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3 **UNITED STATES DISTRICT COURT**
4 **SOUTHERN DISTRICT OF CALIFORNIA**
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6 ROLANDO GUTIERREZ,
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Petitioner,
v.
SCOTT KERNAN, Secretary,
Respondent.

Case No.: 17cv438-MMA (MDD)

**ORDER ADOPTING REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE;**

[Doc. No. 22]

**OVERRULING OBJECTIONS TO
REPORT AND
RECOMMENDATION;**

[Doc. No. 23]

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

[Doc. No. 1]

**DENYING REQUEST FOR
EVIDENTIARY HEARING; AND**

[Doc. No. 1]

**DECLINING TO ISSUE
CERTIFICATE OF
APPEALABILITY**

Petitioner Roland I. Gutierrez (“Petitioner”), a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus (“petition”) pursuant to Title 28 of the United States Code, section 2254 [Doc. No. 1] challenging the constitutionality of his state court convictions for two incidents which were tried together. *See* Lodg. No. 12 at 2.

1 Petitioner challenges his state court convictions of second degree murder of Hannah
2 Podhorsky and the attempted second-degree murder of another victim from a February
3 2009 shooting in violation of California Penal Code sections 187(a) and 664. *Id.*; Lodg.
4 No. 7 at 2176-77. As to both of those counts, the jury found true allegations that
5 Petitioner committed the crimes as part of criminal street gang-related activities and that
6 he was a principal in the crimes, and in their commission at least one principal used a
7 firearm, proximately causing a person's death in violation of California Penal Code
8 sections 186322(b)(1), 12022.53(d), and 12022.53(e)(1). Lodg. Nos. 12 at 2; 7 at 2176-
9 78. Also, Petitioner challenges his state court convictions of making a criminal threat and
10 corporal injury resulting in a traumatic condition from a domestic violence incident in
11 August 2011 in violation of California Penal Code sections 422 and 273.5(a). Lodg. Nos.
12 12 at 2; 7 at 2178-79. As to the corporal injury count, the jury found true the allegation
13 that Petitioner personally used a deadly and dangerous weapon in violation of California
14 Penal Code sections 12022(b)(1) and 1192.7(c)(23). Lodg. Nos. 12 at 2; 7 at 2178-79.

15 Petitioner asserts that the 2009 and 2011 charges were improperly joined, the trial
16 court improperly admitted gang evidence, there was insufficient evidence to support the
17 gang enhancement (California Penal Code section 186.22), and trial and appellate
18 counsel provided ineffective assistance. *See generally*, Doc. No. 1. Respondent
19 answered on the merits, requesting the petition be denied with prejudice, and that no
20 certificate of appealability be issued. Doc. No. 15 at 30. Petitioner filed a traverse. Doc.
21 No. 21.

22 The matter was referred to United States Magistrate Judge Dembin for preparation
23 of a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1), and Civil Local
24 Rule HC.2. Judge Dembin has issued a detailed and well-reasoned report recommending
25 that the Court deny Petitioner's claims for relief without an evidentiary hearing and
26 dismiss the petition. *See* Doc. No. 22. Petitioner timely filed objections to the Report
27 and Recommendation on February 21, 2018. *See* Doc. No. 23. For the reasons set forth
28 below, the Court finds the Report and Recommendation to be thorough, complete, and an

1 accurate analysis of the legal issues presented in the petition. As such, the Court
2 **OVERRULES** Petitioner’s objections and **ADOPTS** the Report and Recommendation in
3 its entirety.

4 STANDARD OF REVIEW

5 Pursuant to Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. §
6 636(b)(1), the Court must “make a *de novo* determination of those portions of the report
7 . . . to which objection is made,” and “may accept, reject, or modify, in whole or in part,
8 the findings or recommendations made by the magistrate [judge].” 28 U.S.C.
9 § 636(b)(1); *see* Fed. R. Civ. P. 72(b)(3); *see also* *United States v. Remsing*, 874 F.2d
10 614, 617 (9th Cir. 1989).

11 DISCUSSION

12 Petitioner objects to Judge Dembin’s Report and Recommendation on various
13 grounds. *See* Doc. No. 23. The Court has conducted a *de novo* review of the pertinent
14 portions of the record with respect to each of Petitioner’s objections, and each objection
15 is addressed in turn.

16 First, Petitioner contends he has met the appropriate standard to prevail on his
17 claims for prejudicial improper joinder of charges. *Id.* at 1-3. Petitioner’s objections do
18 not present new argument and repeat arguments found in the petition and traverse. *See*
19 Doc. Nos. 1, 21, 23. Judge Dembin thoroughly addresses these arguments in the Report
20 and Recommendation. Doc. No. 22 at 17-18. Accordingly, the Court finds Petitioner’s
21 prejudicial improper joinder of charges objections are without merit.

22 Second, Petitioner claims he demonstrates cause and prejudice, thereby
23 overcoming Respondent’s procedural default affirmative defense. *See* Doc. No. 23 at 3,
24 7. Specifically, Petitioner asserts that his ineffective assistance of counsel claims
25 constitute cause and the fact that he was “not found guilty of [California Penal Code
26 section] 12022.53(d), which shows the jury did not find true Petitioner murdered
27 Podhorsky . . .” establishes the requisite prejudice. Doc. No. 23 at 3. As indicated
28 below, Judge Dembin thoroughly addresses Petitioner’s ineffective assistance of counsel

1 claims and recommends that they be denied. As a result, the Court finds Petitioner’s
2 cause and prejudice objections are without merit. *See Engle v. Isaac*, 456 U.S. 107, 134
3 n.43 (1982) (stating that the court need not consider whether the petitioner suffered actual
4 prejudice if the petitioner fails to show cause).

5 Third, Petitioner contends he adequately demonstrates that the admission of
6 Detective Sherman’s testimony was prejudicial and improper. Doc. No. 23 at 4.
7 Petitioner’s objections do not present new argument and repeat arguments found in the
8 petition and traverse. *See* Doc. Nos. 1, 21, 23. Judge Dembin thoroughly addresses these
9 arguments in the Report and Recommendation. Doc. No. 22 at 23-24. Accordingly, the
10 Court finds Petitioner’s objections with respect to admissions of evidence that render a
11 trial fundamentally unfair are without merit. *See Holley v. Yarborough*, 568 F.3d 1091,
12 1101 (9th Cir. 2009) (noting that the Supreme Court “has not yet made a clear ruling that
13 admission of irrelevant or overtly prejudicial evidence constitutes a due process violation
14 sufficient to warrant issuance of a writ”).

15 Fourth, Petitioner asserts he demonstrates ineffective assistance of trial counsel
16 because his trial counsel failed to consult an expert toxicologist, to object to the
17 admission of a “threatening text message,” and to call two witnesses. Doc. No. 23 at 4-6.
18 He also asserts that he demonstrates ineffective assistance of appellate counsel for failing
19 to raise trial counsel’s ineffective assistance on appeal. *Id.* at 6-7. Again, Petitioner’s
20 objections do not present new argument and repeat arguments found in the petition and
21 traverse. *See* Doc. Nos. 1, 21, 23. Judge Dembin thoroughly addresses these arguments
22 in the Report and Recommendation. Doc. No. 22 at 24-34. As such, the Court finds
23 Petitioner’s ineffective assistance of counsel objections are without merit.

24 Fifth, Petitioner contends he is entitled to an evidentiary hearing “[f]or the reasons
25 set forth in this Petition[,] Traverse, and Objection.” Doc. No. 23 at 7. Title 28 U.S.C.
26 section 2254(e) “substantially restricts the district court’s discretion to grant an
27 evidentiary hearing.” *Baja v. Ducharme*, 187 F.3d 1075, 1077 (9th Cir. 1999). Section
28 2254(e)(2) provides:

1 If the applicant has failed to develop the factual basis of a claim in State court
2 proceedings, the court shall not hold an evidentiary hearing on the claim
3 unless the applicant shows that--

4 (A) the claim relies on--

5 (i) a new rule of constitutional law, made retroactive to cases on
6 collateral review by the Supreme Court, that was previously
7 unavailable; or

8 (ii) a factual predicate that could not have been previously
9 discovered through the exercise of due diligence; and

10 (B) the facts underlying the claim would be sufficient to establish by
11 clear and convincing evidence that but for constitutional error, no
12 reasonable factfinder would have found the applicant guilty of the
underlying offense.

13 28 U.S.C. § 2254(e)(2).

14 Judge Dembin correctly concludes that Petitioner fails to show that his claim relies
15 on a new rule of constitutional law, a factual predicate that could not have been
16 previously discovered, or that the facts underlying the claim sufficiently establish by
17 clear and convincing evidence that but for constitutional error, no reasonable factfinder
18 would have found him guilty. Doc. No. 22 at 35. Accordingly, the Court finds
19 Petitioner's evidentiary hearing objections are without merit and that there is a sufficient
20 factual basis in the record to resolve Petitioner's claims. *See Insyxiengmay v. Morgan*,
21 403 F.3d 657, 669-70 (9th Cir. 2005).

22 CERTIFICATE OF APPEALABILITY

23 Rule 11 of the Federal Rules Governing Section 2254 Cases states that "the district
24 court must issue or deny a certificate of appealability when it enters a final order adverse
25 to the applicant." A certificate of appealability is not issued unless there is "a substantial
26 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Under this
27 standard, a petitioner must show that reasonable jurists could debate whether the petition
28 should have been resolved in a different manner, or that the issues presented were

1 adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S.
2 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

3 For the reasons set forth in the Report and Recommendation, the Court finds this
4 standard has not been met. Accordingly, the Court **DECLINES** to issue a certificate of
5 appealability as to any claims or issues raised in the petition.

6 **CONCLUSION**

7 Based on the foregoing, Petitioner's objections are **OVERRULED**, the Report and
8 Recommendation is **ADOPTED** in its entirety, the Petition for Writ of Habeas Corpus
9 and request for evidentiary hearing are **DENIED**, and the Court **DECLINES** to issue a
10 certificate of appealability.

11 The Clerk of Court is instructed to terminate this case and enter judgment in favor
12 of Respondent.

13 **IT IS SO ORDERED.**

14 Dated: March 8, 2018

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16 Hon. Michael M. Anello
17 United States District Judge
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