

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 JOSE MANUEL GARCIA,

12 Petitioner,

13 v.

14 SCOTT KERNAN, Secretary

15 Respondent.  
16

Case No.: 3:16-cv-00911-H-PCL

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE:**

**PETITION FOR WRIT OF HABEAS  
CORPUS**

17 **I. INTRODUCTION**

18 Petitioner Jose Manuel Garcia ("Petitioner"), before the Court pro se, filed a  
19 petition for writ of habeas corpus on April 14, 2016. (Doc. 1.) Petitioner presents ten  
20 arguments in support of his petition: (1) Petitioner's convictions are based on insufficient  
21 evidence; (2) the California Court of Appeal based its decision on Petitioner's jury bias  
22 argument on an unreasonable determination of the facts; (3) six jurors were particularly  
23 biased against Petitioner; (4) the trial court erred in not ordering a mistrial *sua sponte*  
24 following an external incident involving potential jury tampering; (5) Petitioner received  
25 ineffective assistance of counsel from his trial counsel; (6) Petitioner also received  
26 ineffective assistance of counsel from his appellate counsel; (7) Petitioner's sentencing  
27  
28

1 fine is unconstitutional<sup>1</sup>; (8) Petitioner’s sentence is cruel and unusual, thereby violating  
2 his Eighth Amendment rights; (9) cumulative error warrants Petitioner’s trial unfair; and  
3 (10) Petitioner was entrapped by Special Service Unit agent Steven Epperson. (Doc. 1 at  
4 15-19.) Petitioner also requests an evidentiary hearing. (*Id.*)

5 The Honorable Marilyn L. Huff referred this matter to the undersigned Judge for  
6 Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule  
7 72.1(c)(1)(d). After a thorough review of the petition, answer, exhibits, state court  
8 records, and state court decisions, the Court recommends **DENYING** relief.

## 9 **II. BACKGROUND**

10 The Court gives deference to state court findings of fact and presumes them to be  
11 correct; Petitioner may rebut the presumption of correctness, but only by clear and  
12 convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Summer v. Mata*, 449 U.S. 539,  
13 550 (1981) (holding in part that findings of historical fact, including inferences properly  
14 drawn from those facts, are entitled to statutory presumption of correctness). Petitioner  
15 has not claimed these facts are inaccurate, and so this Court takes the following from the  
16 California Court of Appeal:

17 On July 5, 2010, the victim in this case – Victoriano Ortiz, an inmate  
18 at [R.J.] Donovan – was walking in a prison yard with two allies, Geronimo  
19 Polina (“Blue”) and Manuel Gonzalez (“Stomper”). Blue suddenly turned on  
20 Ortiz and attacked him. Numerous other inmates quickly joined the assault  
21 on Ortiz, while other inmates attacked Stomper. The prosecution’s theory  
22 was that the attack was the outcome of a power struggle between two rival  
23 factions of the Mexican Mafia then competing for control of Donovan, one  
24 of which was led by Ortiz and his “mesa,” and the other led by a mesa  
25 composed of [Petitioner] (“Crazy Joe”), Morones, and two others. The  
26 Mexican Mafia seeks to control prisons using mesas as a command system,  
27 which is in effect a governing council. Ordinarily, the chief of the mesa is a  
28 “shot-caller” or “key-holder,” and he has two or three “helpers” to help run  
various aspects or areas of the prison. The shot-caller and his helpers

---

<sup>1</sup> The Court dismissed this particular claim following a motion to dismiss filed by Respondent, finding the claim was outside the Court’s jurisdiction under 28 U.S.C. § 2254(a). (Doc. 28 at 14, citing *Bailey v. Hill*, 599 F.3d 976, 979, 982 (9th Cir. 2010).)

1 comprise the mesa. He derives his authority to run the prison from a  
2 “member” of the Mexican Mafia.

3 *A. The Principal Participants*

4 Morones was an associate in the Mexican Mafia serving a life  
5 sentence at Donovan. His eventual ally, [Petitioner], is also an active  
6 Mexican Mafia associate. Ortiz testified at trial about the structure of the  
7 Mexican Mafia. At the bottom of the organization pyramid are  
8 “southsiders,” all members of Hispanic street gangs in southern California.  
9 These gang members must remit “taxes” (a portion of the proceeds of their  
10 illegal activity) to the Mexican Mafia. The next higher level consists of  
11 “surenos” or “soldiers,” gang members who have garnered authority and  
12 more respect than southsiders by working for the Mexican Mafia, collecting  
13 taxes or enforcing orders through violent attacks. Above the surenos are  
14 “associates,” who have worked their way up and are close to “members”  
15 (also referred to as “carnals”) of the Mexican Mafia. At the top of the  
16 pyramid are the carnals, who can order someone killed or assaulted (also  
17 called “giving the green light”) if the target is not respecting the authority of  
18 the Mexican Mafia. Such an order must be followed by all persons within  
19 the structure. Orders to attack someone, when issued by the mesa operating  
20 under a carnal’s authority to run a prison, must be treated with the same  
21 obedience.

22 Ortiz was an associate in the Mexican Mafia and was incarcerated at  
23 Donovan to serve time for an assault he committed on its behalf. Ortiz  
24 believed his authority to run Donovan derived from his association with and  
25 permission from Richard Buchanon.

26 *B. The Power Struggle for Control of Donovan and the Attack on*  
27 *Ortiz*

28 Ortiz arrived at Donovan in March 2010 and almost immediately sent  
out word through “kites” and word of mouth that he was in charge of  
Donovan and whoever was in charge needed to step down or risk being  
assaulted. “Kites” are small handwritten notes by which messages are  
surreptitiously passed to other inmates within the prison (either between  
cells within a cell block or even between cell blocks) or to persons outside  
the prison. Ortiz also formed his mesa, which included Stomper (Ortiz’s  
right-hand man), and inmate named “Pino,” and Morones. At one point,  
Morones asked Ortiz for paperwork containing Ortiz’s authority, but  
Buchanon had verbally authorized Ortiz to run Donovan.

Another group apparently disagreed with Ortiz’s attempt to exert  
control, and Ortiz believed this group was trying to challenge his authority.  
This group included Morones, who had been in a dispute with Stomper, and  
Pablo Franco (“Casper”). That group began sending kites asserting its

1 authority to run Donovan, which those in the group believed was derived  
2 from another carnal, and included messages to Ortiz that Ortiz “had  
3 something coming.”

4 When Ortiz noticed that southsiders were beginning to follow  
5 Morones’s group, he tried to reassert his authority because there can only be  
6 one mesa running a prison. Ortiz’s efforts to regain control including writing  
7 a kite to Morones asking to resolve the power struggle (an offer that did not  
8 bear fruit) and challenging Casper to a fight, which Casper declined. Ortiz  
9 interpreted Casper’s response and acquiescing to Ortiz’s authority, and he  
10 sent a kite to Casper indicating they both were now working under  
11 Buchanon’s authority. Ortiz formed a new mesa, including Stomper, Blue  
12 and Isaac Balesteros (“Lazy”). For the next month, everything appeared  
13 calm with Ortiz in control.

14 However, in late June or early July, problems over control reemerged  
15 after Rude Espudo (“Crazy Boy”), a carnal, was temporarily incarcerated at  
16 Donovan. Espudo gave authority over Donovan to Morones, [Petitioner]  
17 (Morones’s cellmate), and two other inmates (Casper and an inmate with the  
18 moniker “Oso”). Almost immediately, Garcia began yelling on the tier of  
19 their cell block that he had “authority” and threatened that Ortiz and  
20 Stomper had “something coming”, which Ortiz understood to mean he was  
21 targeted for attack. Ortiz also saw kites written by [Petitioner] and Morones  
22 ordering Ortiz be “whacked” with “no exceptions.”

23 Authorities had placed [Petitioner] in a cell that was surreptitiously  
24 wired, and, during this period, numerous recordings were made of  
25 conversations between Morones and Garcia, as well as of conversations they  
26 had with other inmates. Some of the recordings from July 2, 2010 (three  
27 days before the attack on Ortiz and Stomper) showed that Morones had  
28 already begun writing a kite to Lazy when [Petitioner] began contributing to  
the kite. [Petitioner] told Morones to ensure that the kite declare Espudo’s  
direct orders had established the new mesa, and the new mesa was ordering  
both Lazy and Blue (members of Ortiz’s inner circle) to whack Ortiz and  
Stomper “on this next yard with no exceptions.” The next day, July 3,  
[Petitioner] and Morones discussed whether Ortiz was going to come out to  
the yard and that he had group yard, and [Petitioner] said, “[T]hat’s a good  
thing, that way we can blast the fuck out of him.”

When Ortiz went to walk in the prison yard on July 5, 2010, he knew  
he was risking his safety because there was a chance he would be assaulted.  
However, he believed he still had authorization to run Donovan and could  
not show fear, so he nevertheless went into the yard. As Ortiz was walking  
with two of his allies (Blue and Stomper), Blue suddenly turned on Ortiz and  
began punching and cutting at him. Other inmates joined in the attack on

1 Ortiz while yet another group of inmates attacked Stomper. Although  
2 correctional officers responded by ordering the inmates to get down, and  
3 thereafter by firing some shots when the inmates ignored the command, the  
4 attackers did not immediately cease but instead continued stabbing Ortiz and  
5 banging his head against a wall. Ortiz suffered head and other injuries from  
6 the attack.

7 (Lodgment 19, 4-8.)

8 Petitioner was charged and found guilty by a jury of four criminal acts: conspiracy  
9 to commit murder, California Penal Code §§ 182(a)(1), 187(a), attempted murder through  
10 a conspiracy or aiding and abetting theory, California Penal Code §§187(a), 664,  
11 solicitation of murder, California Penal Code § 653f(b), and assault with a deadly weapon  
12 on a prisoner, California Penal Code § 4501. (Lodgment 1, 75; Lodgment 12, 1667.)  
13 Gang allegations were also found true on all counts, California Penal Code §  
14 186.22(b)(1). (*Id.*) on July 20, 2012, after denying a motion for new trial, the trial court  
15 sentenced Petitioner to an aggregate prison term of 25 years to life plus 19 years  
16 determinate. The trial court later entered judgment on July 23, 2012.

17 Petitioner filed his direct appeal in the California Court of Appeal on June 11,  
18 2013, challenging the conviction on six grounds. (Lodgment 16 at i-iii.) This appeal  
19 alleged reversal of Petitioner's conviction was required for the following reasons: (1) the  
20 trial court erred in answering Jury Question No. 3 regarding the attempted murder jury  
21 instruction; (2) trial counsel was ineffective in allowing the trial court to answer Jury  
22 Question No. 3 in such an erroneous way; (3) the trial court erred in failing to instruct *sua*  
23 *sponte* on the lesser included offense of conspiracy to commit an assault with a deadly  
24 weapon; (4) the trial court erred in imposing Petitioner's sentence on conspiracy to  
25 commit murder; (5) the trial court erred in imposing Petitioner's sentence on counts three  
26 and four; and (6) the trial court erred in failing to stay Petitioner's sentence on attempted  
27 murder. (*Id.*)

28 The government agreed with Petitioner's arguments regarding his sentence, and  
submitted to claims four through six. (Lodgement 17 at 27-32.) The Court of Appeal took

1 notice of this agreement between Petitioner and the government, and accordingly ordered  
2 Petitioner's sentence be modified. (Lodgment 19 at 31-33.) While the Court of Appeal  
3 granted Petitioner's appeal on these three grounds, on February 19, 2014, the Court of  
4 Appeal rejected Petitioner's challenges to the validity of his conviction and affirmed the  
5 judgment with the modified sentence. (*Id.* at 32-33.) On remand, Petitioner was  
6 resentenced to an aggregate term of 25 years to life plus nine years determinate. (Doc. 8-  
7 11, Ex. J at 1.)

8       Following this decision, Petitioner then filed a petition for review with the  
9 California Supreme Court on March 24, 2014. (Lodgment 20.) Petitioner raised those  
10 claims he had previously raised in the Court of Appeal which had been unsuccessful. (*Id.*  
11 at i-ii.) The Supreme Court, on June 11, 2014, summarily denied the petition. (Lodgment  
12 21.)

13       On December 29, 2014, Petitioner filed a petition for writ of habeas corpus in the  
14 California Superior Court. (Lodgment 22.) Herein, Petitioner raised eight arguments: (1)  
15 insufficiency of the evidence; (2) entrapment; (3) juror bias and misconduct; (4)  
16 ineffective assistance of trial counsel; (5) ineffective assistance of appellate counsel; (6)  
17 erroneous imposition of fines and fees; (7) cruel and unusual punishment; and (8)  
18 cumulative effect of error. (*Id.* at i-iv.) Petitioner also requested an evidentiary hearing  
19 based on these claims. (*Id.* at iv.) The Superior Court found Petitioner failed to make a  
20 prima facie showing on any of his claims and denied relief. (Lodgment 23 at 3-10.)

21       After the Superior Court's denial, Petitioner file da petition in the Court of Appeal  
22 alleging the same claims as in the Superior Court. (Lodgment 24 at i-iv.) The Court of  
23 Appeal held all Petitioner's claims in his petition were procedurally barred. (Lodgment  
24 25 at 2.) Specifically, the Court of Appeal found "the claims [were] untimely because  
25 [Petitioner] waited more than two years after he was sentenced to assert them" and gave  
26 no justification for the delay. (*Id.*) The Court of Appeal also rejected all of the claims on  
27 the merits as well. (*Id.* at 2-5.)  
28

1 On May 26, 2015, Petitioner filed a petition for writ of habeas corpus in the  
2 California Supreme Court, raising the same grounds as previously raised in his collateral  
3 attacks in the lower state courts. (Lodgment 26 at i-iv.) Additionally, Petitioner raised a  
4 final argument claiming “all of his state and federal constitutional guarantees” had been  
5 violated “by the state court’s failure and refusal [*sic*] to grant habeas corpus relief.” (*Id.*  
6 at iv.) On October 14, 2015, the Supreme Court summarily denied the habeas petition.  
7 (Lodgment 27.)

8 Finally, on April 14, 2016, Petitioner filed the present petition for writ of habeas  
9 corpus in this Court pursuant to 28 U.S.C. § 2254, challenging his state court conviction  
10 of July 23, 2012. (Doc. 1.) Petitioner rests his petition on the same grounds as he had  
11 previously raised in the state courts: (1) insufficiency of the evidence; (2) entrapment; (3)  
12 juror bias and misconduct; (4) ineffective assistance of trial counsel; (5) ineffective  
13 assistance of appellate counsel; (6) erroneous imposition of fines and fees; (7) cruel and  
14 unusual punishment; and (8) cumulative effect of error. (*Id.* at ii-vi.) Pursuant to a motion  
15 to dismiss filed by Respondent, the Court dismissed the sixth argument regarding the  
16 imposition of fines and fees. (Doc. 28 at 14.) The Court held it “lack[ed] jurisdiction over  
17 Petitioner’s habeas claim challenging the trial court’s imposition of fines and fees.” (*Id.*)  
18 Accordingly, the claim was dismissed.

19 Respondent was ordered to answer Petitioner’s petition, and Respondent did so on  
20 May 10, 2017. (Doc. 31.) At that time, Respondent also lodged the state court record in  
21 this Court. (Doc. 32.) While Petitioner’s traverse was originally due no later than June 9,  
22 2017, this Court granted two extensions, the latest of which extended Petitioner’s  
23 deadline to November 9, 2017. (Docs. 34, 37.) On November 17, 2017, Petitioner  
24 submitted a copy of the Court’s first order granting an extension and nine pages of  
25 medical records. (Doc. 38.) This submission was rejected as not complying with local  
26 rules. (*Id.*) To date, Petitioner has not filed any traverse to Respondent’s answer. Thus,  
27 before this Court now are the remaining seven claims.  
28

### III. SCOPE OF REVIEW

A federal court “shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of state court only on the ground he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §2254(a). Federal habeas courts may not “reexamine state-court determinations on state-law questions.” *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). “[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.” *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *see Park v. California*, 202 F.3d 1146, 1149-50 (9th Cir. 2000) (“a violation of state law standing alone is not cognizable in federal court on habeas”).

This FAP is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *See Lindh v. Murphy*, 521 U.S. 320 (1997). Under AEDPA, a habeas petition will not be granted with respect to any claim adjudicated on the merits by the state court unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. §2254(d); *Early v. Packer*, 537 U.S. 3, 8 (2002). In deciding a state prisoner’s habeas petition, a federal court is not called upon to decide whether it agrees with the state court’s determination; rather, the court applies an extraordinary deferential review, inquiring only whether the state court’s decision was objectively unreasonable. *See Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Hornung*, 386 F.3d 872, 877(9th Cir. 2004). Because Petitioner’s arguments involve only questions of law, this Court reviews the petition under the “contrary to” and “unreasonable application” clauses of § 2254(d)(1).

A federal habeas court may grant relief under the “contrary to” clause if the state court applied a rule different from the governing law set forth in Supreme Court cases, or if it decided a case differently than the Supreme Court on a set of materially indistinguishable facts. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may grant



1 relief under the “unreasonable application” clause if the state court correctly identified  
2 the governing legal principle from Supreme Court decisions but unreasonably applied  
3 those decisions to the facts of a particular case. *Id.* Additionally, the “unreasonable  
4 application” clause requires that the state court decision be more than incorrect or  
5 erroneous; to warrant habeas relief, the state court’s application of clearly established  
6 federal law must be “objectively unreasonable.” *See Lockyer v. Andrade*, 538 U.S. 63, 75  
7 (2003).

8       Where there is no reasoned decision from the state’s highest court, the Court  
9 “looks through” to the underlying appellate court decision and presumes it provides the  
10 basis for the higher court’s denial of a claim or claims. *See Ylst v. Nunnemaker*, 501 U.S.  
11 797, 805-06 (1991). If the dispositive state court order does not “furnish a basis for its  
12 reasoning,” federal habeas courts must conduct an independent review of the record to  
13 determine whether the state court’s decision is contrary to, or an unreasonable application  
14 of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th  
15 Cir. 2000) (overruled on other grounds by *Andrade*, 538 U.S. at 75-76); *accord Hines v.*  
16 *Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). However, a state court need not cite  
17 Supreme Court precedent when resolving a habeas corpus claim. *See Early*, 537 U.S. at  
18 8. “[S]o long as neither the reasoning nor the result of the state-court decision contradicts  
19 [Supreme Court precedent,]” *id.*, the state court decision will not be “contrary to” clearly  
20 established federal law. *Id.* Clearly established federal law, for purposes of §2254(d),  
21 means “the governing principle or principles set forth by the Supreme Court at the time  
22 the state court renders its decision.” *Andrade*, 538 U.S. at 72.

23       Where the state court did not reach the merits of a claim because of the imposition  
24 of a state procedural bar, “there is no state court decision. . . . to which to accord  
25 deference.” *Pirtle*, 313 F.3d at 1167. Thus, this court must review those claims de novo.  
26 *Id.* However, AEDPA “does not require a state court to give reasons before its decision  
27 can be deemed to have been ‘adjudicated on the merits.’” *Harrington v. Richter*, 562 U.S.  
28 86, 100 (2011). “Rather, [as the Supreme Court has] explained, ‘[w]hen a federal claim

1 has been presented to a state court and the state court has denied relief, it may be  
2 presumed that the state court adjudicated the claim on the merits in the absence of any  
3 indication or state-law procedural principles to the contrary.” *Johnson v. Williams*, 133  
4 S. Ct. 1088, 1094 (2013) (quoting *Richter*, 562 U.S. at 99).

#### 5 **IV. DISCUSSION**

6 In his petition, Petitioner raises seven arguments which he claims entitle him to  
7 habeas relief, or in the alternative, an evidentiary hearing. These grounds are as follows:  
8 (1) insufficiency of the evidence; (2) entrapment; (3) juror bias and misconduct; (4)  
9 ineffective assistance of trial counsel; (5) ineffective assistance of appellate counsel; (6)  
10 cruel and unusual punishment; and (7) cumulative effect of error. (Doc. 1 at ii-vi.) In  
11 response to this petition, Respondent first raises a timeliness defense wherein Respondent  
12 claims Petitioner has not filed the instant petition within the allotted time set out by  
13 AEDPA. (Doc. 31 at 12.) Respondent argues all of Petitioner’s claims are procedurally  
14 defaulted due to this failure to comply with the timeliness doctrine. (*Id.* at 13.) Moreover,  
15 Respondent contends even if Petitioner’s claims are not procedurally defaulted, each of  
16 Petitioner’s claims is meritless. (*Id.* at 19-27.)

#### 17 **A. Timeliness under AEDPA**

18 In 1996, AEDPA created additional procedural requirements for a convicted  
19 defendant filing a federal petition for writ of habeas corpus. 28 U.S.C. § 2244. Among  
20 other things, AEDPA now requires a petitioner to file an application for writ of habeas  
21 corpus in a federal court within one year of an adverse judgment of a state court. 28  
22 U.S.C. § 2244(d)(1). This period of limitation begins on “the date on which the judgment  
23 became final by the conclusion of direct review or the expiration of the time for seeking  
24 such review; . . . .” 28 U.S.C. § 2244(d)(1)(A). However, when a “properly filed  
25 application” for collateral review of the judgment or claim is pending in the state court,  
26 this period of limitation will toll. 28 U.S.C. § 2244(d)(2).

27 In federal courts in California, as long as the petitioner was “properly pursuing”  
28 state court remedies, *i.e.* collateral review in the state courts, AEDPA’s “statute of

1 limitations is tolled from the time the first state habeas petition is filed until the California  
2 Supreme Court rejects the petitioner's final collateral challenge." *Nino v. Galaza*, 183  
3 F.3d 1003, 1006 (9th Cir. 1999) (footnote omitted). However, if a state court finds the  
4 petition is untimely under state timing rules, this tolling will not apply, such that the time  
5 between filings in California courts will not count under the "pending" language of  
6 2244(d)(2). *Evans v. Chavis*, 546 U.S. 189 (2006); *Carey v. Saffold*, 536 U.S. 214 (2002).  
7 But, "AEDPA's statute of limitations is not tolled from the time a final decision is issued  
8 on direct state appeal and the time the first state collateral challenge is filed because there  
9 is no case 'pending' during that interval." *Nino*, 183 F.3d at 1006.

10 A pro se prisoner's pleading is deemed filed on the date of its submission to prison  
11 authorities for mailing to the court, as opposed to the date of its receipt by the court clerk.  
12 *Houston v. Lack*, 487 U.S. 266, 276 (1988). To benefit from this so-called prisoner  
13 mailbox rule, a prisoner must meet two requirements: (1) he must be proceeding without  
14 assistance of counsel, and (2) he must deliver his filing to prison authorities for  
15 forwarding to the court. *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003).

16 In this case, Petitioner has proceeded *pro se* since his direct appeal was denied by  
17 the California Supreme Court. (*See, e.g.*, Lodgment 22.) Thus, the first element is met for  
18 Petitioner to avail himself of the prisoner mailbox rule. Additionally, Petitioner includes  
19 in all of his petitions submitted to the various courts a document entitled "PROOF OF  
20 SERVICE DECLARATION OF SERVICE BY U.S. MAIL." (*See, e.g.*, Doc. 1 at 102.)  
21 This document is provided for Petitioner to fill out a proof of service, and provides a  
22 blank line in which Petitioner is to write in the date when Petitioner "turned over to  
23 prison officials in a timely fashion" the specific document "for forwarding to the clerk of  
24 the court as well as to all parties." (*Id.*) This document is sufficient to show Petitioner  
25 delivered each of his filings to prison authorities in anticipation of the filings being  
26 forwarded to the respective courts. Therefore, Petitioner can appropriately use the  
27 prisoner mailbox rule, and the Court accordingly uses the dates indicated on the included  
28

1 proof of service pages instead of the file stamp dates on Petitioner's petitions to calculate  
2 time pursuant to AEDPA.

3 Petitioner's request for review in the California Supreme Court during his direct  
4 appeal was denied on June 11, 2014. (Lodgment 27.) Petitioner then had 90 days to seek  
5 review in the United States Supreme Court. *Barefoot v. Estelle*, 463 U.S. 880, 887  
6 (1983); *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir. 1999). Under 28 U.S.C.  
7 §2244(d)(1)(A), therefore, Petitioner's conviction became final on September 10, 2014.  
8 Petitioner did not submit his petition for writ of habeas corpus to prison officials to then  
9 be filed in the state court until December 18, 2014. (Lodgment 29 at 75.) The time  
10 between these two events was 99 days – effectively meaning 99 days of Petitioner's one  
11 year period of limitation elapsed before Petitioner initiated his post-conviction relief  
12 proceedings.

13 From December 29, 2014 to May 26, 2015, Petitioner's petition went through the  
14 collateral attack process provided by the California courts. Specifically, Petitioner  
15 submitted his petition to prison officials to be filed in the Superior Court on December  
16 18, 2014, and the petition was denied on January 14, 2015. (Doc. 22; Doc. 23.) Petitioner  
17 then filed his petition in the Court of Appeal on February 4, 2015, and the petition was  
18 also denied there on March 5, 2015. (Doc. 24; Doc. 25.) Finally, Petitioner filed his  
19 petition in the California Supreme Court on May 26, 2015, and the petition was denied on  
20 the docket on October 14, 2015. (Doc. 26; Doc. 27.) During this entire process,  
21 Petitioner's one year period of limitation was tolled according to 28 U.S.C. § 2244(d)(2),  
22 so long as Petitioner was "properly pursu[ing]" his claims. *Nino*, 183 F.3d at 1006.

23 Following this denial by the Supreme Court, Petitioner submitted the current  
24 petition to prison officials to be filed with this Court on April 7, 2016 – almost six  
25 months after the Supreme Court's denial. (Doc. 1.) The time between these two events  
26 was 176 days. These days are no longer tolled because the state collateral attack had been  
27 completed, and therefore the days must be counted against the one year period of  
28 limitation. Thus, Petitioner used 99 days of the period of limitation before he launched

1 his collateral attack at the state level, and 176 days after such an attack before launching a  
2 similar collateral attack at the federal level. Combined, therefore, Petitioner waited 265  
3 days to file the current petition, which is within the one year period of limitation.

4 Respondent argues Petitioner's current petition is in fact untimely because the  
5 Court of Appeal rejected the petition initially based on its untimeliness.<sup>2</sup> Respondent  
6 claims the Court of Appeal's justification for the denial means the one year period of  
7 limitation should only be tolled for the pendency of Petitioner's petition filed in the  
8 Superior Court. (Doc. 31 at 12.) Respondent's argument is based on *Pace v.*  
9 *DeGuglielmo*, 544 U.S. 408 (2005), wherein the United States Supreme Court decided  
10 "whether a state postconviction petition rejected by the state court as untimely  
11 nonetheless is 'properly filed'" within the meaning of AEDPA's period of limitation. *Id.*  
12 at 410. The Court answered the issue negatively, thus holding that a state court's finding  
13 a petition untimely will render the petition improperly filed and not eligible for tolling of  
14 the AEDPA statute of limitation.

15 California does not have a definitive statute of limitations for criminal defendants  
16 mounting collateral attacks. Instead, California requires these attacks merely be launched  
17 "in a timely manner." *In re Reno*, 55 Cal.4th 428, 459 (2012). Moreover, "it has long  
18 been required that a petitioner explain and justify any significant delay in seeking habeas  
19 corpus relief." *In re Clark*, 5 Cal.4th 750, 765 (1993). Because of this uncertainty,  
20 California courts must determine whether petitions are presented without "substantial  
21 delay." *In re Reno*, 55 Cal. 4th at 460.

22 In Petitioner's case, the California Court of Appeal discussed the timeliness of  
23 Petitioner's petition in one sentence: "The claims are untimely because [Petitioner]  
24 waited more than two years after he was sentenced to assert them, but has offered no  
25

---

26  
27  
28 <sup>2</sup> The Court of Appeal denied the petition based on untimeliness but ruled that even if timely the claims  
lacked merit. (Lodgment 25, at 2.)

1 explanation for the delay.”<sup>3</sup> (Lodgment 25 at 2.) When a petition is rejected by a state  
2 court for being untimely, the petition, by definition, cannot be “properly filed” under §  
3 2244(d)(2). *Pace*, 544 U.S. at 417. Therefore, because the Court of Appeal rejected  
4 Petitioner’s petition as untimely, AEDPA’s tolling statute no longer applied after the  
5 Superior Court issued its denial.

6 Accordingly, the time between the Court of Appeal’s rejection and Petitioner filing  
7 the current petition before this Court must be counted against the one year period of  
8 limitation.<sup>4</sup> The time between the Superior Court’s denial of Petitioner’s petition on  
9 January 14, 2015, and Petitioner filing the current petition on April 7, 2016 is 499 days.  
10 This is very clearly in excess of the one year limit imposed by AEDPA. While this  
11 amount of time alone exceeds the period of limitation, Petitioner also waited 99 days  
12 after his conviction became final before mounting his initial collateral attack in the  
13 California Superior Court. Combined, Petitioner used 598 days, 233 days more than  
14 AEDPA’s one year period of limitation allowed. Because Petitioner is not entitled to any  
15 tolling which would excuse the tardiness of his claims, Petitioner’s federal petition is  
16 barred by the one year statute of limitation.

17 In Petitioner’s opposition to Respondent’s previously filed motion to dismiss,  
18 (Doc. 8-1), Petitioner set forth facts he believed to excuse any untimeliness in filing his  
19 petition. (Doc. 17 at 11.) Therein, Petitioner states because he is “in the dark of all  
20

---

21 <sup>3</sup> Petitioner’s claims included in his petitions for writ of habeas corpus filed in the state courts, and now  
22 this Court, are wholly different than those Petitioner presented during his direct appeal. (See Lodgment  
23 16, 22, 24, 26; Doc. 1.) Given the differences in Petitioner’s claims on appeal and collateral attack,  
24 Petitioner does not have any grounds to raise an equitable tolling argument. To raise such an argument, a  
25 petitioner must show (1) he has been pursuing his rights diligently, and (2) some extraordinary  
26 circumstance stood in his way. See, e.g., *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96  
(1990). Here, Petitioner has not been pursuing his rights diligently because he had not previously raised  
27 any of the claims included in the collateral attack; instead, Petitioner waited two years to raise such  
28 claims. The Court of Appeal was therefore correct in classifying Petitioner’s claims as untimely.

<sup>4</sup> The time between the Court of Appeal’s rejection on March 5, 2015 and Petitioner’s filing the current  
petition on April 7, 2016 is 399 days. This clearly exceeds the one year period of limitations. Therefore,  
even if the AEDPA statute was tolled for the pendency of the petition filed in the Court of Appeal, the  
one year statute would still be violated.

1 jurisprudence,” he was forced to seek the assistance of an “inmate jailhouse lawyer.” (*Id.*  
2 at 12.) However, during this relationship between Petitioner and the “inmate jailhouse  
3 lawyer,” each of the men were moved from prison to prison – once to the same prison,  
4 and next to separate prisons. (*Id.* at 10.) Petitioner claims because he required this  
5 assistance, and the moving from prison to prison was out of Petitioner’s control,  
6 Petitioner is entitled to equitable tolling of the AEDPA time limit. (*Id.* at 11, 13.)

7       The United States Supreme Court has held that equitable tolling is allowed “only  
8 sparingly.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990). In fact, only two  
9 situations have arisen where federal courts have routinely granted such equitable relief:  
10 where the claimant timely files a document containing a mistake, and when the claimant  
11 is induced or tricked by his adversary to allow the filing deadline to pass. *Id.* Courts are  
12 typically “less forgiving” in situations where the claimant simply failed to exercise due  
13 diligence in order to preserve his legal rights. *Id.*, citing *Baldwin County Welcome Center*  
14 *v. Brown*, 466 U.S. 147, 151 (1984).

15       Here, Petitioner’s failure to comply with the AEDPA time limit does not fall  
16 within one of the two recognized situations where federal courts tend to grant equitable  
17 tolling. Instead, Petitioner’s failure falls squarely within the class of cases where these  
18 courts are “less forgiving,” and typically refuse to grant equitable tolling. Petitioner’s  
19 case does not present an extraordinary set of facts leading the Court to find equitable  
20 tolling warranted. Here, Petitioner did not timely pursue his post conviction relief in such  
21 a way that his efforts could be considered diligent. Petitioner blames the necessity of  
22 outsourcing his petition to an “inmate jailhouse lawyer” which caused significant delays  
23 in filing the petition. This blame is misplaced. Petitioner chose to undertake his own  
24 representation and proceed in this collateral attack pro se. While there are certain  
25 leniencies for pro se litigants, adhering to statutes of limitation is not one of them.  
26 *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir.), *cert. denied*, 133 L.Ed. 2d 69, 116 S.Ct 119  
27 (1995) (although pro se pleadings are liberally construed, pro se litigants are nonetheless  
28 bound by procedural rules). *Cf. Whaleen/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir.

2000) (en banc) (where the Ninth Circuit held a pro se Petitioner's inability to obtain information about the statute of limitation deadline may warrant equitable tolling).<sup>5</sup> Petitioner's rebuttal to the timeliness requirement for his petition fails; therefore, his petition must ultimately fail for tardiness. The petition is accordingly DENIED on this ground.

Although the Court is recommending the petition be denied due to failure to adhere to AEDPA's time limits, even if the petition was considered on the merits, Petitioner's substantive claims would also fail. These claims fail for the reasons set forth below.

**B. Procedural Default**

In addition to being barred by AEDPA's time rule, Respondent argues Petitioner's claims also fail because they are procedurally defaulted. (Doc. 31-1 at 6.) Respondent first raised a procedural default argument in its motion to dismiss. (Doc. 8 at 3.) Petitioner refuted this claim, but alternatively argued there was sufficient cause and prejudice to excuse any potential procedural default. Petitioner argued because he is claiming ineffective assistance of both trial and appellate counsel compounded by Petitioner's complete lack of legal knowledge, therefore requiring him to seek assistance from a fellow inmate, create sufficient cause and prejudice to overcome a procedural default. (Doc. 27 at 13.)

The Court took this argument under submission, and found the timeliness rule (which the Court of Appeal based its denial of Petitioner's habeas petition) to be an independent and adequate state ground. (Doc. 28 at 9.) Additionally, the Court recognized as an independent and adequate state ground the Court of Appeal's denial of Petitioner's habeas claims, except for the ineffective assistance claims, because these claims could have been raised on direct appeal. (*Id.* at 9-10.)

---

<sup>5</sup> Here, Petitioner discussed and made an argument regarding AEDPA's filing time limit, so the case at hand is distinguishable from *Whalem/Hunt*. See *Regan v. State*, 2008 U.S. Dist. LEXIS 55966 (D. Haw. July 22, 2008).



1 In some cases, ineffective assistance can constitute cause in order to overcome a  
2 procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Edwards v. Carpenter*,  
3 529 U.S. 446, 451 (2000). However, such a claim “generally must ‘be presented to the  
4 state courts as an independent claim before it may be used to establish cause for a  
5 procedural default.’” *Edwards*, 529 U.S. at 542. Because Petitioner did not present either  
6 ineffective assistance claim during his direct appeal, the Court then turned to the narrow  
7 exception to the procedural default rule provided by *Martinez v. Ryan*, 566 U.S. 1 (2012)  
8 (*Martinez*), applicable specifically to ineffective assistance claims. This test states,

9 To establish cause to overcome procedural default . . . , a petitioner must  
10 show: (1) the underlying ineffective assistance of trial counsel claim is  
11 substantial; (2) the petitioner was not represented or had ineffective counsel  
12 during the [post conviction relief] proceeding; (3) the state [post conviction  
13 relief] proceeding was the initial review proceeding; and (4) state law  
required (or forced as a practical matter) the petitioner to bring the claim in  
the initial review collateral proceeding.

14 *Dickens v. Ryan*, 740 F.3d 1302, 1319 (9th Cir. 2014) (quotations omitted). This test has  
15 been held by the Ninth Circuit to similarly apply to ineffective assistance claims  
16 regarding appellate counsel. *See Nguyen v. Curry*, 736 F.3d 1287, 1289 (9th Cir. 2013).

17 This Court then made its determination regarding Petitioner’s claims and the effect  
18 of the alleged procedural default thereon:

19 With respect to the first prong of the *Martinez* test, the prisoner must  
20 establish that the ineffective assistance of counsel claim is a substantial one,  
21 meaning that the petitioner “must demonstrate that the claim has some  
22 merit.” *Martinez*, 566 U.S. at 14; accord *Detrich v. Ryan*, 740 F.3d 1237,  
23 1245 (9th Cir. 2013). In the present habeas petition, Petitioner alleges that he  
24 received ineffective assistance of trial counsel because (1) trial counsel  
25 failed to investigate and introduce an entrapment defense; (2) trial counsel  
26 failed to introduce exculpatory audio recordings; (3) trial counsel failed to  
27 interview and subpoena an exculpatory government witness; (4) trial counsel  
28 failed to cross-examine Petitioner’s wife; (5) trial counsel failed to hire a  
gang expert for the defense; (6) trial counsel committed serious misconduct;  
(7) trial counsel failed to move to strike several biased jurors for cause  
during voir dire; (8) trial counsel failed to move for a mistrial; and (9) trial  
counsel failed to challenge at sentencing Petitioner’s consecutive sentence

1 and his restitution fine. (Doc. 1 at 59-61.) Petitioner further alleges that he  
2 received ineffective assistance of appellate counsel because his appellate  
3 counsel failed to raise on direct appeal his claims for: (1) insufficiency of the  
4 evidence; (2) ineffective assistance of trial counsel; (3) entrapment; (4)  
5 entrapment by estoppel and duress; (5) juror bias; (6) trial court's failure to  
6 declare a mistrial; (7) a *Brady* violation; (8) cruel and unusual punishment;  
7 (9) sentencing errors; (10) prosecutorial misconduct; (11) judicial  
8 misconduct; (12) violation of California Rules of Professional Conduct 38  
9 and 5-110 by the prosecutor; and (13) cumulative effect of errors. (*Id.* at 63-  
10 64.)

11 Here, a determination of whether Petitioner's ineffective assistance of  
12 counsel claims are substantial will involve an evaluation of the merits of  
13 those claims. [Footnote omitted.] Further, the evaluation of the merits of  
14 Petitioner's IAC claims is intertwined with the merits of the other claims in  
15 the present petition. For example, Petitioner's claims that his trial counsel  
16 and appellate counsel were ineffective for failing to raise an entrapment  
17 defense at trial and on direct appeal, respectively, are intertwined with  
18 Petitioner's entrapment claim in the present petition. (See Doc. 1, at 59, 63,  
19 73-81.) Accordingly, under these circumstances, the Court finds it  
20 appropriate to deny Respondent's motion to dismiss based on procedural  
21 default without prejudice to Respondent raising the procedural default  
22 defense to Petitioner's habeas claim in his answer. . . .

23 (Doc. 28 at 12-13.) The Court then ordered Respondent to file an answer to the petition  
24 for writ of habeas corpus. (*Id.* at 13.) In making such an order, this Court found  
25 Respondent's procedural default argument to be potentially meritorious. But, based on  
26 the *Martinez* exception and the interplay between the ineffective assistance claims and  
27 the other substantive claims in Petitioner's petition, the Court left all claims intact and  
28 denied Respondents' motion to dismiss. (*Id.*) The Court explicitly denied the procedural  
default argument without prejudice, thereby allowing Respondent to reassert the default  
again in its answer.

As a result, the Court now embarks to analyze the ineffective assistance claims,  
and the merits of the underlying claims therein. Inevitably, while discussing the  
underlying claims in Petitioner's ineffective assistance arguments, the analysis will  
concurrently be discussing Petitioner's original substantive claims included in his  
petition. Therefore, to discuss the petition as efficiently as possible, the Court will

1 temporarily side step the procedural default analysis of the substantive claims in favor of  
2 the discussing merits of Petitioner's ineffective assistance claims to determine whether  
3 under the Martinez test, any of Petitioner's ineffective assistance claims are "substantial,"  
4 thereby defeating any procedural default. The Court will then return to any remaining  
5 substantive claims and determine whether such remaining claims are procedurally  
6 defaulted.

7 **C. IAC of trial counsel**

8 Petitioner claims he received constitutionally ineffective assistance of counsel from  
9 his court appointed trial counsel in nine specific ways. First, trial counsel failed to present  
10 what Petitioner believes and argues was "the only true defense": entrapment. (Doc. 1 at  
11 78, 92.) Second, trial counsel failed to move to strike seven jurors despite these jurors  
12 being allegedly biased for various reasons.<sup>6</sup> (*Id.* at 79, 80.) Third, trial counsel failed to  
13 motion for a mistrial after a man sat in the courtroom and spoke with a juror outside the  
14 courtroom, causing a "chilling effect" on at least three female jurors. (*Id.* at 79-80.)  
15 Fourth, trial counsel failed to challenge Petitioner's sentence as inaccurately applying  
16 sentencing rules when it was given. (*Id.* at 80.) Fifth, trial counsel failed to introduce an  
17 allegedly exculpatory audio recording which Petitioner argues exists. (*Id.* at 78.) Sixth,  
18 trial counsel did not interview or subpoena allegedly exculpatory government witnesses.  
19 (*Id.* at 78.) Seventh, trial counsel did not cross-examine Petitioner's wife.<sup>7</sup> (*Id.*) Eighth,  
20 trial counsel failed to retain a gang expert to refute the prosecution's gang expert,  
21 Epperson, who Petitioner believed was heavily biased against him. (*Id.*) Ninth and  
22 finally, trial counsel was accused by the prosecution of "serious misconduct," including  
23

---

24  
25 <sup>6</sup> Petitioner lists the factors which led him to the conclusion that seven of his 12 jurors and three  
26 alternate jurors were biased. These factors range from a juror having previously served on a jury in the  
27 same courtroom to jurors having extended family in various branches of law enforcement to a juror  
28 being disruptive during trial. (Doc. 1 at 39-65.)

<sup>7</sup> There is nothing in the record showing Petitioner's wife was ever directly examined. Presumably,  
Petitioner means to argue trial counsel failed to call Petitioner's wife as a witness and examine her  
accordingly.

1 intimidating potential witnesses and asking them to perjure themselves, and as a result,  
2 trial counsel prioritized her own defense over Petitioner's. (*Id.*)

3       The clearly established United States Supreme Court law governing ineffective  
4 assistance of counsel claims is set forth in *Strickland v. Washington*, 466 U.S. 668  
5 (1984). *See Williams v. Taylor*, 529 U.S. 362, 391 (2000) (stating it is beyond question  
6 that *Strickland* is the "clearly established" law governing ineffective assistance of counsel  
7 claims); *Baylor v. Estelle*, 94 F.3d 1321, 1323 (9th Cir. 1996) (same); *Jones v. Wood*, 114  
8 F.3d 1002, 1013 (9th Cir. 1997) (same). There, the United States Supreme Court establish  
9 a two-part test for evaluating ineffective assistance of counsel claims. To establish that  
10 his trial counsel was ineffective under *Strickland*, a challenger must show: (1) his trial  
11 counsel's performance was deficient; and (2) trial counsel's deficient performance  
12 prejudiced his defense. *Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998) (citing  
13 *Strickland*, 466 U.S. at 688, 694).

14       To establish deficient performance, Petitioner must show that "counsel made errors  
15 so serious . . . that counsel's representation fell below an objective standard of  
16 reasonableness" under prevailing professional norms. *Strickland*, 466 U.S. at 687-88. The  
17 relevant inquiry is not, however, what counsel could have done, but rather whether the  
18 decisions made by counsel were reasonable. *Babbitt v. Calderon*, 151 F.3d 1170, 1173  
19 (9th Cir. 1998). In considering this factor, counsel is strongly presumed to have rendered  
20 adequate assistance and made all significant decisions in the exercise of reasonable  
21 professional judgment. *Strickland*, 466 U.S. at 690. The Ninth Circuit "h[as] explained  
22 that '[r]eview of counsel's performance is highly deferential and there is a strong  
23 presumption that counsel's conduct fell within the wide range of reasonable  
24 representation.'" *Ortiz*, 149 F.3d at 932 (quoting *Hensley v. Crist*, 67 F.3d 181, 184 (9th  
25 Cir. 1995)). "The reasonableness of counsel's performance is to be evaluated from  
26 counsel's perspective at the time of the alleged error and in light of all the circumstances,  
27 and the standard of review of highly deferential." *Kimmelman v. Morrison*, 477 U.S. 365,  
28

1 381 (1986). Additionally, “[a] fair assessment of attorney performance requires that every  
2 effort be made to eliminate the distorting effects of hindsight, to reconstruct the  
3 circumstances of counsel’s challenged conduct, and to evaluate the conduct from  
4 counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689.

5 It is well settled that “[c]onclusory allegations [of ineffective assistance of counsel]  
6 which are not supported by a statement of specific facts do not warrant habeas relief.”  
7 *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994); *see also Strickland*, 466 U.S. at 690 (a  
8 petitioner “making a claim of ineffective assistance must identify the acts or omissions of  
9 counsel that are alleged not to have been the result of reasonable professional  
10 judgment”); *Ortiz*, 149 F.3d at 933 (rejecting ineffective assistance of counsel claim  
11 where petitioner failed “to indicate how he was prejudiced by counsel’s failure . . .” to  
12 conduct cross-examination on a specific issue); *United States v. Berry*, 814 F.2d 1406  
13 (9th Cir. 1987) (defendant was not denied effective assistance of counsel for failure to  
14 call out-of-state witnesses absent indication of what witnesses would have testified to or  
15 how their testimony would have changed the outcome of proceeding.); *Cranford v.*  
16 *Sumner*, 672 F.Supp. 453, 457 (D. Nev. 1987) (“Aside from the bald allegation that his  
17 attorney should have raised this claim but did not, the petitioner has failed to demonstrate  
18 how his attorney's performance fell below the reasonable level of professional  
19 competence required by *Strickland*”).

20 Also well-established is that a defendant has the ultimate authority to make  
21 fundamental decisions regarding whether to plead guilty, waive a jury trial, testify in his  
22 or her own behalf, or take an appeal. *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1 (1977)  
23 (Burger, C.J. concurring). However:

24  
25 [no decision of the Supreme Court] suggests, . . . the indigent defendant has  
26 a constitutional right to compel appointed counsel to press nonfrivolous  
27 points requested by the client, if counsel, as a matter of professional  
28 judgment, decides not to present those points.

1 *Jones v. Barnes*, 463 U.S. 745, 751 (1983). To require otherwise would “seriously  
2 undermine[] the ability of counsel to present the client's case in accord with counsel's  
3 professional evaluation.” *Id.* The professional judgment and evaluation every defendant is  
4 entitled to is an examination of the record, research of the law, and the marshaling of  
5 arguments on behalf of the defendant. *Douglas v. California*, 372 U.S. 353, 358 (1963).

6 The Ninth Circuit has held that a convicted defendant has no Sixth Amendment  
7 rights on appeal because appellate review is not required of states. “If, however, the State  
8 elects to furnish an avenue for appeal, its procedures must comport with the Due Process  
9 and Equal Protections Clauses of the Fourteenth Amendment.” *Tamalini v. Stewart*, 249  
10 F.3d 895 (9th Cir. 2001).

11 In presenting this claim, Petitioner lists nine actions or inactions Petitioner deems  
12 deficient under *Strickland*. However, Petitioner does not present evidence or argue the  
13 second prong of the *Strickland* test requiring such deficient action to prejudice  
14 Petitioner’s defense. Instead, Petitioner argues a per se presumption applies “because  
15 [trial counsel]’s errors involve[] an actual, or constructive denial of counsel during a  
16 critical stage of the proceedings, as well as because she failed to subject the  
17 government[’]s case to adversarial testing.” (Doc. 1 at 78, citations omitted.)

18 This argument rests specifically on *Cronic*, *Strickland*, *United States v. Swanson*,  
19 943 F.2d 1070 (9th Cir. 1991), and *Toomey v. Bunnell*, 898 F.2d 741 (9th Cir. 1990).  
20 (Doc. 1 at 78.) In citing to this ineffective assistance jurisprudence, Petitioner attempts to  
21 analogize his trial and trial counsel with their counterparts in these cases. If successful,  
22 Petitioner would be given the presumption of prejudice and be excused from proving this  
23 crucial second prong. However, Petitioner’s attempt to do so is unsuccessful.

24 Each of these three cases involving the respective court noting a common  
25 reluctance to apply an exception created by *Cronic*, which “presumes prejudice where  
26 there has been an actual breakdown in the adversarial process at trial.” *Toomey*, 898 F.2d  
27 at 744 n.2. In *Strickland*, the Supreme Court stated in dicta,

28 Attorney errors come in an infinite variety and are as likely to be utterly

1 harmless in a particular case as they are to be prejudicial. They cannot be  
2 classified according to likelihood of causing prejudice. Nor can they be  
3 defined with sufficient precision to inform defense attorneys correctly just  
4 what conduct to avoid. Representation is an art, and an act or omission that  
is unprofessional in one case may be sound or even brilliant in another.

5 *Id.* at 693. Because of this vast spectrum upon which an attorney’s conduct may land,  
6 most often dictated by the circumstances of the case, “[e]ven if a defendant shows that  
7 particular errors of counsel were unreasonable, therefore, the defendant must show that  
8 they actually had an adverse effect on the defense.” *Id.*

9 Beyond the quintessential examples of ineffective assistance of counsel which  
10 render a verdict unreliable, for example counsel sleeping through the trial or failing to  
11 prepare for the trial at all, there are other instances where the court will presume  
12 prejudice. The cases cited by Petitioner lay out these few specific instances. The first  
13 such instance is the complete denial of counsel. *Cronic*, 466 U.S. at 659. Additionally,  
14 when the prosecution’s case is not properly subjected to “meaningful adversarial testing,”  
15 the court will presume prejudice. *Id.* For example, if petitioner’s counsel is “denied the  
16 right of effective cross-examination” because a court would not allow a crucial line of  
17 questioning to be pursued, the prosecution’s case will not have been properly subjected to  
18 meaningful adversarial testing, and thus prejudice will be presumed. *See Davis v. Alaska*,  
19 415 U.S. 308, 318 (1974); *see also Swanson*, 943 F.2d at 1074 (holding when an attorney  
20 informs the jury of his opinion that there is no reasonable doubt as to the only factual  
21 issues, the attorney has failed to subject the prosecution’s case to meaningful adversarial  
22 testing). Additionally, if “counsel is burdened by a conflict of interest” such that counsel  
23 “‘actively represented conflicting interests’ and that ‘an actual conflict of interest  
24 adversely affected his lawyer’s performance,’” the court will presume prejudice.  
25 *Strickland*, 466 U.S. at 692, citing *Cuyler v. Sullivan*, 446 U.S. at 350, 349. The extremity  
26 of the attorney’s deficient act must be such that “there has been actual breakdown in the  
27 adversarial process at trial.” *Toomey*, 898 F.2d at 722 n.2. To illustrate the level to which  
28

1 the attorney's action or inaction must reach, the Ninth Circuit in *Toomey* noted that in a  
2 previous decision, it held an attorney's mental illness was not extreme enough to warrant  
3 the per se rule for prejudice to be applied. *See Smith v. Ylst*, 826 F.2d 872 (9th Cir. 1987),  
4 *cert. denied*, 488 U.S. 829 (1988).

5         Given these cases cited by Petitioner, there are seemingly three situations in which  
6 a court will presume prejudice and allow Petitioner to succeed on an ineffective  
7 assistance claim without showing the result of his trial could have been different but for  
8 his attorney's ineffective assistance. First, when there is a complete denial of counsel.  
9 *Cronic*, 466 U.S. at 659. Second, when counsel failed to subject the government's case to  
10 any "meaningful adversarial testing." *Id.* Third and finally, when counsel's representation  
11 of the petitioner was adversely affected by a conflict of interests which are being actively  
12 represented by counsel. *Strickland*, 466 U.S. at 692.

13         Petitioner's case does not fit into any of these three categories. Petitioner was  
14 provided counsel at his trial. During his trial, counsel zealously advocated for Petitioner,  
15 subjecting each government witness to lengthy and detailed cross-examination. Similarly,  
16 counsel presented a well prepared defense for Petitioner, based on Petitioner's claim of  
17 acting as a confidential informant or at least maintaining a status of a protected witness at  
18 the time of the criminal actions. Thus, Petitioner's counsel did in fact subject the  
19 prosecution's case to meaningful adversarial testing. Finally, there is no evidence to show  
20 Petitioner's trial counsel was engaged in a conflict of interest, let alone one which  
21 adversely affected counsel's performance in Petitioner's trial. In short, Petitioner was  
22 given access to a skilled defense attorney who fiercely advocated for him, and thus was  
23 properly represented at trial.

24         Because Petitioner's case does not fall into any of the enumerated circumstances  
25 where a court will presume prejudice, Petitioner is required to show prejudice resulted  
26 from his trial counsel's alleged deficient acts. *Strickland*, 466 U.S. at 691-92. Without a  
27 showing of prejudice, which is one of two required elements to prove ineffective  
28



1 assistance of counsel, Petitioner's claim must fail. In addressing the prejudice prong of  
2 his ineffective assistance of counsel claim, Petitioner argues

3 his appointed trial counsel's failure to fulfill her duty to represent  
4 [P]etitioner deprived him of a fair trial and effective assistance of counsel as  
5 guaranteed by the [6th and 14th amendments] and there is a reasonable  
6 probability that absent trial counsel's errors the fact finder would have had a  
reasonable doubt respecting his guilt.

7 (Doc. 1 at 80, emphasis omitted.) Petitioner continues to conclude, without any other  
8 explanation, that the facts of Petitioner's case fall squarely within those circumstances  
9 under which prejudice is to be presumed, as held in *Swanson* and *Cronic*. The Court has  
10 found Petitioner was not entitled to such a presumption. Because Petitioner fails to show  
11 any prejudiced resulted from the alleged nine instances of deficient performance,  
12 Petitioner's claim must fail. The Court will not discuss the deficiency of the actions  
13 alleged by Petitioner because no claim can survive Petitioner's failure to allege prejudice.  
14 *Strickland*, 466 U.S. at 691-92. Accordingly, Petitioner's claim of ineffective assistance  
15 of trial counsel is deemed not substantial under *Martinez*, does not overcome the  
16 procedural default, and is therefore DENIED.

17 **D. IAC of Appellate Counsel**

18 Petitioner also claims he received ineffective assistance from his appellate counsel.  
19 (Doc. 1 at 82.) Specifically, Petitioner claims his appellate counsel failed to raise twelve  
20 claims which Petitioner believes are meritorious constitutional claims. (*Id.*) Petitioner  
21 alleges his appellate counsel was ineffective in failing to raise the following arguments in  
22 his direct appeal: (1) insufficient evidence; (2) ineffective assistance of trial counsel; (3)  
23 entrapment; (4) entrapment by estoppel or duress; (5) juror bias; (6) cruel and usual  
24 punishment; (7) the trial court erred in imposing Petitioner's sentence; (8) cumulative  
25 error; (9) the trial court failed to declare a mistrial based on potential jury tampering; (10)  
26 a Brady violation; (11) judicial misconduct; and (12) the prosecutor violated California  
27 Rule of Professional Conduct 38 and 5-110. (*Id.* at 82-83.)  
28

1 Again, to prevail on this claim, Petitioner must not only satisfy the two pronged  
2 *Strickland* test, but must also satisfy the *Martinez* test, which begins with an inquiry as to  
3 whether the claims are “substantial” or not – meaning whether they have merit or not.  
4 Respondent argues Petitioner’s claims of ineffective assistance of appellate counsel are  
5 not meritorious.<sup>8</sup> (Doc. 31-1 at 11-13.)

6 The Strickland standards apply to appellate counsel as well as trial counsel. *Smith*  
7 *v. Murray*, 477 U.S. 527, 535-36 (1986); *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir.  
8 1989). However, an indigent defendant “does not have a constitutional right to compel  
9 appointed counsel to press nonfrivolous points requested by the client, if counsel, as a  
10 matter of professional judgment, decides not to present those points.” *Jones v. Barnes*,  
11 463 U.S. 745, 751 (1983). Counsel “must be allowed to decide what issues are to be  
12 pressed.” *Id.* Otherwise, the ability of counsel to present the client’s case in accord with  
13 counsel’s professional evaluation would be “seriously undermined.” *Id.* See also *Smith v.*  
14 *Stewart*, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998) (counsel not required to file “kitchen-  
15 sink briefs” because it “is not necessary, and is not even particularly good appellate  
16 advocacy.”) There is, of course, no obligation to raise meritless arguments on a client’s  
17 behalf; likewise, counsel is not deficient for failing to raise a weak issue. See *Miller*, 882  
18 F.2d at 1434. In order to demonstrate prejudice in this context, petitioner must show that,  
19 but for appellate counsel’s errors, he probably would have prevailed on appeal. *Id.* at  
20 1434 n.9.

21 Before filing the opening brief on appeal, Petitioner’s appellate counsel sent  
22 Petitioner a letter in which counsel laid out “the potential issues on appeal.” (Doc. 1 at  
23 105.) Herein, appellate counsel listed a series of issues connected to the jury instructions  
24

---

25  
26 <sup>8</sup> Respondent also argues the Martinez test may not apply to appellate counsel at all according to an  
27 appeal of *Ha Van Nyugen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), being appealed in the United States  
28 Supreme Court. (Doc. 31 at 14.) Because the test to determine whether a claim is “substantial” is the  
same as an actual determination of the claim on the merits, the Court does not address this aspect of  
Respondent’s argument. Instead, the Court will simply determine whether the claims have merit or not.

1 which were given during Petitioner's trial and possible *Brady* issues. (*Id.* at 105-110.)  
2 Additionally, appellate counsel informed Petitioner she had investigated duress,  
3 entrapment, and entrapment by estoppel defenses and concluded none were meritorious.  
4 (*Id.* at 110.) Finally, appellate counsel informed Petitioner she was still investigating  
5 whether jury instructions regarding entrapment by estoppel or mistake of law or fact  
6 should have been given. (*Id.*)

7 Petitioner responded to this letter and requested additional claims be made on  
8 direct appeal. (*Id.* at 89.) These claims included: ineffective assistance of trial counsel for  
9 failure to retain a rebuttal expert, failure to object to the change of venue, and failure to  
10 subpoena potential exculpatory witnesses; entrapment; insufficient evidence; "outrageous  
11 governmental misconduct" by Petitioner's handler; abuse of discretion by the trial court  
12 in accepting the prosecution's gang expert, and alternatively, ineffective assistance for  
13 failing to object to this expert witness; and "any meritorious grounds" remaining, such as  
14 the eighth amendment, fourteenth amendment, and cumulative error. (*Id.* at 89-92.)  
15 Additionally, in this letter, Petitioner urged his appellate counsel to discover an audio  
16 recording wherein Petitioner "clearly say[s] 'Don't kill him! Just whack him a couple  
17 times,'" which showed Petitioner did not use the word 'whack' to mean kill. (*Id.* at 93.)

18 Shortly after sending this letter, Petitioner received the opening brief which was  
19 filed by appellate counsel on his behalf. The opening brief filed by appellate counsel  
20 focused on six grounds: the trial court erred in clarifying the jury instruction for murder,  
21 trial counsel rendered ineffective assistance in respect to this jury instruction, the trial  
22 court erred in not instructing the jury on a lesser included defense, and three sentencing  
23 errors. (Lodgment 16 at ii-iii.) No other grounds were included by appellate counsel in  
24 Petitioner's direct appeal.

25 Petitioner responded to this with another letter to appellate counsel. (*Id.* at 94.)  
26 Therein, Petitioner requests appellate counsel file a supplemental brief raising the *Brady*  
27 issues appellate counsel noted in her initial letter, ineffective assistance of trial counsel  
28 for not objecting to these alleged *Brady* issues, entrapment, a trial court error in not

1 instructing the jury regarding the entrapment defense, and insufficient evidence. (*Id.* at  
2 95.) Despite Petitioner’s request, appellate counsel did not file a supplemental brief.  
3 Instead, after the Court of Appeal rendered its opinion, granting in part and denying in  
4 part Petitioner’s appeal, appellate counsel wrote Petitioner another letter. (Lodgment 19;  
5 Doc. 1 at 98.)

6 In this letter, appellate counsel explained to Petitioner what the Court of Appeal  
7 had effectively done to Petitioner’s sentence; it had found the trial court had erred, and  
8 accordingly reduced Petitioner’s sentence by 19 years. (Doc. 1 at 98.) Additionally,  
9 appellate counsel explained in great detail why she had concluded Petitioner’s *Brady*  
10 claims were not meritorious and therefore had not included them in the brief. Appellate  
11 counsel cited case law and conducted an in depth analysis in presenting her conclusion to  
12 Petitioner. (*See* Doc. 1 at 99-103.) In this letter, appellate counsel also discussed why she  
13 had decided against raising the defense of entrapment by estoppel, again providing case  
14 law and analysis which led to her conclusion that the claim lacked merit. (*Id.* at 103-04.)  
15 Effectively, through these letters, appellate counsel provided her professional reasoning  
16 behind not presenting four of the five claims Petitioner requested be raised in a  
17 supplemental brief.

18 Thus, with respect to the first four claims raised by Petitioner in his second letter to  
19 appellate counsel, Petitioner has failed to demonstrate that his appellate counsel rendered  
20 ineffective assistance. Appellate counsel’s decision to decline to present the issues  
21 suggested by petitioner and to instead press only issues on appeal she believed, in her  
22 professional judgment, had more merit than the issues suggested by petitioner was  
23 “within the range of competence demanded of attorneys in criminal cases.” *McMann v.*  
24 *Richardson*, 397 U.S. 759 (1970).

25 In the petition before this Court, Petitioner alleges his appellate counsel was  
26 ineffective for failing to raise, among other things, entrapment, entrapment by estoppel or  
27 duress, sentencing errors, and various *Brady* violations. (Doc. 1 at 82-83.) Based on the  
28 above analysis, appellate counsel was not deficient in failing to raise these particular

1 claims on appeal. Therefore, with respect to these four alleged deficiencies, Petitioner's  
2 claim of ineffective assistance of appellate counsel is without merit.

3 Furthermore, Petitioner also claims his appellate counsel was ineffective for failing  
4 to argue Petitioner received ineffective assistance of trial counsel. (*Id.* at 82.) Given,  
5 however Petitioner has not shown his trial counsel was ineffective and Petitioner has  
6 offered no additional evidence to this extent, Petitioner likewise has not shown his  
7 appellate counsel was ineffective for failing to make such a claim.

8 Because the remainder of the claims brought by Petitioner regarding the alleged  
9 ineffective assistance of appellate counsel are not addressed in either the correspondence  
10 between Petitioner and his appellate counsel or any other analysis herein, the Court will  
11 address the remaining claims separately. These remaining claims are that appellate  
12 counsel was constitutionally ineffective for failure to raise the following on appeal: (1)  
13 insufficient evidence, (2) juror bias, (3) cruel and unusual punishment, (4) cumulative  
14 error, (5) the trial court's error in failing to declare a mistrial following a man sitting in  
15 the courtroom and speaking with a juror, (6) prosecutorial misconduct, (7) judicial  
16 misconduct, and (8) the prosecution's violation of California Rule of Professional  
17 Conduct 38 and 5-110.

18 1. Insufficient evidence<sup>9</sup>

19 In his petition, Petitioner claims his convictions were based on insufficient  
20 evidence. (Doc. 1 at 36.) Petitioner makes a fairly simple argument: the prosecution did  
21 not show Petitioner had the specific intent to kill. (*Id.* at 38.) Instead, the prosecution's  
22 case was based on audio recordings from Petitioner's prison cell which included an  
23 excerpt in which Petitioner dictated a kite to his cellmate directing other inmates to  
24

---

25  
26 <sup>9</sup> Petitioner raises insufficiency of the evidence as its own separate claim in his petition before this  
27 Court. (Doc. 1 at 36.) While the Court analyzes the claim under the ineffective assistance of counsel  
28 heading, Petitioner's arguments will be taken from his petition, and the final conclusion on this claim  
will be effective as to both Petitioner's ineffective assistance claim and his substantive insufficient  
evidence claim.

1 “whack” Ortiz and Gonzalez “on the next yard.” (*Id.* at 36.) Petitioner argues the lack of  
2 evidence showing the kite was in fact sent or that any inmate who participated in the  
3 actual assault of Ortiz had read the kite renders the verdict objectively unreasonable.

4 Petitioner raised this argument in his petitions for writ of habeas corpus filed in the  
5 Superior Court as well as the Court of Appeal. (*See* Lodgment 22, 24.) Each court,  
6 however, rejected the claim as barred under state law. Specifically, the Superior Court  
7 cited to *In re Lindley*, 29 Ca. 2d 709 723 (1947), which holds sufficiency of the evidence  
8 claims are not cognizable on habeas review. (Lodgment 22 at 10.) Likewise the Court of  
9 Appeal cited *In re Reno*, 55 Cal.4th 428, 459 (2012), which affirms the bar against  
10 insufficient evidence claims on habeas review. (Lodgment 24 at 2.)

11 The Due Process Clause of the Fourteenth Amendment protects a criminal  
12 defendant from conviction “except upon proof beyond a reasonable doubt of every fact  
13 necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358,  
14 364 (1970); *accord Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). Thus, a state  
15 prisoner who alleges the evidence introduced at trial was insufficient to support the jury’s  
16 findings states a cognizable federal habeas claim. *Herrera v. Collins*, 506 U.S. 390, 401-  
17 02 (1993). The prisoner, however, faces a “heavy burden” to prevail on such a claim.  
18 *Juan H.*, 408 F.3d at 1274, 1275 n.13. The question is whether “any rational trier of fact  
19 could have found the essential elements of the crime beyond a reasonable doubt.”  
20 *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

21 When determining the sufficiency of the evidence, a reviewing court makes no  
22 determination of the facts in the ordinary sense of resolving factual disputes. *Sarausad v.*  
23 *Porter*, 479 F.3d 671, 678 (9th Cir. 2007), *vacated in part*, 503 F.3d 822 (9th Cir. 2007),  
24 *rev’d on other grounds*, 555 U.S. 179 (2009). Rather, the reviewing court “must respect  
25 the province of the jury to determine the credibility of witnesses, resolve evidentiary  
26 conflicts, and draw reasonable inferences from proven facts by assuming that the jury  
27 resolved all conflicts in a manner that supports the verdict.” *Walters v. Maass*, 45 F.3d  
28 1355, 1358 (9th Cir. 1995); *see also Jackson*, 443 U.S. at 319, 324, 326.

1 In post-AEDPA cases, where, as here, a state court has issued a reasoned decision  
2 rejecting a claim of insufficient evidence under a standard that is not “contrary to”  
3 *Jackson*, a reviewing federal court applies an additional layer of deference. *Juan H.*, 408  
4 F.3d at 1274. “[A] federal court may not overturn a state court decision rejecting a  
5 sufficiency of the evidence challenge simply because the federal court disagrees with the  
6 state court. The federal court instead may do so only if the state court decision was  
7 objectively unreasonable.” *Cavazos v. Smith*, 565 U.S. 1 (2011) (*per curiam*); *see also*  
8 *Juan H.*, 408 F.3d at 1275 n.13. This “double dose of deference . . . can rarely be  
9 surmounted.” *Boyer v. Belleque*, 659 F.3d 957, 964 (9th Cir. 2011); *see also Coleman v.*  
10 *Johnson*, 566 U.S. 650 (2012) (*per curiam*) (“We have made clear that *Jackson* claims  
11 face a high bar in federal habeas proceedings because they are subject to two layers of  
12 judicial deference”).

13 A state court’s resolution of an insufficiency of evidence claim is evaluated under  
14 28 U.S.C. § 2254(d)(1), not § 2254(d)(2). *Emery v. Clark*, 643 F.3d 1210, 1213-14 (9th  
15 Cir. 2011) (“When we undertake collateral review of a state court decision rejecting a  
16 claim of insufficiency of the evidence pursuant to 28 U.S.C. § 2254(d)(1) . . . we ask only  
17 whether the state court’s decision was contrary to or reflected an unreasonable  
18 application of *Jackson* to the facts of a particular case”); *Long v. Johnson*, 736 F.3d 891,  
19 896 (9th Cir. 2013) (“The pivotal question, then, is whether the California Court of  
20 Appeal . . . unreasonably applied *Jackson* in affirming Petitioner’s conviction for second-  
21 degree murder”); *Boyer*, 659 F.3d at 965 (“[T]he state court’s application of the *Jackson*  
22 standard must be ‘objectively unreasonable’ to warrant habeas relief for a state court  
23 prisoner”); *Juan H.*, 408 F.3d at 1275 (“[W]e must ask whether the decision of the  
24 California Court of Appeal reflected an ‘unreasonable application of’ *Jackson* and  
25 *Winship* to the facts of this case”) (citing 28 U.S.C. § 2254(d)(1)).

26 In adjudicating an insufficiency of the evidence claim, a federal habeas court  
27 “look[s] to [state] law only to establish the elements of [the crime] and then turn[s] to the  
28 federal question of whether the [state court] was objectively unreasonable in concluding

1 that sufficient evidence supported [the conviction].” *Juan H.*, 408 F.3d at 1278 n.14. In  
2 determining whether the evidence was sufficient, a federal court must follow the  
3 California courts’ interpretation of state law. *Bradshaw v. Richey*, 546 U.S. 74 (2005).

4 Here, Petitioner argues the prosecution did not prove his specific intent to kill  
5 beyond a reasonable doubt, thus providing insufficient evidence to support Petitioner’s  
6 convictions. (Doc. 1 at 38.) *See People v. Swain*, 12 Cal. 4th 593 (Cal. 1996) (conspiracy  
7 is a specific intent crime where the defendant must specifically intend to agree or  
8 conspire as well as intend to commit the objected offense). Instead, Petitioner argues the  
9 prosecution only showed there was a “mere ‘fake’ participation in the conspiracy and just  
10 an ‘act’ by an undercover C.I. for law enforcement[.]” (Doc. 1 at 37.) Petitioner seems to  
11 claim that the prosecution failed to introduce evidence sufficient to overcome Petitioner’s  
12 defense that he was a confidential informant feigning participation in the conspiracy, and  
13 therefore lacking any criminal intent. (Doc. 1 at 38, “[U]nder the circumstances of this  
14 case [and] the lack of evidence [of] the fact that Petitioner was an undercover C.I.  
15 expecting his release date so he [could] be relocated with his family to another state . . . ,  
16 no rational trier of fact could have found the essential element of intent to kill beyond a  
17 reasonable doubt . . . .”) Despite Petitioner’s contentions, during trial, there was  
18 significant conflicting evidence introduced on this matter. While Petitioner, through his  
19 trial attorney, argued Petitioner’s innocence as shown by his belief that he was to be  
20 transported out of state with his family upon the conclusion of his prison term for a parole  
21 violation, the prosecution introduced evidence to the contrary.

22 Specifically, the prosecution introduced evidence of Petitioner’s past gang  
23 affiliations and conflicting evidence regarding Petitioner’s status as a confidential  
24 informant. Although Petitioner claimed and argued he was a crucial witness for multiple  
25 currently uncharged cases, the prosecution introduced evidence which showed the  
26 contrary: Petitioner was not a confidential informant who helped law enforcement further  
27 their investigations. Additionally, and critically, the prosecution introduced a recording of  
28



Petitioner entering the conspiracy. This recording very well could have been the rational basis for the jury's verdict in Petitioner's case.

Because the standard in an insufficient evidence claim is not whether the Court finds Petitioner's convictions were proven beyond a reasonable doubt, but rather whether a rational jury could find such, this Court must side with the Government. The evidence produced by the prosecution during Petitioner's trial, *i.e.* the audio recording, was sufficient for a reasonable jury to find Petitioner had the requisite specific intent to commit the crimes Petitioner was convicted of. Accordingly, Petitioner's ineffective assistance of appellate counsel claim for failing to raise this ground is DENIED.

## 2. Juror bias

Petitioner next argues his appellate counsel was ineffective in failing to raise an argument that the trial court erred in two respects regarding the jury: first, in denying Petitioner's request to excuse one of the jurors for cause as a biased juror<sup>10</sup>; and second, in failing and refusing to declare a mistrial after the foreperson was approached by a man in the hallway during a trial break, and several jurors reporting a "chilling effect" caused by the man's presence in the courtroom. (Doc. 1 at 82-83.)

The Sixth Amendment guarantees a trial by an impartial jury comprised of "indifferent" jurors. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998). Jurors must decide the case solely on the evidence. *Smith v. Phillips*, 455 U.S. 209, 217 (1982). A defendant's right to a fair trial is denied if even a single juror is biased. *Dyer*, 151 F.3d at 973.

Impartiality, however, does not require a lack of any preconceptions about the defendant or the case. A presumption of impartiality applies if jurors provide assurances that they can "lay aside [their] impression or opinion and render a verdict based on the

---

<sup>10</sup> While Petitioner does not explicitly state which juror he is referring to, nor does he cite to the record where such a motion was denied, the Court recognizes Petitioner's trial counsel requested the trial court excuse Alternate Juror 1. (Lodgment 5 at 242.)

1 evidence presented in court.” *Murphy v. Florida*, 421 U.S. 794, 800, (1975) (quoting  
2 *Irvin*, 366 U.S. at 723). “To hold that the mere existence of any preconceived notion as to  
3 the guilt or innocence of an accused, without more, is sufficient to rebut the presumption  
4 of a prospective juror's impartiality would be to establish an impossible standard.” *Irvin*,  
5 366 U.S. at 723. The presumption is overcome only “by demonstrating that the juror  
6 actually held a biased opinion.” *Ybarra v. McDaniel*, 656 F.3d 984, 992 (9th Cir. 2011)

7 Moreover, “not every incident of juror misconduct requires a new trial.” *United*  
8 *States v. Klee*, 494 F.2d 394, 396 (9th Cir. 1974). “The test is whether or not the  
9 misconduct has prejudiced the defendant to the extent that he has not received a fair  
10 trial.” *Id.* On habeas review, to obtain relief, a petitioner must show that the misconduct  
11 had a substantial and injurious effect or influence on the jury’s verdict. *Henry v. Ryan*,  
12 720 F.3d 1073, 1085 (9th Cir. 2013); *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir.  
13 2000). Additionally, trial court determinations “on juror impartiality deserve a high  
14 measure of deference.” *See Tinsley v. Borg*, 895 F.2d 520, 525 (9th Cir. 1990) (internal  
15 quotation marks omitted).

16 *a. Request to excuse Alternate Juror 1*

17 After trial had already commenced, Alternate Juror 1 approached the trial court and  
18 attorneys to discuss a possible conflict she had not realized during voir dire. (Lodgment 5  
19 at 239.) During voir dire, Alternate Juror 1 had disclosed her husband worked for the  
20 Department of Justice, but did not mention exactly what her husband did there.  
21 (Lodgment 15 at 239-240.) After being seated as an alternate juror, Alternate Juror 1  
22 disclosed she had met Epperson previously at a work function she attended with her  
23 husband approximately four years prior to the trial. (Lodgment 5 at 239.) After this  
24 disclosure, Petitioner’s trial counsel informed the trial court she “would have challenged  
25 [Alternate Juror 1] had [trial counsel] known” of this previous acquaintance. (*Id.* at 242.)  
26 While trial counsel requested the trial court excuse Alternate Juror 1, the trial court found  
27  
28

1 “there [is] no meritorious reason . . . to excuse [Alternate Juror 1].” (*Id.*) Alternate Juror 1  
2 was not called to serve as a juror in the deliberations.<sup>11</sup>

3 In making the claim appellate counsel was ineffective for failing to argue the trial  
4 court improperly denied Petitioner’s request to excuse Alternate Juror 1, Petitioner has  
5 the burden to show “there was no reasonable basis for the state court to deny relief.”  
6 *Richter*, 131 S. Ct. at 784. Petitioner presents no such argument. Instead, Petitioner  
7 makes a conclusory statement that “appellate counsel[’]s failure and refusal to raise  
8 obvious non-frivolous claims” which Petitioner believes are constitutionally reversible  
9 grounds on direct appeal “which would have obtained a reversal or a more favorable  
10 outcome” constitute a violation of his right to effective assistance of counsel. (Doc. 1 at  
11 84.) Petitioner provides no elaboration as to how each of the claims his appellate counsel  
12 failed to advance would satisfy the *Strickland* test, as required to show constitutionally  
13 ineffective assistance of counsel.

14 However, assuming arguendo, Petitioner had elaborated, the trial court’s denial of  
15 trial counsel’s request to excuse Alternate Juror 1 was not an error. The reason for this is  
16 twofold. First, the trial court ensured this previous common gathering attended by both  
17 Alternate Juror 1 and Epperson would not “in any way affect [Alternate Juror 1’s] ability  
18 to be . . . fair and judge the credibility of the witnesses” and “ability to be a good judge of  
19 credibility.” (Lodgment 5 at 240.) Second, Alternate Juror 1 was just that: an alternate  
20 juror. She did not participate in deliberations at the close of trial, thereby not determining  
21 Petitioner’s ultimate verdicts. Thus, even if Alternate Juror 1 did have some sort of bias  
22 with respect to this previous meeting and connection to Epperson, Alternate Juror 1 did  
23 not have an opportunity to express such bias during deliberations with the jurors. *See*  
24 *Meza v. McDonald*, 2012 U.S. Dist. LEXIS 81998, \*81 (Cal. Dist. Ct. May 18, 2012).

---

25  
26  
27  
28 <sup>11</sup> During the trial, Juror 10 was excused in order to allow Juror 10 to participate in a pre-planned trip.  
The trial court replaced Juror 10 with Alternate Juror 3. (Lodgment 8 at 818-821.)

1           Given this, the trial court did not err in denying trial counsel's request to excuse  
2 Alternate Juror 1. Accordingly, Petitioner's appellate counsel was not ineffective in not  
3 raising this claim on direct appeal because as shown above, the claim is not meritorious.  
4 This claim is DENIED.

5                     2. *Mistrial based on "chilling effect"*

6           On November 8, 2010, about a week and a half into Petitioner's trial, an incident  
7 occurred where a "big gentleman" wearing a red shirt, shorts, and athletic shoes sat in the  
8 back of the courtroom. (Lodgment 10 at 1342, 1344.) Petitioner's trial counsel stated on  
9 the record she was "worried that he might be here spying for the Mexican Mafia." (*Id.* at  
10 1342.) This man also spoke with Juror Number 1 that same day. (*Id.*) Juror Number 1  
11 told the trial court the man had initiated conversation with her, inquiring about the case,  
12 but Juror Number 1 had informed him she could not talk about the case with anyone. (*Id.*  
13 at 1347.) After the encounter, Juror Number 1 "didn't really think anything of it" until  
14 she realized the bailiff was speaking with the man. (*Id.* at 1347-48.) The trial court  
15 ensured Juror Number 1 could remain impartial and fair to both parties, despite this  
16 event. (*Id.* at 1348.) However, Juror Number 1 did request an escort to her vehicle from  
17 the courthouse. (*Id.* at 1345.)

18           After this encounter, two female jurors, not including Juror Number 1, had  
19 informed a Corporal at the court that "they were having issues, . . . because of this trial,  
20 they sleep with the light on. They're having trouble sleeping, period." (*Id.*) These same  
21 women had expressed that the event with Juror Number 1 had caused them "a lot of fear"  
22 in addition to that inherent given the nature of the case. (*Id.* at 1344.) Petitioner's trial  
23 counsel requested the trial court speak with these women, and the rest of the jury,  
24 individually to ensure each juror remained committed to their duty as a juror and were  
25 not affected in their ability to remain fair. (*Id.* at 1345.) Despite this request, and on the  
26 advice of the bailiff, who informed the trial court the two additional women were "fine"  
27 and "willing to do the whole trial, and have no issues," the trial court did not question any  
28 other jurors individually. (*Id.* at 1350.) Instead, the trial court posed the same questions to

1 the jury as a whole: “are any of you affected by anything that has been done or said  
2 during the break or at any time?” and “you’re all up to the task still?” (*Id.* at 1351.)  
3 Presumably, all jurors nodded affirmatively.

4 Not every improper ex parte contact with a juror requires a mistrial. The Supreme  
5 Court has stressed that the remedy for allegations of jury bias is a hearing in which the  
6 trial court determines the circumstances of what transpired, the impact on the jurors, and  
7 whether or not it was prejudicial. *See Remmer v. United States*, 347 U.S. 227, 229-30  
8 1954). Here, the trial court held such a hearing after being informed of the man speaking  
9 with Juror Number 1 and having an adverse effect on the other two female jurors. After  
10 doing so, the trial court was able to determine the facts of what had occurred, the impact  
11 on the jurors, and found there was no prejudicial effect. Instead, even after this event, all  
12 the jurors, especially Juror Number 1 and the other two female jurors, informed the trial  
13 court they could affirmatively perform their duty as jurors in the case.

14 Thus, while this event was not ideal, it was not grounds for a mistrial. The trial  
15 court handled the concerns properly and did not err in failing to declare a mistrial *sua*  
16 *sponte*. Accordingly, Petitioner’s argument his appellate counsel was ineffective for  
17 failing to raise this claim is DENIED.

### 18 3. Cruel and unusual punishment

19 Petitioner claims he received ineffective assistance from his appellate counsel  
20 because appellate counsel failed to raise cruel and unusual punishment on Petitioner’s  
21 direct appeal. (Doc. 1 at 88-89.) However, Petitioner does not elaborate as to what he  
22 feels has violated his Eighth Amendment protection from cruel and unusual punishment.  
23 In fact, the only other time this claim is referenced is in Petitioner’s first letter sent to his  
24 appellate counsel. (*Id.* at 89-93.) Only therein as a final point did Petitioner request “since  
25 the appellate courts are unpredictable,” that appellate counsel raise “any meritorious  
26 grounds such as . . . [the Eighth] amendment,” among other things. (*Id.* at 92.)

27 ““After incarceration, only the “unnecessary and wanton infliction of pain” . . .  
28 constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”” *Whitley*

1 v. *Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670  
2 (1977), in turn quoting standard originally described in *Gregg v. Georgia*, 428 U.S. 153,  
3 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (internal citation  
4 omitted)). Under traditional Eighth Amendment analysis, the Court must first consider  
5 whether there is an “infliction of pain,” and, if so, whether that infliction is “unnecessary  
6 and wanton.”

7 Here, Petitioner has offered no facts upon which to base his claim that he has  
8 suffered cruel and unusual punishment. Instead, Petitioner makes the conclusory  
9 argument that his appellate counsel was ineffective in choosing to not raise this claim in  
10 Petitioner’s direct appeal. Without specific facts, the Court cannot affirmatively find  
11 Petitioner’s appellate counsel was ineffective in not raising this claim on appeal.  
12 Accordingly, Petitioner’s claim to this extent is DENIED.

#### 13 4. Prosecutorial misconduct

14 Petitioner next claims that by not raising prosecutorial misconduct in his direct  
15 appeal, his appellate counsel was ineffective. (Doc. 1 at 83.) This claim has two parts.  
16 First, Petitioner argues the prosecutor engaged in “constant misconduct,” consisting of  
17 “insu[]lts and ag[g]ressive misconduct against defense counsel throughout the whole jury  
18 trial,” examples of which are “accusing trial counsel of intimidating witnesses and of  
19 asking witnesses to lie.” (*Id.*) While Petitioner does not cite to any one specific instance  
20 which he believes warrants such a claim, the Court has discovered three instances which  
21 may have led Petitioner to believe such a claim would be valid.

22 In a hearing on September 29, 2011, trial counsel and the prosecution were  
23 discussing discovery requests when the exchange became heated. (Lodgment 5 at 21.)  
24 The prosecution questioned trial counsel as to the prosecution’s “understanding [trial  
25 counsel had] served a bunch of people” already and during the hearing trial counsel stated  
26 she had not. (*Id.*) Trial counsel reacted immediately by stating she had not served anyone,  
27 and she was unclear where the prosecution had learned such information. (*Id.* at 21-22.)  
28

1 Specifically, trial counsel was defending what she perceived to be the prosecution calling  
2 her “a liar.” (*Id.* at 22.)

3 Next, on the first day of trial, before beginning voir dire, the prosecution accused  
4 trial counsel of disseminating a debrief written by the victim. (Lodgment 4 at 81.)  
5 Additionally, the prosecution alleged trial counsel had informed the victim of such facts.  
6 Trial counsel responded that the prosecution was exaggerating the claim; instead, trial  
7 counsel had visited the victim for a witness interview, and during such interview the  
8 witness referred to the debrief. (*Id.* at 85.) Furthermore, at this time, trial counsel  
9 responded to the prosecution’s previous allegations that trial counsel “was telling  
10 witnesses to lie.” (*Id.* at 82.) Trial counsel vehemently denied this, stating an investigator  
11 was present with her at all times, and all of the alleged benefits she had supposedly  
12 offered these inmates never came to fruition. (*Id.* at 83-84.)

13 Second, Petitioner argues the prosecutor violated California Rule of Professional  
14 Conduct (CRPC) 5-110 and the American Bar Association Rule of Professional Conduct  
15 (ABA) Rule 3.8. Petitioner claims these rules were violated by the prosecution  
16 “institut[ing] criminal charges when the prosecutor knew Petitioner was an undercover  
17 C.I.” who was merely feigning participation to preserve his own life in the prison. (*Id.*)

18 *a. Prosecutorial misconduct through trial conduct*

19 A defendant’s due process rights are violated only when a prosecutor’s misconduct  
20 renders a trial “fundamentally unfair.” *Id.*; see also *Smith v. Phillips*, 455 U.S. 209, 219  
21 (1982) (stating that “the touchstone of due process analysis in cases of alleged  
22 prosecutorial misconduct is the fairness of the trial, not the culpability of the  
23 prosecutor”). Claims of prosecutorial misconduct where a proper objection was lodged at  
24 trial are reviewed ““on the merits, examining the entire proceedings to determine whether  
25 the prosecutor's remarks so infected the trial with unfairness as to make the resulting  
26 conviction a denial of due process.”” *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir.)  
27 (citation omitted), *cert. denied*, 516 U.S. 1017 (1995). Under this standard, a petitioner  
28 must show that there is a reasonable probability that the error complained of affected the

1 outcome of the trial, *i.e.*, that absent the alleged impropriety, the verdict probably would  
2 have been different. *Cortez v. Lopez*, 2014 U.S. Dist. LEXIS 35641, \*91 (Cal. E.D. Mar.  
3 18, 2014). Under California law, claims of prosecutorial misconduct must be objected to  
4 at trial in order to be preserved on appeal. *See People v. Fosselman*, 33 Cal. 3d 572, 580-  
5 81 (1983).

6 To the extent this claim of prosecutorial misconduct is premised on statements  
7 made by the prosecutor during hearings outside the presence of the jury, Petitioner has  
8 failed to show how any such comments infected his trial with unfairness. Petitioner cites  
9 no legal authority in support of his claim that a prosecutor's improper statements outside  
10 the presence of the jury violates a defendant's due process rights. Accordingly, because  
11 an appellate attorney is not required to raise claims which are clearly not meritorious,  
12 Petitioner's claims to this extent are not persuasive. Petitioner's claim is DENIED.

13 *b. Prosecutorial violation of CRPC 5-110 and ABA Rule 3.8*

14 CRPC 5-110 presents the special responsibilities of a prosecutor. This rule holds a  
15 prosecutor in a criminal case shall: not pursue charges unsupported by probable cause;  
16 ensure the defendant is not improperly denied counsel; not take advantage of an  
17 unrepresented defendant and obtain a waiver of pretrial rights, unless the defendant is  
18 proceeding pro se; use reasonable care to ensure no agent of the prosecutor makes a  
19 statement the prosecutor would not be allowed to make under CRPC 5-120; when a  
20 prosecutor is aware of a reasonable likelihood a convicted defendant did not in fact  
21 commit the crime of which he was convicted, the prosecutor should take appropriate  
22 action to remedy the wrongful conviction; and when a prosecutor is aware of "clear and  
23 convincing evidence establishing" a defendant convicted of an offense he did not  
24 commit, the prosecutor "shall seek to remedy the conviction." Cal. Rules of Prof'l  
25 Conduct, Rule 5-110. The corresponding ABA rule 3.8 states the same, and adds the  
26 following: a prosecutor shall timely disclose all evidence which tends to negate the  
27 defendant's guilt and shall not subpoena a lawyer in a grand jury, with limited  
28 exceptions. MODEL RULES OF PROF'L RESPONSIBILITY r. 3.8 (1983).



1       Petitioner specifically alleges the prosecutor violated these rules by “instituting  
2 criminal charges when the prosecutor knew Petitioner was an undercover C.I. . . . , with  
3 no probable cause to be charged, [and] knowing [Petitioner] was innocent; . . .” (Doc. 1 at  
4 83.) Thus, Petitioner presumably is claiming the prosecution violated two sections of  
5 these rules: bringing charges not based on probable cause and not taking appropriate  
6 steps to remedy the conviction of an innocent defendant. Cal. Rules of Prof’l Conduct,  
7 Rule 5-110(A), (G).

8       Regarding the prosecution’s alleged lack of probable cause in bringing the charges  
9 against Petitioner, “In California, as in virtually every other jurisdiction, it is a long-  
10 standing principle of common law that a decision by a judge or magistrate to hold a  
11 defendant to answer after a preliminary hearing constitutes prima facie – but not  
12 conclusive – evidence of probable cause.” *Awabdy v. City of Adelanto*, 368 F.3d 1062,  
13 1068 (9th Cir. 2004) (citations omitted). In this case, Petitioner was able to present his  
14 case at a preliminary hearing, where he was presumably represented by counsel, and it  
15 was at such a hearing where Petitioner could have first argued there was no probable  
16 cause for the charges. The Petitioner’s case proceeding beyond this preliminary hearing  
17 leads to a prima facie showing of probable cause to bring the charges. *Id.* Despite this  
18 presumption, Petitioner does not present any rebuttal in alleging his appellate counsel  
19 was ineffective for failing to raise this argument on direct appeal. Instead, Petitioner  
20 merely states this perceived prosecutorial violation in part of a multiple page long list of  
21 claims he believes his appellate counsel should have raised on appeal. (Doc. 1 at 82-82.)

22       Because Petitioner has not provided any argument to rebut the prima facie showing  
23 of probable cause, his claim that the prosecution brought the charges against him without  
24 any such probable cause cannot succeed. Therefore, this claim is meritless and  
25 Petitioner’s appellate counsel was not ineffective in failing to raise it.

26       Similarly, Petitioner’s argument that the prosecution violated its ethical duty in  
27 failing to take the prescribed steps after a prosecutor realizes an innocent defendant has  
28 been convicted is not meritorious. Cal. Rules of Prof’l Conduct, Rule 5-110(G).

1 “[A]ctual innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v.*  
2 *United States*, 523 U.S. 614 (1998); *Calderon v. Thompson*, 523 U.S. 538, 559 (1998);  
3 *Muth v. Fondren*, 676 F.3d 815, 819, 822 (9th Cir.), *cert. denied*, 568 U.S. 894 (2012).  
4 “The evidence of innocence ‘must be so strong that a court cannot have confidence in the  
5 outcome of the trial unless the court is also satisfied that the trial was free of nonharmless  
6 constitutional error.’” *Lee v. Lampert*, 653 F.3d at 937-38 (quoting *Schlup*, 513 U.S. at  
7 316). The court must consider “‘all the evidence, old and new, incriminating and  
8 exculpatory,’ admissible at trial or not.” *Lee*, 653 F.3d at 938 (quoting *House v. Bell*, 547  
9 U.S. 518 (2006). The court must make a “probabilistic determination about what  
10 reasonable, properly instructed jurors would do.” *Id.* (quoting *House*, 547 U.S. at 538).

11 In his petition, Petitioner claims he is innocent a total of ten times. (Doc. 1 at 15,  
12 19, 21, 25, 35, 38, 83, 87, 92, 100.) Despite Petitioner’s claims, Petitioner does not offer  
13 any logical argument to refute the final jury verdict, which found Petitioner guilty. In this  
14 case, the prosecution introduced evidence which showed Petitioner, regardless of whether  
15 defected or an active associate of the Mexican Mafia, engaged in Mexican Mafia business  
16 while incarcerated, which included dictating a kite ordering inmates to murder the victim.  
17 Petitioner, at trial, argued the kite had never been sent, but instead had been flushed down  
18 the toilet, thereby negating Petitioner’s orders. However, the recording which has  
19 Petitioner’s voice making this dictation is overwhelming evidence; and the defense  
20 simply did not overcome this. Petitioner, in his collateral attack, argues an entrapment  
21 defense, which Petitioner believes undermines the prosecution’s evidence and shows  
22 Petitioner’s actual innocence.<sup>12</sup> The Court agrees with the Superior Court’s analysis of  
23 Petitioner’s entrapment defense. (Lodgment 23.) The Superior Court stated “even if there  
24 had been outrageous government misconduct in this case, which there was not, a normal  
25

---

26  
27 <sup>12</sup> Petitioner raised entrapment as a substantive claim in his petition before this Court. (Doc. 1 at 92-  
28 100.) In an effort to minimize duplication of analysis, the Court uses this short analysis to dispel both  
Petitioner’s substantive claim of entrapment as well as Petitioner’s claim of ineffective assistance of  
counsel for failing to raise a claim of entrapment.

1 law-abiding person would not resort to murder in an attempt to dominate and control  
2 prison gang activities.” (*Id.* at 4-5.) Thus, because both of these attempts at showing  
3 Petitioner is actually innocent fail, Petitioner’s claim that the prosecution owed Petitioner  
4 some duty because Petitioner was innocent must also fail.

5 Accordingly, Petitioner’s full claim arguing his appellate counsel was ineffective  
6 for failing to raise prosecutorial misconduct on direct appeal is not meritorious and is  
7 therefore DENIED.

#### 8 5. Judicial Misconduct

9 Petitioner next alleges his appellate counsel was ineffective for not raising a claim  
10 of judicial misconduct in Petitioner’s direct appeal. (Doc. 1 at 83.) Petitioner alleges the  
11 trial judge made “‘sexual/sexist’ jokes to the jurors and courtroom throughout” the  
12 proceeding. (*Id.*) Additionally, Petitioner alleges the trial judge was hostile towards the  
13 defense team. (*Id.*) While Petitioner makes these allegations against the trial court judge,  
14 Petitioner does not point to the record to direct the Court to these perceived acts of  
15 misconduct.

16 A claim of judicial misconduct by a state judge in the context of federal habeas  
17 review does not simply require that the federal court determine whether the state judge  
18 committed judicial misconduct; rather, the question is whether the state judge's behavior  
19 "rendered the trial so fundamentally unfair as to violate federal due process under the  
20 United States Constitution." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995)  
21 (citations omitted).

22 A state judge's conduct must be significantly adverse to a defendant before it  
23 violates constitutional requirements of due process and warrants federal intervention. *Id.*;  
24 *Garcia v. Warden, Dannemora Correctional Facility*, 795 F.2d 5, 8 (2d Cir. 1986). It is  
25 not enough that a federal court not approve of a state judge's conduct. Objectionable as  
26 the conduct at issue might be, when considered in the context of the trial as a whole it  
27 may not be of sufficient gravity to warrant the conclusion that fundamental fairness was  
28 denied. *Duckett*, 67 F.3d 734 at 741 (citations omitted).

1 Frankly, due to the lack of elaboration from Petitioner on this claim, the Court  
2 cannot reasonably determine Petitioner's due process rights were violated by the trial  
3 judge's remarks. Thus, Petitioner's claim to this extent must fail. Accordingly,  
4 Petitioner's claim of ineffective assistance of appellate counsel for failing to raise this  
5 claim is DENIED.

6 6. Cumulative Error<sup>13</sup>

7 Petitioner next claims his appellate counsel was constitutionally ineffective for  
8 failing to raise cumulative error as a grounds for relief on direct appeal. (Doc. 1 at 82-83.)  
9 The cumulative error doctrine recognizes that the cumulative effect of several errors may  
10 prejudice a defendant to the extent that his conviction must be overturned. *See United*  
11 *States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996). The cumulative error doctrine,  
12 however, does not permit the Court to consider the cumulative effect of non-errors. *See*  
13 *Fuller v. Roe*, 182 F.3d 699, 704 (9th Cir. 1999), *overruled on other grounds*, *Slack v.*  
14 *McDaniel*, 529 U.S. 473 (2000) ("where there is no single constitutional error existing,  
15 nothing can accumulate to the level of a constitutional violation").

16 As discussed at length above, there were no errors in Petitioner's trial sufficient to  
17 warrant a reversal. Nor were there any errors at all. In fact, Petitioner had a full and fair  
18 trial where he was represented by a zealous advocate. Because there are no errors to  
19 accumulate, there cannot be any cumulative error which would warrant a reversal.  
20 Therefore, Petitioner's claim his appellate counsel was ineffective for failing to raise a  
21 cumulative error claim on direct appeal is DENIED.

22 7. IAC of appellate counsel conclusion

23 Petitioner raised multiple claims which he argued were sufficient to lead the Court  
24 to reverse Petitioner's convictions. Particularly, Petitioner argued his appellate counsel  
25

---

26  
27 <sup>13</sup> Petitioner also raised this claim as a separate substantive claim in his petition for writ of habeas  
28 corpus. (Doc. 1 at 89.) Based on the Court's prior ruling, however, the Court will analyze this issue  
primarily under an ineffective assistance of counsel analysis. (Doc. 28.)

1 failed to make twelve claims when she filed his direct appeal which Petitioner argues  
2 would have warranted a reversal of his convictions. (Doc. 1 at 82-83.) All of these  
3 arguments, however, are frivolous and not meritorious. “The failure to raise a meritless  
4 legal argument does not constitute ineffective assistance of counsel.” *Baumann v. United*  
5 *States*, 692 F.2d 565, 572 (9th Cir. 1982). Based on this, Petitioner’s claim for habeas  
6 relief based on ineffective assistance of counsel is DENIED.

7 Moreover, because none of Petitioner ineffective assistance claims had merit, the  
8 Martinez exception cannot apply to overcome the procedural default. Therefore,  
9 Petitioner’s petition fails based timeliness, procedural default, and on the merits.

#### 10 **V. CONCLUSION**

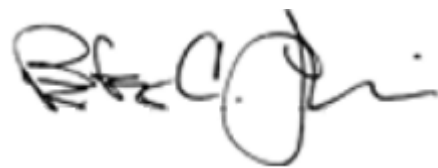
11 This Report and Recommendation is submitted to the Honorable Marilyn L. Huff,  
12 United States District Judge, pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule  
13 72.1(c)(1)(c) of the United States District Court for the Southern District of California.  
14 For the reasons outlined above, **IT IS HEREBY RECOMMENDED** that the Court  
15 issue an Order: (1) approving and adopting this Report and Recommendation, and (2)  
16 directing that Judgment be entered **DENYING** the Petition for Writ of Habeas Corpus.

17 Any party may file written objections with the Court and serve a copy on all parties  
18 on or before **March 20, 2018**. The document should be captioned “Objections to Report  
19 and Recommendation.” The parties are advised that failure to file objections within the  
20 specific time may waive the right to appeal the district court’s order. *Ylst*, 951 F.2d at  
21 1157 (9th Cir. 1991).

22 **IT IS SO ORDERED.**

23 DATE: February 20, 2018

24  
25  
26  
27  
28



Peter C. Lewis  
United States Magistrate Judge