UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DARREN DAVID CHAKER, aka DARREN D. CHAKER, Petitioner, vs. COLLEENE PRECIADO, CHIEF PROBATION OFFICER, Respondent.	Case No. SACV 08-1300-AG(RC) REPORT AND RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, by Magistrate Judge Rosalyn M. Chapman, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

BACKGROUND

I

On June 21, 2006, in Orange County Superior Court case no. 02HF1533, a judge convicted petitioner Darren David Chaker, aka Darren D. Chaker, of one count of possession of an assault weapon in

violation of California Penal Code ("P.C.") § 12280(b). Clerk's Transcript ("CT") 1289-92. On July 14, 2006, the trial court sentenced petitioner to three years formal probation on certain terms and conditions, including that he serve 45 days in the county jail. CT 1423, 1429-31.

The petitioner appealed his conviction and sentence to the California Court of Appeal, CT 1433, which in an unpublished opinion filed February 4, 2008, modified a condition of probation and "[i]n all other respects affirmed the judgment." Lodgment nos. 2-33; Second Supplemental Lodgment ("SSL") nos. 10-11, 23. On March 7, 2008, petitioner, proceeding through counsel, filed a petition for review in the California Supreme Court,[1] which denied the petition on May 14, 2008.[2] Lodgment nos. 4-5; SSL nos. 27, 31.

On May 29, 2007, while his appeal was pending, petitioner filed a habeas corpus petition in the California Supreme Court, which denied

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[1] In his petition for review to the California Supreme Court, petitioner raised the following claims: (1) The trial court violated petitioner's Sixth and Fourteenth Amendment rights by denying his pretrial requests to discharge his retained counsel and to represent himself; and (2) the Court of Appeal violated petitioner's Fourteenth Amendment rights by affirming his conviction based on an alternative theory of guilt that was initially relied on by the trial court, but then abandoned at sentencing based on new evidence that cast doubt on the credibility of the key prosecution witness.

[2] Petitioner filed several habeas corpus petitions in the Superior Court and California Court of Appeal before his conviction became final. Lodgment nos. 6-15, 18-19; SSL nos. 2-9, 16-18, 25, 28-30.

the petition on July 18, 2007,[3] with citation to In re Dixon, 41 Cal. 2d 756 (1953).[4] Lodgment nos. 16-17; SSL nos. 14-15. On August 16, 2007, petitioner filed a second habeas corpus petition in the California Supreme Court,[5] which denied the petition on May 21, 2008. Lodgment nos. 20-23; SSL nos. 19-22, 32.

On April 10, 2009, petitioner filed a habeas corpus petition in the California Court of Appeal, which denied the petition on May 14, 2009. Third Supplemental Lodgment ("TSL") nos. 34-35. On May 15, 2009, petitioner filed a third habeas corpus petition in the California Supreme Court,[6] which denied the petition on September 9,

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[3] In this habeas corpus petition, petitioner raised the claim that P.C. § 12276.1 "is unconstitutional based on the fact there are no definition(s) for the terminology used in said statute. . . ." Lodgment no. 16.

[4] A citation to *In re Dixon* indicates that the failure to raise an issue on appeal generally prohibits raising the issue in a post-appeal habeas corpus petition. LaCrosse v. Kernan, 244 F.3d 702, 707 (9th Cir. 2001); Fields v. Calderon, 125 F.3d 757, 762 (9th Cir. 1997), cert. denied, 523 U.S. 1132 (1998).

[5] In this habeas corpus petition, petitioner claimed: (1) "The [trial] court erred when it failed to hold a hearing when it knew or reasonably should have know [sic] of a conflict of interest . . ."; (2) petitioner received ineffective assistance of counsel when counsel (a) failed to raise an entrapment defense, (b) failed to impeach key prosecution witnesses, (c) refused to allow petitioner to testify, and (d) failed to renew or raise a motion to suppress evidence; (3) the police improperly seized "medical and . . . legal records"; (4) "Petitioner demanded to represent himself on two occasions and was denied that right"; and (5) the trial court imposed invalid probation conditions. Lodgment no. 20.

[6] In this habeas corpus petition, petitioner claimed: (1) "The writ of habeas corpus is proper where there is evidence a witness committed perjury"; (2) Nadine Zaya, a prosecution

witness, committed perjury that "infected the trial" in violation of petitioner's "right to a fair trial and resulted in trial counsel rendering ineffective assistance of counsel"; (3) ineffective assistance of trial counsel who: (a) failed to raise the defense of entrapment; (b) refused to allow petitioner to testify; (c) failed to impeach witness Nadine Zaya with readily available information; (d) "failed to investigate and impeach" the prosecution's sole expert witness, who gave "an opinion about the legality of the rifle"; (e) failed to "renew or raise motion to suppress evidence" based on hearsay from an informant; (f) failed to "file a motion to suppress evidence due to the fact no felony or other crime required for the issuance of a warrant was present in the affidavit"; (g) failed to "file a motion to suppress evidence due to false statements contained in the affidavit for the issuance of a warrant"; and (h) failed to prove a defense of mistake of fact; (4) the trial and appellate courts "violated petitioner's Sixth Amendment right to proof beyond a reasonable doubt by failing to find that the crime of possessing an assault weapon requires actual knowledge of the characteristics which make the gun an assault weapon"; (5) petitioner was denied his right to meaningful review on direct appeal; (6) "prosecutor's knowing use of false testimony requires reversal and failure to provide *Brady* material violated petitioner's due process rights"; (7) "the Assault Weapon Control Act is unconstitutional not only due to its ambiguity and vauge [sic] terms, but since it abridges the Second Amendment right to bear arms"; (8) "the trial court's primary theory of conviction was legally erroneous because the rifle was not an 'assault weapon' without the bolt assembly making the rifle a center fire, semi[-]automatic rifle under [P.C] Section 12276.1"; (9) "the trial court's primary theory of conviction violated due process because there was insufficient evidence of the scienter element . . ." (10) "the trial court's primary theory of conviction violated due process because the statute is unconstitutionally vague as applied to [petitioner's] possession of the rifle without the bolt assembly"; (11) "the [trial] court's error to not inquire about the two letters sent to it prior to trial . . . violated petitioner's right to . . . conflict[-]free counsel and right for self representation"; and (12) the Assault Weapon Control Act is unconstitutional because: (a) the "permanently inoperable" provision's meaning in unintelligible; (b) it is vague because its mens rea requirement departs from the traditional criminal science standard, and (c) "the lack of any statutory measurement provision, and the impossibility of the

2009. TSL nos. 36-37.

II

The California Court of Appeal, in affirming petitioner's conviction, made the following factual findings:[7]

At some point between August and October 2002, petitioner and his ex-girlfriend, Nadine Zaya, traveled from Southern California to Scottsdale, Arizona. Petitioner took Zaya to a gun store, where he purchased the Rifle, a licensed reproduction of a Fabrique Nationale FAL (FN-FAL) battle weapon.[8] At the gun store, petitioner told Zaya he once owned "the exact same gun" but his mother had taken it away from him.

After petitioner purchased the Rifle, he made Zaya take pictures of him with it. He also made Zaya pose with the Rifle. Petitioner then took Zaya to a firing range, where he fired the Rifle and showed her how to shoot, hold, and load it. When Zaya held the Rifle, petitioner reassured her, "It's okay. Look, it's fun. . . . You're going to be okay. I'm an ex-cop. I know how to shoot a gun." Shortly thereafter, petitioner and Zaya returned to California with the Rifle.

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public define [sic] 'permanently inoperable,' demonstrates the ambiguity and vagueness of [P.C. §] 12285." TSL no. 36.

[7] Lodgment no. 3 at 3-4.

[8] FN-FAL refers to Fabrique Nationale-Fusil Automatic Light, a type of automatic battle rifle manufactured by Fabrique Nationale beginning in the late 1940's or early 1950's.

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On October 14, 2002, Laguna Beach police officers visited petitioner's apartment to investigate allegations that he had sexually exploited a minor. Officer Bammer entered the apartment, knocked on a bedroom door, and identified himself as a police officer. After some delay, petitioner emerged from the bedroom and told Bammer the room belonged to him. He refused, however, to permit the police officers to search it.

Petitioner called Zaya after the police officers left the apartment. He expressed concern that the fully-assembled Rifle would be considered an illegal weapon. Petitioner told Zaya he was going to remove parts from the Rifle to "make it legal" and asked her to keep the parts.

The next day, the police officers returned to petitioner's apartment with a search warrant. During the search, Officer Walloch found the Rifle in petitioner's bedroom closet. He noticed the Rifle had a detachable magazine and a pistol grip, but that it was missing its bolt carrier group (bolt).[9] The officers also found unloaded magazines and pictures of petitioner posing with the Rifle at a firing range. In the pictures, the Rifle contained the bolt and the magazine.

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[9] The bolt is a "small . . . but integral part of the [R]ifle." It contains five parts; it loads the ammunition into the firing chamber, houses the firing pin, and extracts the spent casing after the bullet has been fired."

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III

On November 17, 2008, petitioner, proceeding pro se, filed the pending habeas corpus petition, and on January 23, 2009, respondent filed a motion to dismiss the petition as unexhausted. On September 1, 2009, this Court denied the respondent's motion to dismiss, and respondent filed an answer on November 24, 2009. Petitioner did not timely file a reply.

The pending petition raises the following claims:

Ground One – "The Trial Court Violated Petitioner's Right to Have Each Element Proven Since The Rifle Was Missing 13 Parts, Thus Was Not a Violation of [California Penal Code ("P.C.") §] 12776.1 Due to The Fact All of The Parts Were Not Located to Operate it" (Petition at 5);

Ground Two – "The Assault Weapon Control Act (AWCA) is Unconstitutional Since The Terms Used to Define 'What' An Assault Rifle is, is [sic] Not Defined by Statute . . ." (Id.);

Ground Three – "The AWCA and Regulations Are So Vague And Confusing as to Raise Questions Under The AWCA's Mens Rea Requirement" (Petition at 6);

Ground Four – "The Lack Of Any Statutory Measurement Provision, And The Impossibility Of The Public Define [sic] 'Permanently Inoperable,' Demonstrates the Ambiguity and Vagues [sic] of Penal Code Section 12285" (Id.); and

Ground Five – "The Court Erred When it Failed to Hold a Hearing When it Knew or Should Have Known a Conflict Existed After Receiving Two Letters Pre-Trial From Petitioner Providing Explicit Reasons Why a Conflict Existed." (Id.).

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DISCUSSION

IV

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "circumscribes a federal habeas court's review of a state court decision." Lockyer v. Andrade, 538 U.S. 63, 70, 123 S. Ct. 1166, 1172, 155 L. Ed. 2d 144 (2003); Wiggins v. Smith, 539 U.S. 510, 520, 123 S. Ct. 2527, 2534, 156 L. Ed. 2d 471 (2003). As amended by AEDPA, 28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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). Further, under AEDPA, a federal court shall presume a state court's determination of factual issues is correct, and petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The California Supreme Court reached the merits of petitioner's

claims when it denied his petition for review and second and third petitions for habeas corpus relief without comment or citation to authority. Pinholster v. Ayers, 590 F.3d 651, 663 (9th Cir. 2009) (en banc), pet. for cert. filed, (Mar. 9, 2010); Hunter v. Aispuro, 982 F.2d 344, 348 (9th Cir. 1992), cert. denied, 510 U.S. 887 (1993). "Where there has been one reasoned judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S. Ct. 2590, 2594, 115 L. Ed. 2d 706 (1991); Medley v. Runnels, 506 F.3d 857, 862 (9th Cir. 2007) (en banc), cert. denied, 128 S. Ct. 1878 (2008). Therefore, in addressing Ground One, this Court will consider the reasoning of the California Court of Appeal, which issued a written decision addressing this claim. Doody v. Schriro, 596 F.3d 620, 634 (9th Cir. 2010) (en banc); Smith v. Curry, 580 F.3d 1071, 1079 (9th Cir. 2009), pet. for cert. filed, 78 USLW 3523 (Feb. 12, 2010). However, since no state court has provided a reasoned decision addressing the merits of Grounds Two through Five, this Court must conduct "an independent review of the record" to determine whether the California Supreme Court's ultimate decision to deny these claims was contrary to, or an unreasonable application of, clearly established federal law. Pinholster, 590 F.3d at 663; Medley, 506 F.3d at 863 n.3.

V

To review the sufficiency of the evidence in a habeas corpus proceeding, the Court must determine whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Lewis v. Jeffers, 497 U.S. 764, 781, 110 S. Ct.

3092, 3102-03, 111 L. Ed. 2d 606 (1990) (citation omitted); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). All evidence must be considered in the light most favorable to the prosecution, Jeffers, 497 U.S. at 782, 110 S. Ct. at 3103; Jackson, 443 U.S. at 319, 99 S. Ct. at 2789, and if the facts support conflicting inferences, reviewing courts "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326, 99 S. Ct. at 2793; McDaniel v. Brown, __ U.S. __, 130 S. Ct. 665, 673, __ L. Ed. 2d __ (2010). Furthermore, under AEDPA, federal courts must "apply the standards of *Jackson* with an additional layer of deference." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005), cert. denied, 546 U.S. 1137 (2006); Briceno v. Scribner, 555 F.3d 1069, 1078 (9th Cir. 2009). These standards are applied to the substantive elements of the criminal offense under state law. Jackson, 443 U.S. at 324 n.16, 99 S. Ct. at 2792 n.16; Chein v. Shumsky, 373 F.3d 978, 983 (9th Cir.) (en banc), cert. denied, 543 U.S. 956 (2004).

> At the time of petitioner's offense, P.C. § 12280(b) provided:
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> Any person who, within this state, possesses any assault weapon, except as provided in this chapter, is guilty of a public offense and upon conviction shall be punished by imprisonment in the state prison, or in a county jail, not exceeding one year.

P.C. § 12280(b) (2002). Weapons listed or defined as an "assault

weapon" are set forth in P.C. § 12276, which "identifies designated semiautomatic rifles, pistols and shotguns by type, series and model," and P.C. § 12276.1, which further "defines such a firearm generically, as a semiautomatic rifle, pistol or shotgun that possesses one or more of a variety of specified features." Jackson v. Dep't of Justice, 85 Cal. App. 4th 1334, 1340, 102 Cal. Rptr. 2d 849 (2001). To prove a violation of P.C. § 12280(b), the prosecutor must prove the defendant possessed an assault weapon and the defendant knew or should have known the weapon he possessed had the characteristics of an assault weapon. In re Jorge M., 23 Cal. 4th 866, 869-70, 887, 98 Cal. Rptr. 2d 466, 468-69, 482 (2000); In re Daniel G., 120 Cal. App. 4th 824, 831-32, 15 Cal. Rptr. 3d 876 (2004).

In Ground One, petitioner claims there was insufficient evidence to convict him of violating P.C. § 12280(b) because, when the police arrested him, the rifle he possessed was missing 13 parts, including the bolt. The California Court of Appeal rejected petitioner's claim, stating:

> [T]here was sufficient circumstantial evidence [petitioner] possessed a fully-assembled assault weapon in California before the police found it, [thus,] we need not consider whether [petitioner's] possession of the Rifle, without the bolt and magazine, also violated [P.C.] section 12280. [¶] . . . [T]he court convicted [petitioner] of possessing an assault weapon in violation of [P.C.] section 12280(b) on two theories, one of which was that [petitioner] possessed a fully-assembled assault weapon in California. "[T]he law is

clear that we may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court." [¶] To determine whether there is sufficient evidence [petitioner] possessed a fully-assembled assault weapon in California, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. We apply the same standard to convictions based largely on circumstantial evidence. Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [¶] There is sufficient evidence [petitioner] possessed a fully-assembled assault weapon in California. [Petitioner's] telephone conversation with Zaya on October 14, 2002 proves it. As discussed above, [petitioner] called Zaya before the police officers searched his apartment. He told her he intended to remove parts from the Rifle to make it legal and asked her to keep the parts he removed. When the police officers searched [petitioner's] apartment the next day, they found the Rifle without the bolt and the magazine. **[Petitioner's] admission that he needed to remove parts from the Rifle to make it comply with the law is sufficient circumstantial evidence it was fully-assembled before the police found it.** . . . [¶] Next, [petitioner] argues there is insufficient evidence he knew or reasonably should have known the Rifle, without the bolt, had the essential characteristics of an assault

> weapon. Because we have already concluded there is sufficient evidence [petitioner] possessed a fully-assembled assault weapon in California, we do not consider whether [petitioner] realized the Rifle, without the bolt, possessed the characteristics of an assault weapon. Instead, we conclude there was sufficient evidence [petitioner] knew the fully-assembled Rifle possessed the features of an assault weapon. [¶] . . . [T]here is sufficient evidence [petitioner] knew or should have known the fully-assembled Rifle possessed the features of an assault weapon. Before the police searched his apartment, [petitioner] told Zaya he intended to remove parts from the fully-assembled Rifle to make it legal. **If [petitioner] believed he needed to remove parts to comply with the law, he must have known the fully-assembled Rifle was an illegal assault weapon.** Moreover, this is not a situation where the salient characteristics of the firearm are extraordinarily obscure. The Rifle[']s characteristics were, or should have been, readily apparent to [petitioner] who - by his own account - was an ex-cop who previously owned the exact same gun. In Arizona, [petitioner] fired the Rifle and took pictures posing with it. He showed Zaya how to load and shoot it and he bragged to her that he was familiar with guns. He then returned to California with the Rifle. The record suggests the Rifle remained in his sole possession and control until the police visited his apartment. **[Petitioner], therefore, had ample opportunity to examine the Rifle and determine whether it possessed the features of an assault weapon.**

> Accordingly, we reject [petitioner's] claim that there was insufficient evidence of scienter to support his conviction.

Lodgment no. 3 at 7-10 (some quotation marks omitted; emphasis added).

The testimony of a single witness is sufficient to uphold a conviction, Bruce v. Terhune, 376 F.3d 950, 957-58 (9th Cir. 2004) (per curiam); United States v. Larios, 640 F.2d 938, 940 (9th Cir. 1982), and a federal court in a habeas corpus proceeding cannot redetermine the credibility of witnesses when the demeanor of the witnesses was not observed by the federal court. Marshall v. Lonberger, 459 U.S. 422, 434, 103 S. Ct. 843, 851, 74 L. Ed. 2d 646 (l983). Rather, "[t]he reviewing court must respect the province of the [factfinder] to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the [factfinder] resolved all conflicts in a manner that supports the verdict." Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997) (quoting Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995)).

Here, for the reasons the California Court of Appeal explained,[10] there is more than sufficient evidence, based on the testimony of Nadine Zaya, Chris Abad and Greg Walloch, see RT 283:17-331:25, 396:9-447:1, 457:13-524:25, demonstrating petitioner possessed a fully-

[10] Similarly, the trial court determined "the circumstantial evidence . . . [has] proven to me beyond a reasonable doubt that the [petitioner] possessed a fully assembled assault weapon here in California." Reporter's Transcript ("RT") 582:11-591:3.

assembled assault weapon in California, and petitioner knew the weapon he possessed had the characteristics of an assault weapon.[11] In re Jorge M., 23 Cal. 4th at 888, 98 Cal. Rptr. 2d at 482-83; In re Daniel G., 120 Cal. App. 4th 824, 831-32, 15 Cal. Rptr. 3d 876 (2004). Therefore, the California Supreme Court's denial of Ground One was neither contrary to, nor an unreasonable application of, clearly established federal law.

VI

"It is a fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" United States v. Batchelder, 442 U.S. 114, 123, 99 S. Ct. 2198, 2203, 60 L. Ed. 2d 755 (1979) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 619, 83 L. Ed. 888 (1939)). To satisfy due process, a criminal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903 (1983); Batchelder, 442 U.S. at 123, 99 S. Ct. at 2203-04; Anderson v. Morrow, 371 F.3d 1027, 1031 (9th Cir. 2004). Nonetheless, unless First Amendment rights are implicated, a defendant

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[11] Petitioner's claim that he was not in possession of an "assault weapon" when he was arrested because his weapon was "permanently inoperable" is merely another version of his sufficiency of evidence claim, as the California Court of Appeal noted: "We reject this argument because we have already concluded there was sufficient evidence to support [petitioner's] conviction based on his possession of a fully-assembled assault weapon in California." Lodgment no. 3 at 10. The Court, thus, does not address this argument separately.

may only challenge a sentencing provision as unconstitutionally vague as applied to the facts of his case. Chapman v. United States, 500 U.S. 453, 467, 111 S. Ct. 1919, 1929, 114 L. Ed. 2d 524 (1991); United States v. Johnson, 130 F.3d 1352, 1354 (9th Cir. 1997).

In Grounds Two through Four petitioner contends P.C. §§ 12276.1 and 12285 are unconstitutionally vague. To determine petitioner's claims, this Court must consider the statutory language of P.C. §§ 12276.1 and 12285. See United States v. Larm, 824 F.2d 780, 784 (9th Cir. 1987) ("It is the statute that must give sufficient notice of the proscribed conduct, both through adequate promulgation and definiteness in its language."), cert. denied, 484 U.S. 1078 (1988). For the reasons set forth below, there is no merit to petitioner's claims.[12]

P.C. § 12276.1:

At the time of petitioner's offense, P.C. § 12276.1 provided:

(a) Notwithstanding [P.C.] Section 12276, "assault weapon" shall also mean any of the following:

(1) A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine[13] and any one of the following:

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[12] Since the Court finds petitioner's claims are without merit, it will not address respondent's alternate argument that petitioner procedurally defaulted Grounds Two through Four. Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002).

[13] The statute defines "magazine" as "any ammunition feeding device." P.C. § 12276.1(d)(1) (2002).

(A) A pistol grip that protrudes conspicuously beneath the action of the weapon.

(B) A thumbhole stock.

(C) A folding or telescoping stock.

(D) A grenade launcher or flare launcher.

(E) A flash suppressor.

(F) A forward pistol grip.

(2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.[14]

(3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

(4) A semiautomatic pistol that has the capacity to accept a detachable magazine and any one of the following:

(A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.

(B) A second handgrip.

(C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning his or her hand, except a slide that encloses the barrel.

(D) The capacity to accept a detachable magazine at some location outside of the pistol grip.

(5) A semiautomatic pistol with a fixed magazine that has

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[14] The statute defines "capacity to accept more than 10 rounds" as "capable of accommodating more than 10 rounds, but shall not be construed to include a feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds." P.C. § 12276.1(d)(2) (2002).

> the capacity to accept more than 10 rounds.
>
> (6) A semiautomatic shotgun that has both of the following:
>
> (A) A folding or telescoping stock.
>
> (B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.
>
> (7) A semiautomatic shotgun that has the ability to accept a detachable magazine.
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> (8) Any shotgun with a revolving cylinder.

P.C. § 12276.1(a) (2002)[15] (footnotes added). Contrary to petitioner's contention, "[t]his section . . . is painstakingly specific" as to what constitutes an assault weapon. McLeod v. Yates, 2009 WL 5286608, *13 (C.D. Cal.).

P.C. § 12285:

At the time of petitioner's offense, P.C. § 12285 provided:

> Any person who (A) obtains title to an assault weapon registered under this section or that was possessed pursuant to subdivision (g) or (i) of [P.C.] Section 12280 by bequest or intestate succession,[16] or (B) lawfully possessed a

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[15] The statute also provides that "[a]ny antique firearms" and "pistols that are designed expressly for use in Olympic target shooting events" are not an "assault weapon." P.C. § 12276.1(b-c) (2002). Antique firearms are "firearms manufactured prior to January 1, 1899." P.C. § 12276.1(d)(3). (2002).

[16] Subsections (g) and (i) of P.C. § 12280 address possession of an assault weapon by sworn peace officers or retired peace officers. P.C. § 12280(g), (i) (2002).

> firearm subsequently declared to be an assault weapon pursuant to [P.C.] Section 12276.5, or subsequently defined as an assault weapon pursuant to [P.C.] Section 12276.1, shall, within 90 days, render the weapon permanently inoperable, sell the weapon to a licensed gun dealer, obtain a permit from the Department of Justice in the same manner as specified in Article 3 (commencing with Section 12230) of Chapter 2, or remove the weapon from this state.

P.C. § 12285(b)(1) (2002) (footnote added). The petitioner claims P.C. § 12285 is unconstitutionally vague due to the lack of any statutory measurement provision and because "permanently inoperable" is undefined. However, by its plain terms, P.C. § 12285 is inapplicable to petitioner, who obtained title to the assault weapon by purchasing it out of state **after** it had been defined an assault weapon under P.C. § 12276.1. Chapman, 500 U.S. at 467, 111 S. Ct. at 1929; Johnson, 130 F.3d at 1354. Moreover, as noted above, the trial court's determination that petitioner possessed a fully operable assault weapon in California is supported by substantial evidence. In re Jorge M., 23 Cal. 4th at 888, 98 Cal. Rptr. 2d at 482-83; In re Daniel G., 120 Cal. App. 4th at 831-32.

Therefore, the California Supreme Court's denial of Grounds Two through Four was neither contrary to, nor an unreasonable application of, clearly established federal law.

VII

The Sixth Amendment right to counsel includes the right to be

represented by counsel with undivided loyalties. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103, 67 L. Ed. 2d 220 (1981); Campbell v. Rice, 408 F.3d 1166, 1170 (9th Cir.) (en banc), cert. denied, 546 U.S. 1036 (2005); Lewis v. Mayle, 391 F.3d 989, 995 (9th Cir. 2004). When notified of an actual or potential conflict of interest, "a trial court has the obligation 'either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel.'" Campbell, 408 F.3d at 1170 (quoting Holloway v. Arkansas, 435 U.S. 475, 484, 98 S.Ct. 1173, 1178, 55 L. Ed. 2d 426 (1978)). "If the trial court fails to undertake either of these duties, the defendant's Sixth Amendment rights are violated." Campbell, 408 F.3d at 1170; Holloway, 435 U.S. at 484, 98 S. Ct. at 1178-79. Nevertheless, "[e]ven if a defendant's Sixth Amendment rights have been violated in this manner, . . . the defendant cannot obtain relief unless he can demonstrate that his attorney's performance was 'adversely affected' by the conflict of interest." Campbell, 408 F.3d at 1170; Mickens v. Taylor, 535 U.S. 162, 174, 122 S. Ct. 1237, 1245, 152 L. Ed. 2d 291 (2002).

Moreover, to prove an ineffective assistance of counsel claim premised on an alleged conflict of interest, a habeas petitioner must "establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); Morris v. State of Cal., 966 F.2d 448, 455 (9th Cir. 1991), cert. denied, 506 U.S. 831 (1992); see also Mickens, 535 U.S. at 172 n.5, 122 S. Ct. at 1244 n.5 (2002) ("[T]he *Sullivan* standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse

effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."). That is, a habeas petitioner "must demonstrate that his attorney made a choice between possible alternative courses of action that impermissibly favored an interest in competition with those of the client." McClure v. Thompson, 323 F.3d 1233, 1248 (9th Cir.), cert. denied, 540 U.S. 1051 (2003); Washington v. Lampert, 422 F.3d 864, 872 (9th Cir. 2005), cert. denied, 547 U.S. 1074 (2006); see also United States v. Wells, 394 F.3d 725, 733 (9th Cir. 2005) ("[T]o prove an adverse effect, the defendant must show that 'counsel was influenced in his basic strategic decisions' by loyalty to another [interest].'" (citation omitted)). When a habeas petitioner "shows that a conflict of interest actually affected the adequacy of his representation[,]" he "need not demonstrate prejudice in order to obtain relief"; however, until the habeas petitioner "shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Sullivan, 446 U.S. at 349-50, 100 S. Ct. at 1719; Washington, 422 F.3d at 872. "An actual conflict must be proved through a factual showing on the record." Morris, 966 F.2d at 455.

In Ground Five, petitioner claims the trial court erred in failing to hold a hearing when it knew or should have know a conflict of interest existed between petitioner and his trial counsel. However, petitioner points to absolutely nothing in the trial record showing the trial court was notified of any conflict of interest

between him and defense counsel, William H. Forman.[17] Instead, petitioner cites two letters, dated May 22 and June 15, 2006, which are not part of the trial record.[18] Indeed, this is not surprising since, on July 30, 2003, the trial court specifically advised petitioner that it would not consider "personal communications from a represented defendant [whose] case is pending before this court[,]" and ordered all correspondence from petitioner be given to his defense counsel. CT 74-75. Therefore, petitioner has not shown the trial court violated his Sixth Amendment rights by failing to hold a hearing regarding any alleged conflict of interest.

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[17] The petitioner had difficulty getting along with defense counsel, and by the time of trial, six attorneys had represented him. Initially, the public defender was appointed to represent petitioner on November 20, 2002, CT 2; however, on September 17, 2003, the public defender declared a "conflict" and was replaced by the alternate defender, who also declared a "conflict" and was replaced by Martin Heneghan, a conflicts attorney. CT 81. On October 3, 2003, Heneghan filed a motion to be relieved as counsel due to a conflict of interest after petitioner "characterized" Heneghan's conduct as violating due process and being "unethical[,]" CT 83-89, and the trial court granted the motion on November 12, 2003, substituting retained counsel Fay Arfa for Heneghan. CT 103. On March 14, 2005, Arfa filed a motion to withdraw as counsel, citing irreconcilable differences with petitioner, and the trial court granted the motion and appointed Ernest Eady to represent petitioner. CT 1052-55. On February 21, 2006, Eady was relieved as counsel and replaced by retained counsel, William H. Forman, who represented petitioner at trial. CT 1067; RT 184:14-187:11.

[18] These letters, however, are attached as exhibits to the habeas corpus petition filed in the California Court of Appeal on July 18, 2007. SSL no. 16, Exhs. 1-2. Nevertheless, there is no evidence showing petitioner sent these letters to the Superior Court, and petitioner did not raise any alleged conflict when he waived his right to a jury trial in open court. See, e.g., RT 191:6-275:2.

In any event, even if this Court were to assume the trial court received the two letters from petitioner, the result would be the same since the letters do not describe an actual conflict of interest. See Plumlee v. Masto, 512 F.3d 1204, 1210 (9th Cir.) (en banc) (Actual conflict of interest means "legal conflicts of interest - an incompatibility between the interests of two of a lawyer's clients, or between the lawyer's own private interest and those of the client."), cert. denied, 128 S. Ct. 2885 (2008). Rather, they merely describe petitioner's dissatisfaction with his attorney and a disagreement about potential avenues of research. However, the Sixth Amendment does not "guarantee[] a 'meaningful relationship' between an accused and his counsel[,]" Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617, 75 L. Ed. 2d 610 (1983); Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir.), cert. denied, 129 S. Ct. 171 (2008), and petitioner has not shown a violation of his Sixth Amendment rights. See, e.g., Larson, 515 F.3d at 1067 (When defendant "complained solely about his counsel's strategic decisions and lack of communication with him, including that his counsel did not make motions that he requested, contacted witnesses without his consent and did not present him the list of defense witnesses for his approval[,]" he did not establish a Sixth Amendment violation since "no Supreme Court case has held that 'the Sixth Amendment is violated when a defendant is represented by a lawyer free of actual conflicts of interest, but with whom the defendant refuses to cooperate because of dislike or distrust.'" (citation omitted)); Plumlee, 512 F.3d at 1210 ("[Petitioner] has cited no Supreme Court case - and we are not aware of any - that stands for the proposition that the Sixth Amendment is violated when a defendant is represented by a lawyer free of actual conflicts of

interest, but with whom the defendant refuses to cooperate because of dislike or distrust. . . .").

Thus, the California Supreme Court's denial of Ground Five was neither contrary to, nor an unreasonable application of, clearly established federal law.

RECOMMENDATION

IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; (2) adopting the Report and Recommendation as the findings of fact and conclusions of law herein; and (3) directing that Judgment be entered denying the petition and dismissing the action with prejudice.

DATE: April 6, 2010

/S/ ROSALYN M. CHAPMAN
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

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