UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEREMY PORTER,

Petitioner,

v.

MARTIN BITER,

Respondent.

Case No. 16-cv-00733-WHO (PR)

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Jeremy Nelson Porter seeks federal habeas relief from his state convictions on claims that (1) defense counsel rendered ineffective assistance; (2) the trial court failed to reduce his sentence; and (3) his due process right to a fair trial was violated when the jury saw him in shackles and prison clothing. None of these claims has merit. Accordingly, the petition for habeas relief is DENIED.

BACKGROUND

In 2010, Porter shot Irma Flores to death in his car and then deposited her corpse on the sidewalk. The State Appellate Opinion describes what happened:

> On the night of March 25-26, 2010, Flores and her cousins, Christina and Stephanie, and their friends, Sandra, Anna, and Carla, were returning from a club in Bay Point to their Richmond homes in a van driven by Christina. They left the club around 1:30 a.m. on March 26 . . . .

While they were stopped at a stoplight in Richmond at approximately 2:00 a.m., a Buick driven by Porter pulled up to the right side of Christina's van. Porter and his passenger began talking to Flores and the other women in the van. Christina drove away, but Porter followed. Christina drove around the block, thought she had lost Porter, and then stopped at Sandra's house, where Sandra, Anna, and Flores got out. Flores told her friends she did not want to return to her own apartment because her boyfriend [with whom she had a 'sketchy' and 'rough' relationship] was there.

As Christina was driving away from Sandra's house, Porter pulled up to the house in the Buick. Sandra and Anna went into the house; Flores walked over to Porter's car and began talking with him. Flores later came into the house and asked Sandra to dial Porter's cell phone number because he had misplaced his phone. Sandra used her sister's cell phone to call Porter, and this number was later found stored in Porter's phone. After Porter found his phone, Sandra went back inside, and Flores stayed outside with Porter.

Flores later came inside again and talked to Sandra. Flores was crying and said her boyfriend was going to hit her because she had gone out. Sandra offered to let Flores sleep at her house, but Flores went back outside. Sandra went outside and saw Flores and Porter hugging and kissing. Flores told Sandra that she was going to leave with Porter. After failing to convince Flores to stay with her, Sandra went inside. Sandra heard the doors of the Buick close and the engine start.

Later that morning, around 7:00 a.m., a substitute teacher on her way to school discovered Flores's body on a sidewalk. Flores had been shot twice in the face, once in the forehead and once on the right side of her nose.

Richmond Police Officer Steve Harris, an expert in crime scene investigations, examined the scene that morning. Based on the blood spatter on the curb and on Flores's clothing, the broken car glass found at the scene, and the positioning of Flores's body, Harris concluded Flores was shot while sitting inside a car at that location and was then dragged outside. Harris located a bullet about six feet from Flores's body. The flattened tip of the bullet was consistent with hitting a glass window.

At the time of Flores's death in March 2010, Porter was in a dating relationship with Taquoise Newberry. Newberry testified pursuant to a use immunity agreement. Newberry stated she and Porter purchased a Tec–9 firearm a few weeks before Flores was killed.

Newberry testified that, around 4:30 a.m. on March 26, 2010, the morning Flores was killed, Porter called Newberry and said repeatedly, 'I'm sorry,

I'm sorry, I fucked up.' Porter drove to the motel in Oakland where he and Newberry were staying. Newberry saw that the passenger side window of Porter's Buick was gone and there was blood all over the car. Porter told Newberry he was in the car that night with a woman he had met (Flores), who did not want to get out of the car because she was afraid of her boyfriend. Porter said he was not worried about her boyfriend because he had a gun, which he showed to Flores. Porter told Newberry the gun did not have the clip in, and he pointed the gun at Flores and pulled the trigger. Porter said there must have been a round in the chamber, because he fired one bullet into Flores's face or head. Porter said the shooting was an accident. Porter told Newberry he took Flores's body out of the car and laid it on the ground.

[Porter then discarded the gun, a Tec-9 firearm which Newberry and Porter had purchased a few weeks before Flores was killed. The pair later retrieved the gun. Newberry wiped the gun with bleach to remove any fingerprints and then Porter sold the gun.]

. . . .

Newberry threw Porter's bloody clothes in a dumpster. In the Buick, she covered up the front seat and other bloody areas with sheets and T-shirts. Newberry later attempted to clean the car with bleach and other cleaning products.

Newberry wanted to burn the Buick, but Porter decided to scrap it instead. A few days after Flores was killed, Porter paid Maji Mosley, an automotive recycler, to scrap the car. Mosley towed the car to Schnitzer Steel in Oakland to be destroyed.

[The police retrieved the car after Newberry informed the police, through an anonymous telephone call, that the car was about to be destroyed. She had called police because in the days after the killing, Porter had become more aggressive, drank more, and tried to jump off a balcony.]

. . . .

[An examination of the car yielded the following.] The front passenger side window was missing, and there was a bullet hole above the passenger side sun visor. There was blood on the center console and on the right front door panel, which had been removed. Harris also found a traffic ticket and other paperwork in Porter's name, as well as a spent nine-millimeter shell casing.

DNA testing of blood found inside Porter's car revealed a DNA profile matching Flores's profile. A bullet fragment found at the scene also had Flores's DNA on it.

> In early April 2010, Newberry made additional calls to the Richmond Police Department and provided more information, including identifying Porter as a suspect. Newberry told the police Porter had told her he shot Flores accidentally; Porter felt bad about what had happened and had nightmares about it; but he would not come forward because he did not think anyone would believe the shooting was an accident.

(Ans., Ex. 6 (State Appellate Opinion, *People v. Porter*, No. A135565, 2014 WL 4080020 (Cal. Ct. App. Aug 19, 2014) (unpublished)) at 2-5.)

In 2012, a California Superior Court, County of Contra Costa jury found Porter guilty of second degree murder and being a felon in possession of a firearm.[1] The trial court found true a firearm sentencing enhancement. Based on his present and prior convictions, Porter was sentenced to 60 years to life in state prison. His efforts to overturn his conviction 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

[1] He was acquitted of first degree murder. (Ans., Ex. 6 at 5.)

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. Assistance of Counsel

Porter alleges counsel rendered ineffective assistance for failing to (A) investigate possible mental health or substance abuse defenses; and (B) request that the court strike a prior conviction. Neither claim has merit.

In order to prevail on a claim of ineffectiveness of counsel, a petitioner must establish that (1) 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), and (2) 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." *Id.* at 694. 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." *Harrington v. Richter*, 562 U.S. 86, 112 (citing *Strickland*, 466 U.S. at 693).

The standards of 28 U.S.C. § 2254(d) and *Strickland* are "highly deferential . . . and

when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (quotation marks 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.*

A. Failure to Investigate Mental Health and Intoxication Defenses

Petitioner contends that his defense counsel failed to conduct an investigation and present evidence at trial about his mental health problems and substance abuse. (Pet. at 2-5, 10-12.)

Defense counsel filed a motion for a new trial based on what he alleged was his failure to investigate this defense. On at least two occasions prior to trial, Porter asked counsel how drug and alcohol intoxication might affect the case. Also, during trial, Porter's mother also informed counsel that Porter had a "significant" history of mental health problems. Counsel did not investigate Porter's mental health or substance abuse history before or during trial. (Ans., Ex. 6 at 5.)

Appended to the new trial motion was a report by forensic psychologist John Podboy, who had evaluated Porter. (*Id.* at 5.) The report "chronicled Porter's difficult childhood, behavioral problems, substance use and mental health history." (*Id.*) Podboy diagnosed antisocial personality disorder, bipolar disorder mixed with psychotic features, "disassociative fugue" (involving outbursts or episodes during which he took actions that he later could not recall), posttraumatic stress disorder, alcohol abuse and polysubstance abuse. (*Id.*) While Podboy stated Porter had no recollection of what occurred on the night of the crime, Podboy did not provide specific information or opinions about Porter's conduct or mental functioning on that night. (*Id.* at 5-6.)

The trial court denied the new trial motion because counsel made a reasonable strategic decision to argue that someone other than Porter shot Flores, or that the shooting was accidental. (*Id.* at 6.) The defenses used by counsel at trial "were most likely to result in an acquittal, in part because the evidence did not disclose why Flores was shot or the circumstances of the shooting." (*Id.*) In contrast, a mental health defense would likely be

less successful. (*Id.*) It "would require an admission that the defendant was the shooter and would at best result in conviction of a lesser offense." (*Id.*) The trial court also concluded that "counsel was thoroughly prepared to try the case and represented Porter zealously and effectively, including obtaining an acquittal on the first degree murder charge." (*Id.*)

On appeal and here, Porter contends that had Podboy testified about his psychological problems, there was a reasonable probability that one or more jurors would have concluded he killed Flores without express or implied malice. If no malice was found, he had no intent to kill and no conscious disregard for life. Because of this, he could be guilty of only involuntary manslaughter, but not murder. (*Id.* at 8.)

This claim was rejected by the state appellate court. The court concluded that, even assuming counsel was deficient for failing to investigate and present a mental state defense, Porter did not show prejudice. It found that the trial evidence "strongly supported the conclusion that Porter intended to kill Flores, or at the very least acted with conscious disregard for the risk his actions posed to her life." (*Id.* at 8.) His murderous intent was evident. He shot her twice in the face; the gunpowder stippling around the wounds indicated that the gun was between six inches to two feet from her face when it was fired; shooting the gun twice required two pulls of the trigger; and he tried to hide his involvement in the crime. (*Id.* at 8-9.)

Habeas relief is not warranted here. The state appellate court reasonably determined that there was no prejudice. There was (1) substantial evidence that Porter showed conscious disregard for Flores's life, or that he intended to kill her; (2) Podboy's report would not have aided Porter; and (3) an intoxication defense was not supported by the evidence.

1. Intent

In California, murder is the unlawful killing of a human being with malice aforethought, which can be express or implied. Cal. Penal Code §§ 187(a), 188. Express malice is the intent to unlawfully kill. *People v. Perez*, 50 Cal. 4th 222, 233 (2010).

Implied malice is a conscious disregard for life. *People v. Blakeley*, 23 Cal. 4th 82, 87 (2000). Malice is implied "when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. Absent malice, a defendant may be guilty of involuntary manslaughter. *People v. Cook*, 39 Cal. 4th 566, 596 (2006).

There was substantial evidence at least of Porter's conscious disregard for Flores's life, if not that he intended to shoot her. First, Porter shot Flores in the face, twice. Bullets aimed at such a vital body part may indicate "that the killing occurred as the result of [premeditation] rather than unconsidered or rash impulse." *People v. Pride*, 3 Cal. 4th 195, 247 (1992). If that evidence shows premeditation, it also shows an intent to kill.

Second, when the gun was fired, it was between six inches and two feet from her face. Testimony showed that the gun was likely a semiautomatic firearm. Firing two shots would have required two pulls of the trigger. Those facts negate any notion that the killing was accidental and are evidence of a conscious disregard for life. Third, Porter's conduct after the shooting shows clear, deliberate thinking and consciousness of guilt. He dragged Flores's corpse from the car, discarded the gun, attempted to wash off the blood in the car, and tried to have the car demolished.

Porter also had a history of gun violence towards women. On several occasions, Porter pointed the Tec-9 gun (without a clip of bullets in it) at Newberry and pulled the trigger. (Ans., Ex. 6 at 9.) Once, impatient that Newberry would not leave her grandmother's house, Porter fired a shot outside the residence. (*Id.*) Two weeks before Flores was killed, Porter's new girlfriend, Shorlensky Ford, called the police to her apartment. (*Id.*) There they found a pistol, a spent shotgun casing, and a hole in the wall that opened into the next apartment. (*Id.*) The hole had apparently been caused by a shotgun blast. (*Id.*) "Ford told the officers Porter had held the pistol to her head and then pushed it into her mouth." (*Id.*)

On such a record, the state appellate court's rejection of Porter's claim was

reasonable. "In light of Porter's familiarity with guns, it is highly unlikely that even if a juror was not persuaded that Porter intended to kill Flores, the juror would have concluded that Porter acted with implied malice, i.e., he was subjectively aware of the risks associated with handling, pointing and firing guns and acted with conscious disregard for Flores's life." (*Id.* at 9-10.)

2. Podboy's Report

The state appellate court reasonably determined that Podboy's report and his testimony would not have made a difference at trial. The report provided no specific information or opinions about Porter's conduct or mental functioning on the night of the crime. Nor did the report suggest that the mental problems he diagnosed prevented Porter from forming the intent to kill. Similarly, there is no evidence that Porter experienced "fugue-like dissociative states" on the night of the murder. Porter, according to Podboy, reported "at best only [a] spotty recollection." (*Id.*) (His recollection, however spotty, was sufficient for him to recall that he shot Flores and to tell Newberry he had done so.) As the state appellate court stated, the report provided "no correlation between" the diagnoses and Porter's "actual intent" on the night Flores was shot. (Ans., Ex. 6 at 10.)

In light of the manner Flores was killed, Porter's conduct after the shooting, and his familiarity with guns, it was reasonable for the state court to determine that Podboy's testimony (based on the contents of his report) would not have altered the conclusion that Porter acted, at a minimum, with implied malice, i.e., he was subjectively aware of the risks associated with handling, pointing, and firing guns and acted with a conscious disregard for Flores's life.

3. Failure to Investigate Intoxication Defense

Similarly, counsel's failure to investigate Porter's drug or alcohol use was not prejudicial because the evidence did not show that he was under the influence of drugs or alcohol on the night the crime occurred. Rather, it appears he acted with sober clarity and deliberation. According to the evidence, on the night of the murder Porter drove to three separate locations in Richmond before driving to the Oakland motel where he was staying.

The first location was Sandra's house, which, according to Christina, he found on his own because Christina had driven by the house and "circled the block to try to lose him." After leaving Sandra's house with Flores, he drove to another location. After killing Flores and dumping her body, Porter drove to a friend's house where he called Newberry. From there, he drove to Oakland where he and Newberry were staying. According to Newberry, they packed up all their belongings and switched rooms. They then drove to Interstate 580 where they got out of the car and searched for the gun. These deliberate, considered actions are not those of a person whose mental or physical abilities are impaired by intoxicants.

Also, no one provided evidence that Porter was under the influence of drugs or alcohol at the time of the crime. Newberry never said that she saw or believed Porter to be under such influence on the night of Flores's death, though she did say that in the days after the incident he began drinking heavily. Similarly, Sandra, who saw Porter that night before Flores left with him, said nothing about Porter being intoxicated or drugged. Because there was no evidence Porter was under the influence of drugs or alcohol, there was no evidence to support an intoxication defense. On these facts, there is no support for a claim that defense counsel's performance was deficient or that the performance resulted in prejudice. Therefore, the state court's rejection of Porter's claim was reasonable and is entitled to AEDPA deference. This claim is DENIED.

B. Failure to Raise a *Romero* Claim

Porter's sentence was increased under California's Three Strikes Law because he had a prior conviction. A criminal defendant can ask the sentencing court to "strike," or disregard, a prior conviction. Such requests are usually brought under *People v. Superior Court (Romero)*, 13 Cal. 4th 497 (Cal. 1996), or under section 1385 of the penal code. Porter claims defense counsel rendered ineffective assistance by failing to file a *Romero* or section 1385 motion. (Pet. at 6.)

This claim was rejected by the state appellate court. It found no prejudice because the sentencing court considered the same factors a court looks at when ruling on a motion

under *Romero* and section 1385: "Based on the trial court's discussion and conclusions about the circumstances of Porter's present crime and his background, character and prospects (two of the three factors relevant to the section 1385 determination, [citation omitted]), we conclude that on this record there is no reasonable probability the court would have struck the prior conviction had defense counsel raised the issue." (Ans., Ex. 6 at 17-18.)

Habeas relief is not warranted here. The state appellate court's determination that a *Romero* or section 1385 motion would have been unsuccessful forecloses any claim of prejudice resulting from defense counsel's performance. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus). Because there is no prejudice, Porter's claim of ineffective assistance necessarily fails. The state appellate court's rejection of this claim was reasonable and is therefore entitled to AEDPA deference. This claim is DENIED.

II. Sentencing Court

Porter claims both that the sentencing court failed to grant his implicit *Romero* motion and that the court was not aware that it had the discretion to impose a lesser sentence than the law requires. (Pet. at 5-6.) These claims were rejected by the state appellate court. It found that Porter had forfeited these claims by failing to raise them at sentencing. (Ans., Ex. 6 at 16.)

Habeas relief is not warranted here. This Court concludes that even if an explicit *Romero* (or section 1385) motion had been made and the sentencing court had denied it (or even if the court misunderstood its discretionary authority), this claim would lack merit. *Romero* and section 1385 are entirely state-law creations. Therefore, whether the sentencing court correctly used its discretion in not striking a conviction under *Romero* or section 1385 is a matter of state, not federal, law. State law claims are not remediable on federal habeas review, even if state law was erroneously interpreted or applied. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011).

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

III. Shackling Claim

Porter claims that members of the jury observed him shackled and in jail clothing at a very crucial point in the trial, immediately before the court instructed the jury and the parties gave their closing arguments. He claims this violated his due process right to a fair trial. (Pet. at 7, 14-15.)

The state appellate court summarized the facts thusly:

> On the last day of trial, defense counsel told the court that Porter stated he had been led across the courtroom hallway that morning in his jail clothing in the presence of the jurors. Noting that Porter apparently was also shackled at the time, counsel moved for a mistrial. Defense counsel acknowledged the incident resulted from a 'misunderstanding,' and he stated the deputy who brought Porter to court 'was unaware that he needed to be dressed this morning.'
>
> The court denied the mistrial motion, while acknowledging '[i]t is unfortunate that it occurred.' The court explained the jail elevators are on the opposite side of the building, 'so there is physically no way to get a defendant from the jail elevator to the courtroom here across the hall without walking through the hallway, which is a public hallway.' The court stated the fact the jurors may have seen Porter in a jail outfit and handcuffed did little more than let the jurors know Porter was in custody, which the court did not believe would 'come as a huge surprise' to jurors in a murder case. The court stated the best remedy would be to instruct the jurors (as the court had already stated it would do) that they must not consider Porter's custodial status for any purpose in deciding the case. The court offered to consider any other instructions or remedies proposed by the defense, but denied the mistrial motion. Defense counsel did not suggest any other instructions or remedies.
>
> The court later instructed the jury with a variation of CALJIC No. 1.04, as follows: 'The fact that the defendant may be in custody must not be considered by you for any purpose. It is not evidence of guilt, and must not be considered by you as any evidence that he is more likely to be guilty than not guilty. You must not speculate as to why he may be in custody. In determining the issues in this case, disregard this matter entirely.'

(Ans., Ex. 6 at 11-12.)

Porter's claim was rejected by the state appellate court. It found the jurors' (possible) single observation of Porter in restraints and jail clothing as he was being escorted across the courtroom hallway was not prejudicial because the sighting, if it occurred, was brief and on one occasion. (*Id.* at 12.) The court also found that any potential prejudice was cured by the trial court's instruction. (*Id*. at 13-14.)

The sight of a visibly shackled defendant in court is so likely to cause prejudice that it is permitted only when justified by an essential state interest specific to each trial. *Deck v. Missouri*, 544 U.S. 622, 624 (2005). Similarly, "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes." *Estelle v. Williams*, 425 U.S. 501, 512 (1976).

This law applies when a defendant's custodians compel him to appear in court restrained, or in prison garb, or both. Inadvertent sightings outside of the courtroom, such as the one presented here, are another matter. "[A] jury's brief or inadvertent glimpse of a defendant in physical restraints outside of the courtroom does not warrant habeas relief unless the petitioner makes an affirmative showing of prejudice." *Williams v. Woodford*, 384 F.3d 567, 593 (9th Cir. 2002) (citations omitted). Other Ninth Circuit cases are in accord with *Williams*. *See Ghent v. Woodford*, 279 F.3d 1121, 1133 (9th Cir. 2002) (the jurors' occasional, brief glimpses of the defendant in handcuffs and other restraints in the hallway at the entrance to the courtroom were not prejudicial); *United States v. Olano*, 62 F.3d 1180, 1190 (9th Cir. 1995) ("a jury's brief or inadvertent glimpse of a defendant in physical restraints is not inherently or presumptively prejudicial to a defendant"); *Castillo v. Stainer*, 983 F.2d 145, 148 (9th Cir. 1992) (no prejudice when, during transport to or from the courtroom, some members of the jury pool saw the defendant in shackles in the court corridor); *United States v. Halliburton*, 870 F.2d 557, 560-62 (9th Cir. 1989) (jurors' inadvertent observation of the defendant in handcuffs in the corridor did not prejudicially impair the defendant's right to a fair trial).

In fact, when a defendant's shackling was not actually seen by the jury in the

courtroom, if there is any error, it is harmless, not prejudicial. *Rich v. Calderon*, 187 F.3d 1064, 1069 (9th Cir. 1999); *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999).[2]

Habeas relief is not warranted here. The jury may have accidentally and briefly seen Porter in restraints and prison closing outside the courtroom. On this one occasion, Porter was in the public hallway being escorted to the courtroom. He had never appeared in open court or in the presence of the jury in shackles or wearing jail clothing; nor was Porter presented to the jury in jail clothing or shackles on this day. The trial court noted that it had been an oversight by the deputy, who was unaware that Porter had to be dressed for trial. It was unclear from the record how many, if any, of the jurors actually saw Porter. It was clear however that the observation had been brief and in passing only. Because the Supreme Court has only addressed the effect of highly prejudicial *in-court* practices on defendants' fair-trial rights, the effect of state practices outside the courtroom to which Porter objects is an open question in the Court's jurisprudence.

The state appellate court reasonably determined that on these bare facts, Porter failed to show prejudice, a finding that is in accord with the authorities cited above. *See Ghent,* 279 F.3d at 1133; *Olano*, 62 F.3d at 1190. If there was any error, it was harmless. If there was a harmless error, the trial court's instructions cured it. This Court must presume that the jury followed its instructions to disregard any implications of seeing Porter in shackles and prison clothing.

Furthermore, the evidence of Porter's guilt was quite strong. Flores's blood was found in his car and on a shell casing found at the scene of the crime; he admitted to Newberry that he killed Flores; and Flores was last seen with Porter before her death. With such convincing evidence before the jury, Porter cannot have been prejudiced by the accidental sighting of him in shackles.

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

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[2] Porter cites *Rhoden* as support for his shackling claim. However, *Rhoden* addressed a situation in which a defendant was seen shackled throughout trial.

CONCLUSION

The state court's adjudication of Porter's claims did not result in decisions that were contrary to, or involved an unreasonable application of, clearly established federal law, nor in decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Porter's 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). Porter 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: April 7, 2017

WILLIAM H. ORRICK
United States District Judge

United States District Court
Northern District of California