[I]t is not the province of a federal habeas court to
 5 reexamine state-court determinations on state-law questions.”). Here, the trial court adopted the
 6 “safe haven” instruction after finding that “the cases really do speak to the fact that the crime of
 7 robbery is continuing to occur until the perpetrator is safe.” RT at 818 (Dkt. No. 12-8 at 151).
 8 The appellate court affirmed that the instruction “was a correct statement of the pertinent law
 9 needed to decide this case.” CCA Op. at 7 (Dkt. No. 12-11 at 82). It explained that under *Gomez*
 10 and *Estes*, the crime of robbery is a continuing offense that ends when the suspect reaches a place
 11 of safety. *Id.* (citing *People v. Gomez*, 43 Cal.4th 249, 254-55 (2008) and *People v. Flynn*, 77
 12 Cal.App.4th 766, 772 (2000)). As such, the “force or fear” element may arise at any point during
 13 the robbery, including the taking, asportation, or attempt to maintain possession of the property.
 14 *People v. Estes*, 147 Cal.App.3d 23, 27-28. The appellate court found that there was substantial
 15 evidence (i.e., “uncontradicted” evidence) that “in [Alem’s] escape to safety, when confronted by
 16 the victim of the theft, [Alem] evidenced ‘force or fear’ by brandishing the firearm at Gantumur.”
 17 CCA Op. at 7 (Dkt. No. 12-11 at 82). Thus, “[u]nder *Gomez* and *Estes*, the element of ‘force or
 18 fear’ was satisfied during the asportation of the stolen property.” *Id.* In reaching its conclusion,
 19 the appellate court correctly viewed the context of the overall charge in deciding that “the
 20 instruction [was] a correct statement of the law and applies to the facts of this case.” CCA Op. 1
 21 (Dkt. No. 12-11 at 76). *See Estelle*, 502 U.S. at 72; *Fradley*, 456 U.S. at 169.⁴

22 **II. EVEN IF THE INSTRUCTION WAS IMPROPER, IT DID NOT “SO INFECT THE**
 23 **TRIAL” THAT IT AMOUNTED TO A VIOLATION OF DUE PROCESS**

24 The “safe haven” instruction, viewed in context of the instructions as a whole, could not
 25 have “so infected the entire trial that the resulting conviction violates due process.” *See Estelle*,

26 “surrender” it to Gantumur), and the jury rejected it. CCA Op. 8-9 (Dkt. No. 12-11 at 83-84).

27 ⁴ Respondent also cites authorities suggesting that the safe haven instruction is proper when there
 28 is a dispute as to the duration of the attempted robbery involving the use of a firearm. Answer at
 15 (citing CALCRIM Nos. 3146, 3261; *People v. Cavitt*, 33 Cal.4th 187, 208 (2004)).

1 502 U.S. at 72. For one thing, the jury was explicitly instructed that not all instructions may
2 apply. The trial court instructed the jury, pursuant to CALCRIM 200, that:

3 Some of these instructions may not apply, depending on your
4 findings about the facts of the case. Do not assume just because I
5 give a particular instruction that I am suggesting anything about the
6 facts. After you have decided what the facts are, follow the
7 instructions that do apply to the facts as you find them.

8 CT at 161 (Dkt. No. 12-3 at 166). The jury was advised to reject the “safe haven” instruction if it
9 did not apply to the facts.

10 Moreover, the evidence—conflicting facts and all—supported the trial court’s decision to
11 give the “safe haven” instruction. Petitioner insists that the instruction was not factually supported
12 and therefore allowed the jury to find him guilty of robbery absent the force or fear element. Pet.
13 at m-4 (Dkt. No. 1 at 19). Alem testified that he did not steal the phone, but rather tried to return it
14 after Gantumur dropped it on the ground. Pet. at 8-9; CCA Op. at 8 (Dkt. No 12-11 at 83)(“The
15 defense focused on defendant’s courteous efforts to hand over Gantumur’s dropped phone and the
16 aggressive reaction of the owner. The defense did not develop a theory of abandonment of a
17 trespassory taking...”). Under this set of facts, the jury could have found no robbery occurred at
18 all, making the force or fear element immaterial. The jury found Alem guilty of attempted
19 robbery, showing that it credited Gantumur’s testimony over Alem’s. Thus, the disputed
20 instruction did not have “substantial or injurious effect” on the jury’s verdict.⁵

21 Lastly, the prosecution was entitled to argue the state’s version of events in its closing
22 argument. The jury heard all the evidence, determined which of the court’s given instructions
23 should apply, and decided to convict the petitioner of all counts. Even if the instruction was given
24 in error, the jury verdict demonstrates that it credited Gantumur’s testimony. Alem’s petition,
25 when viewed in light of the trial record as a whole, does not support a finding that the safe haven
26 instruction so infected the proceedings that his conviction violates due process.

27 **CONCLUSION**

28 The Court of Appeal’s adjudication of Alem’s claims did not result in decisions that were

⁵ Because Alem’s argument regarding his attempted murder conviction completely depends on the success of his robbery argument, described above, that claim fails as well.

1 contrary to, or involved an unreasonable application of, clearly established federal law.

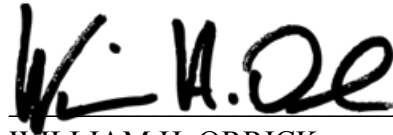
2 Accordingly, the petition is DENIED.

3 A certificate of appealability will not issue as reasonable jurists would not “find the district
4 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S.
5 473, 484 (2000). Alem may seek a certificate of appealability from the Ninth Circuit Court of
6 Appeals.

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

8 **IT IS SO ORDERED.**

9 Dated: December 6, 2016



10
11 WILLIAM H. ORRICK
United States District Judge

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