

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BERTRAND THOMPSON,

Petitioner,

No. CIV S-03-01375 ALA HC

vs.

SILVIA GARCIA, et al.,

Respondents.

ORDER

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges a conviction entered in the San Joaquin County Court on October 22, 1999 for three counts of murder and two counts of second degree robbery. Petitioner is serving three indeterminate terms of life without the possibility of parole. For the reasons explained below Petitioner's petition is denied.

**I**

On direct appeal, the California Court of Appeal summarized the facts underlying petitioner's conviction and sentence as follows:

**Castaneda–Del Real Robbery and Murders**

On July 12, 1995, 16 year-old Julio Castaneda and his friend, Dario Del Real, were at a party at an apartment in Stockton. Castaneda had his mother's .380-caliber Taurus pistol with him; at

1 one point, he and Del Real shot the gun into the air from the  
2 balcony of the apartment. Thereafter, Castaneda and Del Real left  
the party with the gun, saying they were going around the corner to  
buy some drug paraphernalia.

3 Approximately five minute later, Miguel Ruiz, who was  
4 standing on the balcony outside the apartment, heard six to eight  
gunshots. He saw three or four black men between the ages of 18  
5 and 22 years old running towards an older model car he described  
as a "ratty" brown or gold Mustang or Cougar. After the men sped  
6 away in the car, a Hispanic couple came around the corner and told  
Ruiz that two individuals had been shot. Ruiz and a friend ran  
7 around the corner and found Del Real and Castaneda on the asphalt  
on the east side of North San Joaquin Street.

8 Del Real died as the result of a gunshot wound to the left  
side of the head. An extremely damaged .22 caliber bullet was  
retrieved from his skull.

9 Castaneda died as the result of a relatively close-range  
10 gunshot wound to his chest. A "nominal" .38-caliber expended  
bullet casing was recovered from his body. A "nominal .38"  
11 includes a .38 special, a .357 Magnum, a 9-millimeter, and a .380  
automatic.

12 At the scene, police officers found nine expended  
Winchester .380 shell casings, all fired from Castaneda's .380-  
13 caliber Taurus pistol, but did not find the gun. Six months later, in  
February 1996, the Taurus pistol was recovered during a routine  
14 traffic stop of a car driven by Ebien Alston. Alston told Detective  
David Anderson that Alston had traded an Uzi and \$250 in cash to  
15 defendant Webb<sup>1</sup> for the Taurus Pistol. The Uzi was later found  
under a mattress in Webb's residence. When Detective Anderson  
16 interviewed him on February 28, 1996, Webb denied any  
knowledge of the Uzi or of the murders of Castaneda and Del Real.  
17 Anderson interviewed Webb again on February 12, 1998; this time,  
Webb admitted that he owned the Uzi. He also admitted  
18 "kick[ing] [Alston's] butt" for "snitching him off" regarding the  
trade for the Uzi.

19 At the scene of the homicides of Castaneda and Del Real,  
officers also found a pager that belonged to Christopher Culberson.  
20 Culberson and defendants were friends who lived in the same  
Stockton neighborhood. Culberson told officers that he was with  
21 defendants when Castaneda and Del Real were murdered. In  
exchange for his testimony, Culberson was not charged with the  
22 murders, criminal charges pending against him in Nevada were  
dismissed, and a bank robbery charge was reduced to grand theft.  
23 Because Culberson was murdered prior to trial, a redacted version  
of his testimony at defendants' preliminary hearing was read into  
the trial record as follows:

24 On the evening of the homocides, Culberson and

---

25 <sup>1</sup> The California Court of Appeal decision resulted from an appeal brought by Petitioner  
26 and Mr. Webb, a co-defendant at Petitioner's trial.

1 defendants were looking for some marijuana in downtown  
2 Stockton. They were in [Petitioner's] brown Mustang, which had a  
3 missing bumper and grill. The men planned to wait until someone  
4 approached them to sell them drugs while they sat in [Petitioner's]  
5 car, and then they would "snatch" the marijuana when the seller  
6 reached inside. Although they were all armed, there were no plans  
7 to shoot or rob anyone; they simply carried guns with them  
8 everywhere they went. If they could not snatch the marijuana, they  
9 were going to buy some with the eight dollars they had between  
10 them.

11 When no one approached them, they drove down a different  
12 street, parked, and got out of the car. While they were walking  
13 down the street, someone behind them started shooting. The men  
14 ducked and pulled out their guns; [Petitioner] had a .22 revolver,  
15 defendant Webb had a .38 revolver and Culberson had a .380  
16 Glock. When they did not see anyone shooting at them, they put  
17 away their weapons.

18 The men then headed eastbound toward the intersection of  
19 North San Joaquin Street and Flora Street, where they approached  
20 two young Hispanic boys. [Petitioner] asked the boys if they knew  
21 where the "weed" was, but the boys said they did not have any.  
22 Webb asked them if they were the ones shooting. Castaneda  
23 replied they had been shooting in the air. Webb asked Castaneda  
24 what kind of gun he had and if he wanted to sell it. When  
25 Castaneda said he did not want to sell his pistol, Webb pulled out  
26 his .38 revolver, pointed it at Castaneda, and said, "Hand it here."  
Castaneda tried to comply, but Webb tackled him and shot him  
with the revolver before Castaneda had the Taurus Pistol out of his  
pocket.

Del Real was screaming and Culberson was looking at  
Castaneda on the ground when Culberson heard a second shot fired  
from the side. Culberson turned and saw [Petitioner] putting his  
gun away as Del Real collapsed to the ground. Webb picked up  
Castaneda's Taurus pistol, and Webb, [Petitioner], and Culberson  
ran from the scene.

On the way home in [Petitioner's] Mustang, Culberson  
asked Webb why he had shot Castaneda. Webb replied that  
Castaneda had been "pulling for [his] gun." When Culberson  
disagreed, Webb inspected the Taurus pistol and found it contained  
only an empty clip.

Culberson saw [Petitioner] the next day, and asked why he  
had shot Del Real. [Petitioner] replied that he did them a favor  
because, if he had not shot him, the boy would have been a  
witness. [Petitioner] joked about the killing and said he "puffed"  
the boy.

### **Flores Robbery and Murder**

On the night of October 20, 1995, Vincent Flores, who had  
arranged to make a sale of a large amount of methamphetamine,  
went to a meeting with the buyers outside a grocery store in

1 Stockton. His wife, Theresa, followed in another car and was to  
2 hold onto the bag of methamphetamine until Flores had received  
the purchase money. At that point, Flores would call her on his  
cellular telephone, and she would drop off the drugs.

3 After Flores parked his Blazer, Theresa watched two men  
4 get into the vehicle, which then drove out of the parking lot. She  
waited fifteen minutes for Flores to call. When he did not, she  
5 went looking for him. By the time Theresa found the Blazer,  
emergency vehicles were there. Thus, she hid the  
methamphetamine in some bushes.

6 Flores had been shot, and his lifeless body was in the front  
passenger seat. All the bullets that killed him were fired by the  
7 same weapon, which could have been either a .38 Special revolver  
or a .357 Magnum revolver. The pathologist who conducted the  
8 autopsy testified the locations of Flores's gunshot wounds were  
consistent with the bullets coming from a gun held to the left of the  
9 victim; however, the pathologist could not definitively reconstruct  
what happened at the time of the shooting. A California  
10 Department of Justice criminalist opined the most likely scenario  
was that the fatal wound came from the back seat of the vehicle.

11 Officers recovered the bag of methamphetamine that  
Theresa had secreted in the bushes; it held 446.4 grams of  
12 methamphetamine, with a wholesale value of \$7,000 to \$8,000.  
Flores's cellular telephone was found in the rear seat of his Blazer,  
13 and two loaded 9-millimeter magazine clips were found in his left  
front pocket. Flores's 9-millimeter handgun was missing.

14 Flores's black book contained telephone and pager numbers  
for "Tim" or "Timmy," and telephone records showed that Flores  
15 had been in contact with Timothy Bludworth.<sup>2</sup> Bludworth, who  
was [Petitioner's] brother-in-law, worked with Flores and had  
16 engaged in methamphetamine sales with him.

17 On February 25, 1998, Detectives Anderson and Gary  
Catherwood interviewed [Petitioner] at the Washoe County Jail in  
Nevada. [Petitioner] had fled to Nevada after Bludworth was  
18 arrested. After initially denying any involvement in the Flores  
murder, [Petitioner] admitted that he went with Bludworth to rob  
19 Flores in a fake methamphetamine buy. Bludworth was planning  
to get a quarter or half a kilogram of methamphetamine, and had  
20 [Petitioner] borrow a gun for Bludworth to use that night.  
[Petitioner's] cut from the robbery was going to be an ounce of  
21 methamphetamine.

22 According to [Petitioner], when he and Bludworth arrived  
at the grocery store, [Petitioner] got into the back of Flores's  
Blazer and Bludworth got into the front passenger seat. After  
23 talking to Flores as if it were a regular buy, Bludworth pulled out  
his gun and disarmed Flores. Bludworth gave Flores's gun to  
24 [Petitioner], who kept the gun aimed on Flores. Bludworth then  
got out of the Blazer, walked around the vehicle, and had Flores  
25

---

26 <sup>2</sup> Timothy Bludworth was separately charged.

1 scoot over to the passenger seat. They drove about while  
2 Bludworth and Flores argued about the location of the drugs.  
3 [Petitioner], who was tired of the argument and thought the  
4 transaction "wasn't going right," asked to be dropped off. He was  
5 attempting to get out when Bludworth started shooting Flores.  
6 Bludworth had given Flores's cellular telephone to [Petitioner]  
7 who planned to take it. But [Petitioner] got so scared he dropped  
8 it as he ran away. [Petitioner] thought Bludworth was going to rob  
9 Flores. He did not know that Bludworth was going to kill anyone.

10 Christopher Culberson learned of the Flores murder  
11 sometime in late October 1995. His testimony about that event  
12 was as follows:

13 While Culberson was at defendant Webb's house, Webb  
14 made a trigger motion with his finger and told Culberson that  
15 "[Petitioner] did another one." Webb stated [Petitioner] was  
16 supposed to meet a white man who was bringing a "pound of  
17 crank." According to Webb, he drove [Petitioner] and Bludworth  
18 to meet the dealer at a grocery store and watched them get into a  
19 Blazer with a white man. Webb heard gunshots, and [Petitioner]  
20 and Bludworth walked back to the car. Webb said that he "knew  
21 the dude was dead" when he heard the gunshots.

22 [Petitioner] was not present when Webb told Culberson  
23 about the murder. [Petitioner] arrived about 20 minutes later, and  
24 Webb was standing five to six feet away when [Petitioner] told his  
25 version of the Flores murder. [Petitioner] said he was with his  
26 brother-in-law and Webb, who had driven them to meet the dealer.  
At the meeting, [Petitioner] climbed into the back seat of the  
dealer's Blazer. At first, "the white guy" asked where the money  
was and if they were "playing games." [Petitioner] asked the man  
where his gun was, and Flores motioned in reply. Bludworth  
reached for the gun, and [Petitioner] snatched the gun from his  
hand, asking Flores, "Where is the stuff?" Flores explained that  
his girlfriend had the goods at a nearby gas station and he wanted  
to see the money before he went to make the exchange. [Petitioner]  
stated to Flores: "You mean you telling me you didn't bring the  
stuff with you?" When Flores replied that he had not, [Petitioner]  
said: "Well, that's where you fucked up at" and shot him.

### 20 **Petitioner's Testimony**

21 [Petitioner], who admitted that he had committed a first-  
22 degree residential burglary in 1996, denied killing anyone, stating  
23 that Webb and Culberson killed the two boys and Bludworth killed  
24 Flores. [Petitioner] testified as follows:

25 On the night of the Castaneda and Del Real murderers (sic),  
26 [Petitioner] was with Webb and Culberson, who said they should  
go downtown to "snatch" some weed from the "Mexicans." They  
planned to approach someone selling marijuana, get it in their own  
hands, and run off. [Petitioner] had a 9-millimeter gun which could  
use .380 bullets, Webb had a .380 automatic handgun, and  
Culberson was carrying a .22-caliber revolver; but they did not

1 plan to use the guns. [Petitioner] drove his 1972 Mustang.

2 According to [Petitioner], he was not with Webb or  
3 Culberson at the time of the shootings. He was across the street  
4 near the intersection of Hunter and Flora when he saw Webb and  
5 Culberson arguing with two black men, who ran north on Hunter.  
6 [Petitioner] heard a series of gunshots, and then heard two more  
7 shots as he was heading towards the cars. He saw Webb and  
8 Culberson standing around the corner; two bodies were lying in the  
9 street. Webb and Culberson ran towards him, and [Petitioner]  
10 picked up the gun that Culberson dropped. After some confusion,  
11 they found their car and left the area with [Petitioner] driving.  
12 Webb and Culberson told [Petitioner] not to tell anybody. A few  
13 days later, Culberson said he had "puffed that motherfucker."

14 Regarding the Flores murder, [Petitioner] admitted  
15 procuring a gun for his brother-in-law, Bludworth, to use in a drug  
16 run and that [Petitioner] had agreed to go with Bludworth and  
17 bring a friend in exchange for one ounce each of  
18 methamphetamine. Bludworth picked [Petitioner] up that evening,  
19 and Webb joined them. Although [Petitioner] admitted he had  
20 known the gun he borrowed for Bludworth was going to be used in  
21 a robbery, he claimed he did not know for sure that Bludworth was  
22 planning a robbery until [Petitioner] got in the car and Bludworth  
23 "told me exactly." Bludworth said that one of his partners was  
24 going to bring him a quarter kilo or a half kilo and that he was  
25 going to "burn" him, which meant a "rip-off." [Petitioner] knew  
26 Bludworth was going to rob the drug dealer, but neither he nor  
Webb backed out after Bludworth told them his plan. On the way  
to the meeting, [Petitioner] stopped at his mother's house and  
obtained a bag full of pieces of paper he intended to pass off as  
money.

Bludworth drove them to a park near a grocery store, and  
Webb stayed with the car while [Petitioner] and Bludworth went to  
meet Flores. Webb gave [Petitioner] his 9-millimeter Ruger with a  
laser sight to take with him.

When the two men arrived at Flores's vehicle, [Petitioner]  
climbed into the back seat. Flores pulled out two baggies, handed  
them to Bludworth, and told him to check out the  
methamphetamine. When Flores asked if he had the money,  
Bludworth said yes and pulled out a gun. At this point, Flores  
admitted that he did not have all of the methamphetamine with  
him. Bludworth asked Flores where his gun was, then grabbed the  
gun and gave it to [Petitioner] with instructions that he hold it on  
Flores. Nevertheless, according to [Petitioner] he did not point the  
gun at Flores. Bludworth then got out of the Blazer, walked  
around to the driver's side, and directed Flores's to scoot over.  
Bludworth grabbed Flores's cellular telephone and gave it to  
[Petitioner].

As Bludworth started to drive out of the parking lot,  
[Petitioner] thought things "[were not] going right" and told  
Bludworth to take him back to Webb. When they got to the stop  
sign, Bludworth opened the driver's door and [Petitioner] started to



1 move over; but, before he got out of the car, he heard a gunshot  
2 and dropped the cellular telephone. After pushing Bludworth  
3 forward so he could squeeze out of the vehicle, [Petitioner] ran  
4 back to the car where Webb was waiting. When Bludworth arrived  
5 at the car, [Petitioner] still had Webb's gun and Flores's gun,  
6 which he gave to Bludworth.

### 7 **Defendant Webb's Testimony**

8 Webb testified as follows:

9 Culberson was a violent and dishonest person. They ended  
10 their friendship in 1996 after Culberson "ripped-off" \$200 or \$250  
11 in cocaine.

12 On the night of the Castaneda and Del Real homicides in  
13 1995, Webb and Culberson each had four or five dollars and set  
14 out with [Petitioner] to buy some marijuana. Webb did not intend to  
15 "snatch" any drugs, although there may have been some discussion  
16 regarding a "snatch" from the "Mexicans." They were driving in  
17 [Petitioner's] "ratty old Mustang," but stopped and got out near  
18 Sutter Street because the car did not have enough gas.

19 When they approached two black men about buying  
20 marijuana, Webb heard shots being fired from down the street. He  
21 ducked, pulled out his .38-caliber revolver and, after the shooting  
22 stopped, ran around the corner on San Joaquin street. Webb saw  
23 Culberson and [Petitioner] talking to Castaneda and Del Real.  
24 They asked the boys if they had been shooting at them and if they  
25 had any "weed." The boys replied that they had not been shooting  
26 at anyone and did not have any marijuana for sale. [Petitioner] and  
Culberson asked if the boys where the group could buy some  
marijuana.

At this point, Webb saw that Castaneda had a look in his  
eyes and it seemed like he was going for something in his  
waistband, which Webb thought might be a gun. Webb lurched at  
Castaneda and pulled out his own gun, which went off. Webb  
heard a second shot, then got up and ran towards North San  
Joaquin Street. According to Webb, Culberson took Castaneda's  
Taurus pistol. Webb did not see Thompson shoot Del Real.

When they were all in the car, Culberson asked Webb why  
he shot Castaneda and showed him the empty ammunition clip in  
the Taurus pistol. Culberson asked [Petitioner] why he had shot  
the other boy, and [Petitioner] replied he did them a favor since the  
boy would have been a witness.

Sometime in the next two months, Culberson traded Webb  
the Taurus pistol for some marijuana and cash, and Webb traded  
the gun and some cash to Ebien Alston for the Uzi. Webb  
admitted that he and Culberson beat up Alston for talking to the  
police about trading his Uzi for the Taurus. He also admitted that  
he had lied to Detective Anderson during his interviews and had  
not revealed to Anderson that he had shot Castaneda in self-  
defense.

Regarding the Flores murder and robbery, Webb stated that

[Petitioner] called him the day of the murder to see if he wanted to contribute \$200 or \$300 towards a drug buy that [Petitioner's] brother-in-law was putting together. [Petitioner] said Webb would receive an ounce of methamphetamine in return. Webb declined but went along for the ride. He denied he was armed that night.

While he was waiting alone at the park, Webb heard gunshots and then saw [Petitioner] and Bludworth come running towards him. Bludworth drove them home. When Webb asked what happened Bludworth stated: "it wasn't supposed to happen like that." Bludworth said that he had to shoot the dealer because the "guy" did not have the "stuff." At first, Webb denied talking to Culberson about the Flores murder; he then admitted that three or four days after the murder he told Culberson that [Petitioner] "did another one. He shot a guy because he didn't have the stuff."

Answer, Ex. D at 3-14.

Petitioner's conviction and sentence were upheld on appeal. *Id.* at 28. Petitioner sought review of the California Court of Appeal decision in the California Supreme Court. Answer, Ex. E.

Petitioner's request for review was denied without comment. Answer, Ex. F.

## II

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under section 2254(d)(1), a state court decision is "contrary to" clearly established United States Supreme Court precedents if it applies a rule that contradicts the governing law set forth in Supreme Court cases, or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000)).



1 Under the “unreasonable application” clause of section 2254(d)(1), a federal  
2 court may grant an application for a writ of habeas corpus if the state court identifies the correct  
3 governing legal principle from the Supreme Court’s decisions, but unreasonably applies that  
4 principle to the facts of the prisoner’s case. *Williams*, 529 U.S. at 413. A federal habeas court  
5 “may not issue the writ simply because that court concludes in its independent judgment that the  
6 relevant state-court decision applied clearly established federal law erroneously or incorrectly.  
7 Rather, that application must also be unreasonable.” *Id.* at 412; *see also Lockyer v. Andrade*,  
8 538 U.S. 63, 75 (2003) (it is “not enough that a federal habeas court, in its independent review of  
9 the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”)

10 A federal court looks to the last reasoned state court decision as the basis for the  
11 state court judgment. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court  
12 reaches a decision on the merits but provides no reasoning to support its conclusion, a federal  
13 court must independently review the record to determine whether habeas corpus relief is  
14 available under section 2254(d). *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). As the  
15 last reasoned state court opinion in this matter, this court will review the decision of the  
16 California Court of Appeal. *See Answer, Ex. D.*

### 17 III

18 Petitioner claims that “[t]he evidentiary record required the trial court to instruct  
19 on attempted theft and theft as lesser included offenses of attempted robbery.” Amended  
20 Petition at 4. The California Court of Appeal rejected petitioner’s argument.

21 In the Castaneda and Del Real robbery and murders the California Court of  
22 Appeal held that an instruction on a lesser included offense must be given only when there is a  
23 question as to whether all elements of a charged offense were present and there is evidence  
24 justifying conviction of a lesser offense. *Answer, Ex D.* at 19. The California Court of Appeal  
25 found no evidence raising a question as to whether all the elements of robbery were present and  
26 therefore rejected Petitioner’s claim. *Id.*

1 In the Flores robbery and murder the California Court of Appeal held that even if  
2 the evidence warranted a jury instruction on attempted theft or theft, the trial court committed  
3 only harmless error because there was no showing of a reasonable probability that the lack of the  
4 requested instruction affected the outcome. *Id.* at 22. Specifically the court noted that the jury  
5 found that Petitioner used a firearm in the commission of the offense at issue. *Id.* Use of a  
6 firearm during a theft is a robbery because the theft involves the use of force. *Id.* As such, it  
7 was not probable that, even if instructed, the jury would have found Petitioner guilty of  
8 attempted theft or theft instead of robbery. *Id.* Petitioner again challenges the refusal of the trial  
9 court to instruct the jury on attempted theft and theft as lesser included offenses, arguing, “[t]he  
10 evidence warranting instruction on attempted theft and theft was overwhelming.” Petition at 4.

11 A challenge to jury instructions does not generally state a federal constitutional  
12 claim. *See Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (*citing Engle v. Isaac*, 456  
13 U.S. 107, 119 (1982)); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983). However, a  
14 “claim of error based upon a right not specifically guaranteed by the Constitution may  
15 nonetheless form a ground for federal habeas corpus relief where its impact so infects the entire  
16 trial that the resulting conviction violates the defendant’s right to due process.” *Hines v.*  
17 *Enomoto*, 658 F.2d 667, 672 (9th Cir. 1981) (*citing Quigg v. Crist*, 616 F.2d 1107 (9th Cir.  
18 1980)); *See also Prantil v. California*, 843 F.2d 314, 317 (9th Cir. 1988) (To prevail on such a  
19 claim petitioner must demonstrate that an erroneous instruction “so infected the entire trial that  
20 the resulting conviction violates due process.”) The analysis for determining whether a trial is  
21 “so infected with unfairness” as to rise to the level of a due process violation is similar to the  
22 analysis used in determining, under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), whether  
23 an error had “a substantial and injurious effect” on the outcome. *See Thomas v. Hubbard*, 273  
24 F.3d 1164, 1179 (9th Cir. 2001), overruled on other grounds by *Payton v. Woodford*, 299 F.3d  
25 815, 828 n.11 (9th Cir. 2002).

26 Because the omission of an instruction is less likely to be prejudicial than a

1 misstatement of the law, a habeas petitioner whose claim involves a failure to give a particular  
2 instruction bears an especially heavy burden. *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).  
3 Here, Petitioner has not overcome that burden for either robbery.

4 As to the Castaneda and Del Real robbery and murders Petitioner argues that,  
5 “[t]here was no plan to ‘rob people’– the plan was to snatch marijuana. The important fact is  
6 that ‘snatching’ is ‘not robbery.’” Petition at 6. However, as the California Court of Appeal  
7 stated...

8 [a]lthough there is evidence that defendants were planning to steal  
9 marijuana from someone, they do not identify any substantial  
10 evidence that they were attempting to steal marijuana from the  
11 victims at the time the boys were shot, such that defendants could  
12 be found guilty of attempted theft as a lesser included offense of  
13 the charged robbery. Rather, the evidence discloses that the boys  
14 said they did not have any marijuana and that defendants asked  
15 where they could buy some, after which one of the following  
16 occurred: (1) Webb stole Castaneda’s gun at gunpoint and shot  
17 him, whereupon [Petitioner] shot Del Real because he was a  
18 witness; (2) Webb, who only intended to buy marijuana, shot  
19 Castaneda when it looked like he was going for a gun, and  
20 [Petitioner] then shot Del Real because he was a witness; or (3)  
21 [Petitioner] was not present when Webb and Culberson shot the  
22 boys and took the Taurus pistol, and [Petitioner] proffered no  
23 testimony regarding what precipitated the shooting. None of these  
24 scenarios support a determination that defendants were engaged in  
25 an attempted theft of marijuana from the boys at the time the boys  
26 were shot.

18 Answer, Ex. D at 16-17.

19 As to the Flores robbery and murder Petitioner argues that, “[b]ecause the court  
20 cannot determine which theory the jury relied upon, and the jury instruction error in failing to  
21 instruct on theft affected the ‘robbery-of-gun’ theory, too, reversal is required for the reasons set  
22 forth above regarding the Castaneda convictions.” Petition at 15. However, Petitioner testified  
23 that he armed himself and accompanied Bludworth to meet Flores, knowing that Bludworth  
24 intended to rob Flores. Answer, Ex. D at 21. *See also* Petition at 16 (Petitioner recounting his  
25 cross examination: “I didn’t know it was going to be a robbery until we got in the car.”)  
26 Petitioner points to his use of a bag full of fake money as evidence that Petitioner did not intend

1 to take the drugs by force. Petition at 17. However, as the California Court of Appeal noted, it  
2 was unreasonable to believe that a drug dealer would not verify the receipt of money prior to  
3 surrendering a pound of methamphetamine and Petitioner could not explain how they intended to  
4 get the drugs without payment or use of force. Answer, Ex. D at 22.

5 Based upon the evidence presented, Petitioner was not entitled to an instruction on  
6 the lesser included offenses of attempted theft or theft in either robbery. Therefore, the refusal by  
7 the trial court to instruct the jury on the lesser include offenses of attempted theft or theft was not  
8 a violation of federal law, was not an unreasonable application of law to facts and did not render  
9 Petitioner's trial fundamentally unfair.

#### 10 IV

11 Petitioner alleges that his conviction was based solely upon the testimony of  
12 Christopher Culberson and that Mr. Culberson was an accomplice as a matter of law. Petition at  
13 4. Petitioner alleges that this violated California Penal Code § 1111.

14 California Penal Code §1111 reads...

15 [a] conviction cannot be had upon the testimony of an accomplice  
16 unless it be corroborated by such other evidence as shall tend to  
17 connect the defendant with the commission of the offense; and the  
18 corroboration is not sufficient if it merely shows the commission of  
19 the offense or the circumstances thereof.

20 An accomplice is hereby defined as one who is liable to  
21 prosecution for the identical offense charged against the defendant  
22 on trial in the cause in which the testimony of the accomplice is  
23 given.

24 Cal. Penal Code §1111.

25 The California Court of Appeal concluded that Mr. Culberson was not an  
26 accomplice and therefore Petitioner was properly convicted under the California state statute.  
Answer, Ex. D at 26. In this regard, the conclusion by the California Court of Appeal may not be  
set aside in this federal habeas corpus proceeding. *See Estelle*, 502 U.S. at 67-68 (a federal writ  
is not available for alleged error in the interpretation or application of state law); *Aponte v.*

1 *Gomez*, 993 F.2d 705, 707 (9th Cir. 1993) (federal courts are “bound by a state court’s  
 2 construction of its own penal statutes”); *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1399 (9th Cir.  
 3 1989) (a federal court must defer to the state court’s construction of its own penal code unless its  
 4 interpretation is “untenable or amounts to a subterfuge to avoid federal review of a constitutional  
 5 violation”). There is no evidence before this court that the interpretation of the California statute  
 6 by the California Court of Appeal is untenable and or amounts to a subterfuge. Therefore, this  
 7 claim does not support habeas corpus relief.

## 8 V

9 Petitioner asserts that, because his conviction was based entirely on what  
 10 Petitioner contends was the testimony of an accomplice, Petitioner received ineffective assistance  
 11 of counsel because his trial counsel failed to move for an acquittal under California Penal Code §  
 12 1118.1. Petition at 5. California Penal Code § 1118.1 reads...

13 [i]n a case tried before a jury, the court on motion of the defendant  
 14 or on its own motion, at the close of the evidence on either side and  
 15 before the case is submitted to the jury for decision, shall order the  
 16 entry of a judgment of acquittal of one or more of the offenses  
 17 charged in the accusatory pleading if the evidence then before the  
 18 court is insufficient to sustain a conviction of such offense or  
 offenses on appeal. If such a motion for judgment of acquittal at  
 the close of the evidence offered by the prosecution is not granted,  
 the defendant may offer evidence without first having reserved that  
 right.

19 Cal. Penal Code § 1118.1. Petitioner claims that, “[w]hen Culberson’s testimony is removed  
 20 from the prosecution’s case, there is no evidence connecting Petitioner to the Castaneda/Del Real  
 21 crimes....There can be no ‘tactic’ in failing to make a dismissal motion and remove two murder  
 22 charges and a robbery charge from the jury’s consideration.” Petition at 24.

23 The Sixth Amendment guarantees the effective assistance of counsel. The United  
 24 States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in  
 25 *Strickland v. Washington*, 466 U.S. 668 (1984). To support a claim of ineffective assistance of  
 26 counsel, a Petitioner must first show that, considering all the circumstances, counsel’s

1 performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at  
2 687-88. After a petitioner identifies the acts or omissions that are alleged not to have been the  
3 result of reasonable professional judgment, the court must determine whether, in light of all the  
4 circumstances, the identified acts or omissions were outside the wide range of professionally  
5 competent assistance. *Id.* at 690; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Second, a  
6 petitioner must establish that he was prejudiced by counsel's deficient performance. *Strickland*,  
7 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for  
8 counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at  
9 694. A reasonable probability is "a probability sufficient to undermine confidence in the  
10 outcome." *Id.* *See also Williams*, 529 U.S. at 391-92; *Laboa v. Calderon*, 224 F.3d 972, 981  
11 (9th Cir. 2000). A reviewing court "need not determine whether counsel's performance was  
12 deficient before examining the prejudice suffered by the defendant as a result of the alleged  
13 deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of  
14 sufficient prejudice . . . that course should be followed." *Pizzuto v. Arave*, 280 F.3d 949, 955  
15 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 697).

16 In assessing an ineffective assistance of counsel claim "[t]here is a strong  
17 presumption that counsel's performance falls within the 'wide range of professional assistance.'" *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (quoting *Strickland*, 466 U.S. at 689). There  
18 is in addition a strong presumption that counsel "exercised acceptable professional judgment in  
19 all significant decisions made." *Hughes v. Borg*, 898 F.2d 695, 702 (9th Cir. 1990) (citing  
20 *Strickland*, 466 U.S. at 689). However, that deference "is predicated on counsel's performance  
21 of sufficient investigation and preparation to make reasonably informed, reasonably sound  
22 judgments." *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc).

24 Petitioner's claim of ineffective assistance of counsel could only be substantiated  
25 if it were true that Mr. Culberson was an accomplice. The California Court of Appeal found that  
26 Mr. Culberson was not an accomplice, and therefore Petitioner did not receive ineffective



1 assistance of counsel. Answer, Ex. D at 26. As discussed above, this court cannot disturb the  
 2 ruling of the California Court of Appeal in regard to whether or not Mr. Culberson was an  
 3 accomplice. If Mr. Culberson was not an accomplice, then there was no grounds for Petitioner's  
 4 attorney to move for a judgment of acquittal. As such, Petitioner's claim fails because he cannot  
 5 point to any act or omission by his trial counsel that was not the result of reasonable professional  
 6 judgment.

## 7 VI

8 \_\_\_\_\_ Finally, Petitioner claims that, "[b]ased on the verdicts, the evidence was  
 9 insufficient to support Petitioner's convictions in the Castaneda/Del Real shooting and the Flores  
 10 shooting." Petitioner at 5.

11 The Due Process Clause of the Fourteenth Amendment "protects the accused  
 12 against conviction except upon proof beyond a reasonable doubt of every fact necessary to  
 13 constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). There  
 14 is sufficient evidence to support a conviction if, "after viewing the evidence in the light most  
 15 favorable to the prosecution, any rational trier of fact could have found the essential elements of  
 16 the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See also*  
 17 *Prantil v. California*, 843 F.2d 314, 316 (9th Cir. 1988) (per curiam). "[T]he dispositive  
 18 question under *Jackson* is 'whether the record evidence could reasonably support a finding of  
 19 guilt beyond a reasonable doubt.'" *Chein v. Shumsky*, 373 F.3d 978, 982 (9th Cir. 2004) (quoting  
 20 *Jackson*, 443 U.S. at 318). A petitioner in a federal habeas corpus proceeding "faces a heavy  
 21 burden when challenging the sufficiency of the evidence used to obtain a state conviction on  
 22 federal due process grounds." *Juan H. v. Allen*, 408 F.3d 1262, 1274, 1275 & n.13 (9th Cir.  
 23 2005). In order to grant the writ, the habeas court must find that the decision of the state court  
 24 reflected an objectively unreasonable application of *Jackson* and *Winship* to the facts of the case.  
 25 *Sarausad v. Porter*, 479 F.3d 671, 677 (9th Cir. 2007).

26 The court must review the entire record when the sufficiency of the evidence is

1 challenged in habeas proceedings. *Adamson v. Ricketts*, 758 F.2d 441, 448 n.11 (9th Cir. 1985),  
2 *vacated on other grounds*, 789 F.2d 722 (9th Cir. 1986) (en banc), *rev'd*, 483 U.S. 1 (1987). It is  
3 the province of the jury to “resolve conflicts in the testimony, to weigh the evidence, and to draw  
4 reasonable inferences from basic facts to ultimate facts.” *Jackson*, 443 U.S. at 319. If the trier of  
5 fact could draw conflicting inferences from the evidence, the court in its review will assign the  
6 inference that favors conviction. *McMillan v. Gomez*, 19 F.3d 465, 469 (9th Cir. 1994). The  
7 relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether  
8 the jury could reasonably arrive at its verdict. *United States v. Mares*, 940 F.2d 455, 458 (9th  
9 Cir. 1991). “The question is not whether we are personally convinced beyond a reasonable  
10 doubt. It is whether rational jurors could reach the conclusion that these jurors reached.”  
11 *Roehler v. Borg*, 945 F.2d 303, 306 (9th Cir. 1991). The federal habeas court determines the  
12 sufficiency of the evidence in reference to the substantive elements of the criminal offense as  
13 defined by state law. *Jackson*, 443 U.S. at 324 n.16; *Chein*, 373 F.3d at 983.

14 As to the convictions for the Castaneda and Del Real robbery and murders,  
15 Petitioner testified that he agreed to travel with the other defendants to steal marijuana from  
16 someone. RT at 1294-1295. Petitioner agreed that the stealing could be characterized as a  
17 robbery. RT at 1348. Finally, Petitioner testified he was armed. RT at 1295.

18 Webb’s testified that Petitioner admitted shooting Del Real. RT at 1604.  
19 Additionally, the jury was presented with a redacted copy of Culberson’s preliminary hearing  
20 transcript<sup>3</sup> at which Culberson testified that he saw Petitioner putting his gun away shortly after  
21 Del Real fell to the ground and that the next day Petitioner admitted to killing Del Real. Clerk’s  
22 Augmented Transcript on Appeal at 21-25. Presented with such evidence, a rational juror could  
23 reach the conclusion reached in this matter and find Petitioner guilty of one count of robbery and  
24 two counts of murder.

---

25  
26 <sup>3</sup> Because Culberson was murdered prior to trial, a redacted version of his testimony at  
defendants’ preliminary hearing was read into the trial record.

1 As to the Flores robbery and murder, Petitioner testified that he accompanied  
2 Culberson knowing that Culberson intended to rob Flores. RT at 1540. Petitioner also testified  
3 that he loaned Culberson a handgun to use during the robbery. RT at 1480. Petitioner testified  
4 that he was also armed. RT at 1482. Additionally, the jury was presented with a redacted copy  
5 of Culberson's preliminary hearing transcript at which Culberson testified that it was Petitioner  
6 that demanded the drugs from Flores at gun point, that Petitioner took Flores' weapon and that  
7 Petitioner admitted to shooting Flores. Clerk's Augmented Transcript on Appeal at 37.  
8 Presented with such evidence, a rational juror could reach the conclusion reached in this matter  
9 and find Petitioner guilty of one count of robbery and one count of murder. Therefore, after a  
10 review of the entire record, this court finds that the evidence was sufficient to support  
11 Petitioner's conviction on all counts.

## 12 **VII. Conclusion**

13 \_\_\_\_\_ In accordance with the above, IT IS HEREBY ORDERED that Petitioner's  
14 petition for habeas corpus relief under § 2254 is denied and is dismissed.

15 DATED: September 18, 2007

17 \_\_\_\_\_ /s/ Arthur Alarcón

18 \_\_\_\_\_ UNITED STATES CIRCUIT JUDGE

19 \_\_\_\_\_ Sitting by Designation  
20  
21  
22  
23  
24  
25  
26