examination about his failure to tell the police exactly what had happened. Petitioner responded that he "just told [the officer] that I had been attacked in my house and that I defended myself," and he did not answer further questions because he was "having a heart attack." (Lodged Doc. 7, 4 Rep.'s Tr. at 1847-51.) Petitioner then testified, contrary to Officer Miranda's testimony, that he was never read his Miranda rights. (Id. at 1852-53.) He reiterated that he told the officer he stabbed Escobar in self-defense but didn't say anything more about the incident because he was sick and needed to be taken to the hospital. (Id. at 1853.) Officer Miranda testified that after taking pictures of Petitioner for evidence, he took Petitioner to the hospital, where he was examined and given an EKG. (Lodged Doc. 7, 3 Rep.'s Tr. at 949, 956.)

The timing of Petitioner's arrest is unclear from the evidence before the Court. Based on Officer Miranda's testimony, it appears that Petitioner arrived at the police station, spoke to other officers, and then spoke to Officer Miranda, who read him his Miranda rights and questioned him about the stabbing.[1] (Lodged Doc. 7, 3 Rep.'s Tr. at 948, 691-63.) Petitioner apparently told the police as soon as he arrived at the station that he had stabbed someone. (Lodged Doc. 8, Clerk's Tr. at 45-46 (911 operator notes that "suspect" from assault at Petitioner's address had arrived at station).) At some point, apparently before Officer Miranda questioned him, Petitioner was

[1]Petitioner testified, however, that no one ever read him his Miranda rights. (See Lodged Doc. 7, 4 Rep.'s Tr. at 1852-53.)

placed in the back of a patrol car and "detained." (Id. at 948, 964, 968.) Petitioner then was taken to the hospital. (Id. at 949.) Officer Miranda testified that Petitioner was "not in custody" at the time he was placed in the patrol car and was free to leave, although he earlier testified that Petitioner was being "detained" at that time. (See id. at 948, 967.) The officer acknowledged that Petitioner was in custody by the time they arrived at the hospital. (Id. at 954.) The record does not appear to show exactly when Petitioner was formally arrested.

The prosecutor did not mention Petitioner's post-Miranda silence during his opening statement. (See Lodged Doc. 7, 2 Rep.'s Tr. at 622-26.) During closing argument, the prosecutor pointed out that Petitioner had not answered when the police asked him about the details of the incident, and then argued:

> [A]t trial he conveniently says, "well, that's because I was having a heart attack." But he was still able to pose for the pictures. He was still able to drive himself there. There is no medical treatment he receives at the police station. Doesn't make sense. What makes sense is that it wasn't self-defense and he was just trying to cook something up.

(Id. at 2155-56.) Later in his closing argument, the prosecutor stated that Petitioner's story was "completely bogus," "unreasonable," and "made up," and that "[i]f it were true, he would have told that to the police, and it would have made a heck of a lot more sense when he was testifying on the stand." (Id. at 2180.)

The prosecutor also mentioned Petitioner's silence in

rebuttal argument. He reiterated that, had the stabbing occurred in the way Petitioner testified, he

> would have gone to the police station, he would have told the police what happened. He would have said, "Escobar came at me this way. That's why I pulled out the knife and stabbed him. And then after I stabbed him with the knife, he was still coming at me and threatening me and throwing punches at me. And that's why I stabbed him again."

(Id. at 2214.) He also argued that the jury never heard "anything at the police station that the defendant was having a heart attack or, you know, whatever, he complained he was having shortness of breath or anything like that" because "[i]t's made up to dissuade you, to mislead you." (Id. at 2217.)[2] He also argued that "any reasonable person would have told the deputy exactly what happened" and why the stabbing was self-defense, but Petitioner did not do so. (Id. at 2219.)

The court of appeal denied Petitioner's Doyle claim:

> [Petitioner] asserts he invoked his right to remain silent when he told Deputy Miranda that he was going to say nothing more. Thus, he argues, the court erred in allowing the prosecution to question Deputy Miranda further and to comment on his post-arrest silence during argument. The Attorney General responds that

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[2]In fact, Officer Miranda testified that he "took [Petitioner] to the hospital later on that evening [of the stabbing]" because "he was complaining of chest pain." (Lodged Doc. 7, 3 Rep.'s Tr. at 949.)

1 [Petitioner] did not clearly and unambiguously invoke his
2 right to remain silent and the prosecutor properly asked
3 the deputy whether [Petitioner] said that Escobar had
4 attacked him and precipitated the assault. In light of
5 the overwhelming evidence of [Petitioner]'s guilt, we
6 need not resolve the dispute.

7 [Petitioner]'s self-defense plea was rejected by the
8 jury due to the simple unassailable fact that Escobar
9 suffered 25 stabs or cuts, including a potentially life
10 threatening stab wound to his sternum, and [Petitioner]
11 escaped without a scratch. [Petitioner] could not
12 explain how Escobar came to have so many wounds, and he
13 expressly denied stabbing Escobar in the chest. He
14 argues the case was close, as demonstrated by the jury
15 verdict acquitting him of attempted murder. Not so. The
16 acquittal on the greater offense establishes that the
17 jury did not find [Petitioner] intended to kill Escobar,
18 not that [Petitioner] had legal cause to assault him.
19 Doyle error, if any, could not have affected the jury's
20 verdict and was harmless beyond a reasonable doubt. (See
21 People v. Earp (1999) 20 Cal. 4th 826, 857-858 [Doyle
22 error is subject to harmless error test set forth in
23 Chapman v. California (1967) 386 U.S. 18, 24.].)

24 (Lodged Doc. 4 at 9.)

25 **B. Applicable Law**

26 The Fifth and Fourteenth amendments' prohibition against
27 compelled self-incrimination requires police to warn a suspect
28 before custodial interrogation that he has the right to remain

silent and to the presence of an attorney. Miranda, 384 U.S. at 479. If he indicates that he wishes to remain silent, "the interrogation must cease"; if he requests counsel, "the interrogation must cease until an attorney is present." Id. at 474.

Once a defendant waives his Miranda rights, he may subsequently invoke his right to remain silent as to particular questions. Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010). "[I]t is enough" to invoke the right to silence for a suspect to say "he does not want to answer that question." Id. at 1089.

Under Doyle, a prosecutor cannot impeach a defendant with his post-arrest silence following the issuance of Miranda warnings. See Doyle, 426 U.S. at 618-19. Indeed, the prosecutor may not comment on or refer to that silence in any way. See United States v. Lopez, 500 F.3d 840, 844 (9th Cir. 2007) (prosecutor's closing argument commenting on defendant's post-Miranda silence violates Doyle). The rationale for this rule "rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." Wainwright v. Greenfield, 474 U.S. 284, 291, 106 S. Ct. 634, 638, 88 L. Ed. 2d 623 (1986) (internal quotation marks omitted) (holding that prosecution may not use defendant's silence during case-in-chief).

Miranda protections are generally triggered "only where there has been such a restriction on a person's freedom as to render him in custody." Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1528, 128 L. Ed. 2d 293 (1994) (internal

quotation marks omitted). "[I]n custody" means "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983) (per curiam) (internal quotation marks omitted). It is not at all clear, however, that a suspect must be in custody for Doyle to apply; it would appear to apply any time a suspect has been read his Miranda rights and receives the implicit assurance that his silence won't be used against him at trial. See Doyle, 426 U.S. at 618-19 (reasoning that when suspect chooses to remain silent after being assured by Miranda warning that he has right to remain silent, assurance that his silence "will carry no penalty" is "implicit" and thus "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial"); see also Kappos v. Hanks, 54 F.3d 365, 368-69 (7th Cir. 1995) (finding Doyle violation in use of pre-arrest, post-Miranda silence to impeach defendant who claimed that reason for not continuing to answer police questions was that he was ill).

But assuming someone must be in custody for Doyle to apply, neither Miranda nor its Supreme Court progeny set down any bright-line rule or specific test for determining when that has taken place. Instead, those cases suggest that the totality of the circumstances of each case must be examined to determine whether the suspect was in custody. See Yarborough v. Alvarado, 541 U.S. 652, 661-62, 124 S. Ct. 2140, 2148, 158 L. Ed. 2d 938 (2004). The determination is based on an objective inquiry into 1) the circumstances surrounding the interrogation and 2) whether

a reasonable person would have felt at liberty to end the interrogation and leave, given those circumstances. Thompson v. Keohane, 516 U.S. 99, 112, 116 S. Ct. 457, 465, 133 L. Ed. 2d 383 (1995). Relevant factors include "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning." Howes v. Fields, 565 U.S. ___, 132 S. Ct. 1181, 1189, 182 L. Ed. 2d 17 (2012) (citations omitted). The subjective views harbored by either the interrogating officers or the person being questioned are irrelevant to the custody determination; the test is an objective one, and "the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury, 511 U.S. at 322 (internal quotation marks and alteration omitted).

When Doyle has been violated, a petitioner is not entitled to habeas relief "unless the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Hurd, 619 F.3d at 1089-90 (quoting Brecht v. Abrahamson, 507 U.S. 619, 622, 637-38, 113 S. Ct. 1710, 1714, 1722, 123 L. Ed. 2d 353 (1993)). In evaluating whether Doyle error was harmless, the habeas court "attempts to determine not whether the jury would have decided the same way even in the absence of the error, but whether the error influenced the jury." Hurd, 619 F.3d at 1090 (internal quotation marks omitted). In doing so, the court considers "(1) the extent of the comments, (2) whether an inference of guilt from silence was stressed to the jury, and (3)

the extent of other evidence suggesting the defendant's guilt." Id. (alterations omitted). A federal habeas court applies the harmless-error standard enumerated in Brecht "without regard for the state court's harmlessness determination." Merolillo v. Yates, 663 F.3d 444, 455 (9th Cir. 2011).

C. Analysis

Respondent concedes that under Hurd, Petitioner's answers were unambiguous and did invoke his right to silence (Mem. P & A at 14-15) but argues that Doyle nonetheless does not apply because Petitioner was not in custody when Officer Miranda read him his Miranda rights and subsequently questioned him concerning the incident (id. at 15). Petitioner, on the other hand, testified that he was not read his Miranda rights at all. (Lodged Doc. 7, 4 Rep.'s Tr. at 1852-53.) In that circumstance, Doyle would not apply unless he was in fact in custody at the time of his silence. See United States v. Bushyhead, 270 F.3d 905, 912 (9th Cir. 2001) (once a defendant is in custody, "regardless whether the Miranda warnings are actually given, comment on the defendant's exercise of his right to remain silent is unconstitutional" (alterations and internal quotation marks omitted)).

The Court need not decide whether Doyle applies pre-arrest, post-Miranda or whether Petitioner was in fact in custody or was read his Miranda rights because, as the California Court of Appeal found, any error was harmless. Although it is a close call, under the three-factor test set out in Hurd, any Doyle error likely did not have a "substantial and injurious effect or influence" on the jury's verdict and was therefore harmless.

1 As in Hurd, the prosecutor "repeatedly stressed
2 [Petitioner's] silence to the jury as evidence of his guilt[.]"
3 619 F.3d at 1090. In that case, however, the petitioner did not
4 provide an alternative explanation for his silence; here, in
5 contrast, the jury had the option to believe that Petitioner's
6 silence was, as he testified (Lodged Doc. 7, 4 Rep.'s Tr. at
7 1847-53), a result of his suffering a "heart attack" or other
8 illness rather than because he was conscious of his guilt.
9 Indeed, Officer Miranda testified that Petitioner was taken to
10 the hospital that evening and given an EKG because of his chest
11 pains. Accordingly, the prosecutor's comments likely had less
12 impact on the jury than in Hurd. Accord Kappos, 54 F.3d at 369
13 (holding that Doyle error was harmless when petitioner "later
14 testified at trial and provided his own explanation for his
15 silence and for his actions"). Moreover, unlike in Hurd, in
16 which little evidence of the petitioner's guilt existed and some
17 physical evidence corroborated his trial testimony, see 619 F.3d
18 at 1090, here ample other evidence of Petitioner's guilt existed
19 and his story was belied by the physical evidence. As the court
20 of appeal pointed out, Petitioner's theory of self-defense was
21 incredible given the undisputed fact that Petitioner stabbed the
22 victim 25 times yet "escaped without a scratch." (Lodged Doc. 4
23 at 9.) The jury could have, and likely did, base its verdict on
24 that fact alone. Accord Brecht, 507 U.S. at 639 (Doyle error
25 harmless when ample other physical and forensic evidence cast
26 doubt on petitioner's story that shooting of victim was
27 accidental). Finally, the error was also harmless because
28 Petitioner had apparently already admitted to officers, before he

was Mirandized and subsequently refused to answer some questions, that he had stabbed someone in self-defense. Thus, any Doyle error the trial court committed in allowing evidence and argument concerning Petitioner's post-Miranda silence was harmless in light of the alternative explanation offered for Petitioner's silence and the strong evidence against him, and Petitioner is not entitled to habeas relief on this claim.

II. The court of appeal reasonably held that the trial court did not err in refusing to allow Munoz's testimony that Escobar assaulted and threatened her during trial

Petitioner's second ground for relief alleges that the trial court violated his rights to due process and to present a defense when it excluded evidence of Munoz's claim, in the midst of trial, that Escobar had recently assaulted her and threatened to harm her and her children if she testified. (Pet. at 7.)

During trial, the court allowed Petitioner to attack Escobar's credibility by introducing evidence that he had one misdemeanor and two felony convictions and used an alias, a "phony" identification card, and a "fake" green card. (Lodged Doc. 7, 2 Rep.'s Tr. at 601-03, 607-13; 3 Rep.'s Tr. at 920-24.) The defense also put on seven witnesses, including Munoz, who testified that Escobar had a violent character. (Lodged Doc. 7, 3 Rep.'s Tr. at 1216-94; 4 Rep.'s Tr. at 1545, 1547-49.) Munoz specifically testified that on another occasion, Escobar had threatened to harm her if she testified against him at trial. (Lodged Doc. 7, 4 Rep.'s Tr. at 1545, 1547-49.) After that evidence had been presented, the defense sought to introduce evidence that Escobar had assaulted Munoz during a weekend break

in the trial and threatened to hurt her and her children if she testified. (Id. at 1508-10.) The trial court excluded the evidence under California Evidence Code section 352, finding that it was cumulative in light of the ample other evidence the jury had already heard regarding Escobar's violent character; the court noted that the evidence would also be unduly time-consuming. (Id. at 1521, 1543, 1567-68.)

The court of appeal rejected Petitioner's claim that the exclusion of the evidence violated his constitutional rights:

> As he did in the trial court, [Petitioner] urges the victim's character for violence was relevant to support his self-defense claim. Although he is correct, [Petitioner] ignores the fact that he presented a number of witnesses who testified to the victim's aggressive nature. Sandra Munoz, her three children, Leonel Guizar, Maria Ruelas, and Sotelo Garcia testified that the victim was aggressive. Some witnesses stated that he had threatened to kill [Petitioner]. Indeed, Munoz testified to two other incidents when the victim threatened her. There can be little question that her testimony concerning a third such incident was cumulative. On the other side of the scale, the court was aware that there were other witnesses who would be called if Munoz was allowed to give her version of events. [Petitioner] said there was a neighbor who observed the incident and the prosecutor stated there were two deputies who interviewed Munoz on the night in question and took pictures. Given the cumulative nature of Munoz's testimony and the

consumption of time that would have been expended on the matter, the trial court's decision to exclude the testimony was not arbitrary or capricious. We discern no error.

(Lodged Doc. 4 at 11.)

Criminal defendants have a constitutional right to present relevant evidence in their own defense. See, e.g., Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." (internal quotation marks omitted)). "However, a defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions, such as evidentiary and procedural rules." Moses v. Payne, 555 F.3d 742, 757 (9th Cir. 2009) (as amended) (internal quotation marks and brackets omitted). Indeed, "[s]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." Holmes, 547 U.S. at 324 (internal quotation marks omitted); see also Moses, 555 F.3d at 757 ("[T]he Supreme Court has indicated its approval of well-established rules of evidence that permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." (internal quotation marks and brackets omitted)).

The exclusion of evidence pursuant to a state evidentiary

1 rule is unconstitutional only if it "significantly undermined
2 fundamental elements of the defendant's defense." United States
3 v. Scheffer, 523 U.S. 303, 315, 118 S. Ct. 1261, 1267-68, 140 L.
4 Ed. 2d 413 (1998); see also Moses, 555 F.3d at 757 ("Evidentiary
5 rules do not violate a defendant's constitutional rights unless
6 they infringe upon a weighty interest of the accused and are
7 arbitrary or disproportionate to the purposes they are designed
8 to serve." (internal quotation marks and brackets omitted)). In
9 sum, it takes "unusually compelling circumstances to outweigh the
10 strong state interest in administration of its trials." Moses,
11 555 F.3d at 757 (internal quotation marks and ellipsis omitted).
12 The court of appeal's rejection of this claim was not
13 objectively unreasonable. As that court noted, Petitioner was
14 allowed to put on ample evidence to impeach Escobar's credibility
15 and to show that he had a violent character. The additional
16 evidence was not only cumulative, it was also somewhat suspect
17 given Munoz's delay in reporting the alleged incident to the
18 police (see Lodged Doc. 7, 4 Rep.'s Tr. at 1501-07) and her
19 relationship with Petitioner and desire to see him acquitted (id.
20 at 1513-14). Moreover, as the court of appeal noted, the
21 evidence would have been time-consuming to put on, given that
22 there were several other witnesses to the incident who would
23 likely have been called to testify and cross-examined. The court
24 of appeal's ruling that the trial court reasonably exercised its
25 discretion to exclude cumulative and unduly time-consuming
26 evidence was not contrary to or an unreasonable application of
27 clearly established federal law. Petitioner is not entitled to
28 habeas relief on this claim.

III. **Petitioner's instructional-error claim is not cognizable on habeas review; in any event, any error was harmless**

Petitioner's third ground for relief alleges that the trial court erred in giving a flight instruction to the jury because Petitioner did not flee the scene of the crime to evade police but instead drove directly to the police station. (Pet. at 8.) The jury was instructed under CALCRIM No. 372 as follows:

> If [Petitioner] fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that [Petitioner] fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that [Petitioner] fled or tried to flee cannot prove guilt by itself.

(Lodged Doc. 7, 5 Rep.'s Tr. at 2132; see also Lodged Doc. 8, Clerk's Tr. at 87.)

The court of appeal observed, "It is difficult to conclude that [Petitioner] was attempting to flee when he went directly to the police station and was subsequently arrested." (Lodged Doc. 4 at 11-12.) It therefore held that the trial court erred in giving the flight instruction, but the error was harmless in light of the "wealth of evidence demonstrating [Petitioner]'s guilt." (Id.)

Claims of error in state jury instructions are generally matters of state law only. See Gilmore v. Taylor, 508 U.S. 333, 343, 113 S. Ct. 2112, 2118, 124 L. Ed. 2d 306 (1993); see also Williams v. Calderon, 52 F.3d 1465, 1480-81 (9th Cir. 1995). A state-law instructional error "does not alone raise a ground

cognizable in a federal habeas corpus proceeding." Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988) (internal quotation marks omitted). Habeas relief is available only when a petitioner demonstrates that "[an] ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 482, 116 L. Ed. 2d 385 (1991) (internal quotation marks omitted). A challenged instruction must be evaluated in the context of other instructions and the trial record as a whole, not in artificial isolation. Id.; United States v. Frady, 456 U.S. 152, 169, 102 S. Ct. 1584, 1595, 71 L. Ed. 2d 816 (1982).

Petitioner does not claim that the giving of the flight instruction violated his federal constitutional rights; his claim is thus not cognizable on habeas review. See Mitchell v. Goldsmith, 878 F.2d 319, 324 (9th Cir. 1989) (when petitioner "does not contend that the instruction violated federal constitutional standards . . . no relief can be granted even if the instruction given might not have been correct as a matter of state law").

Even if this claim did present a federal constitutional question, any error was harmless. The wording of the instruction correctly admonished the jurors not to base a finding of guilt on Petitioner's flight alone. Moreover, if, as Petitioner contends, no evidence existed that he improperly fled the scene of the crime, the instruction by its very terms would have played no role in the jury's deliberations. The jury is presumed to have followed the instructions as given. See Weeks v. Angelone, 528

U.S. 225, 234, 120 S. Ct. 727, 733, 145 L. Ed. 2d 727 (2000). Thus, the jury's decision to convict Petitioner could not have been derived in meaningful part from its assessment of Petitioner's flight. Rather, the jury likely found Petitioner guilty because he admitted to stabbing Escobar numerous times – the evidence showed that there were 25 different injuries – and sustained no injuries himself, rendering his claim of self-defense incredible. See Morales v. Woodford, 388 F.3d 1159, 1172 (9th Cir. 2003) ("The evidence was so overwhelming that the constitutional error cannot be said to have had an effect upon the verdict in the case at hand.") For all these reasons, Petitioner is not entitled to habeas relief on this claim.

ORDER

IT THEREFORE IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: May 29, 2012

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE