

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF  
CALIFORNIA

Joseph Leonard v. Patrick Eaton

No. 2:19-cv-0230-TLN-SCR (E.D. Cal. Oct. 29, 2025) · No. No. 2:19-cv-0230-TLN-SCR · Decided October  
30, 2025

SUMMARY

This document is a magistrate judge’s Findings and Recommendations in a federal habeas corpus action under 28 U.S.C. § 2254. Petitioner Joseph Leonard challenges his California convictions for murder and attempted murder arising from a McDonald’s parking-lot altercation, asserting claims involving jury instructions, sufficiency of the evidence, ineffective assistance of counsel, PTSD, and Miranda. The court recommends denying habeas relief on the merits and addresses additional claims raised in the petitioner’s traverse.

OPINION

1 2 3 4 5 6 7 UNITED STATES DISTRICT COURT 8 FOR THE EASTERN DISTRICT OF  
CALIFORNIA 9 10 JOSEPH LEONARD, No. 2:19-cv-0230-TLN-SCR 11 Petitioner, 12 v.  
FINDINGS & RECOMMENDATIONS 13 PATRICK EATON, 14 Respondent. 15 16 Petitioner is  
a state prisoner representing himself in this habeas corpus action filed 17 pursuant to 28 U.S.C. §  
2254. Petitioner challenges his 2015 conviction from the Sacramento 18 County Superior Court  
for murder and attempted murder following an altercation in a 19 McDonald’s parking lot.

Upon careful consideration of the record and the applicable law, the 20 undersigned recommends  
denying petitioner’s habeas corpus application on the merits. 21 I. Factual and Procedural History  
22 A. Trial Court Proceedings 23 Following a jury trial, petitioner was convicted of first degree  
murder and premeditated 24 attempted murder. ECF No. 10-1 (Abstract of Judgment).

The jury also found true 25 enhancements for personal use of a deadly weapon (i.e., a motor  
vehicle) and hate crime 26 allegations based on the victims’ ethnicity. ECF No. 50-7 at 118, 121  
(Verdict Forms). On 27 January 9, 2015, petitioner was sentenced to an indeterminate state prison  
term totaling forty 28 years to life. ECF No. 10-1. 1 After independently reviewing the record, this  
court finds the state appellate court’s 2 summary of the evidence accurate and adopts it herein.1 3  
Prosecution’s case-in-chief 4 1.

The killing 5 On the morning of June 6, 2013, [petitioner] and Samantha Silva arrived at  
McDonald’s in [petitioner]’s truck for coffee.2 [Footnote 6 omitted.] After a while, Silva walked  
outside of the restaurant and noticed two men. One had on a backpack; the other had a bicycle. 7

The men offered her food to eat and asked if she was hungry. She said she was not and continued to the truck.

8 The two men, Toussaint Harrison and Justin Oliphant, were giving 9 away food they had taken from a motel to homeless people at the McDonald's parking lot. Harrison was on a bike. They asked Silva 10 for money and cigarettes, and offered her some food. She declined their requests and offers. 11 When [petitioner] returned to the truck, Silva, who is mentally 12 disabled, told [petitioner] that Oliphant and Harrison were bothering her.

This angered [petitioner], and he told them to leave Silva alone. 13 The three men argued and cursed at each other with racial epithets and insults. 14 [Petitioner] walked back to his truck and retrieved a long chain. He 15 swung it at Oliphant and Harrison.

The three men fought, as [petitioner] tried to hit the other two with the chain. One of the men 16 punched [petitioner]. Oliphant pulled out a pocket knife but it fell on the ground. Harrison threw something sharp at [petitioner], possibly 17 a broken bottle or a pocket knife, and it cut his cheek. During the fight, [petitioner] called the two men various racial slurs and 18 derogatory epithets.

The altercation lasted about one minute, after which [petitioner] walked back to his truck and Oliphant and 19 Harrison walked toward the McDonald's entrance. [Footnote omitted.] 20 [Petitioner] backed his truck to the McDonald's entrance where 21 Oliphant and Harrison were standing. He got out of the truck and chased the two men around the parking lot while swinging the chain.

22 After a minute or so, he walked back to the McDonald's entrance and stomped on Harrison's bike. He briefly picked it up, but he dropped 23 it when Oliphant ran toward his truck and threatened to smash the windows. Harrison grabbed his bike, and he and Oliphant walked 24 away and out of the parking lot. [Petitioner], still holding the chain, went inside McDonald's and gave an employee a pocket knife.

He 25 26 1 See 28 U.S.C. § 2254(e)(1) (emphasizing that "a determination of a factual issue made by a State court shall be presumed to be correct" unless the petitioner rebuts it by clear and convincing 27 evidence). 2 The court has replaced "defendant" with "petitioner" to reflect the procedural posture of this 28 habeas corpus proceeding.

The changes are indicated in brackets. 1 returned to his truck and left the parking lot. 2 After they left McDonald's, Oliphant and Harrison went through a parking lot towards an IHOP restaurant. Oliphant walked and 3 Harrison rode his bike. [Petitioner] drove his truck into the parking lot and sped towards them. Oliphant heard a loud "revving" engine 4 and saw [petitioner]'s truck about 20 feet away coming toward them at a high rate of speed.

The truck came at Oliphant. He dove out of 5 the way and landed on the parking lot. The truck hit a sign for a car wash. 6 [Petitioner] reversed the truck, turned around, and headed towards 7 Harrison. Oliphant yelled at Harrison to move. [Petitioner] hit Harrison full-force with the front of the truck. Harrison flew into the 8 air and into the truck's windshield, rolled off the truck, and landed on the ground.

After striking Harrison, [petitioner] stopped, reversed 9 the truck, turned around, and started chasing Oliphant. He tried to hit him two additional times, but Oliphant dodged and jumped out of the 10 way to avoid being hit. Oliphant fled the scene on foot. 11 Frank Folger, an employee at Clutch Mart, heard a squealing sound of tires and a thud. Another Clutch Mart employee, Dan Gandy, also 12 heard the noise.

He went outside and saw Harrison lying on the ground, bleeding. He yelled at Folger to call 911. Folger called as he 13 walked outside holding a cordless phone. A Black male who identified himself as a relative of the injured man picked up 14 Harrison's bicycle and left. 15 After Oliphant escaped, [petitioner] turned his truck around and drove back towards Harrison, who was still lying on the ground.

16 Seeing this, Gandy ran and placed himself between the motionless Harrison and [petitioner]'s truck. [Petitioner] kept driving towards 17 Gandy, but when he got within 10 feet of Gandy, he swerved away and stopped. He got out of his truck, approached Harrison, and 18 kicked him in the head and torso numerous times with his steel-toed boots. He yelled racial and derogatory slurs while he kicked 19 Harrison.

20 Folger walked up and yelled at [petitioner] to stay away from Harrison. Gandy ran into his store and retrieved a large pry bar. He 21 came back holding the bar and told [petitioner] to get away from Harrison. When [petitioner] backed away, Gandy took the keys out 22 of the truck's ignition and told [petitioner] to sit on the tailgate until police arrived.

[Petitioner] told Gandy when this was all done, he 23 knew where Gandy worked and they would settle it. 24 Harrison died from blunt force injuries to the head. He also suffered blunt force injuries to his torso, a dislocated and fractured right 25 clavicle, five broken lumbar vertebrae, and blunt force injuries to his arms and legs. His injuries were consistent with being struck by a 26 motor vehicle.

The pathologist believed more of Harrison's injuries were caused by being hit by the truck than by being kicked or 27 stomped. Harrison's blood tested positive for amphetamine and methamphetamine, but negative for alcohol and other illicit 28 substances. 1 2. [Petitioner]'s arrest 2 Deputies detained [petitioner] at the scene. Asked how the altercation continued so far away from McDonald's, [petitioner] said the 3 altercation just continued that way.

He also said, “If that fucker dies, oh well, he tried to kill me.” 4 [Petitioner] said a number of things over the next two hours while he 5 was detained and recorded in a patrol car. He said, “I was fearin’ for my life. You see what they did to me, man.” He continued, “[T]hey 6 chased me, then... I beat ‘em off me, and then next thing I know, you know, I’m over here—we’re over here.

I don’t know. It just 7 happened so fast.... Maybe I’m wrong. I’m—I’m wrong for, you know, my actions. I doubt if I’m gonna squeak outta this very easily, 8 sir. I mean, it was pretty bad. If those punks wanted bad they got bad.” 9 [Petitioner] said, “I became the aggressor I realize this you know. 10 But they were aggressive but then they started running ‘cause I started getting crazy.” “Just because we got Obama for a president 11 these people think they are real special.

And I am not prejudice.” (Sic.) 12 He also said, “I don’t think I am going to walk on this one. Honestly. 13 You and I both know if they did that to you—you have all the right to do whatever you want to do. That don’t make me an exception. I 14 realize this. But I am not going to take it from these [people] or anybody. You know I am a law abiding citizen turning over a new 15 leaf and look what happens.

I really feel bad about that. I really do. I don’t think none of it was right.” 16 [Petitioner]’s blood contained no presence of alcohol or illicit 17 substances. 18 3. Crime scene investigation 19 Law enforcement personnel observed [petitioner]’s truck had a crack in the grill, a dent in the hood, and the windshield was shattered. They 20 found hair fibers in the windshield.

They also found a white bucket in the truck bed that contained a rusted metal chain. 21 A backpack located at the scene contained a smoking pipe and 22 multiple pieces of broken glass. 23 A vehicle collision expert testified that, based on photos and witness interviews, 21-foot tire friction marks found at the scene were caused 24 by acceleration, not braking.

25 A criminalist determined paint transfer found on the car wash sign at the scene was similar to paint from the fender of [petitioner]’s truck. 26 He also concluded paint transfer found on the truck’s bumper was similar to paint from the car wash sign. 27 28 1 Defense 2 Jon Lee, the manager of the car wash in the parking lot where the killing occurred, arrived at work around 9:00 a.m. the day of the 3 killing.

He did not notice any new damage to the car wash sign. The sign “was always kind of damaged.” 4 [Petitioner] testified on his own behalf. He said when he first walked 5 up to Oliphant and Harrison in the McDonald’s parking lot, he thought they were hungry, so he offered them some change. One said 6 no, but the other said, “Give me your money.” After [petitioner] walked back to the truck, one of them said, “Fuck you, you white 7 bitch ho.” Petitioner walked back to them and told them they had no right to talk to Silva like that.

He said they were scaring her and he 8 asked them to leave her alone. They said in an aggressive manner, “What are you gonna do, man? Do you want to die? You don’t know 9 who you’re

fucking with. We'll kill you." 10 Petitioner backed off and told Silva to call 911. He did not have a cell phone, but neither did she. He walked toward the McDonald's 11 entrance to report the men, and he told Oliphant and Harrison what he was doing.

They immediately started coming at him. [Petitioner] 12 swung at them to back off. Oliphant swung at him with a knife. Harrison threw something and hit [petitioner]'s face, cutting his left 13 cheek. Oliphant threw his knife, and it hit [petitioner] in the stomach and bounced off. [Petitioner] picked up the knife and put it in his 14 pocket. 15 [Petitioner] backed off, but he wondered what they would do to the next person.

So he got into his truck and backed up to the 16 McDonald's entrance to report them. [Petitioner] got out of the truck, and Oliphant yelled at him. [Petitioner] grabbed a chain from the bed 17 of his truck to protect himself. He wrapped the chain around his hand and walked toward the restaurant entrance. 18 Oliphant threatened to break the windows in [petitioner]'s truck.

19 [Petitioner] proceeded toward the two, swinging the metal chain to protect his truck. The two backed up, but came at him again once he 20 turned around to go. [Petitioner] grabbed Harrison's bicycle to keep them there as long as possible, hoping that somebody would help or 21 the police would arrive. 22 [Petitioner] heard someone say, "Get the girl." Oliphant ran toward the truck, [petitioner] ran toward Oliphant, and Harrison ran toward 23 [petitioner] to get his bike.

Harrison retrieved the bike, and then [petitioner] heard someone say, "Pop him with the gun," and then, 24 "Yeah, man." As soon as he heard this, [petitioner] went into McDonald's. He gave the knife to an employee and said, "These 25 people assaulted me.

Here's the evidence. Please call 911. I need help." Then he said he was "going to stop them," and he left the 26 restaurant. 27 He observed Oliphant and Harrison had left, so he got in his truck. His intent at that point was to go home. He was upset and mad. He 28 drove out of the McDonald's parking lot.

As he drove down the 1 street, however, he saw the two men "fleeing" in a driveway entrance to a parking lot. They were headed away from him. He thought, 2 "[T]hey started it. They attacked me. They assaulted me. They threatened the girl. And they had a gun. They needed to be stopped." 3 By "stopped," he meant, "Apprehended for the police." 4 He pulled into the driveway to stop them.

He accelerated to catch up to them. Harrison was farther away, and it looked to [petitioner] that 5 Harrison would leave and go onto a sidewalk. [Petitioner] intended to pull his truck in front of the area where Harrison was going. He 6 approached Oliphant and veered to the left away from him. Harrison was going left, so [petitioner] went to the right. He was trying to stop 7 them from leaving.

He was not trying to hit them. 8 But then Harrison turned right in front of [petitioner], and [petitioner] hit him. He did not accelerate because he “was already rolling.” 9 [Petitioner] put on the brakes as soon as Harrison turned into him. Next, he accelerated backwards and followed Oliphant to block him 10 from leaving, but Oliphant escaped. 11 [Petitioner] parked the truck and got out to see if Harrison was okay.

By then, Gandy was there, but he suddenly left. [Petitioner] saw 12 Harrison laying on the ground and a pistol lying under him. He rolled Harrison over with his foot and kicked the gun away toward 13 Harrison’s backpack. 14 A minute or two later, a man approached Harrison and picked up the gun that was lying there. He went through Harrison’s backpack, then 15 got on the bike.

The man said Harrison was his “cuz.” He rode a few circles around [petitioner], threatened him, and then rode away. 16 Gandy waved a pry bar at [petitioner] and Folgers came out, and the 17 two stared at him. He put down his tailgate and sat on it. 18 On cross-examination, [petitioner] admitted he never told law enforcement there was a threat of a gun being used against him.

His 19 statement to that effect in trial was the first time he mentioned one of the men had a gun. He later stated he told a deputy at the scene 20 something to the effect they had a gun, but both he and the deputy were talking and he did not believe the deputy heard him. 21 Also on cross-examination, [petitioner] disputed Gandy’s and 22 Folger’s testimony that they stood between his truck and Harrison to stop him from hitting Harrison again, and that he kicked Harrison 23 and called him a racial slur.

24 Rebuttal 25 Detective John Kauo detailed the inconsistencies between [petitioner]’s testimony and the statement [petitioner] gave to 26 Detective Kauo the day of the crime. Detective Kauo said [petitioner] in his earlier statement did not mention he offered the men money, 27 that the men threatened to damage his truck, that one of them said, “Get the girl,” that one of them said, “Pop him with a gun,” or even 28 anything about a gun.

[Petitioner] did not claim he accidentally hit 1 Harrison. Rather, he stated he was not going to let the men get away with what they did to him. [Petitioner] told Detective Kauo he ended 2 up at Clutch Mart because “they started runnin’ and [he] wasn’t gonna let them get away from what they did and the way they were 3 acting.” 4 Deputy Gene Goff testified [petitioner] told him at the scene he asked Oliphant and Harrison at McDonald’s to leave Silva alone because 5 she already had a boyfriend.

[Petitioner] said an argument ensued, and the men pulled out knives and tried to slash him. [Petitioner] did 6 not tell Deputy Goff he offered the men change. He did not acknowledge he punched the men or swung a chain at them. He said 7 nothing about a gun near the victim, that one of the men threatened to pop him with a gun or get Silva, or that he used his foot to roll over 8 Harrison in order to kick the gun out from under his body.

[Petitioner] also did not say he accidentally hit Harrison with his 9 truck. He told Deputy Goff, “If that fucker dies, oh well, he tried to kill me.” 10 11 ECF No. 10-2. 12 B. Direct Appeal Proceedings 13 Petitioner appealed the judgment.

The California Court of Appeal affirmed his conviction 14 on February 9, 2018 and the California Supreme Court denied review on May 9, 2018. ECF Nos. 15 10-2, 10-4. 16 C. State and Federal Habeas Proceedings 17 Petitioner filed a petition for writ of habeas corpus in the California Supreme Court on 18 June 12, 2019. ECF No. 32-1.

The court denied the petition without comment on November 26, 19 2019. ECF No. 32-2. 20 Petitioner filed the operative second amended federal petition on January 15, 2020. ECF 21 No. 30. In claim one, he alleges that his right to a fair trial was violated when the trial court 22 reopened closing argument rather than answer the jury’s question about intent.

In claim two, 23 Petitioner alleges that the trial court denied him due process by failing to instruct the jury on 24 imperfect defense of another. In claim three, petitioner contends that counsel was ineffective in 25 violation of the Sixth Amendment for failing to request jury instructions negating premeditation 26 and including provocation by the victim.

Next petitioner raises a sufficiency challenge to the 27 evidence of premeditation supporting his murder and attempted murder conviction. In claim five, 28 petitioner asserts that his conviction was secured in violation of the physical facts due to the 1 inherently unbelievable testimony of the victim. Petitioner next contends that there is sufficient 2 record evidence to reduce his murder conviction to manslaughter.

Claim seven challenges the 3 effectiveness of petitioner’s trial and appellate counsel for various reasons. However, the court 4 previously dismissed subclaims (f)-(j) of claim seven as unexhausted. See ECF No. 51. Next, 5 petitioner alleges that at the time of the offense he was suffering from severe post-traumatic stress 6 disorder (“PTSD”).

Finally, petitioner contends that his Miranda rights were violated. 7 Respondent asserts that, as a preliminary matter, petitioner’s submission of new evidence 8 in support of his habeas claims as well as his request for an evidentiary hearing, are barred by 9 *Cullen v. Pinholster*, 563 U.S. 170 (2011), and its progeny.<sup>3</sup> ECF No. 49 at 16-17. With respect 10 to claim one, respondents submits that there is no Supreme Court decision that has ever “directly 11 addressed whether the reopening of argument, after the jury begins deliberations, violates 12 constitutional mandates.” ECF No. 49 at 20 (citing *Magana-Torres v. Harrington*, No. 2:10-cv- 13 2669-WBS-TJB, 2011 U.S. Dist.

LEXIS 146140 at \*27 (E.D. Cal. Dec. 19, 2011)). Absent such 14 authority, petitioner is not entitled to habeas relief for claim one. Properly construing claim two 15 as a challenge to the trial court’s denial of a lesser included offense instruction based on imperfect 16 defense of others, petitioner is not entitled to relief once again due to a lack of Supreme Court 17 precedent.

ECF No. 49 at 23-24. “[T]he Supreme Court has never clearly held, outside of the 18 death penalty context, that a state criminal defendant is constitutionally entitled to have his jury 19 instructed on lesser included offenses.” ECF No. 49 at 23 (citation omitted). Addressing claims 20 four, five, and six as a cumulative challenge to the sufficiency of the evidence supporting 21 premeditation, respondent counters that petitioner’s claims do not view the evidence in the light 22 most favorable to the prosecution, as is required by *Jackson v. Virginia*, 443 U.S. 307, 319 23 (1979).

Id. at 37. Moreover, “[p]etitioner does not explain how any inconsistency undermined 24 eyewitness accounts of the crimes, video footage, [p]etitioner’s admissions or the remaining 25 physical evidence.” Id. Regarding claim eight, respondent asserts that “a fairminded jurist could 26 27 3 Moreover, respondent does not concede that petitioner has properly exhausted his claims for relief to the extent that his additional factual allegations change or enhance the claims presented 28 to the state court.

See ECF No. 49 at 17. 1 conclude, [p]etitioner points to no record evidence indicating [his] lack of competence [based on 2 his medication for PTSD].” Id. at 38. To the contrary, “from the time he was arrested until the 3 time he took the stand to testify, [p]etitioner... exhibited the ability to communicate, both to 4 officers, and to the courtroom from the stand, in an effort to explain why he was guilty of 5 something less than the charged crimes.” Id. Finally, based on the Miranda claim alleged in 6 ground nine, respondent submits that a “fairminded jurist could conclude that a spontaneous or 7 voluntary statement from a suspect in custody is admissible even in the absence of Miranda 8 warnings.” Id. at 39.

9 Respondent further counters each claim that petitioner’s trial and appellate counsel were 10 ineffective. Specifically, in claim three, respondent contends that the state court’s rejection of his 11 ineffective assistance of counsel claim was not objectively unreasonable because “it would be 12 clear to reasonable counsel that Petitioner actually received all the instruction on provocation that 13 was necessary for the jury to find reduced culpability.

Provocation and state of mind were 14 adequately explained by the several instructions....” Id. at 28. Additionally, “the state court 15 reasonably found, because the jury received instruction and argument on provocation, Petitioner 16 also could not show a redundant pinpoint instruction would have changed the outcome.” Id. The 17 IAC claim for failing to present a PTSD defense does not afford relief in this case because “a 18 fairminded jurist could conclude that Petitioner did not present sufficient evidence that a mental 19 health expert would have diagnosed Petitioner with PTSD, or that such an expert would have 20 testified in a way that was both admissible and helpful to the defense.

Petitioner does not present 21 any such proposed testimony.” Id. at 30 (citations omitted). Counsel’s failure to challenge 22 alleged perjury by witness Silva does not entitle petitioner to

relief because it was reasonable to 23 “refrain from characterizing Silva’s testimony as perjury” based on mere inconsistencies. Id. at 24 33. Trial and appellate counsels’ failure to challenge petitioner’s recorded statements before 25 receiving Miranda warnings did not constitute deficient performance since the statements were 26 not made in response to any police questioning.

Id. at 34-35. 27 In his traverse, petitioner focuses on the events that occurred in the McDonald’s parking 28 lot to demonstrate that the jury should have convicted him of manslaughter instead of 1 premeditated murder. ECF No. 56. Petitioner indicates that the order of the facts presented by 2 respondent is misleading because it suggests that petitioner was the first person to use a 3 dangerous weapon during the initial confrontation in the McDonald’s parking lot.

ECF No. 56 at 4 13-14. Regarding claim one, petitioner submits that the trial court’s decision to reopen argument 5 rather than answer the jury’s question amounts to structural error that requires reversing his 6 conviction. ECF No. 56 at 16. Even relying on the Jackson standard for sufficiency of the 7 evidence challenges, petitioner asserts that “there was no proof of [p]etitioner’s intent to kill 8 anyone of the victims in this case by way of premeditation.” Id. at 23.

Petitioner further contends 9 that he was denied the effective assistance of counsel at trial because there was no tactical reason 10 for failing to request a jury instruction on provocation. Id. at 20-21. Regarding claim seven, 11 petitioner reiterates that his trial and appellate counsel failed to discover or present evidence 12 regarding his PTSD and the medication he was taking for it both prior to and during trial.

Id. at 13 28. “Petitioner contends that this court should find that due to the fact that [p]etitioner served in 14 the military and now suffers from [PTSD,] a known mental illness[,] requires reversal of this case 15 to enable [p]etitioner to... gain adequate mental health care [as] opposed to penal incarceration.” 16 Id. at 32. Additionally, petitioner submits that he is entitled to relief based on the cumulative 17 errors of his attorneys’ ineffectiveness.

Id. at 31. 18 II. New Claims Raised in Traverse 19 Also attached to petitioner’s traverse are numerous exhibits. One of the attachments is the 20 California State Bar Court’s Stipulation of Disbarment for petitioner’s trial counsel dated May 11, 21 2018. ECF No. 56 at 51-65. This disbarment order is based on trial counsel’s misappropriation 22 of three separate client’s funds between 2014 and 2017.

Id. Petitioner also submits a declaration 23 and bank records indicating that trial counsel misappropriated \$45,000 of his veterans’ benefits. 24 ECF No. 56 at 45-49. Other exhibits include a letter petitioner sent to his trial counsel dated 25 February 24, 2018 requesting the contact information for a witness named Kenneth. ECF No. 56 26 at 49-50. According to petitioner, this witness would have been able to testify that petitioner was 27 in imminent danger while at the McDonald’s parking lot.

Id. Finally, petitioner attached portions 28 of his medical records from the Veterans Administration including a May 12, 2011 psychological 1 test that diagnosed petitioner with schizophrenia and not PTSD. ECF No. 56 at 101-107. 2 Based on these exhibits, it appears to the court that petitioner raises new claims for relief 3 in his traverse. These new claims include: 1) a challenge to the use of his prior convictions at 4 sentencing; 2) a Batson challenge to the prosecution's use of peremptory challenges to strike 5 African Americans from the jury; 3) ineffective assistance of trial counsel for: a) failing to 6 investigate and present testimony from witness Kenneth; b) misappropriating petitioner's money; 7 c) failing to object to the prosecutor's fast forwarding of the videotape at trial which concealed 8 witnesses from the jury; d) failing to object to the prosecution's use of just a portion of 9 petitioner's police interrogation to conceal the Miranda violation; and, e) failing to investigate 10 and interview the McDonald's manager to obtain mitigating evidence.

These claims will be 11 addressed in the court's subsequent analysis. 12 III. AEDPA Standard of Review 13 To be entitled to federal habeas corpus relief, petitioner must affirmatively establish that 14 the state court decision resolving the claim on the merits "was contrary to, or involved an 15 unreasonable application of, clearly established Federal law, as determined by the Supreme Court 16 of the United States." 28 U.S.C. § 2254(d)(1).

The "contrary to" and "unreasonable application" 17 clauses of § 2254(d)(1) are different, as the Supreme Court has explained: 18 A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing 19 law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts.

The court 20 may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our 21 decisions but unreasonably applies it to the facts of the particular case.

The focus of the latter inquiry is on whether the state court's 22 application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* [*v. Taylor*, 529 U.S. 362 23 (2000)], that an unreasonable application is different from an incorrect one. 24 25 *Bell v. Cone*, 535 U.S. 685, 694 (2002). 26 "A state court's determination that a claim lacks merit precludes federal habeas relief so 27 long as 'fairminded jurists could disagree' on the correctness of the state court's decision." 28 *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 1 664 (2004)).

Accordingly, "[a]s a condition for obtaining habeas corpus from a federal court, a 2 state prisoner must show that the state court's ruling on the claim being presented in federal court 3 was so lacking in justification that there was an error well understood and comprehended in 4 existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

5 The phrase “clearly established Federal law” in § 2254(d)(1) refers to the “governing legal 6 principle or principles” previously articulated by the Supreme Court. *Lockyer v. Andrade*, 538 7 U.S. 63, 71-72 (2003). Clearly established federal law also includes “the legal principles and 8 standards flowing from precedent.” *Bradley v. Duncan*, 315 F.3d 1091, 1101 (9th Cir.

2002) 9 (quoting *Taylor v. Withrow*, 288 F.3d 846, 852 (6th Cir. 2002)). Only Supreme Court precedent 10 may constitute “clearly established Federal law,” but circuit law has persuasive value regarding 11 what law is “clearly established” and what constitutes “unreasonable application” of that law. 12 *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000); *Robinson v. Ignacio*, 360 F.3d 1044, 13 1057 (9th Cir.

2004). 14 Relief is also available under the AEDPA where the state court predicates its adjudication 15 of a claim on an unreasonable factual determination. 28 U.S.C. § 2254(d)(2). The statute 16 explicitly limits this inquiry to the evidence that was before the state court. See generally *Cullen*, 17 563 U.S. 170.

Under § 2254(d)(2), factual findings of a state court are presumed to be correct 18 subject only to a review of the record which demonstrates that the factual finding(s) “resulted in a 19 decision that was based on an unreasonable determination of the facts in light of the evidence 20 presented in the state court proceeding.” It makes no sense to interpret “unreasonable” in § 21 2254(d)(2) in a manner different from that same word as it appears in § 2254(d)(1) – i.e., the 22 factual error must be so apparent that “fairminded jurists” examining the same record could not 23 abide by the state court factual determination.

A petitioner must show clearly and convincingly 24 that the factual determination is unreasonable. See *Rice v. Collins*, 546 U.S. 333, 338 (2006). 25 If petitioner meets either of the 28 U.S.C. § 2254(d) standards, then the federal habeas 26 court reviews the merits of the constitutional claim under pre-AEDPA standards in order to be 27 entitled to relief. *Frantz v. Hazey*, 533 F.3d 724 (9th Cir.

2008) (en banc). 28 This court looks to the last reasoned state court decision in applying the 28 U.S.C. § 1 2254(d) standard. *Wilson v. Sellers*, 584 U.S. 122 (2018) (adopting the Ylst look through 2 presumption of silent state court denials of relief even after the decision in *Harrington*); see also 3 *Ylst v. Nunnemaker*, 501 U.S. 797 (1991)(establishing the “look through” doctrine in federal 4 habeas cases).

Thus, this court “looks through” any silent denial by the California Supreme Court 5 and reviews the reasoned California Court of Appeal’s decision for objective reasonableness 6 under 28 U.S.C. § 2254(d). See *Johnson v. Williams*, 568 U.S. 289, 297 n. 1 (2013). 7 IV. Analysis 8 A. Fair Trial Violation Based on the Trial Court’s Reopening of Closing Argument 9 10 In claim one, petitioner

contends that his rights to due process and a fair trial were 11 violated when the trial court reopened closing argument in response to a jury question about 12 intent.

See ECF No. 50-11 at 153 (describing the jury's note as asking, "Can the intent of an 13 action change during the process of the crime? Do we use the lesser intent or choose what seems 14 to be the most excessive/strongest intent?"); ECF No. 50-7 at 116 (Clerk's Transcript). While the 15 prosecutor agreed to reopen closing argument, defense counsel asked the court to refer the jury to 16 its previous instructions.

Before these additional closing arguments were given, the jury sent a 17 further note informing the trial court that, "We cannot all agree this is first degree murder. 18 Instructions say to inform you. Please advise." ECF No. 50-11 at 155. Ultimately, both the 19 prosecution and defense were permitted 10 extra minutes of closing argument to address the 20 jury's question on intent.

The second closing arguments ended at 11:17 a.m. and the jury 21 returned its verdict at 2:15 p.m. on the same day. ECF No. 50-11 at 167-168. 22 This claim was raised and rejected on direct appeal. As a result, the last reasoned state 23 court opinion was issued by the California Court of Appeal.

The state court determined that there 24 was no fair trial or due process violation because the trial "court reasonably concluded it could 25 protect defendant's rights best by allowing both sides to argue the issue one more time instead of 26 it expounding on the instructions and risk coercing any type of verdict." ECF No. 10-2 at 14. 27 Nor did the trial court make any comments "showing any kind of preference for a particular 28 verdict." *Id.* 1 Petitioner is not entitled to relief on this claim because he does not demonstrate that the 2 state court decision was contrary to, or an unreasonable application of clearly established federal 3 law.

See 28 U.S.C. § 2254(d). As respondent points out, there is no Supreme Court decision that 4 has ever "directly addressed whether the reopening of argument, after the jury begins 5 deliberations, violates constitutional mandates." See *Magana-Torres v. Harrington*, Case No. 6 2:10-cv-2669-WBS-TJB, 2011 U.S. Dist. LEXIS 146140, at \*27 (E.D. Cal. Dec. 20, 2011)).

The 7 undersigned recognizes that the Ninth Circuit in *United States v. Evanston*, 651 F.3d 1080 (9th 8 Cir. 2011), found that a federal district court abused its discretion in permitting supplemental 9 argument on issues dividing the jury.

However, the *Evanston* court based that decision on its 10 supervisory powers, not on constitutional principles. *Id.* at 1082-83, 1093 n.15; see *Taylor v. 11 Sullivan*, No. CV 12-3550-BRO JPR, 2013 U.S. Dist. LEXIS 119905, at \*55 n.13 (C.D. Cal. 12 Aug. 22, 2013) ("Evanston relied on the court's supervisory powers rather than on any 13 constitutional provision and therefore has no relevance in § 2254(d) analysis") (citation omitted).

14 Accordingly Evanston is not persuasive authority as to what constitutes Supreme Court doctrine 15 on constitutional limits to reopened arguments. Cf. *Early v. Packer*, 537 U.S. 3, 9-11 (2002) 16 (holding that Ninth Circuit erred in a § 2254 case by relying on “nonconstitutional” Supreme 17 Court authority based solely on court's supervisory powers). Absent relevant Supreme Court 18 authority, the undersigned cannot conclude that petitioner is entitled to relief on claim one.

Claim 19 one should be denied. 20 B. Due Process Violation Based on Failure to Instruct on Imperfect Defense of Another 21 22 In claim two, petitioner challenges the trial court's failure to instruct the jury on imperfect 23 defense of another. According to petitioner, he should only have been convicted of voluntary 24 manslaughter and attempted voluntary manslaughter based on this theory of defense.

In 25 substance, this is a claim that the jury should have been instructed on the lesser included 26 manslaughter offenses. 27 This claim was also raised and rejected on direct appeal. The California Court of Appeal 28 rejected this argument because even reviewing the evidence based on petitioner's own testimony, 1 there was no imminent danger of harm to another person to support giving the instruction.

ECF 2 No. 10-2 at 15-18. “If, as he testified, the killing was an accident and he did not intend to kill 3 Harrison, then he did not actually believe he had to use deadly force immediately to defend 4 another person, and there was no basis for instructing on imperfect self defense.” ECF No. 10-2 5 at 17. Likewise, petitioner testified that he did not intend to kill Oliphant.

Id. “Without an intent 6 to kill, [petitioner] could not have believed he had to attempt to kill Oliphant to protect another 7 from imminent harm.” Id. 8 Jury instruction challenges are generally questions of state law. See *Estelle v. McGuire*, 9 502 U.S. 62, 71-72 (1991).

In order to be entitled to federal habeas relief based on the failure to 10 give a jury instruction, petitioner must demonstrate that the defect “so infected the entire trial that 11 the resulting conviction violates due process.” *Estelle*, 502 U.S. at 72.

The petitioner's burden is 12 “especially heavy,” because “[a]n omission, or an incomplete instruction, is less likely to be 13 prejudicial than a misstatement of the law.” *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977); see 14 also *Villafuerte v. Stewart*, 111 F.3d 616, 624 (9th Cir. 1997). 15 In this case, the California Court of Appeal properly concluded that even petitioner's own 16 testimony did not provide sufficient evidence that the killing and attempted killing of Harrison 17 and Oliphant was done in the imperfect defense of another.

Due process only requires a lesser 18 included offense instruction in a non-capital murder case when the evidence is sufficiently 19 substantial that it must be submitted to the jury. See *Mullaney v. Wilbur*, 421 U.S. 684, 697-98, 20 703-04 (1975); contrast *Beck v. Alabama*, 447 U.S. 625, 635-

38 (1980) (holding that due process 21 requires lesser included offense charge in capital murder case).

Having reviewed the trial 22 testimony and the remainder of the jury instructions in this case, the undersigned concludes that 23 the state court rejection of this claim was neither contrary to nor an unreasonable application of 24 federal law. Claim two should be denied. 25 C. Miranda Violation 26 In claim nine, petitioner asserts that his conviction was obtained in violation of his Fifth 27 and Fourteenth Amendment rights to remain silent because he was not given Miranda warnings 28 until the afternoon of the shooting.

See ECF No. 24 at 46 (Sheriff's Department County of 1 Sacramento Miranda Advisement). The Miranda form submitted by petitioner indicates that he 2 invoked his right to remain silent at 2:10 p.m. on June 6, 2013 even though he was arrested at 3 8:00 a.m. that morning. Compare ECF No. 24 at 45 (Arrest Report) with ECF No. 24 at 46. 4 Petitioner relies on this time discrepancy as the basis for the asserted Miranda violation.

5 Under *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), a person in custody subject to 6 interrogation "must be warned that he has a right to remain silent, that any statement he does 7 make may be used as evidence against him, and that he has the right to the presence of an 8 attorney, either retained or appointed." A custodial interrogation is defined as "questioning 9 initiated by law enforcement officers after a person has been taken into custody or otherwise 10 deprived of his freedom of action in any significant way." *Id.* The prosecution bears the burden 11 of demonstrating that the warnings were given and that a waiver of these rights was obtained by 12 the police before the suspect's statements in response to questioning can be admitted as evidence 13 at trial.

*Miranda*, 384 U.S. at 479; see also *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (referring 14 to the "Miranda exclusionary rule"). The requirements of *Miranda* are "clearly established" 15 federal law for purposes of federal habeas review under 28 U.S.C. § 2254(d). See *Juan H. v. Allen*, 408 F.3d 1262, 1271 (9th Cir. 2005). 17 Petitioner presented this claim in his state habeas petition to the California Supreme 18 Court.

Based on the silent denial of his habeas petition, there is no reasoned state court decision 19 concerning this claim for relief. In the absence of a reasoned state court opinion, this court 20 conducts an independent review of the record to determine what rationale could support the state 21 court judgment and whether such rationale was an objectively reasonable application of federal 22 law.

See *Harrington*, 562 U.S. at 102; *Cullen*, 563 U.S. at 188; *Delgado v. Lewis*, 223 F.3d 976, 23 982 (9th Cir. 2000). 24 The record of the motion in limine hearing in the trial court indicates that

petitioner's 25 recorded statements while detained in the police cruiser on the morning of June 6, 2013 were not 26 made in response to questioning by police.

As the trial court found: "These are custodial but no 27 interrogation statements so it's not a Miranda situation. These are just comments, as I understand 28 it, that the defendant made sua sponte while sitting in the rear seat of the patrol car." ECF No. 1 50-8 at 48.

The trial court accordingly admitted these inculpatory statements because they were 2 not made in response to police questioning. Miranda warnings are not required when there is no 3 police questioning. See *Eldred*, 470 U.S. 298, 317 (1985) ("When police ask questions of a 4 suspect in custody without administering the required warnings, Miranda dictates that the answers 5 received be presumed compelled and that they be excluded from evidence at trial in the State's 6 case in chief."); *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984) ("[I]f the police take a suspect 7 into custody and then ask him questions without informing him of the rights enumerated above, 8 his responses cannot be introduced into evidence to establish his guilt.") (footnote and citations 9 omitted).

Thus, the California Supreme Court could have reasonably rejected petitioner's 10 Miranda claim based on the absence of questioning by police. Claim nine should be denied. 11 D. Ineffective Assistance of Counsel (Claims Three and Seven) 12 Petitioner challenges several instances of alleged ineffectiveness by both his trial and 13 appellate attorneys.

The two prong Strickland standard governs ineffective assistance of counsel 14 claims. *Strickland v. Washington*, 466 U.S. 668 (1984). It requires petitioner to establish (1) that 15 counsel's representation fell below an objective standard of reasonableness; and, (2) that 16 counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 692, 694. "The 17 question is whether an attorney's representation amounted to deficient performance under 18 'prevailing professional norms,' not whether it deviated from best practices or most common 19 custom." *Harrington*, 562 U.S. at 105 (citing *Strickland*, 466 U.S. at 690).

Prejudice exists where 20 "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the 21 proceeding would have been different. A reasonable probability is a probability sufficient to 22 undermine confidence in the outcome." *Strickland*, 466 U.S. at 693. "That requires a 23 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen*, 563 U.S. at 189 24 (quoting *Harrington*, 562 U.S. 86, 111-12 (2011)).

25 In reviewing a Strickland claim under AEDPA, the federal court must be "doubly" 26 deferential in determining whether counsel's challenged conduct was deficient. *Harrington*, 562 U.S. at 105. "When § 2254(d) applies, the question is not whether counsel's actions were 28 reasonable.

The question is whether there is any reasonable argument that counsel satisfied 1 Strickland's deferential standard.” Id. 2 In claim three, petitioner asserts that trial counsel was deficient for failing to request a jury 3 instruction on provocation that would have negated his conviction for first degree premeditated 4 murder. ECF No. 24 at 8. This claim was denied in a reasoned decision by the California Court 5 of Appeal on direct review.

ECF No. 10-2 at 18-22.4 The state court applied the Strickland 6 standard governing IAC claims and first determined that counsel’s performance was not deficient 7 because there was insufficient evidence of provocation to justify the jury instruction. ECF No. 8 10-2 at 19. “There is no evidence [petitioner] formed the intent to kill and acted on that intent 9 immediately after the incident at McDonald’s or that provocation affected him in any way.” Id. 10 Additionally, the state court denied relief by finding no prejudice resulting from counsel’s 11 challenged conduct after reviewing the jury instructions that were given as a whole.

Id. at 20-22. 12 “The jury was sufficiently instructed on state of mind, second degree murder, and provocation as 13 an element of voluntary manslaughter such that any error in not instructing on provocation as 14 negating premeditation and deliberation was cured.” Id. at 20.

The California Court of Appeal 15 emphasized that the jury rejected petitioner’s defense at trial and any additional pinpoint 16 instruction on provocation would not have resulted in a different verdict. Id. at 22-23.

Having 17 reviewed the state court record, this court concludes that the denial of relief on this claim was 18 neither contrary to nor an unreasonable application of the Strickland standard governing IAC 19 claims. See 28 U.S.C. § 2254(d). Claim three should therefore be denied. 20 Petitioner’s remaining IAC claims were denied by the California Supreme Court in an 21 unreasoned opinion which constitutes a denial on the merits under the AEDPA.

See ECF No. 32- 22 2; Harrington, 562 U.S. at 99-100. Having independently reviewed the record, the undersigned 23 concludes that the remaining IAC claims could have been rejected by the California Supreme 24 4 The California Court of Appeal analyzed this claim as a failure to request CALCRIM No. 522. 25 ECF No. 10-2 at 18 n. 8. This instruction provides that “provocation may reduce a murder from 26 first degree to second degree [and may reduce a murder to manslaughter].

The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the 27 defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the 28 defendant committed murder or manslaughter.]” Id. 1 Court based on lack of a prima facie case demonstrating any prejudice resulting from counsel’s 2 challenged conduct.

See Cullen, 563 U.S. at 188, n. 12 (finding California court's summary 3 denial represents determination that petitioner failed to state a prima facie case). Petitioner makes 4 much of his diagnosis of PTSD, but the evidence he presented to the state court does not establish 5 that his trial counsel was aware of his PTSD and also does not establish that he was taking any 6 medication for such a diagnosis at the time of the offense in 2013.

See ECF No. 24 at 32-33 7 (evidence from 2016 and 2019) & 36 (statement that "neither attorney Brace nor PI Butrym 8 recalled having knowledge of Leonard's PTSD"). 9 Additionally, petitioner has not shown that Ms. Silva's unelicited testimony and the 10 purported testimony of the McDonald's manager were substantially likely to have changed the 11 jury's verdict.

See ECF No. 24 at 16. The record is relatively thin as to what this alternative 12 testimony would have been. A "Memorandum" from Tara K. Hoveland, an attorney whose role 13 in the case is not clearly identified, states only that it "appeared" to a private investigator hired by 14 petitioner's trial counsel, who interviewed "witnesses at McDonald's" that petitioner "tried t[o] 15 take justice into his own hands." Without information about precisely what testimony should 16 have been elicited, there is no meaningful showing of prejudice.

Therefore, these IAC claims 17 could reasonably have been rejected by the California Supreme Court based on lack of prejudice. 18 See Cullen, 563 U.S. at 190 (emphasizing that petitioner "must demonstrate that it was 19 necessarily unreasonable for the California Supreme Court to conclude: (1) that he had not 20 overcome the strong presumption of competence; and (2) that he had failed to undermine 21 confidence in the jury's sentence....").

22 Likewise, the IAC claim related to the asserted Miranda violation also fails due to lack of 23 prejudice. For the reasons explained in section IV(C) supra, any objection based on Miranda to 24 petitioner's statements would have been overruled because petitioner's statements were not made 25 in response to questioning by police.

For all these reasons, petitioner's IAC claims asserted in 26 claim seven should be denied. 27 E. Sufficiency Challenges to the Evidence (Claims Four Through Six) 28 Petitioner challenges the sufficiency of the evidence supporting his conviction on the 1 grounds that there was no evidence of planning or premeditation, the physical evidence was 2 inconsistent with the victim's testimony, and the evidence of provocation warrants reducing his 3 conviction to voluntary manslaughter.

ECF No. 24 at 10-14. 4 Due process requires that each essential element of a criminal offense be proven beyond a 5 reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). In reviewing the sufficiency of 6 evidence to support a conviction, the question is "whether, viewing the evidence in the light most 7 favorable to the prosecution, any rational trier of fact could have found the

essential elements of 8 the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, (1974).

If the 9 evidence supports conflicting inferences, the reviewing court must presume “that the trier of fact 10 resolved any such conflicts in favor of the prosecution,” and the court must “defer to that 11 resolution.” *Id.* at 326. 12 The California Court of Appeal rejected petitioner’s sufficiency challenge on direct appeal 13 finding that petitioner’s planning, motive, and manner of killing Mr. Harrison and attempted 14 killing of Mr. Oliphant supported his conviction for first degree murder and attempted 15 premeditated murder.

ECF No. 10-2 at 23-25. Notably, petitioner “did not get out of the truck to 16 help [Mr. Harrison] or call for aid. Instead, he reversed the truck, turned around, and aimed it at 17 Oliphant.... When [petitioner] got out of his truck, he still did not help Harrison or call for aid. 18 Instead, he kicked him in the head and torso several times with his steel-toed boots while yelling 19 racial epithets at him.

The jury could reason from these facts ‘the manner of killing was so 20 particular and exacting that the defendant must have intentionally killed according to a 21 preconceived design to take his victim’s life in a particular way.’” ECF No. 10-2 at 25 (internal 22 quotations and citation omitted). 23 The state court’s denial of petitioner’s sufficiency challenge was not contrary to nor an 24 unreasonable application of the *Jackson* standard of review.

This trial was not much of a 25 credibility contest due to the videotape of the events in the McDonald’s parking lot, the two 26 neutral eyewitnesses in the Clutch Mart parking lot, and the inculpatory statements made by 27 petitioner while waiting in the police cruiser.

To claim the killing of Mr. Harrison was accidental 28 (as petitioner claims) in light of all this evidence was inherently incredible and the jury so 1 concluded. Ultimately, petitioner’s sufficiency challenge boils down to a challenge to the jury’s 2 credibility determinations as to petitioner’s mental state.

However, a jury’s credibility assessment 3 is afforded great weight and is not generally subject to review in federal habeas corpus 4 proceedings. See *Schlup v. Delo*, 513 U.S. 298, 330 1995 (emphasizing that “the assessment of 5 the credibility of witnesses is generally beyond the scope of review” under *Jackson*).

Here, 6 applying the deferential *Jackson* standard of review, a rational jury could have found sufficient 7 evidence to convict petitioner of first degree murder and attempted premeditated murder. See 8 *Boyer v. Belleque*, 659 F.3d 957, 964-65 (9th Cir. 2011) (emphasizing that in a federal habeas 9 action, the review of a sufficiency of the evidence challenge is doubly deferential).

Therefore, the 10 state court's denial of this claim was not an unreasonable determination of the facts nor contrary 11 to federal law. 28 U.S.C. § 2254(d). Claims four through six should be denied. 12 F. PTSD At Trial 13 The court has already rejected petitioner's related IAC claim for failing to investigate and 14 produce evidence of petitioner's PTSD. See supra at IV(D).

In Claim Eight, Petitioner appears to 15 allege he was incompetent at trial because he "was highly medicated suffered from severe 16 (PTSD) mental illness." ECF No. 24 at 17. The record is void of any evidence establishing that 17 petitioner was taking any medication for PTSD that would have affected his mental state at trial 18 or that his mental state was otherwise so altered by PTSD at the time of trial such that he was not 19 competent.

Absent such evidence, Claim Eight should be denied. 20 G. New Claims Raised in Traverse 21 It appears to the court that none of the new claims are properly exhausted. See 28 U.S.C. 22 § 2254(b)(1)(A) (requiring exhaustion of state court remedies before federal habeas relief can be 23 granted). Petitioner does not indicate any efforts he has taken to exhaust these claims in state 24 court or why he failed to raise them previously.

Absent exhaustion, this court is precluded from 25 granting petitioner relief on any of the new claims that he raises for the first time in his traverse. 26 27 5 Moreover, this court is precluded from reviewing any evidence that has not been presented in state court. See Cullen, 563 U.S. 170.

Therefore, the exhibits attached to petitioner's traverse do 28 not provide any basis upon which this court can grant relief. 1 Therefore, they should be denied as unexhausted. 2 V. Request for Evidentiary Hearing 3 By order dated March 8, 2023, the previously assigned magistrate judge denied 4 petitioner's request for an evidentiary hearing as premature at that procedural stage in the 5 litigation.

ECF No. 58. The court indicated that it would reconsider petitioner's request when it 6 reviewed the merits of the amended § 2254 application. To this end, the undersigned finds that, 7 after having reviewed the state court record, petitioner is not entitled to an evidentiary hearing on 8 any of his claims for relief. See 28 U.S.C. § 2254(e)(2). 9 VI. Plain Language Summary for Party Proceeding Without a Lawyer 10 The following information is meant to explain this order in plain English and is not 11 intended as legal advice.

12 The court has reviewed your second amended habeas petition and the trial court record in 13 your case. The undersigned is recommending that your amended habeas petition be denied on the 14 merits. If you disagree with this result, you have 21 days to explain why it is not correct. Label 15 your explanation "Objections to Magistrate Judge's Findings and Recommendations." The 16 district court judge assigned to your case will then review the entire record and make the final 17 decision.

18 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of 19 habeas corpus be denied. 20 These findings and recommendations are submitted to the United States District Judge 21 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty one days 22 after being served with these findings and recommendations, any party may file written 23 objections with the court and serve a copy on all parties.

Such a document should be captioned 24 “Objections to Magistrate Judge’s Findings and Recommendations.” In his objections, petitioner 25 may address whether a certificate of appealability should issue in the event he files an appeal of 26 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district 27 court must issue or deny a certificate of appealability when it enters a final order adverse to the 28 applicant).

A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant 1 || has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(3). 2 || Any response to the objections shall be filed and served within fourteen days after service of the 3 || objections.

The parties are advised that failure to file objections within the specified time may 4 | waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 5 | 1991). 6 || DATED: October 29, 2025 9 SEAN C. RIORDAN UNITED STATES MAGISTRATE JUDGE 10 1] 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 23