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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KYRON LAMONT HIGHTOWER, Petitioner, vs. T. FELKER, Respondent.	No. C 07-1338 RMW (PR) ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the petition should not be granted. Respondent has filed an answer addressing the merits of the petition, and petitioner has filed a traverse. Having reviewed the briefs and the underlying record, the court concludes that petitioner is not entitled to relief based on the claims presented and denies the petition.

BACKGROUND

On February 21, 1999, petitioner arrived at Shamoya Brown's house. (Resp. Ex. C (People v. Hightower, California Court of Appeal, First Appellate District, Division Two, Case No. A102390, August 24, 2005) at 2.) Brown is the mother of two of petitioner's children. (Id.) When petitioner arrived, Ernest Neff, also known as "Donti," ("victim"), was already there. (Id.) The victim was the father of another of Brown's children, and Brown and the victim often

argued with each other about child support payments. (Id.)

Petitioner and the victim argued. (Id.) One of them suggested "tak[ing] it outside," and they both continued to argue outside. (Id.) Petitioner was wearing a red jacket with the letters "FUBU" on the front. The victim pushed petitioner and as petitioner followed him down the street, the victim said, "Little youngster, you better step out of my face." (Id.) Petitioner got "into" the victim's face and the two continued to argue. (Id.)

Then, according to a police interview with "O.," Brown's 7-year old son, the victim said, "You can't handle me." (Id. at 3.) Thereafter, petitioner pulled out a gun, and the victim said, "I don't wanna get shot," to which petitioner replied, "You is." (Id.) At the same time, one witness who lived across the street heard petitioner and the victim arguing, called 911, and told the dispatcher that a man in a red "FUBU" jacket pulled a gun and the two men started running. (Id. at 3.) O. also told the police that he watched the victim run into the backyard, petitioner chase him, and then O. heard two gunshots. (Id.) Petitioner then ran out of the backyard, putting his gun back into his waistband and rode off on a bicycle. (Id.) Four days later, petitioner turned himself in. (Id.)

The victim's sister, Keycha Neff, testified that Brown showed her a letter from petitioner to his cousin, directing Sonja West to destroy the FUBU jacket he was wearing. (Id.) West is the mother of another of petitioner's children, and she testified that petitioner left the jacket at her house after the shooting, but denied that he directed her to get rid of it. (Id.) West admitted that she previously told the police that petitioner told her to get rid of the jacket, but explained that she only said that out of anger. (Id.)

The autopsy revealed that both gunshots were fired at the victim from close range. (Id.) One shot entered the thigh, and the fatal second shot entered the left shoulder and passed through the chest cavity and aorta. (Id.) A criminalist testified that the evidence demonstrated a possibility of a struggle going on in which a gun could have gone off inadvertently. (Id. at 4.)

Petitioner was charged with murder, an allegation that he personally used a firearm, and intentionally discharged a firearm causing death. (Id. at 1.) On March 31, 2000, the jury found petitioner guilty of second degree murder and found both enhancements true. (Id. at 2.) On

April 10, 2003, petitioner was sentenced to a term of 40 years to life in state prison. (Id.) On direct appeal, the state appellate court affirmed petitioner's conviction and sentence on August 24, 2005. (Id.) The state supreme court denied a petition for review on November 30, 2005. (Resp. Ex. E.) The state supreme court denied petitioner's habeas petition on August 8, 2007. (Resp. Ex. G.) The instant petition was filed on March 7, 2007.

DISCUSSION

A. Standard of Review

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). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed 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). The first prong applies both to questions of law and to mixed questions of law and fact, Williams v. Taylor, 529 U.S. 362, 384-86 (2000), while the second prong applies to decisions based on factual determinations, Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

"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, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, falling under the second clause of § 2254(d)(1), if the state court correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The federal court on habeas review 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." Id. at 411.

Under 28 U.S.C. § 2254(d)(2), a state court decision "based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." Miller-El, 537 U.S. at 340. The court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1).

In determining whether the state court's decision is contrary to, or involved an unreasonable application of, clearly established federal law, a federal court looks to the decision of the highest state court to address the merits of a petitioner's claim in a reasoned decision. LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000). The standard of review under the AEDPA is somewhat different where the state court gives no reasoned explanation of its decision on a petitioner's federal claim and there is no reasoned lower court decision on the claim. When confronted with such a decision, a federal court should conduct "an independent review of the record" to determine whether the state court's decision was an objectively unreasonable application of clearly established federal law. Richter v. Hickman, 521 F.3d 1222, 1229 (9th Cir. 2008).

B. Petitioner's Claims

1. Ineffective Assistance of Counsel

Petitioner claims that counsel provided ineffective assistance because: (1) counsel failed to effectively present his defense theory of voluntary manslaughter (Petition memorandum, p. 3-13); (2) counsel failed to select the meritorious defense theory of voluntary manslaughter, opting instead to choose the weaker theory of "accident" (Id. at 14-18); (3) counsel failed to investigate and interview exculpatory witnesses Reginald Atkinson and Roquel Williams (Id. at 19-21); and (4) failed to object to prosecutorial misconduct (Id. at 22-32). Petitioner further argues that the cumulative effect of counsel's ineffective assistance violated his Sixth Amendment right. (Id. at 33-36.)

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id.

In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish two things. 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. Id. at 687-88. 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." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

a. Presentation of defense theory and failure to select meritorious defense[1]

Petitioner claims that counsel should have focused on the defense theory of voluntary manslaughter instead of seemingly switching to a theory of unjustifiable self-defense or "accident" during closing argument. (Petition memorandum, p. 9-11.) Petitioner asserts that counsel's argument that the killing was unintentional removed "voluntary manslaughter" as an option the jury would consider. (Id. at 11.) To the extent counsel did present a voluntary manslaughter defense, such a presentation was inept, petitioner argues, because counsel "did not know the law as it pertained to voluntary manslaughter." (Id. at 12, 15.)

A trial attorney has wide discretion in making tactical decisions, including abandoning inconsistent or unsupported defenses. See Turk v. White, 116 F.3d 1264, 1267 (9th Cir. 1997). Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation;

[1] The court agrees with respondent that claims one and two are closely related. Therefore, the court shall address both claims simultaneously.

and (3) the decision appears reasonable under the circumstances. See Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994).

Here, a review of the record demonstrates that counsel's decision to promote an involuntary manslaughter theory of defense was reasonable under the circumstances. See Sanders, 21 F.3d at 1456. First, counsel's attempt to persuade the jury that petitioner's shooting of the victim was unintentional[2] was supported by the evidence presented. Because there were no eyewitnesses to the shooting, counsel presented expert testimony that the physical evidence supported the possibility of struggle with the gun, presented evidence that the victim had a history of violence, presented evidence that petitioner did not go to Brown's house knowing that the victim was there, and advanced a picture of petitioner as being afraid of the victim, who was much older. Contrary to petitioner's argument, an "intent to kill" the victim was not clearly obvious from the evidence presented. (Petition memorandum, p. 10.)

Second, counsel's decision not to concede that petitioner had an intent to kill appears to be strategically sound. Counsel focused his closing argument as an initial matter on persuading the jury that the killing was not premeditated nor committed with malice. While counsel also argued that the killing was not intentional, he maintained that the evidence could support any of several theories, including "accident," i.e., involuntary manslaughter (RT 978-88, 992, 994), heat of passion, i.e., voluntary manslaughter (RT 987), or imperfect self-defense (RT 987). Thus, contrary to petitioner's assertion, counsel did not "remove" voluntary manslaughter as one of the possible verdicts for the jury.

Third, counsel's argument to the jury that the killing was unintentional was not contrary to the law or unsupported by the evidence. Although petitioner asserts that the jury was instructed it could find involuntary manslaughter "only if the killing happened in the performance of an lawful act . . ." (Petition memorandum, p. 16), such an assertion is incorrect. The court relayed the standard jury instruction for involuntary manslaughter which defined an

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[2] At the time of petitioner's trial, California law included "intent to kill" as a necessary element of voluntary manslaughter. See CA Penal Code § 192(a).

"unlawful killing" as occurring "during the commission of an unlawful act not amounting to a felony which is dangerous to human life under the circumstances of it's commission" *in addition to* occurring during the commission of an ordinarily lawful act. (RT 894.) Based on the reasons above, the record does not support petitioner's assertion that counsel's closing argument constituted an abandonment of a viable defense. See Hendricks v. Calderon, 70 F.3d 1032, 1042 (9th Cir. 1995). Accordingly, counsel's performance was not deficient.

Although it is unnecessary for a federal court considering a habeas ineffective assistance claim to address the prejudice prong of the Strickland test if the petitioner cannot even establish incompetence under the first prong, see Siripongs v. Calderon, 133 F.3d 732, 737 (9th Cir. 1998), even assuming deficiency, petitioner fails to demonstrate the required prejudice. See Strickland, 466 U.S. at 694. A different argument by counsel on the issue of whether petitioner had the requisite "intent to kill" would not have made a difference because the jury came back with a verdict of second degree murder. By finding that petitioner was guilty of second degree murder, the jury necessarily found that petitioner committed the killing with malice, see CALJIC 8.50 (CT 288), which is negated if the jury were to find either voluntary or involuntary manslaughter. Even assuming petitioner is correct that counsel withdrew voluntary manslaughter as a potential defense theory, petitioner fails to demonstrate prejudice because the jury not only found that petitioner possessed the intent to kill, as required for both voluntary manslaughter and murder, but by finding malice as well, the jury necessarily rejected the heat of passion voluntary manslaughter theory that petitioner wished counsel had advanced. Accordingly, arguing a voluntary manslaughter theory alone would not have changed the result of the trial.

In light of the above, and after a thorough and independent review of the underlying record, this court concludes that the state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. See Richter v. Hickman, 521 F.3d 1222, 1229 (9th Cir. 2008).

b. Exculpatory witnesses

Petitioner claims that counsel was ineffective for failing to investigate and present testimony from Reginald Atkinson and Raquel Williams. (Petition memorandum, p. 19.)

Petitioner presents a declaration by Atkinson stating that he would have testified that he knew the victim, often saw the victim carrying a gun, and a few weeks prior to the killing, saw the victim asking about petitioner. (Petition Ex. D.) Petitioner also present a declaration by Williams stating that she would have testified that two weeks prior to the killing, she saw the victim drive by petitioner's aunt's house pointing what appeared to be a gun, looking for petitioner, and then noticed the victim making verbal threats and hand gestures at petitioner on an almost daily basis. (Petition Ex. E.) Petitioner asserts that counsel should have called these two witnesses to support a defense theory of voluntary manslaughter because they would have demonstrated that the victim sufficiently provoked petitioner over a period of time. (Petition memorandum, p. 20.)

A defense attorney has a general duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. See Strickland, 466 U.S. at 691. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Silva v. Woodford, 279 F.3d 825, 836 (9th Cir. 2002) (internal quotation omitted).

Here, with respect to the notion that the victim carried guns and generally had a history of violence, any testimony these potential witnesses would have provided was cumulative. For example, Brown testified that the night before the shooting, the victim came to her house with a gun because he was looking for his girlfriend (RT 448-49); the police testified that the victim's criminal history involved guns (RT 766), and the parties stipulated to the victim's prior convictions, including brandishing a firearm (RT 752-53). Further, Brown testified that the victim had a violent character, that he had previously threatened to kill her, that he had often hit and abused her to the point of hospitalization, that at one time, he choked one of her children and threw O. against the wall. (RT 444-447.) Therefore, testimony from Atkinson and Williams would not have resulted in a different outcome at trial. See Turner v. Calderon, 281 F.3d 851, 875-76 (9th Cir. 2002) (concluding that petitioner did not receive constitutionally ineffective assistance of counsel where his attorney did not present cumulative testimony).

With respect to testimony that the victim had been looking for petitioner for two weeks

prior to the killing, counsel's decision to forego those two witnesses appear to be a reasonable one. Although petitioner is correct that sufficient provocation to support a theory of voluntary manslaughter and negate malice can be over a short or long duration, see CALJIC 8.42, here, the evidence at trial demonstrated that petitioner was the aggressor in that he chased the victim into the backyard and shot him. Had the jury heard that the victim had been searching for petitioner for two weeks prior to the killing, the jury could have easily inferred that petitioner premeditated and planned the killing of the victim by arming himself to prepare for an encounter. In other words, such evidence presented a risk of leading to a first degree murder verdict, and counsel could have reasonable decided to avoid that risk. Even assuming that the jury could have found sufficient provocation from the testimony of the two potential witnesses, the fact that the victim stated he did not want to get shot or killed and petitioner responded, "You is," combined with the victim attempting to run away from petitioner, established that "sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return" such that the provocation would not reduce the murder charge to manslaughter. Id. ("If there was provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.")

In light of the above, and after a thorough and independent review of the underlying record, this court concludes that petitioner has not shown that counsel was deficient for failing to investigate and interview these two potential witnesses further. For the same reasons, namely that their testimony would not have necessarily helped petitioner and indeed presented some risk of harm, there is no a reasonable likelihood that but for counsel's failure to investigate them, the results of the proceeding would have been different. The state court's denial of this claim was not contrary to or an unreasonable application of clearly established federal law. See Richter v. Hickman, 521 F.3d 1222, 1229 (9th Cir. 2008).

c. Prosecutorial misconduct

Petitioner claims that counsel was ineffective when he failed to object when the prosecutor misstated the law on homicide, gave an improper example of voluntary manslaughter, and appealed to the jury's emotional side. (Petition memorandum, p. 23-26.)

"Obviously, a 'prosecutor should not misstate the law in closing argument.'" United States v. Moreland, 509 F.3d 1201, 1216 (9th Cir. 2007) (quoting United States v. Berry, 627 F.2d 193, 200 (9th Cir. 1980). Nevertheless, "[i]mproper argument does not, per se, violate a defendant's constitutional rights." Fields v. Woodford, 309 F.3d 1095, 1109 (9th Cir. 2002) (citations omitted), amended by, 315 F.3d 1062 (9th Cir. 2002). Furthermore, "[a]rguments of counsel which misstate the law are subject to . . . correction by the court." Boyde v. California, 494 U.S. 370, 384 (1990).

A review of the closing argument demonstrates that the prosecutor did not misstate the law. He merely argued that the evidence did not support any verdict less than a first degree murder verdict, as was his right to do. See Ceja v. Stewart, 97 F.3d 1246, 1253-54 (9th Cir. 1996) ("Counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom."). As such, the prosecutor properly argued to the jury that there was not sufficient provocation to support a theory of voluntary manslaughter, and counsel cannot be considered deficient for failing to raise an objection. (RT 962-63.)

Similarly, with respect to petitioner's argument that the prosecutor gave an improper example of voluntary manslaughter, a review of the prosecutor's statements reveals that his example of voluntary manslaughter was not misconduct. The prosecutor explained to the jury that a "heat of passion" theory was an evolving one and gave a hypothetical "present day" fact pattern that would support sufficient provocation to establish a heat of passion voluntary manslaughter verdict.[3] (RT 962.) The record does not show that the prosecutor instructed the

[3] The prosecutor's example was, "[S]uppose I come home, I have got guns in the car, and I get home and I -- you know, my child has been raped and murdered right there. I got my gun. The rapist and the murderer is right there. I put the gun up to him. I say, you know, you're

jury that his example was the only type of provocation that was sufficient to support a voluntary manslaughter verdict. The prosecutor used that hypothetical as an example of what would likely be sufficient provocation to support a heat of passion verdict, and attempted to characterize the events surrounding the shooting of the victim in this case as something that would not adequately provoke an ordinarily reasonable person into shooting. Petitioner fails to demonstrate how the prosecutor's example was improper. See id.

Petitioner also claims that the prosecutor improperly called on the jury to base their decision on anything other than the facts and the law.[4] (Petition memorandum, p. 30.) There is no evidence, however, that the jury relied on anything other than the instructions or the evidence presented in determining their verdict. Even if the comments were improper, petitioner has not shown that he was prejudiced by any failure by counsel to object. See Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996) (noting that the jury was directed to follow the instructions as given and finding no substantial or injurious effect on the verdict considering that the alleged improper comments was mentioned once, was not the focus of closing argument, and was

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under arrest and he says, "Screw you" or "you got me," or just smiles at me. He leers at me. And I am so outraged, I am so angry, I am so furious, you know if I were in my normal state of mind I would not shoot him dead. But that type of provocation, I shoot him dead.

I would submit to you, under that set of facts, an ordinarily reasonable person might kill under that type of legally adequate provocation. . . .

But please, let's not prostitute this justifiable notion of some killings with adequate provocation that should be voluntary manslaughter. Let's not prostitute it and allow the defendant to get away with murder just because he killed his victim at the end of a verbal argument." (RT 963.)

[4] Specifically, petitioner points to these prosecutorial statements:

"The unstated premise is . . . The victim was an asshole, so why should we care? Well, we do care. The People care. The community cares. There are people who care about [the victim], obviously." (RT 997.)

"If you believe -- if you truly believe you have a reasonable doubt that this was accidental discharge during self-defense and the defendant never exhibited this conduct, never had any conscious disregard for human life, never said that he was going to shoot the victim, then he is not guilty and you can return this verdict of accident that [defense counsel] has asked for and the defendant gets to ride down on the elevator with you folks." (RT 1014-15.)

contrary to the trial court's instructions).

Here, following the prosecutor's argument, the trial court properly instructed the jury with CALJIC 8.40 regarding the definition of voluntary manslaughter, and with CALJIC 8.42-44 on the heat of passion necessary to reduce a homicide to manslaughter. The trial court also instructed the jury with CALJIC 1.00, which provides that "[y]ou must accept and follow the law as I state it to you. . . . If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions," and with CALJIC 1.02, which provides that statements made by the attorneys are not evidence. Moreover, "[a] jury is presumed to follow its instructions." Weeks v. Angelone, 528 U.S. 225, 234 (2000), and "to accept the law as stated by the court, not as stated by counsel[,]" United States v. Medina Casteneda, 511 F.3d 1246, 1250 (9th Cir.), cert. denied, 128 S. Ct. 2946 (2008).

Accordingly, in light of the trial court's instructions, there is no reasonable probability that the result would have been different had counsel objected. Strickland, 466 U.S. at 694. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established law. See Williams, 529 U.S. at 412-13.

d. Cumulative effect

Petitioner argues that the cumulative effect of all the claims of ineffective assistance of counsel demonstrates enough prejudice to warrant relief. (Petition memorandum, p. 33.) However, where, as here, there is no single constitutional error existing with respect to ineffective assistance of counsel, nothing can accumulate to the level of a constitutional violation. See Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002).

Accordingly, the court concludes that the state appellate court's decision denying relief on the ground of cumulative error with respect to ineffective assistance of counsel was not contrary to, or an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

2. Voluntary manslaughter jury instruction

Petitioner claims that the instruction on voluntary manslaughter improperly instructed the jury that in order to find him guilty of voluntary manslaughter, they must also find that he possessed an intent to kill. (Petition memorandum, p. 43-45.) The instruction at issue was CALJIC 8.40 and, at the time of petitioner's trial, correctly stated the law as follows:

> The crime of voluntary manslaughter is lesser to that of murder charged in the Information. Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of manslaughter in violation of Penal Code Section 192(a). There is no malice aforethought if the killing occurred upon a sudden quarrel or a heat of passion or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. In order to prove this crime, that is the crime of voluntary manslaughter, each of the following elements must be proved: One, a human being was killed; two, the killing was unlawful; . . . three, the killing was done with the intent to kill, but not with malice aforethought. (RT 889.)

Petitioner relies on People v. Lasko, 23 Cal. 4th 101 (2000), and asserts that because the instruction erroneously directed the jury that it could not find voluntary manslaughter unless it also found an intent to kill, the instruction violated his right to due process. (Petition memorandum, p. 44.)

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. See Estelle v. McGuire, 502 U.S. 62, 72 (1991). The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. See id. In reviewing a faulty instruction, the court inquires whether there is a "reasonable likelihood" that the jury has applied the challenged instruction in a way that violates the Constitution. Id. at 72, n.4. If an error is found, the court must also determine that the error had a "substantial and injurious effect or influence in determining the jury's verdict" before granting relief in habeas proceedings. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). A jury instruction that omits or misdescribes an element of an offense is constitutional error subject to "harmless error" analysis. See Evanchyk v. Stewart, 340 F.3d 933, 940 (9th Cir. 2003).

The state appellate court denied this claim. The court agreed with both parties that the challenged instruction was erroneous, however, it did not reverse the conviction because it

concluded that the error was not prejudicial. (Resp. Ex. C, p. 5-7.) Specifically, the court determined that because the jury found petitioner guilty of second degree murder, it "necessarily found the killing was committed with malice." (Id. at 6.)

> This finding of malice demonstrates that, whether or not the jury believed the killing was intentional, the jury did not believe the killing was committed in the heat of passion, accidentally, or in imperfect self-defense. The jury had been instructed that each of the three foregoing circumstances would negate malice. Moreover, the fact that the jury found [petitioner] intentionally discharged a firearm causing death demonstrates that they did not believe the defense theory that the gun discharged accidentally during a struggle. (Id. at 7.)

Here, although the trial court erroneously stated that intent to kill is a required element of voluntary manslaughter, that instruction by itself did not "so infect[ ] the entire trial that the resulting conviction violates due process." Estelle, 502 U .S. at 72. As the record demonstrates, the jury also received CALJIC 8.50, which explains that murder requires malice while manslaughter does not. (CT 288.) The jury was also instructed, through CALJIC 8.50, that regardless of whether the killing was intentional, petitioner could not be convicted of murder unless the State proved that, at the time of the killing, petitioner was not acting in the heat of passion or imperfect self defense. (Id.)

Further, as in Lasko, defense counsel did not focus on voluntary manslaughter as a primary defense theory. In fact, as discussed above, counsel's theory of defense was involuntary manslaughter and in closing argument, he attempted to persuade the jury that the killing was not premeditated or deliberate. In addition, as in Lasko, the evidence presented here strongly suggested an intent to kill. Witnesses overheard the victim saying he did not want to die, and the petitioner respond that the victim was going to die. Witnesses saw the victim running away from petitioner, who was armed, and watched the petitioner chase him into the backyard. Furthermore, petitioner's actions after the killing are not indicative of an unintentional killing: he did not call an ambulance, he asked someone to "get rid of" the jacket he was wearing that day, and he absconded from police for days. Finally, as in Lasko, and contrary to petitioner's assertion, "Had the jury believed that defendant unintentionally killed [the victim] in the heat of passion, it would have concluded that it could not convict defendant of murder (because he killed

in the heat of passion) and could not convict defendant of voluntary manslaughter (because he lacked the intent to kill). The jury most likely would have convicted defendant of involuntary manslaughter, a lesser offense included within the crime of murder, on which the jury was also instructed. Instead, the jury convicted defendant of second degree murder, showing that it did not believe the killing was committed in the heat of passion." Id. at 102.

In any event, the state appellate court's determination that the instructional error was harmless was not unreasonable. In addition to the incorrect voluntary manslaughter instruction, the jury was given the options of first-degree murder, second-degree murder, and involuntary manslaughter. Since second-degree murder requires malice, the jury's finding of second-degree murder means the jury necessarily rejected a heat of passion or unreasonable self-defense theory. This conclusion precluded finding the petitioner guilty of voluntary manslaughter, even if the jury had been properly instructed, because without a finding of malice, the jury could not have convicted petitioner of second degree murder.

Accordingly, the court concludes that the state court's decision rejecting this claim was not contrary to, or an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

3. Imperfect self-defense jury instruction

Petitioner claims that the trial court gave two instructions as to how imperfect or unreasonable self defense (CT 289, 297) will amount to voluntary[5] or involuntary manslaughter[6],

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[5] "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. . ." (CT 289.)

[6] "When a person who is acting in what otherwise be [sic] self-defense kills another human being without malice aforethought and without an intent to kill by using deadly force which was not justifiable under the circumstances, or by the use of force which exceeded that which was reasonably necessary to repel the attack, that person is guilty of involuntary manslaughter." (CT 297.)

which were undermined by another erroneous instruction stating, "A person who kills another person with malice of [sic] aforethought may be found guilty of murder even where the evidence otherwise establishes the right of self-defense, if the jury finds that the nature of the attack did not justify the resort to deadly force, or that the force used exceeded that which was reasonably necessary to repel the attack." (CT 312; Petition memorandum, p. 49-53.)

The state appellate court denied this claim. The court concluded that any error was not prejudicial. (Resp. Ex. C, p. 7-8.) Specifically, the court found that the jury was properly instructed on the difference between murder and manslaughter in that one required a finding of malice while the other did not. (Id. at 7.) The court concluded, therefore, that as in Lasko, a verdict of second degree murder necessarily required the jury to find that petitioner did not act in unreasonable self-defense, because, as the instructions stated, a person who acts in unreasonable self-defense does not harbor malice aforethought. (Id.)

Contrary to petitioner's claim, it is not reasonably likely that if the jury believed that petitioner acted in unreasonable self-defense, it would have felt compelled to find him guilty of murder. (Petition memorandum, p. 53.) First, the jury was instructed that manslaughter is the "unlawful killing of a human being without malice aforethought." (CT 282.) The challenged instruction only referred to a killing *with* malice aforethought. (Emphasis added.) Several other given instructions continued to make that distinction clear for the jury: CALJIC 8.10 (CT 272), 5.17 (CT 289), 8.40 (CT 283), and 8.50 (CT 288). Viewed in the context of the instructions as a whole, see Estelle, 502 U.S. at 72, it is not reasonably likely that the challenged instruction so infected the entire trial.

In addition, as conceded by petitioner, "[E]ven if [the victim's] threat to kill petitioner had been deemed sufficient to create the need for self-defense, the danger ceased the moment [the victim] ran from petitioner and, as the trial court further explained, the right to use force in self-defense ended when the danger ceased to exist." (Petition memorandum, p. 11.) Thus, the evidence did not support a theory of perfect or imperfect self-defense. Further, the jury was instructed that unreasonable self-defense was not available if the petitioner's conduct "created the circumstances which legally justified his adversary's use of force, attack, or pursuit." (CT

289.) Here, the evidence demonstrated that petitioner brandished his firearm, the victim stated he did not want to die, petitioner responded that the victim was going to die, the victim began to run, and petitioner chased him, resulting the victim's death. Considering all of the above, petitioner's argument that he was prejudiced by the challenged instruction is unavailing.

Accordingly, the court concludes that the state court's decision rejecting this claim was not contrary to, or an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

4. Confrontation Clause

Petitioner claims that the use of O.'s videotaped interview with the police violated the Confrontation Clause because it denied him the opportunity to confront or cross-examine O. (Petition memorandum, p. 54-56.) Specifically, petitioner asserts that he had no means to test O.'s initial statements to the police because at trial, O. testified that he did not remember anything about the killing or about his statements to the police.

The Confrontation Clause applies to all out-of-court testimonial statements offered for the truth of the matter asserted, i.e., "testimonial hearsay." See Crawford v. Washington, 541 U.S. 36, 51 (2004). While the Supreme Court has not articulated a comprehensive definition of testimonial hearsay, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Id. at 68. Out-of-court statements by witnesses that are testimonial hearsay are barred under the Confrontation Clause unless (1) the witnesses are unavailable, and (2) the defendants had a prior opportunity to cross-examine the witnesses. Id. at 59. However, the Confrontation Clause does not bar the admission of testimonial hearsay when the declarant appears for cross-examination at trial. Id. at 59 n.9 (citing California v. Green, 399 U.S. 149, 162 (1970)).

The state appellate court denied petitioner's Confrontation Clause claim. Specifically, the court relied on Crawford's statement that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements . . . . The Clause does not bar admission of a statement so long as the declarant is

present at trial to defend or explain it." (Resp. Ex. C, p. 9, quoting Crawford, 541 U.S. at 59 n.9.) The court explained that because O. testified and was available at trial for cross-examination, there was no Confrontation Clause violation. (Id.)

A review of the record indicates that O. indeed appeared at trial and was made available for cross-examination. "[T]he Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." Green, 399 U.S. at 158. Because the Confrontation Clause only guarantees an opportunity for effective cross-examination, the fact that at trial, O. claimed to not remember much of the preceding events does not implicate a violation of the Confrontation Clause. See United States v. Owens, 484 U.S. 544, 599 (1988).

Accordingly, the court concludes that the state court's decision rejecting this claim was not contrary to, or an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

5. Admission of evidence

Petitioner claims that the trial court erred in allowing the victim's sister, Keycha Neff, to testify regarding evidence that petitioner had written a letter to his cousin, asking him to get rid of the gun and his FUBU jacket after the killing. (Petition memorandum, p. 61.) Petitioner asserts that the admission of such evidence was an abuse of discretion because it was inadmissible hearsay and violated the secondary evidence rule. (Id. at 62-63.)

A state court's evidentiary ruling is not subject to federal habeas review unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. See Pulley v. Harris, 465 U.S. 37, 41 (1984). Failure to comply with state rules of evidence is neither a necessary nor a sufficient basis for granting federal habeas relief on due process grounds. See Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999). The due process inquiry in federal habeas review is whether the admission of evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. See Walters v. Maass, 45 F.3d 1355,

1357 (9th Cir. 1995). But note that only if there are no permissible inferences that the jury may draw from the evidence can its admission violate due process. See Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991).

The state appellate court denied petitioner's claim on state law grounds. Specifically, it concluded that admission of testimony regarding the letter was not inadmissible under the hearsay rule because it was inconsistent with witness Brown's testimony. See Cal. Evid. Code § 1235[7]. The state court went on to state that the admission also did not violate the secondary evidence rule, because admission of the evidence would not be unfair. See Cal. Evid. Code § 1521(a)[8]. (Resp. Ex. C, p. 10-11.) Further, the state appellate court found that even if the admission was error, it was harmless because there was other evidence that petitioner had asked Sonja West to dispose of his gun and jacket. (Id. at 11.) Although West denied it at trial, she "acknowledged that she made a contrary statement in the videotaped police interview." (Id.) Accordingly, the state court ruled that the challenged admission of evidence was not prejudicial.

The California Court of Appeal reasonably concluded that the trial court did not err in admitting Neff's testimony regarding witness Brown's statement under California's inconsistent statement exception to the hearsay rule. Brown testified that petitioner's cousin showed her a letter from petitioner, but it had nothing to do with the disposal of the gun or the jacket. In response, the prosecution had Neff testify that Brown previously told her differently. Similarly, the California Court of Appeal reasonably concluded that the trial court did not abuse its discretion in ruling that the testimony was not barred by the secondary evidence rule. There is simply no showing that the admission of Brown's inconsistent statement violated a specific federal constitutional provision or deprived petitioner of the fundamentally fair trial guaranteed

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[7] "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing. . ."

[8] "The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following: (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion. (2) Admission of the secondary evidence would be unfair."

by due process.

Even assuming error in the admission of such evidence, petitioner fails to demonstrate how such admission was prejudicial in light of the fact that the jury heard witness West testify that she previously told the police petitioner asked her to dispose of his gun and jacket. Accordingly, such admission of evidence did not render the trial fundamentally unfair. See Walters, 45 F.3d at 1357.

The court concludes that the state court's decision rejecting this claim was not contrary to, or an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

6. Cumulative error

Petitioner claims, in general, that he was deprived of a fair trial, in light of the cumulative effect of all the claims raised. (Petition memorandum, p. 65-66.) 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). Cumulative error is more likely to be found prejudicial when the government's case is weak. Parle v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007). "[W]here the combined effect of individually harmless errors renders a criminal defense far less persuasive than it might [otherwise] have been, the resulting conviction violates due process." Id. at 927 (internal quotation omitted).

Here, the only trial errors that occurred were the instructional errors discussed above, which the court has already concluded individually, were not prejudicial. In light of the strength of the government's case, this court concludes that the alleged errors, even when considered together, did not render petitioner's defense "far less persuasive," nor did they have a "substantial and injurious effect or influence on the jury's verdict." Id. at 928.

Further, petitioner cites no Supreme Court precedent, and the court is aware of none, providing that the cumulative effect of numerous alleged errors, no one of which is prejudicial, may violate a defendant's due process right to a fair trial. The Supreme Court has, however, long recognized that, "given the myriad safeguards provided to assure a fair trial, and taking into

account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." United States v. Hasting, 461 U.S. 499, 508-509 (1983). The AEDPA mandates that habeas relief may only be granted if the state courts have acted contrary to or have unreasonably applied federal law as determined by the United States Supreme Court. Williams v. Taylor, 529 U.S. 362, 412 (2000). In the absence of Supreme Court precedent recognizing a claim of "cumulative error," therefore, habeas relief cannot be granted.

Accordingly, the court concludes that the state appellate court's decision regarding the cumulative effect of any error was not contrary to, or an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The Clerk shall enter judgment for respondent and close the file.

IT IS SO ORDERED.

Dated: 3/16/09

RONALD M. WHYTE
United States District Judge