

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

JASON P. VOELKER,

No. C 08-1285 CW (PR)

Petitioner,

v.

ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS; DENYING  
CERTIFICATE OF APPEALABILITY

M.C. KRAMER, Warden,

Respondent.

INTRODUCTION

Petitioner Jason P. Voelker, a state prisoner incarcerated at the Sierra Conservation Center in Jamestown, California, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging his criminal convictions and sentence from Marin County Superior Court.

On August 22, 2008, this Court issued an Order to Show Cause why the writ should not be granted. On February 20, 2009, Respondent filed an Answer. On April 21, 2009, Petitioner filed a Traverse.

1 Having considered all of the papers filed by the parties, and  
2 for the following reasons, the Court DENIES the Petition.

3 BACKGROUND

4 The following procedural background and summary of the facts of  
5 Petitioner's commitment offenses is derived from the November 9,  
6 2005 state appellate court opinion<sup>1</sup> affirming the judgment of the  
7 trial court.

8 Defendant was convicted following a jury trial  
9 of first degree robbery in concert (Pen. Code, §§  
10 211, 213, subd. (a)(1)(A)), FN1, assault by means  
11 likely to cause great bodily injury (§ 245, subd.  
12 (a)(1)), and false imprisonment by violence (§ 236).  
13 The jury also found that defendant personally  
14 inflicted great bodily injury upon the victim  
15 (§ 12022.7, subd. (a)) in association with the  
16 robbery and assault offenses. Defendant claims in  
17 this appeal that the trial court erred by failing to  
18 give a voluntary intoxication instruction, and gave  
19 an erroneous instruction on infliction of great  
20 bodily injury. He also challenges the evidentiary  
21 support for the great bodily injury enhancement  
22 finding, and complains that the enhancement was  
23 improperly reinstated by the trial court after it  
24 was dismissed by the prosecution. We find that no  
25 prejudicial instructional errors occurred, the great  
26 bodily injury enhancement finding is supported by  
27 the evidence, and the dismissed enhancement was  
28 properly reinstated to correct a clerical error. We  
therefore affirm the judgment.

STATEMENT OF FACTS

21 The victim, Damian Diprima, encountered  
22 defendant at Matteucci's bar in San Anselmo on the  
23 night of November 6, 2003. Defendant was sitting at  
24 a poker table in the bar with a man named Zeph  
25 Carter, whom Diprima had also met that night.  
26 Diprima described Carter as a "Black male, five  
27 nine," between 160 and 170 pounds. Diprima  
28 testified that he was introduced by Carter to  
defendant, who was a "White male," about "six one,

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<sup>1</sup> This was submitted by Respondent as Exhibit G and will  
hereinafter be referred to as "Opinion."

1 six two, 170 pounds, with a "fade" haircut, wearing  
2 a black hooded sweatshirt and a large diamond  
earring. They briefly conversed and drank beer.

3 During the course of their conversation,  
4 defendant asked if Carter and Diprima "wanted weed."  
5 Diprima replied that he "would take a 20 sack."  
6 Defendant stated that he "had to go to his apartment  
7 to get it," about four or five blocks away, and  
8 asked Diprima for a ride. Diprima declined to drive,  
but offered defendant his car and put the keys on  
the table. Defendant did not take the keys, so  
Diprima took them back and went to the rear patio  
area to smoke a cigarette.

9 When Diprima returned to the crowded bar area  
10 to get another beer, defendant was seated there.  
11 Diprima put his hand on [Petitioner's] shoulder and  
12 said, "Hey, nigga, let me get in here." Diprima  
13 considered the word "nigga" as a term of  
14 "endearment," but defendant exhibited a negative  
15 facial reaction to the remark. A "black male"  
16 seated next to defendant, referred to by Diprima as  
"Bob Marley" for a "Bob Marley patch" on the "green  
Fidel Castro type army hat" he wore, FN2, also took  
offense to Diprima's use of the "N word" and  
declared, "That's not right." Diprima apologized,  
and explained that he "didn't mean it like that."  
After a short discussion, Diprima bought a beer and  
walked away from the bar.

17 "Maybe an hour later," defendant approached  
18 Diprima to ask for a ride home and a loan of \$5 for  
19 a drink. Diprima gave defendant \$5 from the bills  
20 he kept in a money clip in his pocket, and agreed to  
21 drive him home. They again parted until about 1:30  
22 or 1:40 a.m., when Diprima told defendant he wanted  
23 to leave and asked if he still wanted a ride.  
24 Defendant said, "Yeah, in a minute," so Diprima went  
25 outside to wait. Defendant was also intermittently  
outside the bar, "talking to different people," one  
of them Bob Marley, who was standing with a "mulatto  
guy" Diprima described as "six one, six two,  
somewhat slim," with freckles and curly hair,  
wearing a baseball hat, jeans, and running shoes.  
FN3. Defendant "may" have gone back inside the bar  
momentarily with the "mulatto guy," although Diprima  
testified that he was not paying close attention.

26 Diprima told defendant, "I'm gonna leave, if  
27 you want a ride, let's go." They finally left the  
28 bar together in Diprima's rented car about 1:45 or

1 1:50 a.m. On the way to [Petitioner's] apartment  
2 they stopped at a 7-Eleven store. Diprima bought  
3 cigarettes, and they both bought food which they  
4 heated in a microwave oven and ate on the premises.  
5 Defendant attempted to buy beer, but the clerk told  
6 him, "You're too late." After defendant made a  
7 telephone call on a cell phone, they proceeded to  
8 his apartment, about three or four minutes away.

9 Diprima accepted defendant's invitation to come  
10 up to his apartment. Diprima parked his car in the  
11 apartment complex garage and accompanied defendant  
12 through a metal door into an elevator. Suddenly,  
13 the elevator stopped, Bob Marley jumped inside,  
14 spoke briefly with defendant, then "jumped back out  
15 of the elevator." Diprima was uneasy; he felt he  
16 "was being set up" and was in danger of being  
17 attacked. He asked defendant, "What's going on?"  
18 Defendant assured Diprima not to "worry about it."  
19 When the elevator stopped, Diprima accompanied  
20 defendant into his apartment, although he remained  
21 very fearful.

22 As Diprima walked out onto the balcony he  
23 thought he was "screwed." Diprima then walked back  
24 into the living room, whereupon Bob Marley and the  
25 "mullato" [sic] guy wearing a baseball cap "came  
26 through the kitchen area and attacked" him.  
27 Defendant was already in the room. Diprima fell to  
28 the floor, where he was punched and kicked  
repeatedly. He was screaming for them the [sic]  
stop and attempting to remain conscious. Diprima  
testified that he covered his head during the attack  
and could hardly see, but was sure defendant must  
have kicked or punched him five to ten times.

Then defendant placed a "choke hold" on Diprima  
from behind while Bob Marley grabbed his arm and  
forcibly removed his watch. As defendant continued  
to apply a choke hold to Diprima, the other two men  
removed his shoes, socks and belt, and "went  
through" his pockets to take keys, a cell phone and  
money clip. The mullato [sic] guy struck Diprima 15  
to 20 times with the belt, and angrily asked for  
Diprima to produce his credit cards. Bob Marley  
broke a chain off Diprima's neck.

When someone yelled, "Get the knife," Diprima  
managed to struggle out of the choke hold, but was  
"being kicked again." Someone, Diprima "believed it  
was the mulatto guy," stomped him on the head.  
Diprima managed to scramble to his feet. The

1 mulatto guy grabbed a Duraflame log and "whacked"  
2 Diprima "in the head" with it. Diprima then jumped  
3 onto a computer table, and from there leaped onto  
4 defendant. Diprima and defendant struggled before  
5 Diprima spun around and ran for the balcony. Once  
6 on the balcony, Diprima grabbed onto the banister,  
7 extended his arms, and dropped to the ground below.

8 Diprima landed on his feet, but cracked his  
9 chin with his knee. He rolled or crawled, then ran  
10 for a short distance before he reached a ledge.  
11 There Diprima encountered someone, it "might have  
12 been" defendant, with whom he struggled before he  
13 jumped off the 8- to 10-foot ledge into a yard. He  
14 ran down a hill to the street, then "kept running"  
15 to the bottom of the hill.

16 In the street Diprima managed to flag down a  
17 taxi driver. Diprima told the driver he wanted to  
18 be taken to his home, which was about a mile away,  
19 rather than the hospital. The taxi driver testified  
20 that Diprima was "almost comatose," without shoes or  
21 a shirt, and "bleeding profusely," but did not seem  
22 intoxicated or "on drugs."

23 Once he reached his home Diprima told his  
24 girlfriend Melinda Swanson, "Pack your bags, we're  
25 gonna get out of here right now." Diprima feared  
26 that his assailants, who had taken his driver's  
27 license, would come to their home and kill them.  
28 Swanson noticed that Diprima was "really dirty," his  
"face was pretty swollen," blood was "coming out  
from his mouth and chin," he had scrapes elsewhere  
on his body, and "a lot of whip marks on his back."

Within five minutes of Diprima's arrival, he  
and Swanson left their house and drove to the home  
of a friend, Kofi Darko, in San Francisco. During  
the drive to San Francisco and at Darko's residence  
Diprima related "bits and pieces" or a "rough  
sketch" "about what transpired" and why he was  
beaten. Diprima was reluctant to go to the  
hospital, but was convinced by Swanson and Darko  
that he needed treatment.

At San Francisco General Hospital Diprima was  
treated for his wounds: two black eyes, a nasal  
fracture, a severe bruise to his left thumb, serious  
lacerations on his right scalp and chin, a  
laceration to his left inner thigh, abrasions on his  
back, a burn mark across his neck, and bruises over  
essentially his entire body. He received five

1 staples for the wound on his head and sutures for  
2 the laceration on his chin.

3 Meanwhile, San Rafael police officers were  
4 dispatched to defendant's apartment in response to  
5 911 calls of a disturbance and screams for "help"  
6 there. The officers entered the apartment about  
7 2:50 a.m. with the assistance of the apartment  
8 complex manager after they received no response to  
9 their knocking on the locked front door. The  
10 apartment was unoccupied. What appeared to be  
11 dried, splattered blood was visible on the wall and  
12 floor of the left side of the dining room. Several  
13 chairs and a small table had been knocked over in  
14 the center of the living room, and it looked "like  
15 there might have been a struggle." Marijuana plants  
16 and a medical marijuana license were observed in the  
17 residence. The blood stains did not appear to be  
18 fresh, so the officers did not think a physical  
19 altercation had recently occurred in the apartment.  
20 They secured the premises and left.

21 Later that day, Diprima appeared at the San  
22 Rafael police station with Swanson for an interview  
23 with investigating officers Raffaello Pata and Wanda  
24 Spaletta. FN4. During the interview Diprima failed  
25 to disclose to the officers that he "used the N  
26 word" or offered to purchase marijuana from  
27 defendant. FN5. He also did not state to the  
28 officers that defendant hit or kicked him during the  
assault.

17 The following day Diprima went with the officers  
18 to defendant's apartment. Diprima remained quite  
19 fearful as they reached the apartment complex in the  
20 police vehicle, and was reluctant to "go up there" to  
21 defendant's apartment. Diprima's rental car was  
22 still in the parking lot where he left it. As  
23 Diprima was showing the officers the hill he "ran  
24 down" following his leap from the balcony, they  
25 discovered the "Bob Marley hat" on the sidewalk.

22 While Diprima was standing with the officers in  
23 the apartment complex parking lot he suddenly became  
24 "very anxious" and declared, "That's him," referring  
25 to defendant, who was walking out of the apartment  
26 complex with a friend. When queried, Diprima added,  
27 "That's the guy that beat me up." He then quickly  
28 returned to the police vehicle as the officers  
briefly questioned defendant. Defendant was  
subsequently arrested.

1           Around midnight the investigating officers  
2 returned to defendant's apartment to conduct a search  
3 pursuant to a warrant. Diprima's silver chain  
4 necklace was located on a computer table in the  
5 living room, but none of the other personal  
6 belongings he claimed were taken during the attack  
7 were found. The blood seen by an officer on the wall  
the day before was "gone," and appeared to have been  
"washed off." "[S]wipe marks" were visible where  
efforts were made to "clean the wall." Although a  
"majority" of the blood had disappeared, traces of  
dried blood drops were still visible on the linoleum  
floor.

8           The investigating officers subsequently  
9 exhibited a group of six photographs to Diprima.  
10 Among them was the photograph of Tristan Harvey,  
11 whom Diprima positively identified as the assailant  
12 with the "Fidel Castro style army hat" he referred  
to as "Bob Marley." From a separate photo lineup  
Diprima also tentatively identified a man named  
Vijay Kelly as the third assailant. Kelly was  
arrested, but never charged in the case.

13 FN1. All further statutory references are to the  
14 Penal Code unless otherwise indicated.

15 FN2. We will also refer to him as Bob Marley, as the  
16 parties did at trial. Diprima testified that Bob  
17 Marley wore a black jacket and black shirt, along  
with diamond earrings, and was five nine, five ten  
tall.

18 FN3. Again, following the designation used by the  
19 parties at trial, we will refer to this unidentified  
man as the "mulatto guy."

20 FN4. Swanson and Diprima had spoken to the police  
earlier by telephone.

21 FN5. Diprima explained, "I didn't want to make myself look  
22 bad" or divert the "focus" of the interview away from the  
assault.

23 People v. Voelker, No. A108798, 2005 WL 2995811 at \*1-4 (Cal. Ct.  
24 App.); Opinion at 2-7 (footnotes in original). Petitioner's  
25 petition for review to the California Supreme Court was denied on  
26 January 18, 2006.  
27



1           On April 10, 2006, Petitioner filed the first of two habeas  
2 petitions in state superior court. The court denied this petition  
3 in an order dated August 4, 2006 (2006 Order). Petitioner sought  
4 review of this denial in the state appellate court on September 19,  
5 2006. The appellate court denied the petition on October 12, 2006.

6           Petitioner then asked the state supreme court for review of  
7 this denial on October 24, 2006. On January 3, 2007, the California  
8 Supreme Court denied all of Petitioner's claims except his claim  
9 that he had received ineffective assistance of counsel because his  
10 attorney had not called him at the trial to testify on his own  
11 behalf. The Supreme Court granted Petitioner's petition for review  
12 on this claim and directed the appellate court to (1) vacate its  
13 order denying the petition and (2) order the Director of the  
14 California Department of Corrections and Rehabilitation to show  
15 cause in superior court why Petitioner would not be entitled to  
16 relief on his claim of ineffective assistance of counsel. On  
17 January 5, 2007, the appellate court vacated its order and issued an  
18 order to show cause.

19           On February 15, 2007, the superior court ordered an evidentiary  
20 hearing, which was held on June 21, 2007. Ex. O. Following the  
21 hearing, on June 28, 2007, the superior court issued an order  
22 denying Petitioner relief. Ex. P (2007 Order).

23           Two days before the superior court ordered an evidentiary  
24 hearing on his first habeas petition, Petitioner filed a document in  
25 superior court that was construed as a second habeas petition,  
26 challenging a jury instruction, a challenge that the appellate court  
27  
28



1 previously rejected on direct appeal. Ex. N; People v. Voelker,  
2 2005 WL 2995811 at \*6-8. On February 20, 2007, the superior court  
3 issued an order stating that Petitioner had made a prima facie claim  
4 for habeas relief. This habeas petition was denied by the superior  
5 court on April 4, 2007. Ex. N; Doc. #2-3 at 9-10.

6 On September 25, 2007, Petitioner filed an appeal with the  
7 appellate court, which consolidated both of his state habeas cases.  
8 This appeal was denied by the appellate court on December 27, 2007.  
9 Petitioner sought review of this decision by the state supreme court  
10 on January 4, 2008. The supreme court summarily denied the petition  
11 on February 13, 2008.

12 Petitioner then petitioned the United States Supreme Court  
13 for a writ of certiorari on March 20, 2008. The Court denied this  
14 petition on June 23, 2008.

15 Petitioner filed a federal habeas petition with this Court on  
16 March 5, 2008.

#### 17 LEGAL STANDARD

18 The Antiterrorism and Effective Death Penalty Act of 1996  
19 (AEDPA), codified under 28 U.S.C. § 2254, provides "the exclusive  
20 vehicle for a habeas petition by a state prisoner in custody  
21 pursuant to a state court judgment, even when the petitioner is not  
22 challenging his underlying state court conviction." White v.  
23 Lambert, 370 F.3d 1002, 1009-10 (9th Cir. 2004). Under AEDPA, this  
24 Court may entertain a petition for habeas relief on behalf of a  
25 California state inmate "only on the ground that he is in custody in  
26 violation of the Constitution or laws or treaties of the United  
27

1 States." 28 U.S.C. § 2254(a).

2 The writ may not be granted unless the state court's  
3 adjudication of any claim on the merits: "(1) resulted in a  
4 decision that was contrary to, or involved an unreasonable  
5 application of, clearly established Federal law, as determined by  
6 the Supreme Court of the United States; or (2) resulted in a  
7 decision that was based on an unreasonable determination of the  
8 facts in light of the evidence presented in the State court  
9 proceeding." 28 U.S.C. § 2254(d). Under this deferential standard,  
10 federal habeas relief will not be granted "simply because [this]  
11 [C]ourt concludes in its independent judgment that the relevant  
12 state-court decision applied clearly established federal law  
13 erroneously or incorrectly. Rather, that application must also be  
14 unreasonable." Williams v. Taylor, 529 U.S. 362, 411 (2000). In  
15 Harrington v. Richter, the Court further stressed that "'an  
16 unreasonable application of federal law is different from an  
17 incorrect application of federal law.'" 131 S. Ct. 770, 785 (2011)  
18 (citing Williams, 529 U.S. at 410) (emphasis in original). "A state  
19 court's determination that a claim lacks merit precludes federal  
20 habeas relief so long as 'fairminded jurists could disagree' on the  
21 correctness of the state court's decision." Id. at 786 (citing  
22 Yarborough v. Alvarado, 541 U.S. 653, 664 (2004)).

23 While circuit law may provide persuasive authority in  
24 determining whether the state court made an unreasonable application  
25 of Supreme Court precedent, the only definitive source of clearly  
26 established federal law under 28 U.S.C. § 2254(d) rests in the  
27  
28

1 holdings (as opposed to the dicta) of the Supreme Court as of the  
2 time of the state court decision. Williams, 529 U.S. at 412; Clark  
3 v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

4 The state court decision to which 28 U.S.C. § 2254 applies is  
5 the "last reasoned decision" of the state court. See Ylst v.  
6 Nunnemaker, 501 U.S. 797, 803-804 (1991); Barker v. Fleming, 423  
7 F.3d 1085, 1091-1092 (9th Cir. 2005). Although Ylst primarily  
8 involved the issue of procedural default, the "look through" rule  
9 announced there has been extended beyond that particular context.  
10 Barker, 423 F.3d at 1092 n.3 (citing Lambert v. Blodgett, 393 F.3d  
11 943, 970 n.17 (9th Cir. 2004) and Bailey v. Rae, 339 F.3d 1107,  
12 1112-1113 (9th Cir. 2003)). When the state court gives no reasoned  
13 explanation of its decision, a federal court should conduct "an  
14 independent review of the record" to determine whether the state  
15 court's decision was an objectively unreasonable application of  
16 clearly established federal law. Plascencia v. Alameida, 467 F.3d  
17 1190, 1197-1198 (9th Cir. 2006).

18 Even if a petitioner meets the requirements of § 2254(d),  
19 habeas relief is warranted only if the constitutional error at issue  
20 had a substantial and injurious effect or influence in determining  
21 the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 638 (1993).  
22 Under this standard, petitioners "may obtain plenary review of their  
23 constitutional claims, but they are not entitled to habeas relief  
24 based on trial error unless they can establish that it resulted in  
25 'actual prejudice.'" Brecht, 507 U.S. at 637, citing United States  
26 v. Lane, 474 U.S. 438, 439 (1986).

## DISCUSSION

Petitioner raises eight claims in his Petition. Respondent denies all of Petitioner's claims. Each claim is analyzed below.

## I. Ineffective Assistance Of Counsel Claims

Petitioner claims that his trial counsel rendered ineffective assistance to Petitioner when he: (1) failed to call Petitioner to testify on his own behalf; and (2) failed to introduce allegedly exculpatory evidence at trial.

## A. Legal Standard

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

In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, Petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. Strickland, 466 U.S. at 687-688. Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable

1 probability is a probability sufficient to undermine confidence in  
2 the outcome. Id.

3 B. Failure to Permit Petitioner to Testify

4 Petitioner claims that it was ineffective assistance for his  
5 trial counsel to prevent him from testifying. The last reasoned  
6 state court decision on Petitioner's claim of ineffective assistance  
7 of counsel with regard to counsel's failure to permit Petitioner to  
8 testify is the 2007 Order. The superior court provided the  
9 following reasoned analysis of Petitioner's claim:

10 At the June 21 [, 2007 evidentiary] hearing,  
11 Petitioner called as a witness Chief Assistant  
12 Public Defender David Brown, who testified that  
13 before trial he had discussed with Petitioner's  
14 trial counsel, James Wall, ongoing strategy issues,  
15 including whether Petitioner would take the witness  
16 stand in his own defense. As far as Mr. Brown knew,  
17 the decision whether to call Petitioner as a witness  
18 had not been made. Mr. Brown testified that at that  
19 time, he had agreed that, if needed, he would role-  
20 play as a prosecutor and cross-examine Petitioner to  
21 help prepare him to testify. Mr. Brown testified  
22 that these discussions about mock cross-examination  
23 occurred before the trial began, and that at no time  
24 before or during the trial was he called upon to  
25 help prepare Petitioner to testify.

26 Attorney Mary Stearns, an experienced criminal  
27 defense attorney, testified that she had prepared  
28 and argued Petitioner's motion for a new trial. She  
29 did not contend in that motion that a new trial  
30 should be granted to Petitioner because he had not  
31 been called to testify in his own defense. She  
32 stated that her "factual summary" in connection with  
33 a request for monies for an investigator included  
34 the following:

35 There are a few more issues: like that  
36 defendant wanted to testify and [his  
37 attorney] said he would on many  
38 occasions, but on day that he was to  
39 testify, [his attorney] told him not to  
40 as defendant had not gotten any sleep  
41 the night before.

1 Ms. Stearns testified that in her experience with  
2 him, Petitioner told her forthrightly of his  
3 concerns; he was not shy or withdrawn.

4 Both Mr. Brown and Ms. Stearns testified that  
5 Mr. Wall was a zealous, aggressive advocate for his  
6 criminal defense clients.

7 Petitioner testified that Mr. Wall had told him  
8 all along that he had to testify and that they had  
9 to present an affirmative defense. He said that  
10 a[s] the defense case was nearing its conclusion,  
11 Mr. Wall told the court that Petitioner would be the  
12 final defense witness. At that point, court  
13 recessed for the day. Petitioner testified that Mr.  
14 Wall did not come to visit him in the jail that  
15 evening. The next morning, Petitioner told Mr. Wall  
16 that he had not slept the night before. When court  
17 convened the next morning, Mr. Wall rested his case  
18 without calling Petitioner. Petitioner testified  
19 that when he heard that, he was upset. He asked his  
20 attorney, "What are you doing, what's going on? I  
21 wanted to testify," and his attorney replied, "Hold  
22 on." Petitioner did not ask for a recess so that he  
23 could confer with counsel, and he did not speak out.  
24 He explained that by stating that he had been  
25 admonished never to address the court unless spoken  
26 to.

27 On cross-examination, Petitioner admitted that  
28 his attorney had done a very good job of cross-  
examining the victim for three days, and that he had  
managed to bring out many details in the victim's  
testimony that were apparently inconsistent.  
Petitioner conceded that he had not raised the issue  
of his desire to testify in his motion for a new  
trial or at any time before the sentencing hearing.

Petitioner went on to recapitulate the  
testimony he would have given had he been called as  
a witness.

Petitioner did not call his trial counsel,  
James Wall, as a witness at this evidentiary  
hearing.

The only witness for the Respondents was  
Attorney Ashley Worsham, who prosecuted Petitioner  
for the Marin County District Attorney's Office.  
Ms. Worsham testified that Mr. Wall is a zealous,  
very aggressive advocate. Ms. Worsham testified

1 that although she was of course not privy to  
2 conversations between Petitioner and Mr. Wall, she  
3 noticed during the trial that Petitioner was active,  
4 involved, and participating. He took lots of notes  
5 and had many whispered consultations with his  
6 counsel. The court had ruled that if Petitioner  
7 testified in his defense, the People could impeach  
8 his credibility with evidence of a prior felony  
9 conviction and an arrest for an offense involving  
10 moral turpitude. Petitioner had given a statement  
11 to the San Rafael Police Department; the court had  
12 excluded it from the prosecutor's case in chief as  
13 having been obtained in violation of Petitioner's  
14 Miranda rights. The issue of whether and to what  
15 extent those statements could be used to impeach  
16 Petitioner had not been ruled on. Ms. Worsham did  
17 not observe Petitioner express dissatisfaction with  
18 Mr. Wall's decision not to call him. He did not ask  
19 to address the court or request a recess. She also  
20 expressed her opinion that the evidence against  
21 Petitioner was strong, that this was not a close  
22 case.

23 The official record of this trial reveals that  
24 as the trial was nearing its conclusion, the court  
25 noted, out of the jury's presence and in the  
26 presence of Petitioner and both counsel, that the  
27 defense had not decided whether to call defendant as  
28 a witness and that if defendant were to testify, "we  
29 have some Castro and Wheeler issues that we have to  
30 deal with" (RT 1195). There is no indication in the  
31 record that Petitioner or his counsel disagreed when  
32 the court noted that the defense had not yet decided  
33 whether to call Petitioner as a witness. The next  
34 morning, when court convened, the court asked if the  
35 defense would be calling any more witnesses. Mr.  
36 Wall replied: "The defense is satisfied with the  
37 case, the evidence, and we rest." (RT 1206).  
38 Petitioner says that he remonstrated with his  
39 attorney about this decision. None of this alleged  
40 colloquy was observed by the prosecutor or by the  
41 court. None of it was on the record. Petitioner  
42 did not address the court about his desire to  
43 testify, nor did he request (or ask his attorney to  
44 request) a recess.

#### 45 DISCUSSION

46 Viewing the evidence proffered by Petitioner at  
47 this evidentiary hearing in the light most favorable  
48 to Petitioner, it demonstrates that Petitioner's  
49 taking the stand in his own defense was under active



1 discussion until the close of the defense case, at  
2 which time Petitioner's counsel made a decision not  
3 to call Petitioner as a witness, and that Petitioner  
4 acquiesced, perhaps reluctantly, in that strategy  
5 decision. Petitioner has not proven that he did not  
6 accede to his attorney's decision not to call him as  
7 a witness.

8 Petitioner was under an obligation timely to  
9 assert his right to be called as a witness. People  
10 v. Robles, (1970) 2 Cal.3d 205, 215. Like Mr.  
11 Guillen, Petitioner in this case "did not apprise  
12 the court he desired to testify at any time during  
13 the trial proceeding when the right could have been  
14 accorded him, instead he waited until an adverse  
15 verdict was rendered against him before advising the  
16 court he had really wanted to take the stand after  
17 all, then demanded [a] new trial - another chance  
18 before a new jury - on the ground his counsel had  
19 'deprived' him of his right" (People v. Guillen,  
20 supra, 37 Cal.App.3d 976, 985-985).

21 Habeas corpus is civil in nature. Petitioner  
22 has the burden of proving the truth of his  
23 contentions by a preponderance of the evidence.  
24 Attorney James Wall is a percipient witness of  
25 whether Petitioner indeed stated a desire to testify  
26 in his own defense. Petitioner could have called  
27 his trial counsel, James Wall, as a witness at this  
28 evidentiary hearing, but he did not do so. Under  
these circumstances, Petitioner's testimony should  
be viewed with distrust. Evidence Code § 412.

If, arguendo, Petitioner had testified at this  
trial, he has not convinced this court that the  
outcome of the trial would have been more favorable  
to Petitioner. Notwithstanding some contradictions  
among witnesses, the evidence against Petitioner was  
convincing and strong. Petitioner was going to be  
impeached with evidence of a prior felony conviction  
and other conduct, and, perhaps, with prior  
inconsistent statements to the police. Petitioner  
has failed to demonstrate that the outcome of the  
trial would have been different if he had testified.  
People v. Ledesma (1987) 43 Cal.3d 171.

2007 Order at 2-6.

Petitioner claims trial counsel was ineffective because he  
did not permit Petitioner to testify as a witness on his own behalf.

1 Respondent argues that Petitioner's right to testify on his own  
2 behalf was forfeited when Petitioner failed to object at trial after  
3 not being called as a witness by counsel.

4 Because the Marin County Superior Court, on remand from the  
5 California Court of Appeal, held an evidentiary hearing and issued a  
6 reasoned opinion on this claim, this claim has been adjudicated on  
7 the merits in state court. Barker, 423 F.3d at 1092. Thus, this  
8 Court is bound by the Superior Court's determination, unless that  
9 court's adjudication of the claim: "(1) resulted in a decision that  
10 was contrary to, or involved an unreasonable application of, clearly  
11 established Federal law, as determined by the Supreme Court of the  
12 United States; or (2) resulted in a decision that was based on an  
13 unreasonable determination of the facts in light of the evidence  
14 presented in the State court proceeding." 28 U.S.C. § 2254(d);  
15 Williams, 529 U.S. at 411. After a careful review of the record,  
16 and as set forth below, the Court finds that the state superior  
17 court's conclusion that trial counsel did not render ineffective  
18 assistance when he did not call Petitioner as a witness was not  
19 contrary to, nor did it involve an unreasonable application of,  
20 clearly established federal law, and it was not based on an  
21 unreasonable determination of the facts. See 28 U.S.C. § 2254(d);  
22 Williams, 529 U.S. at 411; Strickland, 466 U.S. at 686.

23 First, trial counsel's performance was not objectively  
24 unreasonable. Strickland, 466 U.S. at 687-88. His choice not to  
25 call Petitioner as a witness was reasonable, in that the record  
26 indicates that calling Petitioner to the stand may have jeopardized  
27  
28

1 his defense. 2007 Order at 6. According to the record, potentially  
2 damaging impeachment evidence could have been introduced by the  
3 prosecutor had Petitioner testified, including evidence of a prior  
4 felony conviction, evidence of an arrest involving moral turpitude,  
5 and possible evidence of prior inconsistent statements to the  
6 police. 2007 Order at 3-6. Such evidence would likely have been  
7 prejudicial to Petitioner. Because not calling Petitioner as a  
8 witness was a reasonable tactical strategy, counsel's performance  
9 did not fall below an objective standard of reasonableness, and thus  
10 was not deficient under Strickland. Strickland, 466 U.S. at 687-  
11 688.

12 Second, even if trial counsel's failure to call Petitioner as a  
13 witness was deficient performance, Strickland, 466 U.S. at 687-688,  
14 Petitioner cannot demonstrate that counsel's performance was  
15 prejudicial to him, i.e. that the outcome of his trial would have  
16 been different had he been able to testify. Id. at 694. According  
17 to Superior Court Judge Verna A. Adams, who presided over the  
18 evidentiary hearing on this claim and also presided at Petitioner's  
19 criminal proceedings, Petitioner's testimony on his own behalf would  
20 have been overshadowed by the "convincing and strong" evidence  
21 against him. 2007 Order at 6. Therefore, it is unlikely that the  
22 outcome of Petitioner's trial would have been different had he  
23 testified. Moreover, the superior court's decision was not based on  
24 an unreasonable determination of the facts in light of the evidence  
25 presented at the state proceedings. 28 U.S.C. § 2254(d); Williams,  
26 529 U.S. at 411.

1 Finally, Petitioner was obliged under California law to object  
2 timely to his counsel's decision to not call him as a witness at  
3 trial. See People v. Robles, 2 Cal. 3d 205, 215 (1970). The  
4 evidence shows that, although he had ample opportunity to do so,  
5 Petitioner did not protest, either to Mr. Wall at the trial or to  
6 the judge, after he was not called as a witness at trial. Because  
7 Petitioner cannot demonstrate that the state court's decision  
8 denying this claim was unreasonable, see 28 U.S.C. § 2254(d);  
9 Williams, 529 U.S. at 411; Strickland, 466 U.S. at 686, this claim  
10 must be denied.

11 C. Failure To Introduce Potentially Exculpatory Evidence

12 Petitioner maintains that phone records, in particular the  
13 record of a one-minute phone call made from his apartment at 2:36  
14 a.m. on the night in question, should have been offered into  
15 evidence by his counsel. According to Petitioner, evidence of the  
16 phone call would have been exculpatory, because it would have  
17 contradicted evidence that he had been engaged in an assault on  
18 Dipalma at that time.

19 The last reasoned state court decision on Petitioner's claim of  
20 ineffective assistance of counsel with regard to his failure to  
21 introduce allegedly exculpatory evidence is the Marin County  
22 Superior Court opinion of August 4, 2006. The superior court  
23 provided the following reasoned analysis of Petitioner's claim:

24 In his application [for state habeas relief],  
25 Petitioner contends that: . . .

- 26 2. His trial counsel neglected to introduce  
27 exculpatory evidence (in the form of his  
28 telephone records and those of his

girlfriend, Raven Oliver), thereby demonstrating ineffective assistance of counsel.

While it is true that the phone records were not received into evidence, FN2, the jury did hear testimony of Raven Oliver, who referred to these records to refresh her memory. The jury heard Ms. Oliver's testimony, which was impeached with evidence of prior inconsistent statements she had made to D.A. Investigators, and contradicted by other witnesses. Those records are not necessarily exculpatory; moreover, defense counsel, by using those records to refresh Ms. Oliver's memory, assured that they were brought to the attention of the jury.

Petitioner has not convinced this court that the outcome of the trial would have been different if the telephone records had been received in evidence.

FN2. To do so would have been error, because no proper foundation was laid.

2006 Order at 2-3 (footnote in original).

Petitioner cannot demonstrate that the state court's reasoned decision was contrary to, or involved an unreasonable application of, clearly established United States Supreme Court law. Nor can he demonstrate that the state court's factual findings were unreasonable.

A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as the result of the alleged deficiencies. See Strickland, 466 U.S. at 697; Williams v. Calderon, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995) (approving district court's refusal to consider whether counsel's conduct was deficient after determining that petitioner could not establish prejudice). Here, even if it were deficient performance for Petitioner's counsel to have failed to introduce the

1 phone records, there is no showing of prejudice. As the state court  
2 reasonably concluded, the phone records at issue were not  
3 necessarily exculpatory, and would not have changed the outcome of  
4 the trial. 2006 Order at 2-3.

5 To begin with, the phone call made from the apartment at 2:36  
6 a.m. was no more than one minute long, and was not necessarily  
7 inconsistent with Diprima's testimony that Petitioner participated  
8 in the assault against him. While Diprima did not testify that he  
9 saw Petitioner on the phone, he did testify that he did not see  
10 Petitioner for the entire altercation and that Petitioner's  
11 chokehold on him did not last for the entire assault. In addition,  
12 Petitioner could have made the brief call after Diprima jumped from  
13 the balcony.<sup>2</sup> Finally, as the state court noted, Raven Oliver, the  
14 recipient of the 2:36 a.m. call, had her memory refreshed by the  
15 record of the call, thus alerting the jury of its existence. 2006  
16 Order at 2-3.

17 Given the record and the state court's reasoned decision,  
18 Petitioner cannot establish that he was prejudiced, i.e. that there  
19 was "a reasonable probability that, but for counsel's unprofessional  
20 errors, the result of the proceeding would have been different."  
21 Strickland, 466 U.S. at 687-688. Accordingly, this claim must be  
22 denied.

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23  
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25  
26 <sup>2</sup> The phone call to 911 regarding Diprima's jump, made by Mike  
27 Kollin, occurred at 2:39 or 2:40 a.m. The record does not reveal how  
28 long it took Kollin to call 911 after he became aware of Diprima's  
jump.

1 II. Newly Discovered Evidence

2       Petitioner claims that the state court violated his  
3 constitutional rights to due process and fundamental fairness when  
4 it refused to consider newly discovered evidence, in the form of  
5 potential witness testimony, submitted by Petitioner in conjunction  
6 with his motion for a new trial. Petitioner points to two  
7 documents, both of which his defense counsel proffered in the motion  
8 for a new trial, in support of this claim. One is a report by an  
9 investigator that Karlan Brooks, who lived in an apartment below  
10 Petitioner's at the time of the relevant crimes, saw a man fall off  
11 of Petitioner's balcony and then saw Petitioner approach the man and  
12 ask if he was all right. The second document is a declaration from  
13 the defense investigator at Petitioner's trial, who states that he  
14 was unable to contact Zeph Carter. In addition to these documents  
15 that were submitted at Petitioner's motion for a new trial,  
16 Petitioner submits a declaration from Tristan Harvey that  
17 Petitioner's trial counsel knew that Zeph Carter had information  
18 that would have exonerated Petitioner, but does not detail the  
19 alleged information or the source of it.

20       The last reasoned state court decision on this claim is the  
21 2006 Order. The superior court provided the following reasoned  
22 analysis of Petitioner's claim:

23               In his application [for state habeas relief],  
24               Petitioner contends that:. . .

- 25               3. The trial court committed reversible error  
26               when it declined to take evidence at the  
27               hearing on Petitioner's motion for a new  
28               trial (§ 1181).



1           In his motion for a new trial, filed post  
2           verdict pursuant to [§] 1181, Petitioner requested  
3           the court to consider evidence from two witnesses  
4           who had not been called to testify at trial --  
5           namely, Zeph Carter and Karlan Brooks. Neither of  
6           these persons is an eye witness to the crime. This  
7           court declined to hold an evidentiary hearing for  
8           the taking of these witnesses' testimony, citing [§]  
9           1181(8). Nothing in Petitioner's [state habeas]  
10          application has convinced this court that that  
11          ruling was in error.

12       2006 Order at 3.

13       Petitioner cannot demonstrate that anything in the state  
14       court's reasoned opinion denying this claim is contrary to, or an  
15       unreasonable application of, clearly established United States  
16       Supreme Court law. Nor can he show that the opinion was based on an  
17       unreasonable determination of the facts. As the state court  
18       reasonably concluded, the trial court was not in error when it  
19       denied Petitioner's motion for a new trial. The documents submitted  
20       by Petitioner in support of the new trial motion did not include  
21       particularly exculpatory evidence. Neither Brooks nor Carter was an  
22       eyewitness to the crime, and the fact that Brooks may have seen  
23       Petitioner approach Diprima and ask if Diprima was all right is not  
24       necessarily inconsistent with Petitioner having participated in an  
25       assault upon Diprima earlier in his apartment. In addition, there  
26       was no affidavit submitted by Carter and, therefore, any allegedly  
27       exculpatory evidence he supposedly would have offered is  
28       speculative. Furthermore, even if Petitioner had demonstrated a  
29       colorable claim of error, he would not be able to show that any  
30       error had a substantial or injurious effect on the verdict. Brecht,  
31       507 U.S. at 638. As discussed above, the evidence proffered by

Petitioner was not exculpatory and substantial evidence was properly admitted to support the jury's conclusion that Petitioner was guilty.

To the extent that Petitioner is, as Respondent argues, attempting to bring an actual innocence claim, his claim must also fail. To be entitled to relief, a petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent. See Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (en banc); Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000); Osborne v. District Attorney's Office, 521 F.3d 1118, 1130-31 (9th Cir. 2008), rev'd and remanded on other grounds, 129 S. Ct. 2308 (2009); Herrera v. Collins, 506 U.S. 390, 417 (1993). Here, any claim of actual innocence must fail because the evidence proffered did not reach the Herrera standard of a "truly persuasive demonstration of actual innocence." Herrera, 506 U.S. at 417. This claim must be denied.

### III. Instructional Error: CALJIC No. 3.01

Petitioner claims that the trial court erred when it did not give CALJIC No. 3.01.<sup>3</sup> The jury was instructed it could find

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<sup>3</sup> CALJIC 3.01 reads as follows:

#### AIDING AND ABETTING--DEFINED

A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she:

(1) With knowledge of the unlawful purpose of the perpetrator, and

(2) With the intent or purpose of committing or encouraging or

1 Petitioner guilty of the charged crimes as either a direct  
2 participant or as an aider or abettor. According to Petitioner,  
3 without CALJIC No. 3.01, the jury was not properly instructed that  
4 if it found Petitioner guilty under an aiding or abetting theory, it  
5 must find that Petitioner had the specific intent required for  
6 aiding and abetting. The state court denied this claim in a summary  
7 opinion.

8 A. Factual Background<sup>4</sup>

9 On the final day of trial, February 24, 2004, the trial court  
10 held a preliminary jury instruction conference out of the presence  
11 of the jury. RT 1215-1216. Petitioner and counsel for both sides  
12 were present. RT 1215. The relevant portion of the reporter's  
13 transcript is as follows:

14 THE COURT: Okay. And that - so far, have I made any  
15 rulings or tentative rulings that either side wants  
16 to disagree with? I haven't gotten to the [CALJIC]  
3.00, 3.01 battle yet.

17 MS. WORSHAM [Prosecutor]: No, your Honor.

18                       
facilitating the commission of the crime, and

19 (3) By act or advice aids, promotes, encourages or instigates  
20 the commission of the crime.

21 [A person who aids and abets the [commission] [or] [attempted  
22 commission] of a crime need not be present at the scene of the  
crime.]

23 [Mere presence at the scene of a crime which does not itself  
24 assist the commission of the crime does not amount to aiding and  
abetting.]

25 [Mere knowledge that a crime is being committed and the failure  
26 to prevent it does not amount to aiding and abetting.]

27 <sup>4</sup> The facts in this section are undisputed, unless otherwise  
28 indicated.

1 MR. WALL [Petitioner's counsel]: No. And we  
2 discussed the 3.00, 3.01, and I think Miss Worsham's  
going to say something about it.

3 THE COURT: All right.

4 MS. WORSHAM: Your Honor, the People would prefer the  
Court to give 3.00.

5 THE COURT: Okay. And not - and then 3.01 will be  
6 withdrawn?

7 MISS WORSHAM: Yes.

8 THE COURT: Okay. Then that resolves that, yes?

9 MR. WALL: Yes, ma'am.

10 RT 1216.<sup>5</sup>

11 The court then instructed the jury in relevant part, as  
12 follows:

13 Persons who - who are involved in committing a  
14 crime are referred to as principals in that crime.

15 Each principal, regardless of the extent or  
manner of participation, is equally guilty.  
16 Principals include: [o]ne, those who directly and  
actively commit the act constituting the crime; or,  
17 two, those who aid and abet the commission of the  
crime. . . [CALJIC 3.00: Principals - Defined]

18 Before the commission of the crimes charged in  
Counts One, Two and Three, an aider and abettor may  
19 withdraw from participation in those crimes and thus  
avoid responsibility for those crimes by doing two  
20 things: [f]irst, he must notify the other principals  
known to him of his intention to withdraw from the  
21 commission of those crimes; second, he must do  
everything in his power to prevent [the crimes']  
22 commission. [CALJIC 3.03: TERMINATION OF LIABILITY  
OF AIDER AND ABETTOR]

23  
24 If the evidence establishes beyond a reasonable

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25  
26 <sup>5</sup> Given that Petitioner's trial counsel acceded to the withdrawal  
of CALJIC 3.01, it is arguable that he is precluded from bringing this  
27 claim on habeas. Respondent, however, does not so maintain, and this  
Court will therefore consider Petitioner's claim on the merits.

doubt that the Defendant aided and abetted the commission of the crimes charged in this case, the fact, if it is a fact, that he was not present at the time and place of the commission of the alleged crimes for which he is being tried does not matter and does not, in and of itself, entitle the Defendant to an acquittal. [CALJIC 4.51: ALIBI - AIDER AND ABETTOR OR CO-CONSPIRATOR]

. . . .

In the crimes charged in Count Two [assault with a deadly weapon or by means of force likely to produce great bodily injury, and assault] and in Count Three [false imprisonment by force or menace, and false imprisonment], there must exist a union or joint operation to act or conduct and general criminal intent. . . . [CALJIC 3.30: CONCURRENCE OF ACT AND GENERAL CRIMINAL INTENT]

[As to Count One,] [t]o constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed. [CALJIC 9.40.2: ROBBERY - AFTER ACQUIRED INTENT]

For the purpose of determining whether a person is guilty as an aider or abettor to robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time, and continues so long as the stolen property is being carried away to a place of temporary safety. [CALJIC 9.40.1: ROBBERY - AIDING AND ABETTING - WHEN INTENT TO ABET MUST BE FORMED]. . . .

Defendant is accused in Count One of having violated Section 213 Subdivision (a)(1)(A) of the Penal Code, a crime.

Every person who voluntarily, acting in concert with two or more persons, commits robbery within an inhabited dwelling house, is guilty of violating Penal Code Section 213 Subdivision (a)(1)(A), a crime.

The term "acting in concert" means two or more persons acting together in a group crime, and includes not only those who personally engaged in

1 the act or acts constituting the crime, but also  
 2 those who aid and abet a person in accomplishing it.  
 3 . . . [CALJIC 9.42.1: ROBBERY FIRST DEGREE - ACTING  
 IN CONCERT (Penal Code § 213, subdivision (a)(1)(A))

4 . . . .

5 Defendant is accused in Count Two of having  
 6 violated Section 245 Subdivision (a)(1) of the Penal  
 Code, a crime [assault with deadly weapon or by  
 force likely to produce great bodily injury].

7 . . . .

8 When a person participates in a group beating  
 9 and it is not possible to determine which assailant  
 inflicted a particular injury, he may be found to  
 10 have personally inflicted great bodily injury upon  
 the victim if, one, the application of unlawful  
 11 physical force upon the victim was of such a nature  
 that by itself it could have caused the great bodily  
 12 injury suffered by the victim; or two, that at the  
 time Defendant personally applied unlawful physical  
 13 force upon the victim, and Defendant then knew or  
 reasonably should have known that the cumulative  
 14 effect of all the unlawful physical force would  
 result in great bodily injury to the victim. [CALJIC  
 15 17.20: INFLICTION OF GREAT BODILY HARM § 12022.7(d)]

16 . . . .

RT 1222-1242.

#### 17 B. Legal Standard

18 To obtain federal collateral relief for errors in the jury  
 19 charge, a petitioner must show that the ailing instruction by itself  
 20 so infected the entire trial that the resulting conviction violates  
 21 due process. See Estelle v. McGuire, 502 U.S. 62, 72 (1991); Cupp  
 22 v. Naughten, 414 U.S. 141, 147 (1973); see also Donnelly v.  
 23 DeChristoforo, 416 U.S. 637, 643 (1974) ("[I]t must be established  
 24 not merely that the instruction is undesirable, erroneous or even  
 25 "universally condemned," but that it violated some [constitutional  
 26 right]. . .") (internal citation omitted). The instruction may not

1 be judged in artificial isolation, but must be considered in the  
2 context of the instructions as a whole and the trial record. See  
3 Estelle, 502 U.S. at 72.

4 The omission of an instruction is less likely to be prejudicial  
5 than a misstatement of the law. See Walker v. Endell, 850 F.2d 470,  
6 475-476 (9th Cir. 1987) (citing Henderson v. Kibbe, 431 U.S. 145,  
7 155 (1977)). Thus, a habeas petitioner whose claim involves a  
8 failure to give a particular instruction bears an "'especially heavy  
9 burden.'" Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997)  
10 (quoting Henderson, 431 U.S. at 155). The significance of the  
11 omission of such an instruction may be evaluated by comparison with  
12 the instructions that were given. Murtishaw v. Woodford, 255 F.3d  
13 926, 971-972 (9th Cir. 2001) (quoting Henderson, 431 U.S. at 156).  
14 In other words, the court must evaluate jury instructions in the  
15 context of the overall charge to the jury as a component of the  
16 entire trial process. United States v. Frady, 456 U.S. 152, 169  
17 (1982) (citing Henderson, 431 U.S. at 154).

18 A jury instruction that omits an element of an offense warrants  
19 relief only if the omission is prejudicial under Brecht. See  
20 Evanchyk v. Stewart, 340 F.3d 933, 940 (9th Cir. 2003); Spicer v.  
21 Gregoire, 194 F.3d 1006, 1008 (9th Cir. 1999) (citing Brecht, 507  
22 U.S. at 637, and finding that omission of element of offense in jury  
23 instruction is not prejudicial if the omission "did not have a  
24 'substantial and injurious effect or influence in determining the  
25 jury's verdict.'" ) The Supreme Court held in California v. Roy that  
26 the omission of the "intent" element from an aiding and abetting  
27  
28



1 instruction is not prejudicial under Brecht where the jury could  
2 have found intent based on the evidence it considered. 519 U.S. 2,  
3 5 (1996). The omission is not prejudicial and does not require  
4 habeas relief unless it "'had substantial and injurious effect or  
5 influence in determining the jury's verdict.'" Roy, 519 U.S. at 4  
6 (quoting Brecht, 507 U.S. at 637); see Roy v. Gomez, 108 F.3d 242,  
7 242 (9th Cir. 1997) (on remand after California v. Roy).

8 C. Analysis

9 Petitioner argues that, because the trial court did not provide  
10 the jury with the CALJIC No. 3.01 aiding and abetting instruction,  
11 the jury never properly considered whether Petitioner had the  
12 specific intent necessary to find him guilty of aiding and abetting  
13 the crimes committed against the victim. Respondent counters that,  
14 using the proper deferential standard of review under AEDPA, the  
15 state court reasonably concluded that the jury convicted Petitioner  
16 by finding the intent necessary under state law,<sup>6</sup> notwithstanding  
17 the court's failure to instruct the jury using CALJIC 3.01.  
18 Respondent further argues that Petitioner has failed to show that  
19 any error had a "substantial and injurious effect or influence in  
20 determining the jury's verdict" under Brecht, 507 U.S. at 623.  
21 Respondent is correct.

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22  
23  
24 <sup>6</sup>California Penal Code section 31 reads in part as follows:

25 All persons concerned in the commission of a crime, whether it  
26 be felony or misdemeanor, and whether they directly commit the act  
27 constituting the offense, or aid and abet in its commission, or, not  
being present, have advised and encouraged its commission. . .or who,  
by threats, menaces, command, or coercion, compel another to commit  
any crime, are principals in any crime so committed.

1 To obtain relief, Petitioner must show that the omission of  
2 CALJIC 3.01, by itself, "so infected the entire trial that the  
3 resulting conviction violates due process." Estelle, 502 U.S. at  
4 72. The jury had the option of finding Petitioner guilty under two  
5 theories of participation: as a direct participant in the crimes  
6 against Diprima, or as an aider and abettor of the crimes. The jury  
7 verdict forms do not indicate under which theory the jury determined  
8 Petitioner guilty of the crimes at issue. The error which  
9 Petitioner claims is only at issue if the jury found him guilty of  
10 the charged crimes as an aider or abettor, and not as a direct  
11 participant.

12 Petitioner is unable to demonstrate that the state court's  
13 rejection of this claim was unreasonable. As noted above, the court  
14 did instruct the jurors that in order to find Petitioner guilty of  
15 the first crime he was charged with, robbery, as defined by  
16 § 213(a)(1)(A), they must find that Petitioner "must have formed the  
17 specific intent to permanently deprive an owner of his property  
18 before or at the time that the act of taking the property occurred."  
19 RT 1222-1242. Roy, 108 F. 3d at 242. Thus, regardless of whether  
20 the jury found Petitioner guilty of robbery as a direct participant  
21 or as an aider or abettor, the jury necessarily found that  
22 Petitioner had specific intent.

23 It was also reasonable for the state court to uphold  
24 Petitioner's convictions for the crimes of assault by means of force  
25 likely to produce great bodily injury and false imprisonment by  
26 violence. Regarding Petitioner's conviction for assault, the jury  
27  
28

1 also found true the special allegations that Petitioner personally  
2 inflicted great bodily injury in the assault. Because the jury  
3 found that Petitioner personally inflicted injury, it almost  
4 certainly found Petitioner guilty as a direct participant in the  
5 assault, and not as an aider or abettor. And while the court  
6 instructed the jury generally that persons can commit crimes either  
7 as direct participants or by aiding and abetting, the prosecutor  
8 specifically argued that the false imprisonment charge resulted from  
9 Petitioner "holding the victim in the choke hold while [others]  
10 robbed and beat him." RT 1280. The prosecutor's theory of the  
11 case, combined with testimony from Diprima that Petitioner had him  
12 in a chokehold (RT 805, 847, 863), demonstrates that the jury almost  
13 certainly found Petitioner guilty of false imprisonment as a direct  
14 participant.

15 For the reasons discussed above, Petitioner cannot demonstrate  
16 that omission of CALJIC No. 3.01 had a substantial or injurious  
17 effect on the verdict. Brecht, 507 U.S. at 638. The evidence  
18 against Petitioner was substantial, including evidence that he was a  
19 direct participant in the attack and robbery. Because Petitioner  
20 cannot demonstrate that he was prejudiced by the omission of the  
21 instruction at issue, his claim must be denied.

22 IV. Instructional Error: CALJIC No. 17.20

23 In this claim, Petitioner maintains that the trial court erred  
24 by giving CALJIC No. 17.20. This claim was addressed in a reasoned  
25 opinion by the California Court of Appeal.

26 Defendant also argues that the trial court  
27 presented the jury with an "improper legal theory"

1 by including the second part of the "group beating"  
 2 language in CALJIC No. 17.20 in its instruction to  
 3 the jury on the great bodily injury enhancement.  
 4 The court instructed the jury: "When a person  
 5 participates in a group beating and it is not  
 6 possible to determine which assailant inflicted a  
 7 particular injury, he may be found to have  
 8 personally inflicted great bodily injury upon the  
 9 victim, if one, the application of unlawful physical  
 10 force upon the victim was of such a nature that, by  
 11 itself, it could have caused the great bodily injury  
 12 suffered by the victim, or two, that at the time the  
 13 defendant personally applied unlawful physical force  
 14 to the victim, the defendant knew that other  
 15 persons, as part of the same incident, had applied,  
 16 were applying, or would apply unlawful physical  
 17 force upon the victim and the defendant then knew,  
 18 or reasonably should have known that the cumulative  
 19 effect of all the unlawful physical force would  
 20 result in great bodily injury to the victim."  
 21 [Footnote omitted].

22 Defendant does not object to the content of the  
 23 first part of the "group beating" instruction,  
 24 although he submits that "no evidence satisfying" it  
 25 was presented. His primary complaint is that the  
 26 "second basis" articulated in CALJIC No. 17.20 for a  
 27 section 12022.7 enhancement "allows a finding based  
 28 on mere knowledge," rather than the requisite  
 evidence "that the defendant personally inflicted  
 the injury." He maintains that by "eliminating the  
 need for a jury finding on the statutorily required  
 elements of the allegation, the instruction  
 misstated the law and therefore was erroneous."

29 The California Supreme Court established in  
 30 People v. Cole (1982) 31 Cal.3d 568, 579 (Cole),  
 31 that the "designation 'personally'" in section  
 32 12022.7 was intended "to limit the category of  
 33 persons subject to the enhancement to those who  
 34 directly perform the act that causes the physical  
 35 injury to the victim. . . ." "The choice of the  
 36 word 'personally' necessarily excludes those who may  
 37 have aided or abetted the actor directly inflicting  
 38 the injury." (Cole, supra, at p. 572. . .) Thus, a  
 section 12022.7 enhancement requires a finding that  
 the defendant both personally and intentionally  
 inflicted great bodily injury upon the victim.  
 (Cole, supra, at p. 579. . .)

39 Special standards of proof have evolved,  
 40 however, in cases where multiple assailants

1 simultaneously attack a single victim and great  
 2 bodily injury is inflicted. Strict adherence to the  
 3 rule articulated in Cole that "an aider and abettor  
 4 who strikes no blow" cannot be culpable under  
 5 section 12022.7 has been found misplaced and  
 6 inapplicable where the defendant is an active  
 7 participant in a "group pummeling" or beating.  
 8 (People v. Corona (1989) 213 Cal.App.3d 589, 594  
 9 (Corona)). In Corona, the court did not "attempt to  
 10 set forth a universally applicable test for when an  
 11 individual ceases to be an accomplice and becomes a  
 12 direct participant to the infliction of great bodily  
 13 injury," but concluded "that when a defendant  
 14 participates in a group beating and when it is not  
 15 possible to determine which assailant inflicted  
 16 which injuries, the defendant may be punished with a  
 17 great bodily injury enhancement if his conduct was  
 18 of a nature that it could have caused the great  
 19 bodily injury suffered." (Corona, supra, at p. 594;  
 20 see also People v. Banuelos (2003) 106 Cal.App.4th  
 21 1332, 1337; People v. Magana (1993) 17 Cal.App.4th  
 22 1371, 1380.) The rule announced in Corona and  
 23 followed in successor cases does not subject a  
 24 defendant to section 12022.7 enhancements "because  
 25 he was one of several participants each of whom  
 26 engaged in conduct that may have caused injuries to  
 27 a single victim. Rather, it stands for the  
 28 proposition that a defendant cannot insulate himself  
 from criminal liability by being one of multiple  
 participants even when proof of the precise level of  
 culpability is wanting." (People v. Cobb (2004) 124  
 Cal.App.4th 1051, 1058.) FN8.

We disagree with defendant's contention that  
 the CALJIC No. 17.20 instruction erroneously  
 authorized a finding of a section 12022.7  
 enhancement "based upon mere knowledge." Even the  
 second alternative of the group beating rule in  
 CALJIC No. 17.20 specifies that in addition to the  
 element of knowledge of the cumulative effect of all  
 the unlawful physical force inflicted during a group  
 attack, the defendant must have "personally applied  
 unlawful physical force to the victim." The CALJIC  
 No. 17.20 instruction also accurately articulates  
 that the exception to the personal liability rule  
 "applies only when proof of the personally liable  
 defendant is impossible. If the prosecution could  
 have introduced evidence resolving the issue, but  
 did not, the failure of proof does not justify  
 imposition of the enhancement on all potentially  
 culpable defendants." (People v. Gutierrez, supra,  
 46 Cal.App.4th 804, 816, *italics omitted*. . . .)

Thus in People v. Banuelos, supra, 106 Cal.App.4th 1332, 1337 (Banuelos), the court found that the language of CALJIC No. 17.20, and specifically the second part of the group beating instruction, "is consistent with the holding in Cole that a mere aider and abettor cannot receive the special great bodily injury enhancement; only a person who directly participates in the physical attack can receive the enhancement. . . . So too does the language of paragraph four of CALJIC No. 17.20 comport with the intent of the Legislature to deter personal infliction of great bodily injury in the future by preventing that intent from being frustrated in cases where multiple assailants cause the great bodily injury. Because the instruction requires that it be proven a defendant has personally inflicted an injury on the victim during a group attack, such instruction does not lighten the People's burden of proof as Banuelos asserts." The court therefore concluded that the final paragraph of CALJIC No. 17.20 "is a correct statement of the law." (Banuelos, supra, at p. 1338.)

We agree with the decision of the court in Banuelos that the CALJIC No. 17.20 properly reflects in a group beating case the requirement of section 12022.7 that "the individual accused of inflicting great bodily injury must be the person who directly acted to cause the injury." (Cole, supra, 31 Cal.3d 568, 572.) Pursuant to the instruction the enhancement may not be imposed upon a defendant who has acted only in the capacity of an aider and abettor. Direct participation in the acts that caused the great bodily injury is necessary, as is the impossibility of determining which assailant inflicted a particular injury. We are not persuaded that the jury may have erroneously believed from the instruction that a section 12022.7 enhancement finding was justified even if defendant did not personally inflict the injury upon the victim. (Banuelos, supra, 106 Cal.App.4th 1332, 1337-1338.)

We further conclude that the instruction in its entirety was supported by the evidence. Defendant and two others simultaneously attacked Diprima. According to Diprima's testimony, he believed - although he was not sure - that defendant hit and kicked him while he was on the floor. Defendant then restrained Diprima while the others continued the beating. Defendant directly acted to cause all of the injuries suffered by Diprima. This is also not a case in which the inability of the victim to

1 associate a particular assailant with particular  
2 injuries he suffered was due to a failure of the  
3 prosecution to offer additional available evidence.  
4 (Cf., People v. Gutierrez, supra, 46 Cal.App.4th  
5 804, 816; People v. Magana, supra, 17 Cal.App.4th  
6 1371, 1380-1381.) Rather, the victim's attempts to  
7 protect himself prevented him from determining with  
8 any accuracy which attacker inflicted which  
9 resulting injury. (Banuelos, supra, 106 Cal.App.4th  
10 1332, 1338.)

11 We realize that the second alternative of the  
12 CALJIC No. 17.20 instruction does not specifically  
13 reflect the requirement stated in Corona that the  
14 defendant's "conduct was of a nature that it could  
15 have caused the great bodily injury suffered." FN9.  
16 (Corona, supra, 213 Cal.App.3d 589, 594, italics  
17 added; see also Banuelos, supra, 106 Cal.App.4th  
18 1332, 1337; People v. Magana, supra, 17 Cal.App.4th  
19 1371, 1380.) To the extent this omission may be  
20 viewed as error, we find it harmless in the present  
21 case. An erroneous instruction on the "elements of  
22 a statute imposing a sentence enhancement is  
23 prejudicial 'only where it is reasonably probable  
24 that a result more favorable to the defendant would  
25 have been reached in the absence of the error.'  
26 [Citation.] On review, we examine the entire record,  
27 including the facts, instructions, arguments of  
28 counsel, communications from the jury during  
deliberations, and the entire verdict." (People v.  
Gutierrez, supra, 46 Cal.App.4th 804, 815.)

17 Defendant's personal participation in the  
18 physical aspects of the beating that resulted in the  
19 victim's injuries furnishes proof that defendant was  
20 not an aider and abettor, that he directly acted  
21 with others to cause the great bodily injuries, and  
22 that his conduct - in hitting and kicking Diprima  
23 while he was on the ground, then restraining him  
24 with a choke hold while defendant's two confederates  
25 ruthlessly beat him - was of a nature that it  
26 directly contributed to the great bodily injury  
27 ultimately inflicted. While the prosecutor  
28 specifically relied upon the second part of the  
group instruction to persuade the jury that  
defendant inflicted great bodily injuries upon the  
victim, the argument was offered in the framework of  
describing defendant's acts that caused the great  
bodily injury. We conclude that even if the trial  
court had added to the instruction the element that  
the defendant's conduct was of a nature that it  
could have caused the great bodily injury, a result  
more favorable to defendant would not have been



1 reached. No prejudicial error was committed.

2 FN8. The paragraph of CALJIC 17.20 challenged by  
3 defendant in the present appeal was added in a  
4 revision of the instruction based upon the decision  
5 in Corona, but has been the subject of dispute, and  
6 the issue of its validity is pending before the  
7 California Supreme Court. Review has been granted  
8 in two cases which found the instruction violative  
9 of the requirement articulated in Cole, that a  
10 finding of a great bodily injury enhancement under  
11 section 12022.7 cannot be based upon mere aiding and  
12 abetting. . . .<sup>7</sup>

13 FN9. We observe that in some cases there may be a  
14 factual distinction between acts that directly cause  
15 injury and acts that could have caused great bodily  
16 injury.

17 Opinion at 9-14.<sup>8</sup>

18 Here, Petitioner has not demonstrated that the state court's  
19 reasoned opinion is contrary to, or an unreasonable application of,  
20 clearly established United States Supreme Court law. Petitioner  
21 also fails to demonstrate that the state court's opinion relied on  
22 an unreasonable determination of the facts.

23 Petitioner primarily maintains that the instruction incorrectly  
24 sets forth the applicable state law, and that the state court's  
25 decision to the contrary was in error. This argument must fail.

26 In this case, the California Court of Appeal was engaged in an  
27 analysis and interpretation of California state law, and whether  
28

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29 <sup>7</sup> The California Supreme Court has since resolved this issue,  
30 holding that CALJIC 17.20 does not misstate the law regarding  
31 allegations of personal infliction of great bodily injury, and  
32 overturning the decisions of the Courts of Appeal that found the  
33 instruction violative of Cole. People v. Modiri, 39 Cal. 4th 481  
34 (2006).

35 <sup>8</sup> All emphasis in the California Court of Appeal's opinion is  
36 original.

1 state jury instructions were consonant with state substantive  
2 criminal law. A state court's interpretation of state law,  
3 including one announced on direct appeal of the challenged  
4 conviction, binds a federal court sitting in habeas corpus.  
5 Bradshaw v. Richey, 546 U.S. 74, 76 (2005); Hicks v. Feiock, 485  
6 U.S. 624, 629 (1988).

7 The state's highest court is the final authority on the law  
8 of that state. Sandstrom v. Montana, 442 U.S. 510, 516-517 (1979).  
9 Even a determination of state law made by an intermediate appellate  
10 court must be followed and may not be "'disregarded by a federal  
11 court unless it is convinced by other persuasive data that the  
12 highest court of the state would decide otherwise.'" Hicks, 485  
13 U.S. at 630 n.3 (quoting West v. American Telephone & Telegraph Co.,  
14 311 U.S. 223, 237-238 (1940)). A federal court may, however, re-  
15 examine a state court's interpretation of its law if that  
16 interpretation appears to be an obvious subterfuge to evade  
17 consideration of a federal issue. Mullaney v. Wilbur, 421 U.S. 684,  
18 691 n.11 (1975).

19 Petitioner does not and cannot cite to any evidence either  
20 that the California Supreme Court would decide this matter  
21 differently<sup>9</sup> or that the California Court of Appeal's decision was a  
22 subterfuge to evade consideration of a federal issue. The  
23 California Supreme Court denied Petitioner's petition for review of

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24  
25 <sup>9</sup>As noted above, the California Supreme Court has since resolved  
26 this issue, holding that CALJIC 17.20 does not misstate the law  
27 regarding allegations of personal infliction of great bodily injury,  
and overturning the decisions of the Courts of Appeal that found the  
instruction violative of Cole. People v. Modiri, 39 Cal. 4th 481  
(2006).

1 the decision on direct appeal and later denied Petitioner's habeas  
2 petition. Had the California Supreme Court wanted to overturn the  
3 California Court of Appeal's analysis of the state law at issue, it  
4 could have done so, either on direct or collateral review of  
5 Petitioner's case.

6 Petitioner also argues that the instruction violated his due  
7 process rights under the federal Constitution because the  
8 instruction relieved the prosecution of its burden of proving every  
9 element of the crime. Elements of a crime are determined by state  
10 law, however, and as discussed above, the state court reasonably  
11 concluded that the challenged jury instruction was consonant with  
12 the state law regarding the elements of the charged crimes. As  
13 such, and because Petitioner may not "transform a state-law issue  
14 into a federal one merely by asserting a violation of due process,"  
15 Longford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996), this argument  
16 must fail.

17 Finally, even if Petitioner had demonstrated that the state  
18 court's decision was in error, he would not be entitled to relief  
19 because he has not demonstrated that any alleged error was  
20 prejudicial. The state court reasonably found that, based on the  
21 evidence from the victim of Petitioner's "personal participation in  
22 the physical aspects of the beating that resulted in the victim's  
23 injuries," even a different instruction would not have resulted in a  
24 verdict more favorable to Petitioner. Opinion at 14. Accordingly,  
25 Petitioner also cannot show that any alleged error had "'a  
26 substantial and injurious effect' on the verdict." Dillard v. Roe,  
27 244 F.3d 758, 767 n.7 (9th Cir. 2001) (quoting Brecht, 507 U.S. at  
28

623). Because Petitioner cannot demonstrate prejudice, his claim must be denied.

#### V. Sufficiency Of The Evidence

In this claim, Petitioner maintains that there was insufficient evidence to support the jury's conclusion that Petitioner inflicted great bodily injury on victim Diprima. California Penal Code section 12022.7 allows for additional punishment for "[a]ny person who personally inflicts great bodily injury." The California Court of Appeal considered this issue in a reasoned opinion on direct appeal.

We proceed to defendant's contention that the great bodily injury findings must be reversed for lack of evidence. Defendant claims that his "cohorts" were "the ones who personally inflicted the injuries on Diprima; thus, as a matter of law, the evidence is insufficient to support the great bodily injury enhancement."

"We often address claims of insufficient evidence, and the standard of review is settled. 'A reviewing court faced with a such a claim determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] We examine the record to determine "whether it shows evidence that is reasonable, credible, and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citations.]" (People v. Moon (2005) 37 Cal.4th 1, 22.)

Following our discussion of the group beating instruction [see Section III.D., supra], and particularly the evidentiary support for it, we need not undertake a detailed further analysis to reach the conclusion that the great bodily injury enhancement finding is based upon substantial evidence. We add only that section 12022.7 "expressly defines great bodily injury as

1 constituting 'a significant or substantial physical  
2 injury,'" and the victim in the present case  
3 suffered many of those throughout his body and in  
4 cumulative effect. (People v. Escobar (1992) 3  
5 Cal.4th 740, 746-750.)

6 Nothing in the language of the statute or the  
7 Cole decision adds a requirement that the  
8 [Petitioner]'s acts alone must inflict the great  
9 bodily injury. And in fact, the contrary is true.  
10 "More than one person may be found to have directly  
11 participated in inflicting a single injury."  
12 (People v. Guzman, supra, 77 Cal.App.4th 761, 764.)  
13 Defendant actively participated in the infliction of  
14 all of the injuries suffered by the victim by not  
15 only hitting and kicking him, but also administering  
16 a choke hold while others grievously beat him, then  
17 causing him to jump from the balcony. [Petitioner]'s  
18 conduct was of a nature that it could have caused  
19 the great bodily injury suffered. (Corona, supra,  
20 213 Cal.App.3d 589, 594-595.) As the group beating  
21 instruction was supported by substantial evidence,  
22 so is the jury's enhancement finding.

23 Opinion at 15-16.

24 Petitioner cannot demonstrate that anything in the state  
25 court's reasoned opinion denying this claim is contrary to, or an  
26 unreasonable application of, clearly established United States  
27 Supreme Court law. Nor can he show that the opinion was based on an  
28 unreasonable determination of the facts.

29 A federal court reviewing collaterally a state court conviction  
30 on a claim of insufficient evidence does not determine whether it is  
31 satisfied that the evidence established guilt beyond a reasonable  
32 doubt. Payne v. Borg, 982 F.2d 335, 338 (9th Cir. 1992). The  
33 federal court "determines only whether, 'after viewing the evidence  
34 in the light most favorable to the prosecution, any rational trier  
35 of fact could have found the essential elements of the crime beyond  
36 a reasonable doubt.'" See id. (quoting Jackson, 443 U.S. at 319).  
37 Only if no rational trier of fact could have found proof of guilt  
38

1 beyond a reasonable doubt, has there been a due process violation.  
2 Jackson, 443 U.S. at 324; Payne, 982 F.2d at 338; Miller v. Stagner,  
3 757 F.2d 988, 992-993 (9th Cir.), amended, 768 F.2d 1090 (9th Cir.  
4 1985); Bashor v. Risley, 730 F.2d 1228, 1239 (9th Cir. 1984).

5 Here, without resolving any factual disputes, the appellate  
6 court properly viewed the evidence in the light most favorable to  
7 the prosecution. Payne, 982 F. 2d at 338; Opinion at 15. The  
8 evidence showed that Petitioner "actively participated" in the  
9 attack on Diprima. In addition, Petitioner's participation in the  
10 attack "was of a nature that it could have caused the great bodily  
11 injury suffered [by Diprima]." Id.

12 Moreover, the appellate court, in considering relevant state  
13 law, determined that the requirement in § 12022.7 that Petitioner  
14 "personally" inflict great bodily injury did not mean that  
15 Petitioner alone must have inflicted great bodily injury in order  
16 for the jury to find him guilty of this offense. Doc. #13-2, Ex. G;  
17 Doc. #2-2 at 30. Therefore, the appellate court correctly applied  
18 Jackson to the facts of the case in its determination that  
19 sufficient evidence supported the finding that Petitioner committed  
20 great bodily injury under § 12022.7. See Jackson, 443 U.S. at 1275;  
21 see 28 U.S.C. § 2254(d).

22 Finally, Petitioner's suggestion that the victim's testimony  
23 was not sufficient evidence that Petitioner personally inflicted  
24 great bodily injury is a credibility issue this Court must presume  
25 that the trier of fact resolved in favor of the prosecution. See  
26 Jackson, 443 U.S. at 326. Because the jury determined that the  
27 victim's testimony was credible evidence of Petitioner's personal  
28

1 infliction of great bodily injury, this Court must defer to that  
2 factual determination. Accordingly, this claim must be denied.

3 VI. Sentencing Enhancement

4 Petitioner claims that by reinstating a sentencing enhancement  
5 under § 12022.7 for great bodily injury, previously dismissed on the  
6 prosecutor's motion, the trial court erred as a matter of law,  
7 violating Petitioner's right to due process and the constitutional  
8 prohibition against double jeopardy. Respondent argues that  
9 Petitioner's claim fails because he cites only California case law,  
10 and has not cited any constitutional law to support his claim.  
11 Respondent further argues, citing Sattazahn v. Pennsylvania, 537  
12 U.S. 101, 109 (2003), that the trial court's dismissal and  
13 reinstatement of the § 12022.7 enhancement was not a violation of  
14 the Double Jeopardy Clause of the Constitution because the clause  
15 only applies when there is some event, such as an acquittal, that  
16 terminates the original jeopardy; inadvertent trial error is not  
17 sufficient to qualify as such an event under the clause. Respondent  
18 is correct.

19 This claim was addressed in a reasoned opinion by the  
20 California Court of Appeals.

21 Defendant's final claim of error is that the  
22 trial court "wrongly reinstated" the great bodily  
23 injury enhancement finding. The record reflects  
24 that at a hearing on July 30, 2004, after trial and  
25 the jury's finding on the great bodily injury  
26 enhancement, the prosecution moved to dismiss "the  
27 12022.7," which was summarily granted by the trial  
28 court. The minute order for that date indicates  
that the "PC 12022.1(B)" (on-bail) enhancement  
allegation was stricken by the district attorney.  
(Italics added.) At the sentencing hearing on  
December 22, 2004, the defense claimed that the  
great bodily injury enhancement had been stricken,

1 and therefore a sentence on that finding was  
 2 impermissible. The prosecutor stated that she  
 3 intended to dismiss the on bail enhancement  
 4 allegation at the prior hearing - it had not been  
 5 submitted to the jury - but "mistakenly" moved to  
 6 "dismiss the 12022.7." The trial court ruled that  
 7 the "District Attorney's erroneous reference" to  
 8 section 12022.7, rather than 12022.1, could be  
 9 corrected, and the "out on bail enhancement" was  
 10 dismissed. Defendant now claims that once the trial  
 11 court dismissed the section 12022.7 enhancement, "it  
 12 had no power or authority to reinstate it."

13 We disagree. A trial court retains the  
 14 inherent power to correct clerical errors or  
 15 misprisions in its records, whether made by the  
 16 clerk or the court itself. (People v. Mitchell  
 17 (2001) 26 Cal.4th 181, 185; Ames v. Paley (2001) 89  
 18 Cal.App.4th 668, 672-673; People v. McGee (1991) 232  
 19 Cal.App.3d 620, 624.) "The court may correct these  
 20 errors on its own motion or upon the application of  
 21 the parties. [Citation.] . . . Likewise, if the  
 22 minutes or abstract of judgment fails to reflect the  
 23 judgment pronounced by the court, the error is  
 24 clerical and the record can be corrected at any time  
 25 to make it reflect the true facts." (People v.  
 26 Little (1993) 19 Cal.App.4th 449, 452.) "The  
 27 difference between judicial and clerical error rests  
 28 not upon the party committing the error, but rather  
 on whether it was the deliberate result of judicial  
 reasoning and determination. The distinction  
 between clerical error and judicial error is whether  
 the error was made in rendering the judgment, or in  
 recording the judgment rendered." (Rochin v. Pat  
Johnson Manufacturing Co. (1998) 67 Cal.App.4th  
 1228, 1238.) "Changes which correct errors,  
 mistakes and omissions made through inadvertence,  
 but do not involve the exercise of the judicial  
 function, are considered corrections of clerical  
 errors that leave the original judgment intact."  
 (Stone v. Regents of University of California (1999)  
 77 Cal.App.4th 736, 744).

The reference to the section 12022.7  
 enhancement was inadvertent error rather than any  
 exercise of judicial discretion, and was therefore  
 subject to correction by the trial court. (See West  
Shield Investigations & Security Consultants v.  
Superior Court (2000) 82 Cal.App.4th 935, 950-951;  
APRI Ins. Co. v. Superior Court (1999) 76  
 Cal.App.4th 176, 185-186; Hamilton v. Laine (1997)  
 57 Cal.App.4th 885, 891.)





1 Williams, 422 F.3d at 1012. Petitioner is not entitled to relief on  
2 this claim.

3 VII. Cumulative Error

4 Petitioner claims that the cumulative effect of the errors at  
5 his trial deprived him of his constitutional rights. The Superior  
6 Court considered this claim in a reasoned decision on August 4,  
7 2006, as follows:

8 In his [state habeas] application, Petitioner  
9 contends that: . . .

10 6. The entire proceedings were fundamentally  
unfair.

11 It is axiomatic that Petitioner has the burden  
12 of establishing a prima facie case for relief on  
each issue presented by him on his application for a  
13 writ of habeas corpus. People v. Romero (1994) 8  
Cal.4th 728, 737; People v. Duvall (1995) 9 Cal. 4th  
14 464, 474. Conclusions unsupported by any evidence  
are insufficient. Based on the foregoing, the  
15 issues set forth in this application do not set  
forth a case for relief in *habeas corpus*.

16 2007 Order at 3-4.

17 In some cases, although no single trial error is sufficiently  
18 prejudicial to warrant reversal, the cumulative effect of several  
19 errors may still prejudice a defendant so much that his conviction  
20 must be overturned. See Alcala v. Woodford, 334 F.3d 862, 893-895  
21 (9th Cir. 2003). However, where there is no single constitutional  
22 error existing, nothing can accumulate to the level of a  
23 constitutional violation. See Mancuso v. Olivarez, 292 F.3d 939,  
24 957 (9th Cir. 2002).

25 Because this Court finds that, based on its assessment of  
26 Petitioner's claims, no single constitutional error exists,  
27 Petitioner's claim of cumulative error is DENIED.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Habeas Corpus is DENIED. Further, a Certificate of Appealability is DENIED. See Rule 11(a) of the Rules Governing Section 2254 Cases (effective Dec. 1, 2009). Petitioner has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not appeal the denial of a Certificate of Appealability but may seek a certificate from the Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the Rules Governing Section 2254 Cases (effective Dec. 1, 2009).

The Clerk of Court shall terminate all pending motions as moot, enter Judgment in accordance with this Order and close the file.

IT IS SO ORDERED.

Dated: 9/30/2011

  
CLAUDIA WILKEN  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

JASON P. VOELKER,

Plaintiff,

v.

M.C. KRAMER et al,

Defendant.

Case Number: CV08-01285 CW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 30, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jason Paul Voelker V-62496  
Sierra Conservation Center  
5150 O'Byrnes Ferry Road  
B5-BB2-11  
Jamestown, CA 95327

Dated: September 30, 2011

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk