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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

8
9 BRETT RONALD MATTESON,

1:12-cv-00060-AWI-BAM (HC)

10 Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

11 v.

[Doc. 1]

12 LELAND S. McEWEN,

13 Respondent.
14 _____ /

15 Petitioner is proceeding pro se with a petition for writ of habeas corpus pursuant to 28
16 U.S.C. § 2254.

17 PROCEDURAL HISTORY

18 Following a jury trial in the Fresno County Superior Court, Petitioner was convicted of
19 several counts of identity theft (Cal. Penal Code¹ § 530.5, subd. (a)), manufacturing of deceptive
20 identification documents (§ 483.5, subd. (a)), and theft of access card account information (§
21 484e, subd. (d)). Petitioner admitted the truth of the prior prison term allegations. Petitioner was
22 sentenced to a total term of 37 years and 8 months in state prison.

23 Petitioner filed a timely notice of appeal on March 4, 2010.

24 On June 1, 2011, the clerk of the superior court prepared and filed a new abstract of
25 judgment to address certain counts which had been omitted from the original abstract of
26 judgment filed on March 8, 2010.
27 _____

28 ¹ All further statutory references are to the California Penal Code unless otherwise indicated.

1 On September 7, 2011, the California Court of Appeal, Fifth Appellate District reversed
2 Petitioner's conviction for count 47 and remanded for resentencing, but affirmed the judgment in
3 all other respects.

4 On December 14, 2011, the California Supreme Court denied review. Petitioner did not
5 file any state post-conviction collateral petitions.

6 Petitioner filed the instant federal petition for writ of habeas corpus on January 10, 2012.
7 Respondent filed an answer on May 3, 2012, and Petitioner filed a traverse on May 29, 2012.

8 STATEMENT OF FACTS²

9 **Summary of Facts Relating to Identity Theft**
10 **(Counts 1-48)**

11 The prosecution presented evidence to show that debit and/or credit card
12 information for 47 individual victims was set forth on documents found at
13 [Petitioner's] home. [Petitioner] did not obtain their permission to acquire the
14 information, and there were unauthorized charges on their credit accounts. Those
15 unauthorized charges were made between April and September 2007.

16 Twenty-six of the victims had used their credit cards at the Red Robin
17 Restaurant in the River Park area of Fresno prior to the dates of the unauthorized
18 charges. Nine of the victims had used their credit cards at Goldfield's Restaurant
19 at Chukchansi Casino.

20 **Conceded Error (Count 47)**

21 [Petitioner] contends and the People concede that count 47 is not
22 supported by substantial evidence. Jill Gonzales identified her credit card number
23 on documents found in [Petitioner's] possession. However, Gonzales did not
24 testify that there were unauthorized charges on her account. The People agree the
25 judgment of conviction should be reversed as to this count.

26 **Summary of Facts Relating to Manufacture of Deceptive**
27 **Identification Documents (Counts 50-58)**

28 A number of witnesses testified they had gone to [Petitioner's] home and
had obtained "fake" or false identifications from him.

Summary of Facts Relating to Theft of Access Card
Account Information (Counts 59-110) (fn. 2)

[FN. 2] The court dismissed counts 63, 73, 75, and 84 on motion of the
prosecution and facts relating to those offenses are not included in the statement
of facts.

² The Fifth DCA's summary of the facts in its September 7, 2011, opinion is presumed correct. 28 U.S.C. §§ 2254(d)(2), (e)(1). Petitioner does not present clear and convincing evidence to the contrary; thus, the Court adopts the factual recitations set forth by the Fifth DCA.

1 The prosecution presented evidence to show that debit and/or credit card
2 information for the victims of these counts was set forth on documents found at
3 [Petitioner's] home. [Petitioner] did not obtain their permission to acquire the
4 information, and there were unauthorized charges on their credit accounts. Those
5 unauthorized charges were made between April and September 2007.

4 **Facts Applicable to All Charged Counts Testimony of Patrick Adolph**

5 In December 2007, Patrick Adolph went to [Petitioner's] home to get a
6 fake identification. Adolph said he was 20 years old, going on a trip and wanted
7 an identification that stated he was 21 years of age so that he could get into bars.
8 Adolph said [Petitioner] "was a pretty popular individual by word of mouth
9 around the local high schools at the time. So it was pretty easy to get in contact
10 with him." Adolph obtained [Petitioner's] phone number and made an
11 appointment to meet at [Petitioner's] home just south of Palm and Herndon
12 Avenues. [Petitioner] opened his garage, and Adolph accompanied him to an area
13 with a computer, printer, and a cabinet with a backdrop for taking pictures.
14 [Petitioner] used Adolph's driver's licence to calculate the false date of birth. As
15 [Petitioner] processed the picture for the false identification, Adolph mentioned he
16 worked as a server at the Sequoia Brewery Restaurant and had done so for two
17 and one-half years. [Petitioner] told Adolph he was involved in credit card theft,
18 showed him a wallet filled with numerous credit cards, and explained how the
19 process worked. Adolph said, "He showed me how you can have a person's name
20 on the front, but the information that he gets from the different credit cards is
21 completely different on the back, so it will say your name on the front but then it
22 will be somebody else's credit card on the back."

23 [Petitioner] took Adolph inside his house and showed him items he had
24 purchased using the credit card numbers of other individuals. The purchased
25 items included a flat screen television in [Petitioner's] family room. [Petitioner]
26 gave Adolph a list of stores "that were a-okay to shop at that you would not get in
27 trouble for." [Petitioner] then told Adolph he had unnamed servers and bartenders
28 working for him at Red Robin and Campagnia restaurants. According to
[Petitioner], these restaurant employees would swipe the credit cards of patrons
through "a little black scanner" to collect credit card account information.
[Petitioner] said he was then able to place that information "on the credit cards he
has available."

[Petitioner] asked Adolph whether he would be interested in doing similar
work for [Petitioner] in exchange for "an allowance," in an unspecified sum.
[Petitioner] also offered to take Adolph on a Christmas shopping trip if he agreed
to participate. Adolph told [Petitioner] he would get back to him later. Adolph
took the fake identification and paid [Petitioner]. [Petitioner] called Adolph later
and asked whether he was interested in his proposition. Adolph told [Petitioner]
he would get back to him. Adolph then contacted Fresno Police Detective Ken
Dodd, gave him a statement, and then showed Dodd the location of [Petitioner's]
residence. At some point Dodd told Adolph he could be arrested on criminal
charges for being in possession with a false identification. However, Dodd did
not threaten Adolph with prosecution.

26 **Testimony of Kristen Brandon Marie Larsen**

27 Larsen testified a mutual friend referred her to a man nicknamed "Casper"
28 who knew someone who could get her a fake I.D. because she was under age 21.
Larsen picked up Casper and he guided her to a home. Larsen and Casper entered

1 the garage of the home. Larsen said there was “[a] computer by a door and that
2 was it.” Larsen said [Petitioner] was alone in the garage when she and Casper
3 arrived. [Petitioner] set up a hanging blue screen, took her picture, and entered her
4 information into a computer. She instructed [Petitioner] that she wanted her birth
5 information to reflect that she was 21 years of age. She paid [Petitioner] \$150 for
6 the false identification and left the home. Larsen said a bouncer at a Clovis
7 establishment later took the false identification away from her. Larsen contacted
8 Casper again, he gave her [Petitioner’s] phone number, and Larsen contacted
9 [Petitioner] directly. She went to his home alone the second time and took
10 another photograph for a second false driver’s license.

11 On the second occasion, she and [Petitioner] had “an engaging
12 conversation” and he asked her whether she knew anyone working in the
13 restaurant business. He explained how “he would swipe [credit] cards and
14 somehow put it on gift cards. He also asked whether she knew anyone in the
15 restaurant trade who would be willing to do that for him. Larsen went a third time
16 to [Petitioner’s] garage in the company of her friend Megan and Megan’s friend.
17 Megan and her friend went to get false identification cards. Larsen went to
18 [Petitioner’s] garage a fourth time in the company of her friend, Johnny Juarez,
19 who also had a false identification made.

20 **Testimony of Mitchell Alexander Isaak**

21 Isaak testified his friend, Alyssa Whited, was conducting promotions at
22 local bars. Whited was not yet 21 years of age when her agent arranged for her to
23 obtain a false identification in 2007. Isaak was 19 or 20 years of age at the time
24 and he, too, wanted a false identification to obtain alcohol. A man named Casper
25 put Whited in touch with [Petitioner]. Whited, Isaak, and one Derek Welch went
26 to [Petitioner’s] home and entered through the garage. A blue backdrop was
27 hanging from the garage ceiling. Whited, Welch, and Isaak each stood in front of
28 the backdrop and had their photographs taken. [Petitioner] put the photographs on
a laptop computer, which was set up in the garage next to a large printer. Isaak
said [Petitioner] asked the trio for information, including name, address, and birth
date. The computer generated an identification card, which Isaak subsequently
lost while riding an ATV in the desert.

29 **Testimony of Rammel Gabriel Del Mundo**

30 Rammel Del Mundo testified he had a false identification made in 2007 so
31 that he could go to bars and drink. Del Mundo said Johnny Amparano, a friend
32 from high school, had a false identification and said he could arrange for Del
33 Mundo to obtain one also. Amparano took Del Mundo to a home in the area of
34 Bullard and West Avenues, and they entered through the open garage. Del
35 Mundo stood in front of a light blue background, placed his feet against some duct
36 tape markings on the ground, and had his picture taken.

37 Del Mundo said the photographer took down some personal information
38 and said the identification would be ready in 90 minutes. Del Mundo returned at
the appointed time, paid the photographer around \$150, and obtained the
identification card. Del Mundo said there was an error on the card, and the
photographer said he would fix it. They agreed to meet in the parking lot of the
Save Mart store at Bullard and West Avenues, and the photographer gave Del
Mundo the corrected card at that location.

1 While at the garage, Del Mundo and the photographer spoke about another
2 aspect of the latter's business. The photographer said people would stop by his
3 mailbox at night and deposit information in the box. The photographer would
4 retrieve that information in the morning and then make credit cards that would
5 enable the people to buy television sets and other merchandise. Del Mundo could
6 not identify the photographer in court but did identify him to Detective Dodd after
7 viewing a photo lineup on June 24, 2008. Del Mundo said he threw away the
8 false identification when he turned age 21.

9 **Testimony of Nolan Fitzpatrick**

10 Nolan Fitzpatrick testified he was currently on felony probation in Madera
11 County for violating section 484e, subdivision (d), acquiring access card
12 information of others with intent to defraud. Fitzpatrick said he wanted to get a
13 fake identification when he was age 20 because he had friends over age 21 and
14 wanted to "hang out" with them at a nightclub. Fitzpatrick and his roommate,
15 Hans, had a friend named Phong Tran who lived next door to [Petitioner]. Tran
16 and Fitzpatrick worked at Chukchansi Casino. Tran was a bartender or "bar back"
17 and Fitzpatrick was a waiter. In 2007, Fitzpatrick went to Tran's home for dinner
18 and spoke about the possibility of obtaining a false identification. Tran called
19 [Petitioner], made arrangements, and Fitzpatrick went next door to [Petitioner's]
20 home and obtained the fake identification. Fitzpatrick entered [Petitioner's]
21 garage, stood in front of a large blue cardboard, and [Petitioner] took his picture.
22 [Petitioner] uploaded the photograph into a laptop computer and generated "a
23 California-looking driver's license."

24 [Petitioner] asked where he worked, and Fitzpatrick said he worked as a
25 waiter at Goldfield's Restaurant in Chukchansi Casino. [Petitioner] noted that
26 Fitzpatrick was already breaking the law by getting a fake I.D. [Petitioner] then
27 asked whether Fitzpatrick would be willing to "card read," i.e., run credit cards
28 through a black scanning device at his workplace. [Petitioner] explained the
information would be used to make gift or credit cards to purchase items.
Fitzpatrick agreed to the arrangement and took the scanner to work. He scanned
the credit cards of customers in the device after properly running their cards
through the restaurant's cash register. A few weeks after taking the scanner,
Fitzpatrick brought the device back to [Petitioner's] home, and [Petitioner]
connected the scanner to his laptop computer. Fitzpatrick saw bank routing
appear on [Petitioner's] computer screen.

[Petitioner] told Fitzpatrick he would use the scanned credit card
information to make some gift cards for Fitzpatrick. [Petitioner] pulled some gift
card blanks from his wallet, ran them through the scanning device, and gave the
coded gift cards to Fitzpatrick. [Petitioner] and Fitzpatrick followed the same
procedures on four additional occasions. Fitzpatrick used the gift cards to
purchase items. He said he knew the gift cards bore stolen credit card
information. Fitzpatrick said he scanned customer credit cards from the beginning
of April 2007 until he was caught in June 2007. Fitzpatrick said he targeted
customers who were mean or rude to him. Fitzpatrick estimated he made between
2,000 and 4,000 purchases using the credit cards. The purchases were at such
stores as Best Buy and Sears.

On an early morning in June 2007, deputies from Madera County Sheriff's
Department went to Fitzpatrick's apartment on Nees Avenue in Fresno and took
the scanner and the items he had purchased with the gift cards, including a helmet,
jacket, gloves, a camera, and an iPod. The deputies also took an identification

1 card bearing the name “Craig Shane Smith.” Fitzpatrick told deputies he had the
2 identification made so that he could go to bars with Phong and Hans. He falsely
3 told deputies the identification card was made in Kaiser Park. He later falsely told
4 deputies the identification card was made in the front seat of a truck. Fitzpatrick
5 also denied knowing [Petitioner] or where he lived. The deputies did not place
6 Fitzpatrick under arrest. A day or two after the deputies went to Fitzpatrick’s
7 apartment, [Petitioner] contacted him and nervously told Fitzpatrick not to tell
8 anyone his name or address. Fitzpatrick and [Petitioner] had gone shopping
9 together on at least one occasion, and [Petitioner] used the gift cards to buy an
10 iPod at Best Buy and accompanied him on at least one shopping trip to show
11 Fitzpatrick how to use the gift cards. [Petitioner] also advised Fitzpatrick to wait
12 at least a month before using a gift card with third party account information so
13 that the account holder would not be able to trace the location where the credit
14 card was compromised.

15 Fitzpatrick testified he was fired from his job at Chukchansi Casino
16 because of the card reading. Phong Tran was also fired, but Fitzpatrick did not
17 know when or the reasons for the firing. Fitzpatrick did tell the security
18 supervisor at Chukchansi that Tran was his contact with [Petitioner].

19 **Testimony of Jessica Wiggs Foster Baldwin**

20 In June 2007, Jessica Wiggs Foster Baldwin was a waitress at the Red
21 Robin Restaurant in the River Park area of Fresno. She had worked at Red Robin
22 since October 2005. She met [Petitioner] through a mutual friend named Casper.
23 She had met Casper at a fraternity and learned he was a photographer. Baldwin
24 went to Casper’s home, and he took some lingerie pictures of her. Their mutual
25 friends, J.J. and Tasha, were also present. Baldwin went back to Casper’s home a
26 week or two later to look at the photographs on a computer. [Petitioner] was
27 present at Casper’s home when Baldwin arrived. Casper introduced [Petitioner],
28 said he had fake identifications, mentioned that Baldwin was under age 21, and
asked her if she wanted a false identification so that she could go into bars. He
also asked whether Baldwin knew of anyone who wanted to obtain a false
identification. [Petitioner] spoke to Baldwin about false identifications. Baldwin
said she was not interested in getting one because she would be turning 21 in
several months. However, she told the two men she would ask people she knew
whether they were interested in getting false identifications. After speaking about
false identifications, Casper agreed to place Baldwin’s lingerie photographs on a
compact disk.

29 One week later Baldwin returned to Casper’s home to pick up the CD.
30 [Petitioner] was present again and asked whether she wanted a false identification
31 card but she declined. [fn. 3] [Petitioner] nevertheless gave her a gift card and
32 encouraged her to recruit other people to come to him for fake identifications.
33 Baldwin used the gift card at Wal-Mart and Mervyn’s stores, even though it was a
34 Sierra Vista Mall gift card with a Visa logo.

35 [FN 3] On cross-examination, Baldwin said she had a false identification
36 at one time, but that [Petitioner] did not make that identification card.

37 [Petitioner] was aware that Baldwin was a restaurant server and worked all
38 the time. [Petitioner] asked Baldwin whether she would be willing to scan
customer credit cards with a card reader but Baldwin said she was not interested.
Baldwin received the CD from Casper and walked outside to her car. [Petitioner]
followed her outside with a similar CD in his hand. [Petitioner] then told Baldwin

1 she would have to scan customer cards “for a week or so,” otherwise her lingerie
2 pictures would be posted from the CD to the Internet. Baldwin testified, “I didn’t
3 want to do it but I didn’t want my pictures all over the Internet.” [Petitioner] gave
4 Baldwin a scanner/reader device. She said there was button on the side of the
5 device and [Petitioner] instructed her to wait for the button to turn green and then
6 scan the credit cards of customers. He also told her he would call in a week, meet
7 with her, and then give back her CD with the lingerie pictures.

8 Baldwin said she used [Petitioner’s] device to scan the credit cards of her
9 Red Robin customers. At some point, [Petitioner] contacted her and said he
10 wanted to collect the credit card numbers she had scanned. Baldwin said she met
11 [Petitioner] at a parking lot in the River Park shopping center and she got into his
12 vehicle, a small, light-brown Toyota truck. [Petitioner] hooked up the scanner to
13 his laptop computer, and he downloaded the card information. After taking the
14 information, [Petitioner] told Baldwin she did not have enough credit card
15 information and that she had to scan more credit cards in order to get her pictures
16 back. She complied, but he did not return the CD. [Petitioner] promised Baldwin
17 a laptop computer in exchange for scanning credit cards, and he made the
18 purchase with her at a Best Buy store in the summer of 2007. [fn 4.] She did not
19 understand that [Petitioner] used stolen credit card numbers to make the purchase.
20 After [Petitioner] bought Baldwin the laptop computer, he said she would have to
21 scan more cards. She continued to scan customer credit cards. Baldwin said she
22 did not go to the police because she was scared.

23 [FN 4] Detective Dodd testified that officers found evidence of an
24 unauthorized credit card purchase of a Best Buy laptop on August 18, 2007.

25 At one point, Baldwin attempted to stop scanning customer cards, but
26 [Petitioner] threatened to kill her mother and sister if she did so. Baldwin said
27 [Petitioner] had also threatened to kill his girlfriend, Susan, and her children if
28 Susan said anything about his activities. He also visited the Red Robin restaurant
to speak with her during work hours because she would not return his phone calls.
Baldwin said she scanned customer credit cards and returned the device to
[Petitioner] for downloading somewhere between six and ten times. On one of
those occasions, Baldwin and [Petitioner] met in the parking lot of a Raley’s
grocery store. Baldwin said she ultimately tried to ignore [Petitioner’s] phone
calls and “was trying just to get away from the situation.” At some point in
October, 2007, someone broke into Baldwin’s truck. She testified that
[Petitioner] threatened to cut her brake lines if she did not do what he wanted, i.e.,
if she did not scan enough credit cards. On October 31, 2007, Baldwin finally
quit her job at Red Robin so she would no longer have to scan customer credit
cards for [Petitioner]. She explained, “[T]hat’s the only way I could figure out to
stop everything without having to get in trouble.” When she quit her job, she still
had [Petitioner’s] card scanner in her possession. She had last met with
[Petitioner] a couple of weeks earlier.

29 Baldwin began employment at another restaurant. [Petitioner] found out
30 where she was working, stopped at the restaurant, and tried to talk to her and get
31 the scanner. She lied to [Petitioner] and said she was managing rather than
32 serving in the new restaurant. She claimed she did not have any contact with
33 credit cards and could not get any more account information for him. Baldwin
34 said [Petitioner] was arrested in December 2007 and that he sent her a text
35 message about his incarceration. Upon his release from jail, [Petitioner] contacted
36 Baldwin and advised her not to contact him because the police were tapping or
37 bugging his phone.

1 Baldwin said Detective Dodd contacted her by telephone on April 14,
2 2008. She lied to Detective Dodd at [Petitioner's] behest. [Petitioner] had told her
3 that if she claimed she did not know anything, then the police could not prosecute
4 her or get her into trouble. Baldwin and her mother voluntarily went to police
5 headquarters and had a conversation with Dodd on April 17, 2008. Baldwin was
6 not truthful during this interview, telling the detective she had skimmed cards for
7 someone named "Randy" rather than for [Petitioner]. Detective Dodd asked
8 whether Baldwin had been threatened and she broke down in tears and said she
9 was fearful to give a statement. She nevertheless declined to disclose everything
10 that went on and denied that she skimmed credit cards. At trial, Baldwin said she
11 never skimmed credit cards before she met [Petitioner] and did not skim cards
12 between the time she left Red Robin and the time Detective Dodd interviewed and
13 arrested her on August 4, 2008.

14 Baldwin testified she had skimmed a Red Robin manager's access card
15 that allowed her entry into the Red Robin system. She said [Petitioner] told her
16 not to skim credit cards under her own employee number so that she would avoid
17 detection. On August 4, 2008, Baldwin was arrested for 26 felony counts of
18 identity theft. She said she threw the skimming device over a fence into a field on
19 the day of her arrest. She testified she was scared, stupid, young, nine months
20 pregnant, and did not know what to do with the device. She later tried to retrieve
21 the device using metal detectors but could not find it.

22 **Testimony of Detective Ken Dodd**

23 Fresno Police Detective Ken Dodd testified he was assigned to the
24 Financial Crimes Unit of the Department. He began investigating [Petitioner]
25 after receiving the information from Kris Arnold, whose late father had been a
26 Fresno Police Detective. Arnold's information led to Patrick Adolph, who
27 supplied a cellular telephone number and an address on West Browning Avenue
28 in Fresno. Dodd drove by the residence and looked for a white truck but did not
see such a vehicle. He ran the cell number through the Fresno Police Department
Records Management System (RMS) and Computer-Aided Dispatch System
(CAD). Dodd determined that the number was associated with [Petitioner] and
the address on West Browning Avenue. Dodd drove by the home a second time
and saw a white truck. He ran the license number of the truck and found the
vehicle was registered to Suzette Jumper. Dodd ran Suzette Jumper's name
through the RMS system and found [Petitioner] listed as her boyfriend. Dodd and
Adolph subsequently drove down West Browning Avenue, and Adolph identified
[Petitioner's] home at the southeast corner of West Browning and West Avenues,
a duplex with two separate residences conjoined at the middle. Dodd also
determined the other residence was occupied by Phong Tran.

29 On December 13, 2007, Dodd and other law enforcement officers
30 searched [Petitioner's] residence. Phong Tran occupied the other, adjoining half
31 of the duplex. Approximately 8 to 15 people participated in the search, including
32 one investigator from the Department of Motor Vehicles. [Petitioner] was present
33 with a teenage girl, the daughter of Suzette Jumper. Jumper came to the duplex
34 and picked her daughter up. During the search of [Petitioner's] portion of the
35 duplex, officers found rectangular tape marks on the garage floor. They also
36 found a blue backdrop, multiple tripods, a Fargo card printer for printing plastic
37 cards, an unopened Xbox 360 gaming device in a Best Buy shopping bag, and a
38 motorcycle. In response to police questioning, Suzette Jumper told officers that
the Xbox had been fraudulently purchased. Officers found packs of blank plastic
cards with magnetic strips on the kitchen refrigerator and in the garage. The

1 officers located [Petitioner's] wallet on the kitchen counter. The wallet contained
2 [Petitioner's] commercial driver's license, his crane operator's certification card, a
3 blank card, numerous credit cards bearing [Petitioner's] name, three Target store
4 receipts, a scrap of paper bearing a 16-digit credit card code, [Petitioner's] social
5 security card, a business card for Best Buy customer service manager Justin Cruz,
6 and a Subway rewards and cash card. Detective Dodd determined that account
7 numbers encoded on the magnetic strips of the various credit cards were actually
8 associated with accounts for people other than [Petitioner].

9 Officers searched the master bedroom and found a laptop computer on the
10 south wall. They also found several USB thumb drives, a camera with case, an
11 encoder, a signature digitizer, and a disk entitled, "Halloween Party 2007." The
12 disk contained a number of photographs, including a picture of a woman with
13 blonde hair whom Dodd identified as Suzette Jumper. They also found a Sony
14 Cybershot camera, a Motorola cell phone, and a shredder containing shredded
15 paper. [Petitioner] was placed under arrested [sic] on December 13, 2007. The
16 following day, Detective Mike Carrillo received a telephone call from a female
17 who said police had overlooked a crucial piece of evidence. Dodd and Detective
18 Heather Ground went to Suzette Jumper's place of employment, picked up
19 Jumper, and went to the Browning Avenue home, which Jumper shared with
20 [Petitioner]. They recovered a Toshiba laptop computer concealed inside a video
21 cassette recorder (VCR). The VCR was located in an entertainment center in the
22 master bedroom. They also found a Sunpak 7500TM tripod and a Vanguard Pro
23 K tripod at the residence, along with three thumb drivers in the master bedroom.
24 Someone used a Visa card belonging to Kevin Hurley to purchase the Sunpak
25 7500 TM on November 7, 2007, without his permission. The detectives gave the
26 laptops, cell phones, thumb drives and a case of compact disks (CDs) to James
27 Lutter of the Fresno Police Department for analysis. One of the flash drives had
28 two sets of credit card numbers linked to Jessica Baldwin, and the concealed
laptop had credit card numbers linked to Nolan Fitzpatrick.

On April 22, 2008, Detective Dodd obtained a court order directing Red
Robin to provide him with all credit card transactions involving Jessica Foster
between June 1, 2007 and November 5, 2007. Dodd obtained the report and
testified the victims identified in counts 1, 2, 4-18, 20, 23-24, 39-45, 47-48, 59-
63, 65, 68, 77, 79-81, 85-88, 90-106 and 110 had accounts that were included on a
list of transactions reflecting Jessica Baldwin's service at the River Park Red
Robin Restaurant. Detective Dodd testified that more than 600 names were
included on the Red Robin list of Jessica Baldwin's customer transactions. Dodd
also testified that James Lutter prepared a photo lineup of suspects, and Rammel
Del Mundo identified the photograph of [Petitioner] as the individual who
prepared his false identification card. Although Patrick Adolph supplied a
description of [Petitioner] to Detective Dodd. Dodd said he did not show Adolph
a photo lineup of suspects until after [Petitioner's] arrest. Dodd further testified
that Lutter supplied him with a list of names and credit card numbers but that he
was unable to contact every single person on the list. Dodd also said he attempted
to obtain videotapes from retail stores involved in this case but he learned that
smaller convenience stores keep their tapes for just one day, large stores keep
them for one week, and "about 90 days is the most that I found, where they will
keep it."

Dodd said [Petitioner] was initially arrested on December 13, 2007, but
the District Attorney's office did not file charges immediately after that arrest.
[Petitioner] was released from custody and re-arrested in early August 2008.
Officers found a number of text messages between Casper and [Petitioner] on the

1 latter's cell phone. The messages implied a conversation about the skimming of
2 credit cards. Adolph told Dodd that when [Petitioner] created false identification,
3 Adolph saw headshots of approximately 60 other people on the laptop screen.
4 James Lutter provided Dodd with a report containing more than 60 headshots,
5 including that of Adolph.

4 **Testimony of James Lutter**

5 James Lutter, a civilian computer forensic examiner with the Fresno Police
6 Department, analyzed various pieces of equipment seized from [Petitioner's]
7 residence, including cell phones, USB drives, digital cameras, an identification
8 card printer ribbon, Exeba software for operating an encoder, compact disks, a
9 Gateway CPU, a Magcard reader/writer, Topaz Systems SigLite for digitizing
10 signatures, flatbed scanner, laptop computer, Evidence Eliminator program for
11 wiping/deleting computer data, and a ribbon compatible with Zebra, Eltran, and
12 Fargo I.D. printers. He explained how certain pieces of equipment could be used
13 for card skimming and production. He also identified exhibits containing stolen
14 account information and explained how he had retrieved that information from the
15 equipment.

11 **Testimony of Sharise J. Reimer**

12 Sharise Reimer testified she had a false driver's license made in 2007 in
13 order to go drinking at bars. She said her friend, Megan Beltz, had already
14 obtained a false identification, and Beltz contacted the person who manufactured
15 her card. Beltz and Reimer went to a home at Browning and West Avenues
16 around Halloween and entered through the open garage. Reimer and Beltz saw
17 Kristen Larsen in the garage. Larsen had lost her first identification card and was
18 having another one made. Larsen and Reimer talked about Las Vegas, and Larsen
19 said her identification did not work there. The person who made the card asked
20 Reimer a couple of questions about what she wanted on her identification, such as
21 name, address, and swiping capability. The man had her stand in front of a blue
22 board and he took her picture. She signed her name and the man generated an
23 identification card that resembled a California driver's license. Reimer said she
24 no longer had the card because her parents disposed of it. She could not identify
25 the man from a photo lineup or in the courtroom.

20 **Testimony of Derek C. Welch**

21 Derek Welch testified he had a false driver's license made in 2007 so that
22 he could buy alcohol even though he was underage. Welch said he accompanied
23 Alex Isaak and Alyssa Whited to a home with an open garage. Welch did not
24 remember too much about the manufacturing process for the false identification
25 card but did recall a blue backdrop hanging from the garage roof, and the presence
26 of a computer and printer. Welch said he paid approximately \$100 for the false
27 identification, but it was confiscated in San Diego. He said the false identification
28 appeared to be a California driver's license. Welch could not identify the
residence where the false identification was manufactured or the person who
manufactured it.

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28 **Testimony of Jonathan Ross**

1 Jonathan Ross testified he had a false identification made in 2007 in order
2 to buy alcohol even though he was underage. Ross learned about a local
3 manufacturer of false identification cards through his high school friends. Ross
4 went alone to a home in the Bullard and West area of Fresno. He entered the
5 home through an open garage door and saw a man waiting for him. The man took
6 down Ross's personal information and then took his photograph. The man
7 manufactured two identification cards because the first card was damaged when it
8 came out of the printer. Ross paid the man about \$150 for the false identification
9 cards and kept both of them. Ross could not identify the maker of the cards at
10 trial.

11 **Testimony of Leonard Aguilar**

12 Leonard Aguilar testified he had a false identification made in 2007 "[t]o
13 have 21-and-over privileges." He learned about the manufacturer of false
14 identification cards through a friend. Aguilar and his friend went to the
15 manufacturer's home and entered the garage. The man who manufactured
16 identification cards was present in the garage. He took Aguilar's photograph and
17 generated a card for about \$150. The card was later confiscated at a bar. At trial,
18 Aguilar could not identify the man who manufactured the card.

19 **Testimony of John J. Amparano**

20 John Amparano testified he obtained a fake identification in 2007 "to get
21 in the clubs" at a time he was under age 21. Amparano said he was a friend of
22 Kristen Larsen, and Larsen showed an identification to get beer at a restaurant.
23 Amparano knew that Larsen was also underage and he asked her about the card.
24 Larsen told Amparano, "Oh, I know this person, this guy, and he does this."
25 Larsen eventually took Amparano to a home in northwest Fresno. A blonde-
26 haired friend of Larsen also went with them. Larsen called ahead and the trio
27 parked near the house. They entered the open garage of the home and met the
28 man who manufactured false identifications. Amparano described the garage as
"a little miniature DMV setup," including a blue background for picture-taking, a
camera, and computer. Amparano paid \$150 or \$200 for his false identification,
and the man generated a card.

Amparano said he went to the home a second time with his friends, "Mike
'Antaneno' and 'Vermel.'" The two friends struck up a conversation with the man
about his other activities, including false social security and credit cards.
Amparano said the man "didn't want us to know about that stuff. We're too
young." Amparano said a detective showed him a six-photo lineup in June 2008
and Amparano selected a picture of the man who manufactured his identification
card. At trial, Amparano said [Petitioner] was the maker of his false identification
card.

23 **Testimony of Firebaugh Police Officer Magda Martinez**

24 Firebaugh Police Officer Magda Martinez testified a Gabriel Bautista
25 contacted her at 2:12 p.m. on November 29, 2007. Bautista reported there had
26 been unauthorized charges on his credit card and one of those charges had been
27 made at the Wal-Mart store in Clovis. Officer Martinez's assisting officer,
28 Officer Valdez, had previously worked at Wal-Mart and was aware that security
videos were kept for a period of time. Martinez contacted the assistance manager
of the Clovis Wal-Mart, advised her of the investigation, and Martinez and Valdez
were able to retrieve the video for the time of the transaction. The Firebaugh

1 officers turned that video over to the Fresno Police Department, where Detective
2 Dodd later retrieved it. The prosecution played the Wal-Mart video for the jury,
and the court admitted a still photograph from that video.

3 Martinez reviewed her report at trial and said that someone had made five
4 unauthorized purchases using Bautista's credit card information. Those purchases
5 took place between 1:21 and 2:46 p.m. on November 27, 2007. The purchases
occurred at Best Buy, Wal-Mart, Starbucks, Subway, and Pets-Mart.

6 **Testimony of Fresno Police Detective George Irmerian**

7 Fresno Police Detective George Irmerian testified he assisted in the service
8 of the search warrant in [Petitioner's] Browning Avenue home on December 13,
2007. Detective Irmerian searched the dining room area, found a shredder in the
9 dining room, and saw shredded documents inside the machine. Irmerian pointed
out the material to Detective Dodd, and Dodd asked him to collect the shredded
paper.

10 **Testimony of Fresno Police Detective David P. Passmore**

11 Fresno Police Detective David Passmore testified he assisted in the service
12 of the search warrant at [Petitioner's] Browning Avenue home on December 13,
2007. Passmore searched the master bedroom and found multiple USB thumb
13 drives on the post of a four-poster bed.

14 **Testimony of Fresno Police Detective Terry A. Terry**

15 Fresno Police Detective Terry Ann Terry testified she worked in the
16 Financial Crimes Unit and assisted in the search of [Petitioner's] home on
December 13, 2007. Detective Terry and her colleague, Detective Castillo,
17 searched the garage area of the home and found one tripod inside the garage and
one tripod outside the garage. She also found a wallet on a countertop in the
kitchen.

18 **Testimony of Fresno Police Detective Heather Ground**

19 Fresno Police Detective Heather Ground testified she worked in the
20 Financial Crimes Unit and assisted in the search of [Petitioner's] home on
December 13, 2007. She returned on December 14, 2007, with Detective Ken
21 Dodd and Suzette Jumper. The trio went to the master bedroom and looked for a
laptop computer that was concealed inside of a video cassette recorder (VCR).
22 The detectives found and seized the item. [Petitioner] was not present at his home
during the search on December 14, 2007. Detective Ground understood that
23 Suzette Jumper and her children also lived in the home. Ground said that
Detective Dodd recovered an Xbox game console because Jumper said that was
24 one of the items purchased with a stolen credit card number during a shopping trip
that Jumper shared with [Petitioner]. Jumper said she accompanied [Petitioner]
25 on other shopping trips where he used other people's credit card numbers to
purchase household items.

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28 **Testimony of Correctional Officer Joe Papagni**

1 Joe Papagni testified he was a correctional officer with the Fresno County
2 Sheriff's Department and was familiar with the phone system in the Fresno
3 County Jail. Officer Papagni said inmates are allowed to place outgoing phone
4 calls from the jail and that such calls are recorded. At the beginning of each call,
5 the parties are admonished that the call is being recorded and the receiving party
6 must accept the charges. Inmates are assigned a jail identification number (JID)
7 and an inmate who makes an outgoing call must enter his or her JID to make the
8 call. [Petitioner's] JID was 0282026 and a printout indicated his JID was used to
9 make outgoing calls on August 7, 2008, at 4:53 p.m., August 11, 2008, at 6:34
10 p.m., and August 12, 2008, at 5:11 p.m. Detective Dodd, who had spoken with
11 both [Petitioner] and Suzette Jumper, believed the recordings contained the voices
12 of [Petitioner] and Suzette Jumper.

13 **Testimony of Jerica Means**

14 Jerica Means testified she had a false California driver's license made in
15 2007 to go out to bars even though she was under age 21. A friend had a false
16 identification and gave Means the phone number of the person who manufactured
17 it. Means called the individual and then went to his home with her friend, Bob
18 Sullivan. Means and Sullivan entered the man's garage. Means stood in front of a
19 blue backdrop and had her picture taken. The man generated two false
20 identification cards, and Means paid him for the cards. She gave one of the cards
21 to a Fresno police detective in 2008. During her conversation with the detective,
22 Means identified the man who made her identification cards from a photo lineup.
23 She was unable to identify that person at trial. Detective Dodd testified he spoke
24 with Means in June of 2008, showed her a photo lineup, and said she picked
25 [Petitioner's] photograph.

26 **Testimony of Senior Investigator Linda Sue Brock**

27 Linda Sue Brock testified she was a senior investigator with the Fresno
28 County District Attorney's Office. She testified that [Petitioner] was arrested on
December 13, 2007, and released the next day. He was taken into custody a
second time on or about August 4, 2008. Investigator Brock testified that
Detective Dodd brought her a box of shredded documents that was seized at
[Petitioner's] home pursuant to a warrant in December 2007. Brock testified, "[I]
was decided that I would look at pretty much every single piece of paper in this
bag to see if I could find anything of evidentiary value to it." She said the district
attorney's office had the records of victims listed in the amended information and
a list of unauthorized credit card charges. She looked through the shredded paper
for receipts that might match the unauthorized charges. In doing so, she realized
certain store receipts had unique characteristics, such as the font color and style of
wording. Brock was able to compare and match information on shredded partial
receipts with the names of victims in the amended information and unauthorized
charges on the list of such charges.

Brock testified she investigated Suzette Jumper and her four then-minor
children. She said the children were born in Fresno County and their certificates
of birth listed the mother's maiden name as "Suzette Marie Allan." Brock
explained that all births are registered in the mother's name.

Brock confirmed the office of the district attorney made plea deals with
Jessica Baldwin and Nolan Fitzpatrick for their truthful testimony. She said the
district attorney's office made no other deals with witnesses. Brock said she had
multiple conversations with Phong Tran and recorded at least one of them.

1 At the conclusion of Brock's testimony, the prosecution played for the jury
2 a number of recordings of phone calls [Petitioner] made after his arrest and
3 incarceration in Fresno County Jail. The recordings included one conversation
4 between [Petitioner] and his girlfriend/wife, Suzette Jumper. The court admitted
5 the tape recordings into evidence.

6 **Defense Evidence**

7 **Testimony of B.J.**

8 [Petitioner's] stepdaughter testified Detective Dodd and other officers
9 served a search warrant at her house on December 13, 2007. The officers entered
10 the house and asked whether [Petitioner] was present. She told officers she did
11 not know because she had just awakened. She said Detective Dodd jammed his
12 flashlight into her chest, pushed her against the wall, told her not to touch her dog,
13 and ordered her to stay against the wall. They later seated her in the kitchen. She
14 said Dodd did not show her a warrant before officers searched the residence.

15 The stepdaughter testified that Phone Tran had frequently entered
16 [Petitioner's] home with permission and had used [Petitioner's] computer and
17 paper shredder. He entered the house several times a week and was sometimes
18 alone in the house. She said Tran always had a flash drive in his possession.
19 Tran's flash drive was black with white lettering. She said [Petitioner] always had
20 one of his flash drives on a lanyard with his keys. He had another flash drive that
21 was not on a lanyard. She never saw Tran shred documents in her home but did
22 hear the shredder operating while he was on the premises.

23 The stepdaughter said she lived with [Petitioner] and her mother beginning
24 in 2004 or 2005. At that time, he worked as an on-call driver for a towing
25 company and later became a crane operator. She was unaware that [Petitioner]
26 was making false identifications in the family garage for underage drinkers. She
27 said she did not see a blue backdrop or other photographic paraphernalia in the
28 garage. She said her mother and [Petitioner] went shopping for household items,
but she did not see [Petitioner] going on spending sprees and buying and bringing
home lots of items. She said she did not pay attention to how [Petitioner] paid for
items when she went shopping with him. She testified she was unaware that
money was being paid in the family garage for false identifications.

29 **Testimony of Suzette Marie Jumper**

30 Suzette Jumper initially testified she was living with [Petitioner] during
31 the period in question. After conferring with independent counsel, she invoked
32 her privilege against self-incrimination under the Fifth Amendment and declined
33 to testify as a defense witness.

34 **Testimony of Detective Ken Dodd**

35 Testifying during the defense case, Detective Dodd said he did not conduct
36 any scientific analysis of the jailhouse recordings and said in his opinion the voice
37 of [Petitioner] was on the jailhouse phone recordings. Detective Dodd testified
38 that a majority of the officers wore gloves during the search but no one took
fingerprints or photographed evidence found in its original state. Dodd
acknowledged he did not have training in credit card data, such as information on
a magnetic strip. Dodd acknowledged that officers seized credit and debit cards
and certain cards that had both debit and credit features. Dodd said he did not

1 take the credit cards from [Petitioner's] wallet to a specific examiner to verify that
2 a particular encoding machine had been used to encode cards.

3 Dodd confirmed that the Visa card of Kevin Hurley was used at a Best
4 Buy store without his authorization on November 7, 2007, to purchase a Sunpak
5 7500 TM and that a similar tripod was found at [Petitioner's] home. Dodd also
6 testified that a credit card of the late Patricia Peterson was used at a Best Buy store
7 without her authorization on August 18, 2007 to purchase an MT 3422 laptop
8 computer and that Jessica Baldwin surrendered a similar laptop to Dodd. Baldwin
9 told Dodd the laptop was the computer that [Petitioner] purchased for her. In
10 Dodd's opinion, [Petitioner] either acquired third party credit card numbers and
11 then made unauthorized charges or aided and abetted others by creating credit
12 card gift cards so that those others could use them to make unauthorized
13 purchases.

14 Dodd testified the Fresno Police Department has a credit card reader that
15 analyzes the magnetic strip on a card and sets out the account number on a screen.
16 Several credit cards were in [Petitioner] wallet, and Dodd slid them through the
17 reader. One of the cards had no encoded account number that matched the
18 number embossed on the front of the card. Other cards bore [Petitioner's]
19 embossed name but yielded account information for three Red Robin customers of
20 Jessica Baldwin.

21 Detective Dodd testified that [Petitioner's] cell phone contained incoming
22 text messages from Tran and Casper. In Dodd's opinion, those messages were
23 consistent with someone engaging in credit card skimming.

24 **Testimony of Rick Barclay**

25 Barclay testified he was a licensed private investigator working for the
26 defense. Barclay said Detective Dodd's references at trial to a residence at 1465
27 West Browning Avenue were inaccurate because no such address existed.

28 Barclay said he had made efforts to locate Phong Tran. He also testified a
website known as "FresnoSheriff.org" sets forth jail identification numbers for
inmates and that the public has access to such information. Barclay
acknowledged the Fresno County jail issued a printout of calls made from the jail
and the phone numbers to which calls were made. Barclay said he did not
investigate the phone number called under [Petitioner's] jail identification
number. Barclay said he generally called Suzette Jumper on her cell phone and
not a home phone.

29 **Testimony of Arnold Martinez**

30 Arnold Martinez testified he had been the manager of the Red Robin
31 restaurant in River Park for five years. Martinez said he had employed Jessica
32 Baldwin for between eight months and one year. Martinez said he carries a
33 magnetic card that allows the holder to provide "comps or voids or [to] look up
34 tables in a restaurant." He also said the card would enable the holder to reprint a
35 guest's check. Martinez said he never gave Jessica Baldwin permission to have a
36 manager's access card. He said magnetic cards are not given to team members. A
37 team member with such a card could manipulate the work clock and add more
38 hours for payroll purposes. Martinez had no evidence that Baldwin used a
manager's access card to steal money or over report work hours. To the best of
Martinez's recollection, Baldwin failed to report for work and "typically if we

1 don't hear from a team member or an employee in a certain amount of time, they
2 terminate themselves by not coming into work or calling." Martinez did not know
the reason why Baldwin failed to report for work.

3 **Testimony of Anthony Sciola**

4 Anthony Sciola, the owner of Campagna Restaurant, testified that Tran
5 and his brother, Bay Tran, worked for him as servers. Phong Tran worked for him
6 for three to five years. He fired Tran and his brother after customers reported
7 suspicious activities on their credit accounts after using their credit cards at
8 Campagna. Sciola said he reprinted the bills of the two customers, noticed that
9 the servers were Phong and Bay, and received a few calls after those incidents.
Sciola said those facts "kind of throw a red flag up," and Sciola thought
something suspicious was going on. The two brothers were terminated, and the
restaurant had no other problems with fraudulent activity. Sciola did not know
whether Phong skimmed credit cards at the request of [Petitioner]. Sciola did not
know [Petitioner] or know that he was Phong's neighbor.

10 **Testimony of Sherri Ann Persons**

11 [Petitioner's] sister, Sherri Ann Persons, testified she gave [Petitioner]
12 permission to use her Target Visa card to purchase bedroom furniture and [a] big
13 screen television. She further testified she gave [Petitioner] permission to use the
14 card to place a deposit on a Harley Davidson motorcycle. She said [Petitioner]
15 made monthly payments on the card for these purchases. Persons said the big
16 screen was purchased legally at Best Buy and that she was present at the time of
purchase. Persons said she had twice been to the Browning Avenue home that
[Petitioner] shared with Suzette Jumper. On one occasion, Persons attended a
Halloween party in the garage and there were between 20 and 25 guests present.
She said the guests had access to all of the rooms of the house.

17 Persons said her credit card had a limit of \$9,000, and the highest balance
18 that [Petitioner] incurred was between \$5,000 and \$7,500. Persons said her credit
19 card number was changed after [Petitioner's] arrest because the card company
considered her a victim based on evidence that [Petitioner] had possession of her
card.

20 **Testimony of Phong Tran**

21 After conferring with independent counsel, Tran invoked his privilege
22 against self-incrimination under the Fifth Amendment and declined to testify as a
defense witness.

23 **Rebuttal Evidence**

24 Linda Brock testified she ran [Petitioner's] name through a secured law
25 enforcement website called Accurint. According to Accurint, the two recorded
outgoing calls at the Fresno County jail were made to a telephone number
associated with [Petitioner].

26 (Ex. A at 3-26.)

27
28 **DISCUSSION**

1 I. Jurisdiction

2 Relief by way of a petition for writ of habeas corpus extends to a person in custody
3 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws
4 or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor,
5 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as
6 guaranteed by the U.S. Constitution. The challenged conviction arises out of the Fresno County
7 Superior Court, which is located within the jurisdiction of this Court. 28 U.S.C. § 2254(a); 28
8 U.S.C. § 2241(d).

9 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
10 of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its
11 enactment. Lindh v. Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499
12 (9th Cir. 1997), *cert. denied*, 522 U.S. 1008 (quoting Drinkard v. Johnson, 97 F.3d 751, 769 (5th
13 Cir. 1996)). The instant petition was filed after the enactment of the AEDPA and is therefore
14 governed by its provisions.

15 II. Standard of Review

16 Where a petitioner files his federal habeas petition after the effective date of the Anti-
17 Terrorism and Effective Death Penalty Act (“AEDPA”), he can prevail only if he can show that
18 the state court’s adjudication of his claim:

- 19 (1) resulted in a decision that was contrary to, or involved an unreasonable
20 application of, clearly established Federal law, as determined by the Supreme
21 Court of the United States;
22 or
23 (2) resulted in a decision that was based on an unreasonable determination of the
24 facts in light of the evidence presented in the State court proceeding.

25 28 U.S.C. § 2254(d). “Federal habeas relief may not be granted for claims subject to § 2254(d)
26 unless it is shown that the earlier state court’s decision “was contrary to” federal law then clearly
27 established in the holdings of [the Supreme] Court.” Harrington v. Richter, __ U.S. __, 131 S.Ct.
28 770, 785 (2011) (citing 28 U.S.C. § 2254(d)(1) and Williams v. Taylor, 539 U.S. 362, 412
(2000)). Habeas relief is also available if the state court’s decision “involved an unreasonable
application” of clearly established federal law, or “was based on an unreasonable determination

1 of the facts” in light of the record before the state court. Richter, 131 S.Ct. 785 (citing 28 U.S.C.
2 § 2254(d)(1), (d)(2)). “[C]learly established ... as determined by” the Supreme Court “refers to
3 the holdings, as opposed to the dicta, of th[at] Court’s decisions as of the time of the relevant
4 state-court decision.” Williams v. Taylor, 529 U.S. at 412. Therefore, a “specific” legal rule
5 may not be inferred from Supreme Court precedent, merely because such rule might be logical
6 given that precedent. Rather, the Supreme Court case itself must have “squarely” established that
7 specific legal rule. Richter, 131 S.Ct. at 786; Knowles v. Mirzayance, ___ U.S. ___, 129 S.Ct.
8 1411, 1419 (2009). Moreover, the Supreme Court itself must have applied the specific legal rule
9 to the “context” in which the Petitioner’s claim falls. Premo v. Moore, ___ U.S. ___, 131 S.Ct.
10 733, 737 (2011). Under § 2254(d)(1), review is limited to the record that was before the state
11 court adjudicated the claim on the merits. Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388, 1398
12 (2011). “A state court’s determination that a claim lacks merits precludes federal habeas relief so
13 long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”
14 Richter, 131 S.Ct. at 786.

15 “Factual determinations by state courts are presumed correct absent clear and convincing
16 evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court
17 and based on a factual determination will not be overturned on factual grounds unless objectively
18 unreasonable in light of the evidence presented in the state court proceedings, § 2254(d)(2).”
19 Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Both subsections (d)(2) and (e)(1) of § 2254
20 apply to findings of historical or pure fact, not mixed questions of fact and law. See Lambert v.
21 Blodgett, 393 F.3d 943, 976-77 (2004).

22 Courts further review the last reasoned state court opinion. See Ylst v. Nunnemaker, 501
23 U.S. 979, 803 (1991). However, “[w]here a state court’s decision is unaccompanied by an
24 explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable
25 basis for the state court to deny relief.” Richter, 131 S.Ct. at 784.

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28 III. Shackling During Trial

1 Petitioner contends the shackling during trial violated his state and federal constitutional
2 rights to counsel and due process.

3 Petitioner raised this claim to the California Court of Appeal, Fifth Appellate District
4 which denied the claim in the last reasoned decision. The appellate court set forth the lengthy
5 procedural background regarding this claim stating:

6 [Petitioner] represented himself at trial. On January 12, 2010, the first day
7 of trial, the prosecutor noted that [Petitioner] was shackled in the courtroom and
8 the court observed, “[t]hat would be a problem” in an anticipated six-week trial.
9 The court asked a deputy sheriff whether there was a need to keep [Petitioner]
10 shackled. The deputy responded, “Yes, that is the standard operating procedure,
11 your Honor. The defendant or the Court can request that [the shackles be
12 removed] and I have to run it through chain of command to run his background to
13 clear him....” The court indicated it was unaware of anything in [Petitioner’s]
14 criminal record that would suggest a reputation for violence or similar behavior.
15 The court also suggested that two deputies might be assigned to the courtroom and
16 asked the deputy who was present to look into that possibility. The court,
17 prosecutor, and [Petitioner] discussed the defense’s use of the “Elmo” overhead
18 machine in the courtroom, and the court suggested that [Petitioner’s] courtroom
19 assistance, Rick Barclay, could operate the machine so that [Petitioner] would not
20 have to move and reveal his shackles to the jury.

21 On the afternoon of January 12, 2010, the court addressed [Petitioner’s] in-
22 custody status, noting: “We normally try not to give that information to the jury. In
23 a six-week trial, it may become obvious to them that you are in custody. I don’t
24 know if you want to disclose that information to them, let them know it.”
25 [Petitioner] asked whether it would be easier if he simply disclosed his in-custody
26 status. The court replied, “Sometimes attorneys think it is better to let them know.
27 They’re going to figure out anyway, probably. They never see you walk outside.
28 You are always going to be seated.” [Petitioner] said he was trying to keep his feet
under the desk “but you can still see.” The court advised “we’re going to remove
the restraining device.” As to disclosure of in-custody status, the court said, “I will
leave it up to you, sir.” [Petitioner] said, “I will work it in, not right at the
beginning, but I will, I will work it in.” The court then said, “Okay. Need to do it
during the voir dire, sir.” The court explained he did not want [Petitioner] “to be in
the middle of the trial then bring it in for some reason.”

During a recess in the voir dire, the court held proceedings outside the
presence of the prospective jurors. Deputy Cristo of the Fresno County Sheriff’s
Office said his office had checked [Petitioner’s] background and determined
[Petitioner’s] past crimes were property crimes that did not involve violence.
Cristo said his office was not opposed to having [Petitioner] “quietly covered.”
The court explained that [Petitioner] wanted to be “undone” once the trial itself
started. Cristo said, “[W]e are not going to oppose him being completely
unrestrained.” However, Cristo did ask the court to impose “some sort of
restrictions on movement.” The court suggested the only movement would occur
when [Petitioner] “has to come up to the bench at all.” Cristo asked that
[Petitioner] “not approach the well, the clerk, and limited approach on the jury.”
The court suggested, “He would just come up here so we can discuss whatever
issues might come up, but we would not step outside the courtroom.”

1 Deputy Cristo then said, “Well, we would ask if he does approach, if he
2 comes close to the bench, that a deputy sheriff be right with him for the obvious
security reasons.” The court observed:

3 “Sure, I thought you would say that. That creates some
4 issues themselves. [¶] It may be better [that] if an issue arises that I
ask the jury to step out and we can address the issues and come back
5 in, otherwise, I think it is too cumbersome and it would probably be
prejudicial, because it would appear that he is somewhat dangerous,
6 and that is the last thing I want. [¶] Mr. Matteson, I think we will
have to leave you shackled, sir, and if we have an issue come up, I
7 will have to ask the jurors to leave.”

8 [Petitioner] then asked the court whether he could have just one leg
shackled, rather than two “because it creates the issue of them being able to see
9 behind me...” Deputy Cristo did not oppose that solution and the court said, “We
can do that for the trial.” The court said, “We can do that. Why don’t we go ahead
10 and unshackle one leg and seal the shackle.” Cristo said, “Judge, if the issue does
come up where Mr. Matteson needs to move around, present evidence, he would
11 just ask and we would provide another deputy sheriff in the courtroom for extra
security.” Cristo also reiterated, “Let me make sure I understand you correctly. He
12 will be covered. If he needs to move, we will bring out an extra body?” The court
answered in the affirmative.

13 During his opening statement, [Petitioner] said of the prosecutor:

14 “And she’s only got to convince one of you that I’m guilty.
I’ve got to convince all 12 of you that I’m not guilty. And her
15 statements are—everything is supposed to be that you are presumed
innocent until you are proven guilty. But the true fact is, you are
16 guilty and you must prove your innocence. If that theory was true,
what you hear, would I not be seated, chained to the desk right now,
17 if I was already proven innocent and then guilty from there
(indicating)?”

18 The prosecutor interposed an objection and the court advised the jury:

19 Ladies and Gentlemen, I will have to say something here.
20 Mr. Matteson has just let you know that he is presently in custody,
and that is true. I mean, he obviously is shackled. His choice was
21 to let you know early on that he has not made bail, he has not been
released on his own recognizance. And if he wants to let you know
22 at this time, for whatever reasons, it may benefit him.

23 “Another thing, too, is he is absolutely wrong about the
District Attorney convincing one person and that is the end of the
24 case. The People have to convince all 12 of you that he is guilty of
any particular charge. And if they can’t do that, that is the end of it.
25 And he is presumed innocent. He is not presumed guilty. That is
the law, Mr. Matteson is absolutely wrong on those accounts.”

26
27 At the conclusion of the opening statements, the court further advised the
jury:

28 “I have to say something else about Mr. Matteson’s

1 custodial status. It was discussed earlier outside your presence, it's
2 always a concern when someone is in custody and can't freely move
3 around the courtroom. We discussed a way to free Mr. Matteson.
4 Since he has not posted bail, he is in custody, obviously. We would
5 have two deputies here. That is mandated by the sheriff's office,
6 that we have to have two deputies if someone is in custody. And
7 Mr. Matteson was gracious enough to say, you know, that is okay,
8 he can remain like this. At some point, he let you know he was in
9 custody. I had not anticipated it would come up this way. His
10 custody status is not relevant to the issue of guilt or innocence. It is
11 just a reality that some people can't make bail. And he couldn't
12 make bail. But I don't want it to reflect on one side or the other. It
13 is just reality. He is in custody, and you have learned he is in
14 custody and that is just the way it is. And, again, I said he was
15 gracious in agreeing to that, because otherwise we would have to
16 have another deputy here. And I guess you are aware of the
17 sheriff's office situation, they're having budget problems, and it is
18 helpful that someone agrees to just do what he did."

19 [Petitioner] concluded his closing argument, by stating: "[W]hen you leave
20 this courtroom after all the decision have been made, you go back to your families,
21 you go back to your jobs, life as usual, everything goes on. The prosecutor goes on
22 to her next case, her next commission. When I walk out of this courtroom, I'm
23 looking at 77 years in prison." The court admonished [Petitioner] and advised the
24 jury: "[S]entencing is strictly for the court. You are not to consider the question of
25 punishment."

26 At the conclusion of all the evidence and arguments, the court instructed
27 the jury with CALCRIM No. 204 [defendant physically restrained] as follows:

28 "The fact that physical restraints have been placed on the
29 defendant is not evidence. Do not speculate about the reason. You
30 must completely disregard this circumstance in deciding the issues
31 in this case. Do not consider it for any purpose or discuss it during
32 your deliberations."

33 After the jury rendered its verdicts, Juror No. 27 advised the
34 court: "[I]t is just very hard to issue the verdict. And I would plead
35 for you to have leniency on the amount of time the defendant has to
36 serve." The court responded, "I know Mr. Matteson made a
37 comment that he ought not to have made when he was arguing. As
38 I remind you, sentencing is for the Court."

39 (Ex. A at 40-43.)

40 After citing the relevant California law, the appellate court ruled as follows:

41 [Petitioner] contends the trial court abused its discretion by shackling him
42 "despite a specific finding of no manifest need and without consideration of less
43 restrictive alternatives." (Initial capitalization omitted.) Respondent concedes the
44 trial court "failed to base its decision on 'manifest need' to shackle [Petitioner] in
45 particular," although the court did conduct an individualized analysis of
46 [Petitioner's] situation and determined he did not have a history of violence. The
47 trial court ultimately directed the unshackling of one of [Petitioner's] legs afer
48 [Petitioner] noted "it [shackling of both legs] creates the issue of [the jurors] being

1 able to see behind me[.] At least [with] one [leg shackled], I can take one leg, one
2 leg tucked back.”

3 The Supreme Court has “consistently held that courtroom shackling, even if
4 error, was harmless if there is no evidence that the jury saw the restraints, or that
5 the shackles impaired or prejudiced the defendant’s right to testify or participate in
6 his defense.” (*People v. Anderson, supra*, 25 Cal.4th at p. 596.) The record on
7 appeal does not indicate that the jurors knew [petitioner] was restrained prior to his
8 informing them of the single leg restraint during the course of his opening
9 statement. Nor does the record suggest that the jurors were otherwise prejudiced
10 against him. As respondent points out, “a party cannot profit by his or her own
11 wrongdoing,” i.e., in this case [Petitioner’s] mentioning of the leg restraint to the
12 empaneled jurors after the court and court security personnel took numerous
13 precautions and steps to enable him to present his defense in propria persona
14 without revealing any physical restraints. (*In re Hamilton* (1999) 20 Cal.4th 273,
15 305.)

16 Although the trial court erred in failing to find a “manifest need” for the
17 shackling of [Petitioner], as set forth in *Pride*, that error was not prejudicial where
18 there is no evidence that the jury was aware of the restraint prior to [Petitioner’s]
19 opening statement, the court explained the presence of the restraint immediately
20 after [Petitioner] made his opening statement, and the court admonished the jury—at
21 the conclusion of the evidence—not to consider the presence of the restraint for any
22 purpose.

23 The trial court did not commit reversible error by allowing [Petitioner] to
24 be shackled in the presence of the jury.

25 (Ex. A at 45-46.)

26 “[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to
27 the jury absent a trial court determination, in the exercise of its discretion, that are not justified by
28 a state interest specific to a particular trial.” *Deck v. Missouri*, 544 U.S. 622, 629 (2005), accord
Williams v. Woodford, 384 F.3d 567, 591 (9th Cir. 2004); *Rhoden v. Rowland*, 172 F.3d 633, 636
(9th Cir. 1999). Nonetheless, the Ninth Circuit has concluded that failure to object to shackling at
trial “constitute[s] a waiver of the issue.” See *King v. Rowland*, 977 F.2d 1354, 1357 (9th Cir.
1992) (citing *Estelle v. Williams*, 425 U.S. 501, 512-513 (1976)). Moreover, a shackling claim
brought on federal habeas corpus is subject to harmless error analysis under *Brecht v.*
Abrahamson, 507 U.S. 619, 623 (1993). Thus, even if it was erroneous to shackle a defendant,
the Court must determine under *Brecht* whether the shackling had a substantial and injurious
effect on the verdict. *Duckett v. Godinez*, 67 F.3d 734, 749 (9th Cir. 1995).

Here, although the trial court erred in failing to make the determination of a “manifest
need” for the use of restraints, Petitioner has not demonstrated that he suffered any prejudice. In

1 Dyas v. Poole, 317 F.3d 934, 937 (9th Cir. 2003), it was conceded the defendant was
2 unconstitutionally shackled during trial, and the Ninth Circuit held there was prejudice because at
3 least one juror saw the shackles in the courtroom during trial, the defendant was charged with a
4 violent crime which increased the risk that the shackles branded her as having a violent nature,
5 and the evidence was not overwhelming. See also Rhoden v Rowland, 172 F.3d 633, 637 (9th
6 Cir. 1999) (habeas corpus relief warranted where at least some of the jurors saw the shackles
7 which essentially brandished defendant as having a violent nature in a case where his propensity
8 for violence was a crucial issue and evidence indicated the shackles caused defendant physical and
9 emotional pain during trial.) To determine whether the imposition of visible physical restraints
10 amounts to prejudicial error, the reviewing court shall consider the appearance and visibility of the
11 restraining device, the nature of the crime with which the defendant was charged, and the strength
12 of the State's evidence against the defendant. Larson v. Palmateer, 515 F.3d 1057, 1063 (9th Cir.
13 2008).

14 In this case, the single leg restraint only became visible to the jurors when Petitioner made
15 specific reference to it during his opening statement and attempt to use it in his favor. The
16 appellate court properly reasoned that Petitioner cannot "profit from his own" wrongdoing.
17 Illinois v. Allen, 397 U.S. 337, 345 (1970). Contrary to Petitioner's claim, there was no evidence
18 that the jury was aware of the concealed restraint at the time he disclosed it during his opening
19 statement. The trial court immediately sustained the prosecutor's objection and informed the jury
20 that Petitioner had "simply not made bail" and had "not been released on his own recognizance."
21 (RT 731-732.) The court further explained that Petitioner was gracious enough to agree to the
22 restraint because otherwise it was mandated by the sheriff's department that two deputies be
23 present. (RT 731.) After the close of evidence, the court specifically instructed the jury with
24 CALCRIM No. 204 which explained, *inter alia*, that the physical restraints placed on Petitioner
25 was not evidence and the jury was to disregard it in determining his guilt. (RT 1974.) The jury is
26 presumed to follow the court's admonitions. See Richardson v. Marsh, 481 U.S. 200, 206 (1987)
27 (noting that "almost invariable assumption of the law that jurors follow their instructions").

28 Petitioner contends that his ability to represent himself during trial was compromised

1 because of the shackling. Petitioner fails to provide any support for his conclusory allegation.
2 Petitioner reasons that because the prosecutor stood and faced the jury during voir dire and
3 opening and closing arguments, he was prejudiced by having to sit during the entire trial.
4 However, as just stated, it was Petitioner himself who decided to make the jury aware of the single
5 leg shackle, and he cannot now claim prejudice by his own wrongdoing. During voir dire,
6 Petitioner expressed his intent not to testify at trial which was prior to the shackling issue and the
7 restraint could not have deterred or dissuaded him from testifying. (RT 696.) Furthermore, the
8 transcript of the trial reveals that Petitioner thoroughly represented himself during the trial and he
9 presents no specifics as to how the single leg restraint prevented him from doing so. Thus, there
10 is no basis for concluding that the restraints compromised Petitioner's ability to voir dire
11 respective jurors, to make his opening and closing statements, to lodge objections, and to question
12 witnesses. Petitioner never complained to the Court that he was unable to effectively represent
13 himself because of the restraints and the trial court agreed to accommodate Petitioner if
14 unshackling was necessary. Moreover, even if Petitioner had been unrestrained, the trial court
15 could have reasonably decided he should not freely roam the courtroom but rather should stay at
16 the counsel table or the witness stand. Petitioner has not cited nor is this Court aware of any
17 clearly established Supreme Court authority that requires a trial court to give a self-representing
18 defendant unfettered access to all areas of the courtroom.

19 Petitioner further reasons the jury likely speculated that he was a violent person.
20 However, Petitioner was not charged with a violent crime and absent such charge there was no
21 increase in potential prejudice to Petitioner by use of the shackles. In fact, because Petitioner was
22 charged with identify theft (a nonviolent offense) it is reasonable to assume the jury believed him
23 to be a nonviolent person.

24 Contrary to Petitioner's contention, the trial court did not state that the jurors observed
25 Petitioner in leg shackles. Rather, the trial court acknowledged that they may have been able to
26 see the restraints only after Petitioner had called it to the jury's attention and there was no finding
27 that any juror actually observed the shackles. The trial court informed Petitioner that in a six-
28 week jury trial it may become obvious to jury that Petitioner was in custody and some counsel

1 chose to strategically disclose this fact to the jurors during voir dire. (RT 704-705.) The court
2 specifically told Petitioner that it was up to him to determine whether he wished to disclose such
3 fact to the jury. (RT 705.)

4 Finally, there was overwhelming evidence of Petitioner's guilt. Petitioner was charged
5 and convicted of 48 counts of unauthorized use of personal identifying information each involving
6 a different victim. The evidence at trial revealed that each of the victims debit or credit card
7 account information was found at Petitioner's home, Petitioner did not have permission to use the
8 victim's account information, and there were unauthorized charges on their accounts. (See RT
9 1103-1121, 1141-1147 [count 15], 1151-1155 [count 5], 1155-1159 [count 33], 1163-1166 [count
10 10], 1180-1186 [count 7], 1186-1192 [count 3], 1192-1195 [count 32], 1201-1203 [count 25],
11 1207-1211 [count 16], 1260-1266 [count 45], 1266-1272 [count 44], 1296-1305 [count 2], 1311-
12 1316 [count 18], 1317-1321 [count 23], 1321-1326 [count 6], 1359-1364 [count 48], 1366-1372
13 [count 24], 1372-1376 [count 12], 1378-1381 [count 29], 1388-1390 [count 37], 1394-1399
14 [count 22], 1410-1412 [count 19], 1418-1423 [count 13], 1446-1452 [count 9], 1460-1465 [count
15 27], 1466-1470 [count 28], 1471-1473 [count 14], 1479-1483 [count 40], 1484-1492 [count 1],
16 1520-1524 [count 31], 1530-1534 [count 39], 1535-1538 [count 46], 1539-1542 [count 30], 1546-
17 1550 [count 17], 1557-1560 [count 26], 1567-1570 [count 34], 1593-1598 [count 11], 1609-1613
18 [count 42], 1614-1618 [count 20], 1632-1637 [count 8], 1663-1667 [count 38], 1682-1685 [count
19 47]³, 1685-1691 [count 36], 1705-1708 [count 35], 1741-1743, 1746 [count 41].)

20 Twenty-six of the victims had their cards used at the Red Robin restaurant in the River
21 Park area of Fresno in the summer and fall of 2007-prior to the dates of the unauthorized charges
22 made on their accounts, i.e. August to December of 2007. See RT 1103-1121, 1141-1147 [count
23 15], 1151-1155 [count 5], 1163-1166 [count 10], 1180-1186 [count 7], 1207-1211 [count 16],
24 1260-1266 [count 45], 1266-1272 [count 44], 1296-1305 [count 2], 1311-1316 [count 18], 1317-
25 1321 [count 23], 1321-1326 [count 43], 1332-1337 [count 4], 1352-1357 [count 6], 1359-1364

27 ³ On appeal, the State conceded that Jill Gonzales (the victim in count 47) identified her card number found
28 in Petitioner's possession, but did not testify that there were unauthorized charges on her account. Thus, this
conviction was reversed.

1 [count 48], 1366-1372 [count 24], 1446-1452 [count 9], 1471-1473 [count 14], 1479-1483 [count
2 40], 1484-1492 [count 1], 1530-1534 [count 39], 1546-1550 [count 17], 1593-1598 [count 11],
3 1609-1613 [count 42], 1614-1618 [count 20], 1632-1637 [count 8], 1682-1685 [count 47].)

4 Petitioner was also charged and convicted of manufacturing deceptive identification
5 documents (counts 50 to 58). Several underage witnesses testified that they went to Petitioner's
6 home and obtained false identifications from him. (See RT 739-745, 768-812, 1196-1199, 1272-
7 1278, 1283-1288, 1424-1427, 1434-1445, 1695-1698.)

8 In Counts 59 through 110, Petitioner was charged with the related crime of theft of access
9 card account information.⁴ Each victim again identified their credit or debit card account
10 information and confirmed the account numbers found at Petitioner's home belonged to them. It
11 was determined that thirty-one of the victims had eaten at the River Park Red Robin restaurant in
12 the summer and fall of 2007-at the time Baldwin was working there. (See RT 1103-1121, 1148-
13 1150 [count 95], 1160-1162 [count 77], 1204-1206 [count 105], 1246-1249 [count 79], 1250-
14 1254 [count 81], 1254-1259 [count 62], 1280-1282 [count 102], 1288-1292 [count 96], 1292-
15 1295 [count 59], 1327-1331 [count 65], 1346-1349 [count 101], 1385-1387 [count 99], 1414-
16 1417 [count 110], 1453-1456 [count 97], 1456-1459 [count 87], 1494-1498 [count 86], 1498-
17 1501 [count 104], 1503-1506 [count 90], 1509-1513 [count 94], 1516-1520 [count 92], 1543-
18 1545 [count 98], 1552-1556 [count 60], 1561-1565 [count 68], 1586-1589 [count 88], 1589-1593
19 [count 91], 1599-1602 [count 100], 1605-1608 [count 85], 1627-1630 [count 93], 1676-1678
20 [count 103], 1679-1682 [count 61], 1691-1694 [count 80].) Nine of the victims used their cards at
21 Goldfield's restaurant at the Chukchansi Casino in 2007 when Fitzpatrick was skimming cards.
22 (See Rt 1103-1121, 1382-1384 [count 69], 1391-1393 [count 78], 1525-1527 [count 67], 1527-
23 1529 [count 70], 1582-1585 [count 83], 1603-1604 [count 82], 1700-1701 [count 64], 1702-1702
24 [count 72], 1709-1711 [count 66].) The remaining eight victims verified their account numbers
25 were found in documents seized from Petitioner's home. (RT 1103-1121, 1212-1214 [count 106],
26 1234-1241 [count 74], 1350-1351 [count 108], 1357-1359 [count 76], 1430-1434 [count 71],
27

28 ⁴ The prosecution dismissed counts 63, 73, 75, and 84, so those counts are not discussed.

1 1476-1478 [count 89], 1507 [count 107], 1514-1516 [count 109].)

2 Furthermore, the jury deliberated for just over three hours (with readback of Nolan
3 Fitzpatrick’s testimony for 13 minutes), which strongly supports the inference that the case against
4 Petitioner was clear-cut. (CT 746-748); see e.g. Gibson v. Glanon, 633 F.2d 851, 855 n. 8 (9th
5 Cir. 1980) (the length of deliberations has been cited as a factor in determining whether the
6 State’s case was strong, citing Parker v. Gladden, 385 U.S. 363, 365 (1966) (26 hours) and
7 Dallago v. United States, 427 F.2d 546, 559 D.C. Cir. 1969) (5 days).)

8 Given that Petitioner himself disclosed the fact of the hidden leg restraint to the jury, the
9 evidence against him was overwhelming, and Petitioner was not charged with a violent offense,
10 any error did not have a substantial and injurious impact on the jury’s verdict, and the appellate
11 court’s determination of this issue was not contrary to, or an unreasonable application of, clearly
12 established Supreme Court precedent, and habeas corpus relief is foreclosed.

13 IV. Insufficient Evidence

14 Petitioner contends that there was insufficient evidence to support his convictions of
15 identity theft in counts 1-6, 8, 10-13, 14-18, 20, 22-40, and 45-48 because the prosecution failed
16 to prove he “actually used” the information to defraud the victims.

17 In the last reasoned decision, the California Court of Appeal, Fifth Appellate District
18 denied the claim stating as follows:

19 [Petitioner] specifically argues:

20 “Mr. Matteson concedes that the evidence was sufficient to sustain
21 convictions as to the first group of charges—counts 7, 9, 14, 19, 21, 41, 42, 43 and
22 44. But ... the evidence was insufficient to sustain a conviction as to the remaining
23 two groups of charges—counts 1, 2, 3, 4, 5, 6, 8, 10, 11, 12, 13, 15, 16, 17, 18, 20,
24 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 45, 46, 47
25 and 48—because the state did not prove beyond a reasonable doubt that Mr.
26 Matteson was connected to the unauthorized charges. Reversal of these counts is
27 required.”

28 **B. Section 530.5, subdivision (a)**

Counts 1 through 48 of the first amended information charged [petitioner]
with separate violations of “Penal Code Section 530.5(a), a felony.” Section 530.5,
subdivision (a) states:

1 “Every person who willfully obtains personal identifying information, as
2 defined in subdivision (b) of Section 530.55, of another person, and uses that
3 information for any unlawful purpose, including to obtain, or attempt to obtain,
4 credit goods, services, real property, or medical information without the consent of
that person, is guilty of a public offense, and upon conviction therefor, shall be
punished by a fine, by imprisonment in a county jail not to exceed one year, or by
both a fine and imprisonment, or by imprisonment in the state prison.”

5 To violate section 530.5, subdivision (a), a defendant must both (1) obtain
6 personal identifying information and (2) use that information for an unlawful
7 purpose. Thus, it is the use of the identifying information for an unlawful that
8 completes the crime. Each separate use constitutes a new crime. (*People v.*
Mitchell (2008) 164 Cal.App.4th 442, 455.) Nevertheless, section 530.5,
subdivision (a) does not require an intend to defraud. (*People v. Hagedorn* (2005)
127 Cal.App.4th 734, 744.)

9 **C. Law of Substantial Evidence**

10 In reviewing a judgment of conviction, the Supreme Court has stated the
11 applicable standard for assessing the sufficiency of evidence:

12 “In assessing a claim of insufficiency of evidence, the reviewing court’s
13 task is to review the whole record in the light most favorable to the judgment to
14 determine whether it discloses substantial evidence—that is, evidence that is
15 reasonable, credible, and of solid value—such that a reasonable trier of fact could
16 find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26
17 Cal.3d 557, 578.) The federal standard of review is to the same effect: Under
18 principles of federal due process, review for sufficiency of evidence entails not the
19 determination whether the reviewing court itself believes the evidence at trial
20 establishes guilt beyond a reasonable doubt, but, instead, whether after viewing the
21 evidence in the light most favorable to the prosecution, any rational trier of fact
22 could have found the essential elements of the crime beyond a reasonable doubt.
(*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) The standard of review is the
same in cases in which the prosecution relies mainly on circumstantial evidence.
(*People v. Stanley* (1995) 10 Cal.4th 764, 792.) ““Although it is the duty of the
jury to acquit a defendant if it finds that circumstantial evidence is susceptible of
two interpretations, one of which suggests guilt and the other innocence [citations],
it is the jury, not the appellate court[,] which must be convinced of the defendant’s
guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of
facts’s findings, the opinion of the reviewing court that the circumstances might
also reasonably be reconciled with a contrary finding does not warrant a reversal of
the judgment.” [Citations.]” (*Id.* at pp. 792-793.)” (*People v. Rodriguez* (1999) 20
Cal.4th 1, 11.)

23 The “sufficiency of the evidence” standard of review is the same whether
24 the evidence is direct, circumstantial, or a mixture of the two. (*People v. Towler*
(1982) 31 Cal.3d 105, 118; see *People v. Akins* (1997) 56 Cal.App.4th 331, 336.)

25 **D. Analysis**

26 In this case [Petitioner] concedes there was “ample evidence casting
27 suspicion on him.” He acknowledges he possessed an encoder, had the necessary
28 software, had the victims’ names and account numbers, and had a list of local
stores including many of the stores at which unauthorized purchases were made.

1 He further concedes this “may have been sufficient to prove he had illegal access to
2 the account information, and the opportunity to commit the charged crimes.”
3 However, he maintains it was insufficient to prove the unauthorized use charges
4 beyond a reasonable doubt. [Petitioner] submits there was no evidence linking the
5 unauthorized charges to himself, to accomplices Nolan Fitzpatrick or Jessica
6 Baldwin, or to his girlfriend Suzette Jumper or her children.

7 We consider the entire record in the light most favorable to the judgment
8 below and presume the existence of every fact that could reasonably be deduced
9 from the evidence to support it. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) It
10 is the trier of fact’s exclusive province to assess the credibility of witnesses,
11 resolve conflicts and weigh the evidence. (*People v. Sanchez* (2003) 113
12 Cal.App.4th 325, 330.) Absent impossibility or inherent improbability, the
13 testimony of a single witness is sufficient to prove a disputed fact. (*People v.*
14 *Young* (2005) 34 Cal.4th 1149, 1181.) The test is whether substantial evidence
15 supports the jury’s conclusion, not whether the evidence proves guilty beyond a
16 reasonable doubt (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) Thus, an
17 appellant who attacks the sufficiency of the evidence bears an enormous burden.
18 (*Sanchez, supra*, 113 Cal.App.4th at p. 330.)

19 An appellant who contends some particular finding is not supported is
20 required to set forth in his brief a summary of the material evidence upon that
21 issue. A recitation of only defendants’ evidence is not the demonstration
22 contemplated under this rule. The reviewing court is not called upon to make an
23 independent search of the record where this rule is ignored. A claim of
24 insufficiency of the evidence is entitled to no consideration when it is apparent that
25 a substantial amount of evidence was received on behalf of the respondents. When
26 defendants contend some particular issue of fact is not sustained, they are required
27 to set forth in their brief all of the material evidence on the point and not merely
28 their own evidence. Unless this is done, the error is deemed to be waived. (*People*
v. Dougherty (1982) 138 Cal.App.3d 278, 282.)

29 In this case, [Petitioner] concedes the first element of section 530.5,
30 subdivision (a), i.e., “the state presented evidence showing that the account
31 numbers of all 48 victims’ account[s] were found in [Petitioner’s] possession” and
32 further concedes “jurors could reasonably find the third element satisfied—that the
33 victims did not consent to certain charges.” [Petitioner] then goes on to challenge
34 the evidence underlying the second element of section 530.5, subdivision (a) —“that
35 it was defendant who actually used the account numbers.” Without summarizing
36 the record, [Petitioner] divides the counts in to three different groups, based on the
37 nature of “the state’s evidence.”

38 **1. The First Group of Counts**

39 The first group consists of counts 7, 9, 14, 19, 21, 41-44. As to those
40 counts [Petitioner] concedes “the prosecutor presented evidence which—... under
41 the deferential rules of appellate review—if believed was sufficient to link the
42 unauthorized charges to [him]. [Citations.]”

43 **2. The Second Group of Counts**

44 The second group consists of counts 26 and 32 (regarding purchases
45 relating to motorcycles) and counts 1, 2, 4, and 34-36 (regarding purchases relating
46 to Halloween or party supply store). As to these counts, [Petitioner] contends “the
47 prosecutor presented evidence of purchases which the prosecutor claimed were
48

1 sufficiently linked to [Petitioner] through less probative circumstantial evidence.
2 [Citations.]”

3 Counts 26 and 32 alleged unauthorized purchases using the account
4 information of John Metcalf and Alevia Hatfield. To establish these counts, the
5 prosecutor presented testimony to show unauthorized charges on their accounts at
6 several motorcycle stores. The prosecutor also presented testimony from other
7 witnesses who had seen a motorcycle in [Petitioner’s] garage.

8 As to counts 26 and 32, [Petitioner] acknowledged the evidence showed
9 that credit card numbers belonging to Metcalf and Hatfield had been used to make
10 unauthorized purchases at Biker Design in Daytona Florida, Golden Valley Harley
11 in Los Banos, and Fresno Motor Sports. During argument, the prosecutor pointed
12 out that [Petitioner] had a list with 78 different entries, and that 60 of the stores on
13 that list matched unauthorized purchases alleged in this action. The prosecutor
14 acknowledged that some of the stores on the list were “very common,” but pointed
15 out that the “Harley Davidson, Los Banos store only, which is the Golden Valley
16 Harley Davidson listed, it says Los Banos location on one of our victim’s credit
17 card accounts. That is exactly where the unauthorized purchase was. It is on
18 [Petitioner’s] list. Not a common store.” [Petitioner] contends the fact that Golden
19 Valley Harley Davidson was part of his list was “too attenuated a link to prove that
20 [Petitioner] made the unauthorized charges alleged in counts 26 and 32.”
21 Circumstantial evidence may constitute substantial evidence of guilt. (See *People*
22 *v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Millwee* (1998) 18 Cal.4th 96, 132;
23 *People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Here, the jury could infer from
24 the [Petitioner’s] list and the unauthorized charges that [Petitioner] used, or aided
25 and abetted the use of, the personal identifying information of Metcalf and Hatfield
26 at the Golden Valley Harley store in Los Banos.

27 As to counts 1, 2, 4, and 34-36, [Petitioner] acknowledges the allegations of
28 the first amended information “charged Mr. Matteson with unauthorized use based
on purchases made at Halloween or party supply stores.” He further concedes the
record shows that unauthorized charges at these Halloween stores, these seasonal
Halloween stores and party stores, all in ... September, October, leading up to
Halloween.” He further noted that the jurors would have the opportunity to review
“approximately 58 photos of some extremely intricate Halloween decorations that
clearly were expensive.” [Petitioner] submits this connection is “too tenuous to
show beyond a reasonable doubt that it was [Petitioner] who made the
unauthorized purchases in connection with these counts.” “Substantial evidence
includes circumstantial evidence and any reasonable inferences drawn from that
evidence.” (*In re Michael D* (2002) 100 Cal.App.4th 115, 126.) “[W]hile
substantial evidence may consist of inferences, such inferences must be “a product
of logic and reason” and “must rest on the evidence” [citation]; inferences that are
the result of mere speculation or conjecture cannot support a finding [citations].”
(*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394, italics omitted.)
Here, the jury could reasonably and fairly infer from the Halloween party
photographs and the unauthorized charges at various Halloween stores that
[Petitioner] used, or aided and abetted the use of, the personal identifying
information of the victims named in Counts 1, 2, 4, and 34 through 36.

26 3. The Third Group of Counts

27 As to the remaining counts, the [Petitioner] argues:

28 “Of course the prosecutor was fully entitled to proceed on an aiding and

1 abetting theory. But she was also required to prove her theory beyond a reasonable
2 doubt. As to counts 3, 5, 6, 8, 10, 11, 12, 13, 15, 16, 17, 18, 20, 22, 23, 25, 27, 28,
3 29, 30, 31, 33, 37, 38, 39, 40, 45, 46, and 48 there simply was no evidence linking
4 the unauthorized charges to [Petitioner]. Nor was the evidence presented to link
5 any specific purchase to accomplices Nolan Fitzpatrick or Jessica Baldwin, or to
6 [Petitioner's] girlfriend Suzette Jumper or her children. Convictions may not be
7 had on these counts based on mere suspicion or speculation (*People v. Tran* [1996]
8 47 Cal.App.4th [759.] 771-772; *People v. Johnson, supra*, 26 Cal.3d at pp. 576-
9 577.)”

6 Aiding and abetting is a theory upon which a person may be held
7 accountable for an offense committed by another. (*People v. Keovilayphone*
8 (2005) 132 Cal.App.4th 491, 497.) “[A]n aider and abettor is a person who,
9 “acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the
10 intent or purpose of committing, encouraging, or facilitating the commission of the
11 offense, (3) by act or advice aids, promotes, encourages or instigates, the
12 commission of the crime.” (*People v. Hickles* (1997) 56 Cal.App.4th 1183, 1193.)
13 [Petitioner] correctly contends the prosecutor could proceed on an aiding and
14 abetting theory and that suspicion and speculation are insufficient bases for
15 conviction. However, the very settled rule of appellate review is a trial court’s
16 judgment is presumed to be correct, error is never presumed, and the appealing
17 party must affirmatively demonstrate error on the face of the record. (*People v.*
18 *Davis* (1996) 50 Cal.App.4th 168, 172.) [Petitioner’s] summary contention is not
19 supported by a summary of the material evidence—favorable and unfavorable—on
20 this issue. Under California law, it is incumbent upon appellants to state fully,
21 with transcript references, the evidence claimed to be insufficient to support the
22 findings. (*People v. Dougherty, supra*, 138 Cal.App.3d at p. 283.) “An appellant
23 must fairly set forth all the significant facts, not just those beneficial to the
24 appellant.” (*In re S.C.* (2006) 138 Cal.App.4th 396, 402.) The burden to provide a
25 fair summary of the evidence grows with complexity of the record. (*Myers v.*
26 *Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 739.)

17 Here, [Petitioner] has supplied numerous transcript references but not a
18 complete statement of the evidence claimed to be insufficient to support the
19 findings. Moreover, the trial court received more than 150 documentary and other
20 exhibits into evidence. However, [Petitioner] has not designated those exhibits for
21 transmittal to or consideration by this court (Cal. Rules of Court, rule 8.224). A
22 claim of insufficiency of the evidence is entitled to no consideration when it is
23 apparent that a substantial amount of evidence was received on behalf of the
24 respondents. A reviewing court will not engage in an independent review of the
25 record where, as here, this rule is ignored. (*People v. Dougherty, supra*, 138
26 Cal.App.3d at p. 282.) [Petitioner’s] contention is deemed waived.

23 (Ex. A at 27-33.)

24 The law on insufficiency of the evidence claim is clearly established. The United States
25 Supreme Court has held that when reviewing an insufficiency of the evidence claim on habeas, a
26 federal court must determine whether, viewing the evidence and the inferences to be drawn from
27 it in the light most favorable to the prosecution, any rational trier of fact could find the essential
28

1 elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).
2 Sufficiency claims are judged by the elements defined by state law. Id. at 324, n. 16. On federal
3 habeas review, AEDPA requires an additional layer of deference to the state decision. Juan H. V.
4 Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). A federal court may not grant a habeas petition
5 unless it finds that the state court was “objectively unreasonable” in applying the principles
6 underlying the Jackson standard when reviewing the petitioner’s claim. Cavazos v. Smith, 132
7 S.Ct. 2, 3, (2011). This Court must determine whether the state decision was an unreasonable
8 application of the Jackson standard. As the Supreme Court recently reiterated,

9 A reviewing court may set aside the jury’s verdict on the ground of insufficient
10 evidence only if no rational trier of fact could have agreed with the jury. What is
11 more, a federal court may not overturn a state court decision rejecting a sufficiency
12 of the evidence challenge simply because the federal court disagrees with the state
13 court. The federal court instead may do so only if the state court decision was
14 “objectively unreasonable.” Renico v. Lett, 559 U.S. ___, ___, 130 S.Ct. 1855, 1862,
15 176 L.Ed.2d 678 (2010) (internal quotation marks omitted).

16 Cavazos, 132 S.Ct. at 3.

17 As previously stated, California Penal Code section 530.5(a) states:

18 Every person who willfully obtains personal identifying information, as defined in
19 subdivision (b) of Section 530.55, of another person, and uses that information for
20 any unlawful purpose, including to obtain, or attempt to obtain, credit goods,
21 services, real property, or medical information without the consent of that person,
22 is guilty of a public offense, and upon conviction therefor, shall be punished by a
23 fine, by imprisonment in a county jail not to exceed one year, or by both a fine and
24 imprisonment, or by imprisonment in the state prison.

25 Petitioner’s sole challenge is to the second prong of California Penal Code section 530.5(a)
26 in which he claims the State failed to prove that he used the personal account information for an
27 unlawful purpose. When Nolan Fitzpatrick, Jessica Baldwin, and Patrick Adolph went to
28 Petitioner’s residence to obtain false identification cards, Petitioner solicited each of them to skim
credit cards at the restaurants where they worked. (RT 738-740, 743, 809-810, 813-814, 859-
860.) Kristen Larsen also went to Petitioner’s residence to obtain a false identification card and
Petitioner asked her if she knew anyone employed in the restaurant business. (RT 768-781.)

James Lutter, a computer forensic examiner for the Fresno Police Department, analyzed
various pieces of equipment found at Petitioner’s home, and explained how the equipment

1 contained the necessary software to fraudulently skim credit card information for personal use.
2 (RT 1095-1124.)

3 Petitioner's girlfriend, Suzette Jumper told Detectives Ground and Dodd that Petitioner
4 had purchased an X-box with a stolen credit card, which was found at Petitioner's residence. (RT
5 1648-1651.) Jumper also disclosed that Petitioner shopped on a regular basis using the stolen
6 credit card information. (RT 1651.)

7 A search of Petitioner's residence was conducted, and Petitioner was found to be in
8 possession of the card information near the time the unauthorized charges had been deducted from
9 the accounts. Numerous receipts were found in Petitioner's home which matched certain
10 unauthorized charges made to the accounts of the victims in counts 7, 14, 19, 21, 41-44 at several
11 stores in the Fresno-area, including Foods Co., Wal-Mart, Marshall's Office Depot, Sears,
12 Victoria's Secret, Macy's, Best Buy, and Kohl's. As to Count 9, an unauthorized charge at Best
13 Buy was deducted from the victim's account for a Sunpak 7500 TM tripod, which was found at
14 Petitioner's home. (RT 1172, 1450-1452.) In addition, several shredded receipts were found at
15 Petitioner's home for Pep Boys, Cost Plus, Save Mart, Orchard Supply, Harbor Freight Tools, and
16 Fresno Motor Sports-the same stores where several unauthorized charges related to the identity
17 theft counts occurred. (See RT 1141-1147 [count 15], 1151-1155 [count 5], 1155-1159 [count
18 33], 1163-1166 [count 10], 1180-1186 [count 7], 1186-1192 [count 3], 1192-1195 [count 32],
19 1201-1203 [count 25], 1207-1211 [count 16], 1260-1266 [count 45], 1266-1272 [count 44], 1296-
20 1305 [count 2], 1311-1316 [count 18], 1317-1321 [count 23], 1321-1326 [count 43], 1332-1337
21 [count 4], 1338-1345 [count 21], 1352-1357 [count 6], 1359-1364 [count 48], 1366-1372 [count
22 24], 1372-1376 [count 12], 1378-1381 [count 29], 1388-1390 [count 37], 1394-1399 [count 22],
23 1410-1412 [count 19], 1418-1423 [count 13], 1446-1452 [count 9], 1460-1465 [count 27], 1466-
24 1470 [count 28], 1471-1473 [count 14], 1479-1483 [count 40], 1484-1492 [count 1], 1520-1524
25 [count 31], 1530-1534 [count 39], 1535-1538 [count 46], 1539-1542 [count 30], 1546-1550
26 [count 17], 1557-1560 [count 26], 1567-1570 [count 34], 1593-1598 [count 11], 1609-1613
27 [count 42], 1614-1618 [count 20], 1632-1637 [count 8], 1663-1667 [count 38], 1685-1691 [count
28 36], 1705-1708 [count 35], 1741-1743 [count 41]. Petitioner also had a list of places the

1 fraudulent cards could be used, which clearly demonstrates that Petitioner knew where the cards
2 were being used. (RT 742-743.)

3 There were several purchases made at Halloween stores, and there was evidence Petitioner
4 had a Halloween party with elaborate decorations. (RT 994, 1197.) Nolan Fitzpatrick actually
5 saw Petitioner using the victim's credit card numbers to purchase items at various stores, and
6 Baldwin observed Petitioner buy her a lap top computer at Best Buy. (RT 820-821, 867-868.) In
7 exchange for Fitzpatrick and Baldwin scanning customer's credit cards at Red Robin and
8 Goldfield's, they were each given fraudulent gift cards and both used them to purchase items.
9 (RT 817-819, 865-868.) When Adolph purchased a fake identification card from Petitioner,
10 Petitioner solicited him to scan credit cards of customers at the Sequoia Brewery Restaurant
11 where he worked, and Petitioner offered to take him Christmas shopping for doing so. Patrick
12 Adolph observed several fraudulent credit cards in Petitioner's wallet, and Petitioner showed him
13 numerous items in his home, including a flat screen television that he had purchased with the
14 fraudulent cards. (RT 740-741.)

15 Moreover, the majority of the account information was obtained from victims who had
16 used their cards at Goldfield's restaurant or Red Robin restaurant during the time Fitzpatrick and
17 Baldwin were skimming cards for Petitioner at these restaurants. (RT 1141-1147 [count 15],
18 1151-1155 [count 5], 1163-1166 [count 10], 1180-1186 [count 7], 1201-1203 [count 25], 1207-
19 1211 [count 16], 1260-1266 [count 45], 1266-1272 [count 44], 1296-1305 [count 2], 1311-1316
20 [count 18], 1317-1321 [count 23], 1321-1326 [count 43], 1332-1337 [count 4], 1352-1357 [count
21 6], 1359-1364 [count 48], 1366-1372 [count 24], 1446-1452 [count 9], 1460-1465 [count 27],
22 1466-1470 [count 28], 1471-1473 [count 14], 1479-1483 [count 40], 1484-1492 [count 1], 1520-
23 1524 [count 31], 1530-1534 [count 39], 1539-1542 [count 30], 1546-1550 [count 17], 1593-1598
24 [count 11], 1609-1613 [count 42], 1614-1618 [count 20], 1632-1637 [count 8], 1682-1685 [count
25 47].) Furthermore, the unauthorized charges stopped the day before Petitioner was arrested.

26
27 Considering all of the evidence in favor of the prosecution, there was sufficient evidence
28 from which the jury could reasonably infer that Petitioner either used or aided and abetted the use

1 of the victim’s account information, and the state court’s determination of this issue was not
2 contrary to, or an unreasonable application of, clearly established Supreme Court precedent.

3 V. Evidentiary Hearing

4 Petitioner requests an evidentiary hearing to resolve the aforementioned claims. Because
5 Petitioner’s claims can be resolved on the existing state court record, an evidentiary hearing in this
6 Court is precluded. Schriro v. Landrigan, 550 U.S. 465, 474 (2007) (evidentiary hearing
7 unwarranted if “the record refutes the applicant’s factual allegations or otherwise precludes habeas
8 relief); see also Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998) (affirming denial of
9 evidentiary hearing because the applicant’s factual allegations “fl[ew] in the face of logic in light
10 of . . . [the applicant’s] deliberate acts which are easily discernible from the record”).

11 Accordingly, Petitioner’s request for an evidentiary hearing should be denied.

12 RECOMMENDATION

13 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 14 1. The instant petition for writ of habeas corpus be DENIED;
- 15 2. The Clerk of Court be directed to enter judgment in favor of Respondent.

16 This Findings and Recommendation is submitted to the assigned United States District
17 Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the
18 Local Rules of Practice for the United States District Court, Eastern District of California. Within
19 thirty (30) days after being served with a copy, any party may file written objections with the court
20 and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate
21 Judge’s Findings and Recommendation.” Replies to the objections shall be served and filed
22 within fourteen (14) days after service of the objections. The Court will then review the

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27 Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that
28 failure to file objections within the specified time may waive the right to appeal the District

1 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

2 IT IS SO ORDERED.

3 **Dated: July 13, 2012**

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

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