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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE FRUCTUOSO,
Petitioner,
v.
DANIEL PARAMO, Warden,
Respondent.

Case No. CV 14-2481 SS

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

Effective March 20, 2014, Jose Fructuoso ("Petitioner"), a California state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.¹ (Dkt. No. 1). On October 31, 2014, Respondent filed an Answer to the Petition

¹ "When a prisoner gives prison authorities a habeas petition or other pleading to mail to court, [pursuant to the mailbox rule,] the court deems the petition constructively 'filed' on the date it is signed[.]" Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010); Houston v. Lack, 487 U.S. 266, 276 (1988). Here, that date was March 20, 2014.

1 with an accompanying Memorandum of Points and Authorities ("Ans.
2 Mem."). (Dkt. No. 18). Respondent has also lodged relevant
3 portions of the record from Petitioner's state court proceedings,
4 including a one-volume copy of the Clerk's Transcript ("CT") and a
5 seven-volume copy of the Reporter's Transcript ("RT") from
6 Petitioner's trial. (Dkt. Nos. 13, 19). On February 2, 2016,
7 Petitioner filed a Reply with an accompanying Memorandum of Points
8 and Authorities ("Reply Mem."). (Dkt. No. 35). For the reasons
9 discussed below, the Court DENIES the Petition and DISMISSES this
10 action with prejudice.²

11
12 **II.**

13 **PRIOR PROCEEDINGS**

14
15 On November 23, 2011, a Los Angeles County Superior Court jury
16 convicted Petitioner of one count of second degree murder in
17 violation of California Penal Code ("P.C.") § 187, and also found
18 it to be true that Petitioner personally used a deadly or dangerous
19 weapon within the meaning of P.C. § 12022(b)(1). (CT 266, 272-
20 73). On February 10, 2012, the trial court sentenced Petitioner
21 to 16 years to life in state prison. (CT 289-90, 292-93; RT 4507-
22 08, 4808-09).

23
24 Petitioner appealed his convictions and sentence to the
25 California Court of Appeal (Second Appellate District, Div. 4),
26 which affirmed the judgment in an unpublished opinion filed on

27
28

² The parties have consented to proceed before a Magistrate Judge.
(See Dkt. Nos. 7, 11, 14).

1 April 8, 2013. (Lodgments 1-4). Petitioner then filed a petition
2 for review in the California Supreme Court, which denied the
3 petition without citation to authority on July 10, 2013.
4 (Lodgments 8-9).

5
6 **III.**

7 **FACTUAL BACKGROUND**

8
9 The following facts, taken from the California Court of
10 Appeal's written decision on direct review, have not been rebutted
11 with clear and convincing evidence and must, therefore, be presumed
12 correct. 28 U.S.C. § 2254(e)(1); Slovik v. Yates, 556 F.3d 747,
13 749 n.1 (9th Cir. 2009). The Court here only includes facts
14 relevant to Petitioner's habeas petition.

15
16 On the afternoon of January 1, 2010, Bennett
17 Bradley's downstairs neighbor saw him outside, watering
18 his garden while talking on a cordless telephone. At
19 5:00 p.m. the same day, the neighbor heard footsteps
20 upstairs in Bradley's apartment and the sound of someone
21 moving furniture. When Bradley, a theatrical director,
22 did not appear for a meeting at work on January 2, a
23 coworker went to his apartment. Bradley was dead on the
24 floor of the living room with his throat slashed and his
25 pants twisted and down around his legs. The outside
26 doors to his apartment were open. His wallet was found
27 near his body, with the cash missing. His bedroom had
28

1 him to waive his Fifth Amendment privilege against self-
2 incrimination in order to preserve his Sixth Amendment right to
3 present a defense. (Petition at 7; Reply Mem. at 4-14). In Ground
4 Two, Petitioner contends the prosecutor committed misconduct during
5 his cross-examination of Petitioner when he: (a) accused Petitioner
6 of being a prostitute; (b) asked Petitioner about a concealed
7 knife; and (c) questioned Petitioner about whether Petitioner had
8 ever observed animals being slaughtered. (Petition at 7; Reply
9 Mem. at 15-22). In Ground Three, Petitioner asserts that admission
10 of expert witness testimony about DNA evidence violated his Sixth
11 Amendment right to confront the witnesses against him. (Petition
12 at 7; Reply Mem. at 22-37). In Ground Four, Petitioner claims a
13 police officer transporting him to jail improperly questioned him
14 in violation of Miranda v. Arizona, 384 U.S. 436 (1966).³ (Petition
15 at 8; Reply Mem. at 37-43). In Ground Five, Petitioner alleges
16 the trial court failed to adequately respond to the jury's question
17 about the difference between first and second degree murder.
18 (Petition at 8; Reply Mem. at 43-49). In Ground Six, Petitioner
19 claims the evidence is insufficient to demonstrate he committed
20 second degree murder. (Petition at 8-9; Reply Mem. at 50-55).

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25 ³ Ground Four also initially alleged that Petitioner was denied
26 his Sixth Amendment right to counsel. (See Petition at 8).
27 However, Respondent argued the Sixth Amendment claim was
28 unexhausted. Petitioner agreed, and requested the Court strike
the unexhausted (Sixth Amendment) portion of Ground Four. The
Court granted Petitioner's request. (Dkt. Nos. 12, 15-16).

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V.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." Harrington v. Richter, 562 U.S. 86, 98 (2011). Under AEDPA's deferential standard, a federal court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court, or was based upon an unreasonable determination of the facts. Id. at 100 (citing 28 U.S.C. § 2254(d)). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt[.]" Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citations and internal quotation marks omitted).

Petitioner raised his claims in his petition for review to the California Supreme Court, which denied the petition without comment or citation to authority. (Lodgments 5-6). The Court "looks through" the California Supreme Court's silent denial to the last reasoned decision as the basis for the state court's judgment. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."); Cannedy v. Adams, 706 F.3d 1148, 1159 (9th Cir. 2013) ("[W]e conclude that

1 Richter does not change our practice of 'looking through' summary
2 denials to the last reasoned decision - whether those denials are
3 on the merits or denials of discretionary review." (footnote
4 omitted)), as amended, 733 F.3d 794 (9th Cir. 2013), cert. denied,
5 134 S. Ct. 1001 (2014). Therefore, in addressing Grounds One
6 through Four and Six, the Court will consider the California Court
7 of Appeal's reasoned opinion addressing those claims. Berghuis v.
8 Thompkins, 560 U.S. 370, 380 (2010). However, the Court will
9 address Ground Five de novo.⁴ See Id. at 390 ("Courts can . . .
10 deny writs of habeas corpus under § 2254 by engaging in de novo
11 review when it is unclear whether AEDPA deference applies, because
12 a habeas petitioner will not be entitled to a writ of habeas corpus
13 if his or her claim is rejected on de novo review[.]"); Norris v.
14 Morgan, 622 F.3d 1276, 1290 (9th Cir. 2010) (affirming denial of
15 habeas corpus petition when claim failed even under de novo
16 review); Frantz v. Hazey, 533 F.3d 724, 735-37 (9th Cir. 2008) (en
17 banc) (a federal habeas court can review constitutional issues de
18 novo before performing a § 2254(d)(1) analysis).

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22 ⁴ Although Petitioner cited both state and federal law in relation
23 to Ground Five (see Lodgment 1 at 74, 77-78, 83; see also Lodgment
24 5 at 32, 38 (petition for review citing both state and federal
25 law)), the California Court of Appeal discussed only the state law
26 aspect of Ground Five. (See Lodgment 4 at 28). Since Ground Five
27 must be denied even on de novo review, the Court need not consider
28 the applicability of the Johnson v. Williams presumption. See
Johnson v. Williams, 133 S. Ct. 1088, 1096 (2013) ("When a state
court rejects a federal claim without expressly addressing that
claim, a federal habeas court must presume that the federal claim
was adjudicated on the merits - but that presumption can in some
limited circumstances be rebutted.").

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VI.

DISCUSSION

A. Petitioner Is Not Entitled To Relief On Ground One

In Ground One, Petitioner claims the trial court improperly required him to waive his Fifth Amendment privilege against self-incrimination in order to preserve his Sixth Amendment right to present a defense. (Petition at 7; see also Reply Mem. at 4-14). More particularly, Petitioner complains that the trial court ruled that Petitioner's expert witness, Nancy Kaser-Boyd, Ph.D., could not testify about statements Petitioner made to her unless those statements were already in the record. (See RT 2798-99 ("My ruling is that the expert cannot relay the statements about the incident to the jurors, the statements made by [Petitioner]. . . . If [Petitioner] testifies and lays it all out as he told the doctor, then that's a different story. She can testify because that evidence . . . will already be in the record.")).

1. Background

The California Court of Appeal set forth the following facts underlying this claim:

Before trial, the prosecutor moved to limit the examination of defense expert witness, [forensic psychologist] Dr. Kaser-Boyd, and to exclude inadmissible hearsay in the guise of expert opinion. One

1 of his arguments was that the defense could not put
2 [Petitioner's] statements before the jury in the guise
3 of using them as a basis for Dr. Kaser-Boyd's opinion
4 that he suffered from [post-traumatic stress disorder
5 ("PTSD")]. At the outset of the discussion of that
6 motion, the court [addressed] the order of the witnesses.
7 Defense counsel said: "As an offer of proof, I'm letting
8 the court know my client will be testifying." The court
9 asked why defense counsel did not plan to call
10 [Petitioner] right away since he planned to testify.
11 Defense counsel said she was not ready to have him
12 testify on direct because she had been preparing for the
13 examination of Dr. Kaser-Boyd.

14
15 The court then took up the prosecution's motion to
16 require [Petitioner] to testify first in order to lay a
17 foundation for Dr. Kaser-Boyd's testimony about the basis
18 for her opinion that he suffered from PTSD. The court
19 asked whether [Petitioner] would testify before Dr.
20 Kaser-Boyd. Defense counsel said that he would not, and
21 that he did not have to because the expert witness could
22 testify about hearsay statements which were used to form
23 her opinions. The prosecutor argued that this was a
24 backdoor method of placing [Petitioner's] statements
25 before the jury without his testimony. Defense counsel
26 said she was confused about the prosecutor's concern
27 because she had represented to the court that
28 [Petitioner] would testify. The court observed that if

1 [Petitioner] changed his mind about testifying, the
2 prosecutor would have no way of challenging Dr. Kaser-
3 Boyd's testimony about what [Petitioner] told her.
4

5 The trial court tentatively ruled that Dr. Kaser-
6 Boyd could not testify unless [Petitioner] testified[.]
7 It took a recess to read [a case] cited by defense
8 counsel. . . . Defense counsel argued that the court's
9 ruling would force [Petitioner] to choose between
10 invoking his Fifth Amendment privilege not to testify or
11 having Dr. Kaser-Boyd prevented from testifying about
12 the basis for her PTSD opinion. The court relied on the
13 rule that it had the discretion to weigh the probative
14 value of the inadmissible evidence relied upon by an
15 expert witness against the risk that the jury might
16 improperly consider it as independent proof of those
17 facts. . . . The court ruled that unless [Petitioner]
18 testified about his history of sexual abuse, Dr. Kaser-
19 Boyd could not testify about his statements which were a
20 basis for her opinion that he suffered from PTSD.
21 [Petitioner] testified before Dr. Kaser-Boyd.
22

23 (Lodgment 4 at 4-5 (citations omitted); see also CT 168-88; RT
24 2787-2800).

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1 **2. California Court of Appeal's Opinion**

2
3 The California Court of Appeal set forth the issue, as
4 follows:

5
6 [Petitioner] argues the trial court erred in
7 requiring him to testify as to the factual basis for a
8 defense expert's testimony that he suffered from [PTSD].
9 He claims he was forced to waive his Fifth Amendment
10 privilege against self[-]incrimination in order to
11 preserve his Sixth Amendment right to present the PTSD
12 defense. [¶] . . . The question presented by
13 [Petitioner] is more properly framed as whether the trial
14 court erred in ruling that [Petitioner's] testimony was
15 required to lay an adequate foundation for the testimony
16 of the expert witness on PTSD. We review the trial
17 court's ruling on that question for abuse of discretion.

18
19 (Lodgment 4 at 3-4). The California Court of Appeal, relying on
20 California case law and the California Evidence Code, concluded
21 that, on the record presented, there was "no abuse of the trial
22 court's discretion in requiring [Petitioner] to testify to a
23 factual foundation for Dr. Kaser-Boyd's opinion that he suffered
24 from PTSD. . . . [T]he trial court acted within its discretion in
25 concluding that admission of [Petitioner's] statements through the
26 expert's testimony would allow the jury to consider those
27 statements for the truth of the matter asserted." (Lodgment 4 at
28 7-10).

1 **3. Analysis**

2
3 a. State Law Claims

4
5 Although Petitioner claims the trial court violated his Fifth
6 Amendment privilege against self-incrimination, his argument
7 relies almost entirely on California law. (See, e.g., Reply Mem.
8 at 8 (“The court’s ruling that [P]etitioner had to testify before
9 Dr. Kaser-Boyd could testify was wrong as a matter of law.
10 [California] Evidence Code [§] 802 allows an expert witness to
11 ‘state on direct examination the reasons for his opinion and the
12 matter . . . upon which it is based[.]’”). However, a federal
13 court, in conducting habeas review, is limited to deciding whether
14 a state court decision violates the Constitution, laws or treaties
15 of the United States. 28 U.S.C. § 2254(a); Swarthout v. Cooke,
16 562 U.S. 216, 219 (2011) (per curiam); Estelle v. McGuire, 502 U.S.
17 62, 67-68 (1991). Federal habeas corpus relief “does not lie for
18 errors of state law[,]” Lewis v. Jeffers, 497 U.S. 764, 780 (1990);
19 see also Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (per curiam)
20 (“[I]t is only noncompliance with federal law that renders a
21 State’s criminal judgment susceptible to collateral attack in the
22 federal courts.” (emphasis in original)), and Petitioner “may not
23 transform a state-law issue into a federal one merely by asserting
24 a violation of due process.” Langford v. Day, 110 F.3d 1380, 1389
25 (9th Cir. 1997). Therefore, to the extent Petitioner claims - in
26 Ground One or in any of his other claims for relief - that he is
27 entitled to habeas corpus relief due to an alleged state law
28 violation, or because the trial court abused its discretion, any

1 such claim is not cognizable in this proceeding.⁵ See Williams v.
2 Borg, 139 F.3d 737, 740 (9th Cir. 1998) (Federal habeas relief is
3 available "only for constitutional violation, not for abuse of
4 discretion.").

5
6 b. Ground One Is Without Merit

7
8 The Fifth Amendment provides, in pertinent part, that "[n]o
9 person . . . shall be compelled in any criminal case to be a witness
10 against himself." U.S. Const. amend. V. This privilege against
11 self-incrimination, which applies to the states through the
12 Fourteenth Amendment, "guarantees . . . the right of a person to
13 remain silent unless he chooses to speak in the unfettered exercise
14 of his own free will, and to suffer no penalty . . . for such
15 silence." Malloy v. Hogan, 378 U.S. 1, 8 (1964); see also Harris
16 v. New York, 401 U.S. 222, 225 (1971) ("Every criminal defendant
17 is privileged to testify in his own defense, or to refuse to do
18 so."). "The essence of this basic constitutional principle is 'the
19 requirement that the State which proposes to convict and punish an
20 individual produce the evidence against him by the independent
21

22 ⁵ Indeed, "a state court's interpretation of state law, including
23 one announced on direct appeal of the challenged conviction, binds
24 a federal court sitting in habeas corpus." Bradshaw v. Richey,
25 546 U.S. 74, 76 (2005) (per curiam); see also Hicks on behalf of
26 Feiock v. Feiock, 485 U.S. 624, 629-30 & n.3 (1988) ("We are not
27 at liberty to depart from the state appellate court's resolution
28 of these issues of state law. Although petitioner marshals a
number of sources in support of the contention that the state
appellate court misapplied state law on these two points, the
California Supreme Court denied review of this case, and we are
not free in this situation to overturn the state court's
conclusions of state law.").

1 labor of its officers, not by the simple, cruel expedient of forcing
2 it from his own lips.'" Estelle v. Smith, 451 U.S. 454, 462 (1981)
3 (citations and emphasis omitted). However, "the Fifth Amendment
4 proscribes only self-incrimination obtained by a 'genuine
5 compulsion of testimony.' Absent some officially coerced self-
6 accusation, the Fifth Amendment privilege is not violated by even
7 the most damning admissions." United States v. Washington, 431
8 U.S. 181, 187 (1977). Thus, for instance, while in certain cases
9 "there are undoubted pressures[] generated by the strength of the
10 government's case against [a criminal defendant] pushing [him] to
11 testify[,] " those pressures do not "constitute 'compulsion' for
12 Fifth Amendment purposes." Ohio Adult Parole Auth. v. Woodard,
13 523 U.S. 272, 287 (1998); Williams v. Florida, 399 U.S. 78, 83-84
14 (1970).

15
16 Petitioner contends the trial court's evidentiary ruling
17 limiting Dr. Kaser-Boyd's testimony about statements Petitioner
18 made to her unless those statements were already in the record
19 forced him to choose between his Fifth Amendment privilege against
20 self-incrimination and his Sixth Amendment right to present a
21 defense, but he cites no pertinent authority supporting this
22 argument.⁶ To the contrary, such decisions have consistently been
23 held not to infringe upon a petitioner's privilege against self-

24 _____
25 ⁶ Petitioner's claim is more than a little disingenuous since the
26 trial court was informed Petitioner was going to testify regardless
27 of the trial court's ruling. (See, e.g., RT 2789 ("I [defense
28 counsel] am representing to the court that [Petitioner] will be
testifying. So [Dr. Kaser-Boyd's] statements won't be offered for
the truth as a backdoor to get [Petitioner's] statements in.
[Petitioner] will testify. So that should be a non-issue.")).

1 incrimination. See Williams, 399 U.S. at 84 (“That the defendant
2 faces . . . a dilemma demanding a choice between complete silence
3 and presenting a defense has never been thought an invasion of the
4 privilege against compelled self-incrimination.”); Menendez v.
5 Terhune, 422 F.3d 1012, 1032 (9th Cir. 2005) (“The judge did not
6 require the defendants to take the stand; he merely regulated the
7 admission of evidence, and his commentary as to what evidence might
8 constitute a foundation did not infringe on Petitioners’ right to
9 decide whether to testify.”); United States v. Perkins, 937 F.2d
10 1397, 1404-05 (9th Cir. 1991) (defendant’s “tactical decision to
11 testify” based on his “own subjective perception of what
12 constitutes a proper trial strategy” does not violate the Fifth
13 Amendment’s privilege against self-incrimination, even if the
14 defendant felt it necessary to testify because of the district
15 court’s evidentiary rulings); United States v. Garro, 268 F. App’x
16 573, 575 (9th Cir. 2008) (“[A]ny decision of Garro to testify in
17 order to lay [a] foundation for the tape’s admission was a tactical
18 one and not compelled in violation of the Fifth Amendment”); United
19 States v. Singh, 811 F.2d 758, 762 (2d Cir. 1987) (“[T]he court
20 did not compel appellant to testify at all. It merely refused to
21 accept the proffered testimony of other witnesses until a proper
22 foundation was laid. There was nothing erroneous about this.”).

23
24 Therefore, the rejection of this claim was not contrary to,
25 or an unreasonable application of, clearly established federal
26 law.⁷

27 _____
28 ⁷ Petitioner contends AEDPA deference is inapplicable to this
claim because the California Court of Appeal did not specifically

1 **B. Petitioner Is Not Entitled To Relief On His Prosecutorial**
2 **Misconduct Claims**

3
4 In Ground Two, Petitioner contends the prosecutor committed
5 misconduct during his cross-examination of Petitioner when he: (a)
6 accused Petitioner of being a prostitute; (b) asked Petitioner
7 about a concealed knife; and (c) questioned Petitioner about
8 whether Petitioner had ever observed animals being slaughtered.
9 (Petition at 7; Reply Mem. at 15-22).

10
11 **1. Factual Background**

12
13 The California Court of Appeal set forth the following facts
14 underlying these claims:

15
16 1. *Prostitution*

17
18 [Petitioner] argues it was improper for the
19 prosecutor to ask [Petitioner] if he had told detectives

20
21 discuss Petitioner's Fifth Amendment argument. (Pet. Mem. at 6-
22 7). However, the California Court of Appeal was well aware of the
23 argument Petitioner was making (see Lodgment 4 at 3-4
24 ("[Petitioner] claims he was forced to waive his Fifth Amendment
25 privilege against self[-]incrimination in order to preserve his
26 Sixth Amendment right to present the PTSD defense."), 5-6
27 ("[Petitioner] claims the [trial] court's ruling required that he
28 waive his Fifth Amendment privilege against self-incrimination in
order to preserve his Sixth Amendment right to present a
defense")), and the Court presumes the California Court of Appeal
denied this claim on the merits. Williams, 133 S. Ct. at 1096.
Petitioner has not rebutted this presumption. In any event, for
the reasons discussed herein, Petitioner's claim fails even if
subject to de novo review.

1 that he had prostituted himself for money. He cites a
2 series of questions during his cross-examination in which
3 [Petitioner] denied asking Bradley for money in exchange
4 for sex. [Petitioner] denied prostituting himself for
5 money. The court sustained a defense objection to a
6 question asking whether [Petitioner] prostituted himself
7 for people who "appreciate" it. The prosecutor then
8 asked: "Mr. Fructuoso, you told Detective Frettlhor that
9 you don't like to prostitute yourself for money; isn't
10 that true?" There was no objection, and [Petitioner]
11 answered "Yes." The court overruled an objection when
12 the prosecutor next asked whether [Petitioner] told
13 Detective Frettlhor that he did prostitute himself for
14 money, but only to people "who appreciate" it. When the
15 interpreter said the question had not been interpreted,
16 the prosecutor asked whether [Petitioner] told Detective
17 Frettlhor that he did prostitute himself. An objection
18 was overruled and [Petitioner] denied saying both that,
19 and that he only prostituted himself for people who
20 appreciate it. [Petitioner] also denied committing
21 prostitution with another man.

22
23 At sidebar, defense counsel argued that the
24 transcript of [Petitioner's] interview with the
25 detectives clearly showed that [Petitioner] denied
26 engaging in prostitution for money. The prosecutor
27 disagreed, quoting the transcript in which [Petitioner]
28 said he did not prostitute himself, and "I just like to

1 do it with persons I like." The prosecutor told the
2 court he planned to play this recording for the jury.
3 Defense counsel continued to argue that [Petitioner]
4 consistently denied prostituting himself for money
5 during the interview. The court read the transcript and
6 ruled that the prosecutor had a good faith basis to
7 inquire into this area, and overruled the objection. The
8 court advised defense counsel that she could examine
9 [Petitioner] about the conversation on redirect.

10
11 Later, outside the presence of the jury, the
12 prosecutor asked to make a record regarding his good
13 faith basis for asking [Petitioner] whether he told the
14 detective he had prostituted himself. He read the
15 following portion of the transcript of the police
16 interview into the record regarding [Petitioner's]
17 relationship with another man: "Question, 'bisexual?
18 Okay, now your relationship, your relationship with
19 Danny, was that just for money, or did you do it sometimes
20 for - because you wanted to?' 'Well, that happened at a
21 time, well, that he had me, and I didn't think there was
22 a reason to say or to reject him or - but I did like
23 him.' [¶] 'You liked him?' [¶] 'Yes. I did like - yes,
24 and I didn't like prostituting myself for money, no.'
25 [¶] 'But did you do it?' [¶] 'Yes.'" The prosecutor
26 said this was the basis for his good faith belief that
27 [Petitioner] told the detective he had prostituted
28 himself for money and with Danny. The prosecutor read

1 the next portion of the interview transcript in which
2 the detective asked [Petitioner] how long he had been
3 prostituting himself. [Petitioner] once again denied
4 that, and said "'I just like to do it with a person I
5 like.'"

6
7 Defense counsel argued that "it" in the last quoted
8 sentence could refer to either prostitution or sex. She
9 contended it was not a reference to prostitution because
10 [Petitioner] corrected the detective and said "'No, I
11 didn't prostitute myself.'" The court said that it had
12 allowed the question and asked the prosecutor whether he
13 planned further examination of [Petitioner] on that
14 issue. The prosecutor said he did not, that he just
15 wanted to demonstrate the basis for his good faith belief
16 in the propriety of that line of questioning.
17 Ultimately, the prosecutor chose not to play the
18 interview for the jury.

19
20 2. *Concealed Knife*

21
22 After a recess, the court said: "I have a note from
23 one of the jurors who has a different view concerning
24 the interpretation, and I'm going to read it in the
25 record. Then counsel may want to inquire again to see
26 if you can clarify the point, whether Mr. Haidar [the
27 prosecutor] said something to the effect of, quote "'In
28 fact, that's when you pulled the knife out of your

1 pants?' Or, quote, 'Translator never mentioned anything
2 about his pants or the knife being concealed.'" The
3 court invited counsel to consider the note and decide
4 whether they wanted to reexamine [Petitioner] about these
5 questions. Redirect examination of [Petitioner]
6 resumed, and he was asked whether he had a weapon
7 concealed in his pants on January 2, 2010 when he went
8 to Bradley's apartment. [Petitioner] said he did not.
9

10 3. *Observation of Animal Slaughtering*

11
12 In cross-examination of [Petitioner], the
13 prosecutor asked him about his work in produce at a
14 market in Oaxaca before he came to the United States.
15 The prosecutor asked whether animals were slaughtered at
16 that market. [Petitioner] said no, small animals were
17 sold. When the prosecutor asked whether they were sold
18 alive, the trial court sustained an objection that there
19 was no good faith basis for those questions. Objections
20 were sustained to questions as to whether [Petitioner]
21 had seen animals being slaughtered while in Mexico.
22

23 At a sidebar conference, the prosecutor argued that
24 whether [Petitioner] had observed animals being
25 slaughtered by slitting their throats was "relevant to
26 his knowledge and ability to [do] what he did to Bennett
27 Bradley which is slitting his throat." Defense counsel
28 objected that there was no evidence that [Petitioner]

1 slaughtered animals, and that the question was
2 argumentative. She complained that the prosecutor had
3 repeatedly asked questions containing a fact not in the
4 record which could not be proven, which was prejudicial
5 to [Petitioner]. She contended the prosecutor had no
6 good faith basis to believe that animals were slaughtered
7 in the market where [Petitioner] worked in Oaxaca. The
8 court responded: "That's not an unusual position to
9 take." Defense counsel argued that this line of
10 questioning was prejudicial misconduct because the
11 prosecutor was, in effect, testifying to facts not in
12 evidence.

13
14 In arguing that the question about animal
15 slaughtering was part of a pattern of misconduct by the
16 prosecutor, defense counsel cited the note from a juror
17 about the interpretation of testimony regarding whether
18 [Petitioner] concealed a knife in his pants. Defense
19 counsel argued that this note demonstrated that one of
20 the jurors had observed that the prosecutor was
21 testifying to facts in the context of his questions to
22 [Petitioner].

23
24 The prosecutor responded: "It's common knowledge.
25 I've been to Mexico. These small towns, they slaughter
26 animals. It's not anything unusual." Defense counsel
27 demanded an offer of proof from the prosecutor as to the
28

1 basis for a belief that [Petitioner] has a specific
2 knowledge about how to slaughter animals.

3
4 The court ruled that the entire line of questioning
5 was not irrelevant and that the prosecutor had not acted
6 improperly. It observed: "I just think that it's common
7 sense that if you cut someone's throat, they are either
8 going to die or be severely injured for a long time. I
9 think it's a waste of time. That's why I sustained the
10 objections." The prosecutor was admonished to move on
11 to another line of questioning and did so.

12
13 (Lodgment 4 at 11-14; see also RT 3166-71, 3175-76, 3188-90, 3203-
14 04, 3315-16, 3327-30, 3342).

15
16 **2. California Court of Appeal's Opinion**

17
18 The California Court of Appeal determined that Petitioner had
19 not properly preserved his prosecutorial misconduct claims.
20 (Lodgment 4 at 15). Alternately, the California Court of Appeal
21 held that the claims were meritless, stating:

22
23 Even assuming that all of the misconduct claims are
24 preserved for appeal, we find no basis for reversal. As
25 to the prostitution line of questioning, we conclude the
26 prosecutor demonstrated a good faith belief in the facts
27 underlying these questions. ""It is improper for a
28 prosecutor to ask questions of a witness that suggest

1 facts harmful to a defendant, absent a good faith belief
2 that such facts exist."'" The prosecutor's questions
3 were properly based on the portion of the interview with
4 the detective in which [Petitioner] said he prostituted
5 himself for money, although he did not like it. Any
6 ambiguity in this statement could have been addressed by
7 defense counsel on redirect. It was relevant to
8 [Petitioner's] defense that the murder occurred when
9 Bradley attempted to rape him, as he had done when
10 [Petitioner] was 16.

11
12 Similarly, since the knife with Bradley's blood was
13 found in [Petitioner's] apartment, the prosecutor had a
14 good faith basis to ask [Petitioner] whether he had the
15 knife concealed in his clothing when he went to Bradley's
16 apartment. We agree with respondent that the juror's
17 note appeared to refer to problems the juror had with
18 the interpretation rather than the prosecutor's conduct.

19
20 We find less support for the prosecutor's questions
21 about [Petitioner's] observation of animal slaughter in
22 Mexico while working at a market. But the trial court
23 sustained defense objections that the prosecutor had no
24 good faith factual basis for this line of questioning.
25 After objections to two questions were sustained, a
26 sidebar was held. Although the court found the
27 prosecutor had not acted improperly, it found the
28 questions were a waste of time and directed the

1 prosecutor to move on to another topic. Defense counsel
2 failed to ask the court to admonish the jury to disregard
3 the questions. The jury was instructed that the
4 questions by counsel are not evidence. It was told: "Do
5 not assume that something is true just because one of
6 the attorneys asked a question that suggested it was
7 true." On this record, we find no prejudicial misconduct
8 under either the state or federal standards.

9
10 (Lodgment 4 at 16-17 (citation omitted)).

11 12 **3. Analysis**

13
14 Prosecutorial misconduct rises to the level of a
15 constitutional violation only where it "'so infected the trial with
16 unfairness as to make the resulting conviction a denial of due
17 process.'"⁸ Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting

18
19 ⁸ Respondent contends Ground Two is procedurally defaulted. (Ans.
20 Mem. at 22-23). However, the Court will not address this argument
21 because it retains the discretion to deny claims on the merits even
22 if the claims are alleged to be procedurally defaulted. See
23 Flournoy v. Small, 681 F.3d 1000, 1004 n.1 (9th Cir. 2012) ("While
24 we ordinarily resolve the issue of procedural bar prior to any
25 consideration of the merits on habeas review, we are not required
26 to do so when a petition clearly fails on the merits."); Franklin
27 v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("[C]ourts are
28 empowered to, and in some cases should, reach the merits of habeas
petitions if they are . . . clearly not meritorious despite an
asserted procedural bar."). Rather, because the California Court
of Appeal alternately rejected Petitioner's prosecutorial
misconduct allegations on the merits, this Court will apply AEDPA
deference to the California Court of Appeal's reasoning. See
Clabourne v. Ryan, 745 F.3d 362, 383 (9th Cir. 2014) ("AEDPA
deference applies to [an] alternative holding on the merits."),
overruled in part on other grounds, McKinney v. Ryan, 813 F.3d 798

1 Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)); see also
2 Smith v. Phillips, 455 U.S. 209, 219 (1982) (“[T]he touchstone of
3 due process analysis in cases of alleged prosecutorial misconduct
4 is the fairness of the trial, not the culpability of the
5 prosecutor.”). Determining whether a due process violation
6 occurred requires an examination of the entire proceedings so the
7 prosecutor’s conduct may be placed in its proper context. Boyde
8 v. California, 494 U.S. 370, 384-85 (1990); Greer v. Miller, 483
9 U.S. 756, 765-66 (1987). Moreover, “[p]rosecutorial misconduct
10 which rises to the level of a due process violation may provide
11 the grounds for granting a habeas petition only if that misconduct
12 . . . ‘had substantial and injurious effect or influence in
13 determining the jury’s verdict.’” Shaw v. Terhune, 380 F.3d 473,
14 478 (9th Cir. 2004) (quoting Brecht v. Abrahamson, 507 U.S. 619,
15 623 (1993)).

16
17 “‘It is improper under the guise of artful cross-examination,
18 to tell the jury the substance of inadmissible evidence.’” United
19 States v. Stinson, 647 F.3d 1196, 1214 (9th Cir. 2011) (citation
20 omitted); see also United States v. Sine, 493 F.3d 1021, 1032 n.8
21 (9th Cir. 2007) (“[I]ncorporating inadmissible evidence into
22 questioning can constitute prosecutorial misconduct.”). Here,
23 however, as the California Court of Appeal found, the prosecutor
24 had a good faith basis for asking Petitioner whether he had engaged
25 in prostitution, and whether he had taken a concealed knife to the
26 _____
27 (9th Cir. 2015) (en banc), cert. denied, ___ S. Ct. ___, 2016 WL
28 1258977 (Oct. 3, 2016); Stephens v. Branker, 570 F.3d 198, 208 (4th
Cir. 2009) (“[A]n alternative merits determination to a procedural
bar ruling is entitled to AEDPA deference.”).

1 victim's home. (See Lodgment 4 at 16-17; see also RT 3188-90).
2 Accordingly, the prosecutor did not commit misconduct in asking
3 these questions. See United States v. Cabrera, 201 F.3d 1243, 1247
4 (9th Cir. 2000) ("[T]he prosecutor did not engage in misconduct.
5 He did not seek to introduce evidence that had been ruled
6 inadmissible."); United States v. Etsitty, 130 F.3d 420, 424 (9th
7 Cir. 1997) (no prosecutorial misconduct when "[n]othing in the
8 questioning or the answers given can be construed to reflect an
9 intention by the prosecutor to mislead the jury"), amended by, 140
10 F.3d 1274 (9th Cir. 1998).

11
12 Moreover, even if the prosecutor's questions regarding
13 Petitioner's observations of animal slaughter were improper, the
14 trial court sustained defense counsel's objections to the
15 questions. (RT 3327-30). The trial court also instructed the jury
16 that:

17
18 Nothing that the attorneys say is evidence. . . . Their
19 questions are not evidence. Only the witnesses' answers
20 are evidence. The attorneys' questions are significant
21 only if they helped you to understand the witnesses'
22 answers. Do not assume that something is true just
23 because one of the attorneys asked a question that
24 suggested it was true. [¶] During the trial, the
25 attorneys objected to questions or moved to strike
26 answers given by the witnesses. I ruled on the
27 objections according to the law. If I sustained an
28 objection, you must ignore the question. If the witness

1 was not permitted to answer, do not guess what the answer
2 might have been or why I ruled as I did.
3

4 (RT 3706; CT 249-50). The "jury is presumed to follow its
5 instructions[,]” Weeks v. Angelone, 528 U.S. 225, 234 (2000);
6 Blueford v. Arkansas, 132 S. Ct. 2044, 2051 (2012), and Petitioner
7 has provided the Court with “no reason to believe that the jury in
8 this case was incapable of obeying the [trial court’s]
9 instructions.” Miller, 483 U.S. at 766 n.8; see also Boyde, 494
10 U.S. at 384 (“[A]rguments of counsel generally carry less weight
11 with a jury than do instructions from the court.”). Accordingly,
12 Petitioner’s allegation that the prosecutor committed misconduct
13 in questioning him about observing the slaughtering of animals is
14 without merit. See Trillo v. Biter, 769 F.3d 995, 999-1000 (9th
15 Cir. 2014) (“The prosecutor’s comment did not materially affect
16 the fairness of the proceedings because the trial court sustained
17 the defendant’s objection, and the trial court instructed the jury
18 that ‘[s]tatements made by the attorneys during trial are not
19 evidence.’ We presume that juries listen to and follow curative
20 instructions from judges.”); United States v. Tham, 665 F.2d 855,
21 860 (9th Cir. 1981) (defendant’s objections to prosecutor’s
22 statements were “meritless” when district court sustained
23 defendant’s objections and properly instructed the jury regarding
24 prosecutor’s comments).

25
26 Finally, for the reasons discussed above, Petitioner’s
27 “allegations of prosecutorial misconduct do not rise to the level
28 of a due process violation even when considered in the aggregate.”

1 Wood v. Ryan, 693 F.3d 1104, 1116-17 (9th Cir. 2012); see also
2 Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) (“Because we
3 conclude that no error of constitutional magnitude occurred, no
4 cumulative prejudice is possible.”). Accordingly, the California
5 courts’ rejection of Ground Two was not contrary to, or an
6 unreasonable application of, clearly established federal law.

7
8 **C. Petitioner Is Not Entitled To Relief On His Confrontation**
9 **Clause Claim**

10
11 In Ground Three, Petitioner alleges that admission of expert
12 witness testimony about DNA evidence violated his Sixth Amendment
13 right to confront the witnesses against him. (Petition at 7; Reply
14 Mem. at 22-37).

15
16 **1. Background**

17
18 The California Court of Appeal found the following facts
19 underlying this claim:

20
21 [Aimee] Rogers[, an analyst for Orchard Cellmark,]
22 testified at a hearing under [California] Evidence Code
23 [§] 402⁹ about the procedures at the Orchid Cellmark
24 laboratory for extracting and analyzing DNA. She
25 explained that automation specialists placed evidence

26
27 ⁹ Cal. Evid. Code § 402 provides, in pertinent part, that “[t]he
28 court may hear and determine the question of the admissibility of
evidence out of the presence or hearing of the jury[.]” Cal. Evid.
Code § 402(b).

1 samples into machines which then generated an
2 electropherogram, known as a visual DNA printout.
3 Worksheets of the technician's work and quality assurance
4 tests were kept. Rogers testified that she prepared a
5 report (exhibit 45) based on her analysis of 350 pages
6 of raw data generated by the machines from materials
7 collected from Bradley, [Petitioner], and various
8 locations at the crime scene. She had not personally
9 observed the creation of the data and the work of the
10 technicians, although she reviewed all the worksheets
11 and found no violations of protocols or errors.

12
13 [Petitioner] argued that admission of this evidence
14 violated his Sixth Amendment confrontation rights. The
15 trial court concluded that the technicians who took part
16 in the testing process, but who did not testify, were
17 "not themselves reporting any objective facts." The
18 court concluded that they were "submitting the samples
19 to machines, which are generating information, which is
20 now to be used by the expert." It allowed Rogers to
21 testify to her analysis of the DNA.

22
23 Rogers then testified before the jury that Bradley's
24 DNA was found on the knife recovered from [Petitioner's]
25 apartment. [Petitioner's] DNA was found on samples taken
26 from the bathroom sink and soap dispenser in Bradley's
27 apartment. The probability that the DNA found on the
28 bathroom sink and soap dispenser belonged to anyone else

1 but [Petitioner] in the southwest Hispanic population
2 was one in 115.4 quadrillion. The probability of a
3 random unrelated individual in the Black population
4 having the same DNA profile as Bradley's as found on the
5 sink, soap dispenser and knife was one in 438 trillion,
6 one in 2.909 quadrillion in the Caucasian population,
7 one in 10.25 quadrillion in the southeast Hispanic
8 population, one in 34.31 quadrillion in the southwest
9 Hispanic population, and one in 229.4 quadrillion in the
10 Asian population.^[10]

11
12 (Lodgment 4 at 17-18 (footnotes added); see also RT 1802-95).

13 14 **2. California Court of Appeal's Opinion**

15
16 The California Court of Appeal denied Petitioner's claim,
17 stating:

18
19 "The Sixth Amendment of the United States
20 Constitution grants a criminal defendant the right to
21 confront adverse witnesses." In [Crawford v. Washington,
22 541 U.S. 36 (2004)], "the court created a general rule
23 that the prosecution may not rely on 'testimonial' out-
24 of-court statements unless the witness is unavailable to
25 testify and the defendant had a prior opportunity for

26
27 ¹⁰ Rodgers testified that the world's population is 6.6 billion so
28 a quadrillion "would be several hundred thousand times the world's
population" and a trillion would be "a hundred times the world's
population." (RT 1891-92).

1 cross-examination.” The United States Supreme Court
2 applied its Crawford holding in three cases involving
3 laboratory findings of nontestifying analysts:
4 [Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009);
5 Bullcoming v. New Mexico, 564 U.S. 647 (2011), and
6 Williams v. Illinois, 132 S. Ct. 2221 (2012)]. Little
7 agreement was reached by the justices in these cases,
8 the first two of which were decided 5-4, although in each
9 case Justice Thomas found a distinct reason for agreeing
10 to the outcome of the majority in each. In Williams,
11 there was no majority opinion, but a four justice
12 plurality.

13
14 The California Supreme Court addressed this quartet
15 of cases in a trilogy of cases decided in 2012: [People
16 v. Lopez, 55 Cal. 4th 569 (2012), People v. Dungo, 55
17 Cal. 4th 608 (2012), and People v. Rutterschmidt, 55 Cal.
18 4th 650 (2012)]. It carefully examined the various
19 approaches adopted by the United States Supreme Court.
20 The court recognized that the United States Supreme Court
21 had not agreed upon a definition of “testimonial” for
22 confrontation clause purposes. Based on its reading of
23 the quartet of United States Supreme Court cases, the
24 Lopez court identified two “critical components”
25 required to find a statement testimonial: 1) the
26 statement must have been made with some degree of
27 formality or solemnity; and 2) “all nine high court
28 justices agree that an out-of-court statement is

1 testimonial only if its primary purpose pertains in some
2 fashion to a criminal prosecution, but they do not agree
3 on what the statement's primary purpose must be."
4

5 The Supreme Court in Lopez reasoned that it need
6 not consider the primary purpose of a nontestifying
7 analyst's laboratory report on blood alcohol level,
8 because it concluded that the critical portions of the
9 report "were not made with the requisite degree of
10 formality or solemnity to be considered testimonial." In
11 Lopez, a report written by a nontestifying analyst was
12 admitted into evidence. A different criminologist
13 testified at trial that he had reviewed the laboratory
14 report and stated the conclusion of the analyst who
15 prepared that report. The testifying analyst went on to
16 say that based on his own experience and review, he had
17 reached the same conclusion.
18

19 Five pages of the laboratory report at issue in
20 Lopez were comprised "entirely of data generated by a
21 gas chromatography machine to measure calibrations,
22 quality control, and the concentration of alcohol in a
23 blood sample." Although the nontestifying analyst's
24 signature or initials appeared on each of these five
25 pages, there was no statement, express or implied by him
26 on any of them. The Court concluded that machine
27 generated printouts are not testimonial and do not
28 implicate the Sixth Amendment right to confrontation.

1 While it acknowledged that the United States Supreme
2 Court has not yet addressed this question, the Lopez
3 court agreed with federal appellate courts which had
4 upheld the use of such printouts. It reasoned: "Because,
5 unlike a person, a machine cannot be cross-examined, here
6 the prosecution's introduction into evidence of the
7 machine-generated printouts . . . did not implicate the
8 Sixth Amendment's right to confrontation."
9

10 Factual distinctions between our case and Lopez
11 bolster the conclusion that Rogers' testimony was not
12 barred by the Sixth Amendment. Here, the only report
13 received into evidence was prepared by Rogers herself,
14 based on raw data generated by machines which she
15 described as "robots" operated by nontestifying
16 automation technologists. The 350 pages of raw data were
17 not admitted into evidence. We conclude that under the
18 reasoning of Lopez, Rogers' reliance on the machine-
19 generated raw data did not violate the [C]onfrontation
20 [C]lause.
21

22 The first page of the chart on which the testifying
23 analyst relied in Lopez contained handwritten notations
24 by both the nontestifying analyst and a laboratory
25 assistant, who also did not testify.^[fn. 2] It was
26 undisputed that the information that the defendant's
27 blood sample contained .09 percent alcohol was admitted
28 for its truth. The Lopez majority concluded that the

1 notations did not meet the requirements that they be made
2 with formality or solemnity. Neither the nontestifying
3 analyst who performed the analysis nor the lab assistant
4 signed, certified, or swore to the contents of page one
5 of the report. Justice Werdegar, in a concurring opinion
6 signed by Chief Justice Cantil-Sakauye, Justice Baxter
7 and Justice Chin, agreed that the logsheet notations were
8 not made with sufficient formality or solemnity to be
9 deemed testimonial.

10
11 Respondent argues, and we agree, that there is no
12 evidence that the raw data on which Rogers relied was
13 prepared with the requisite formality or solemnity. Nor
14 is there here evidence of a sworn certification,
15 declaration, or other formality. Under these
16 circumstances, we conclude the trial court did not err
17 in allowing Rogers to testify to her own opinions based
18 on the raw data generated by other technicians using
19 various machines.

20
21 (Lodgment 4 at 18-21).

22
23 **3. Analysis**

24
25 The Sixth Amendment's Confrontation Clause provides that "[i]n
26 all criminal prosecutions, the accused shall enjoy the right . . .
27 to be confronted with the witnesses against him. . . ." U.S.
28 Const., Amend. VI. The Confrontation Clause bars "admission of

1 testimonial statements of a witness who did not appear at trial
2 unless he was unavailable to testify, and the defendant . . . had
3 a prior opportunity for cross-examination.” Crawford, 541 U.S. at
4 53-54; Davis v. Washington, 547 U.S. 813, 821 (2006). The
5 Confrontation Clause applies only to “‘witnesses’ against the
6 accused, i.e., those who ‘bear testimony.’” Crawford, 541 U.S. at
7 51 (citation omitted); Davis, 547 U.S. at 823-24. “‘Testimony,’
8 in turn, is typically a solemn declaration or affirmation made for
9 the purpose of establishing or proving some fact.” Crawford, 541
10 U.S. at 51 (citation and some internal punctuation omitted); Davis,
11 547 U.S. at 824. As the Davis court explained:

12
13 [a] critical portion of [Crawford’s] holding . . . is
14 the phrase “testimonial statements.” Only statements of
15 this sort cause the declarant to be a “witness” within
16 the meaning of the Confrontation Clause. It is the
17 testimonial character of the statement that separates it
18 from other hearsay that, while subject to traditional
19 limitations upon hearsay evidence, is not subject to the
20 Confrontation Clause.

21
22 Davis, 547 U.S. at 821 (citation omitted). Thus, nontestimonial
23 statements do not implicate the Confrontation Clause. Giles v.
24 California, 554 U.S. 353, 376 (2008); Whorton v. Bockting, 549 U.S.
25 406, 420 (2007). Moreover, the Confrontation Clause “does not bar
26 the use of testimonial statements for purposes other than
27 establishing the truth of the matter asserted.” Crawford, 541 U.S.
28 at 59 n.9; see also United States v. Wahchumwah, 710 F.3d 862, 871

1 (9th Cir. 2013) (Crawford "applies only to testimonial hearsay,
2 and 'does not bar the use of testimonial statements for purposes
3 other than establishing the truth of the matter asserted.'" (citation omitted)).
4 Additionally, a Confrontation Clause violation is subject to harmless error analysis. Delaware v. Van
5 Artsdall, 475 U.S. 673, 684 (1986). A Confrontation Clause
6 violation is harmless, and does not justify habeas relief, unless
7 it had substantial and injurious effect or influence in determining
8 the jury's verdict. Brecht, 507 U.S. at 623; Ocampo v. Vail, 649
9 F.3d 1098, 1114 (9th Cir. 2011).
10

11
12 Rogers, a DNA analyst at Orchid Cellmark laboratory, testified
13 about the laboratory's procedures for extracting and analyzing DNA
14 and the report she personally prepared analyzing the raw data
15 gathered during DNA testing. (RT 1809-95). Petitioner contends
16 that Rogers's testimony violated the Confrontation Clause because,
17 even though Rogers personally analyzed and prepared a report based
18 on raw data, she did not personally perform or supervise the
19 preliminary steps through which the raw data was generated, such
20 as DNA extraction, amplification and quantification. (Reply Mem.
21 at 22-37; see also RT 1811-12, 1848).
22

23 The state courts' rejection of Petitioner's claim was not
24 contrary to, or an unreasonable application of clearly established
25 federal law. The Supreme Court has held that admission of
26 laboratory technicians' affidavits confirming that substances
27 seized from a petitioner were cocaine constituted "testimonial
28 statements" under Crawford, and that "[a]bsent a showing that the

1 analysts were unavailable to testify at trial and that petitioner
2 had a prior opportunity to cross-examine them, petitioner was
3 entitled to be confronted with the analysts at trial.” Melendez-
4 Diaz, 557 U.S. at 310-11 (emphasis and internal quotation marks
5 omitted). The Supreme Court has also determined that a forensic
6 analyst’s certified report of blood alcohol analysis was
7 testimonial, and its admission into evidence through the “surrogate
8 testimony” of a scientist who had neither performed nor observed
9 the testing procedure violated the Confrontation Clause.
10 Bullcoming, 564 U.S. at 659-65. But neither of these cases, nor
11 the Supreme Court’s more recent decision in Williams,¹¹ provides

12 ¹¹ In Williams, a deeply divided Supreme Court held that an
13 expert’s testimony “that a DNA profile produced by an outside
14 laboratory, Cellmark, matched a profile produced by the state
15 police lab using a sample of petitioner’s blood” did not violate
16 the Confrontation Clause. Williams, 132 S. Ct. at 2227-44
17 (plurality opinion) & 2255-64 (Thomas, J., concurring). “When a
18 fragmented [Supreme] Court decides a case and no single rationale
19 explaining the result enjoys the assent of five Justices, ‘the
20 holding of the Court may be viewed as that position taken by those
21 Members who concurred in the judgments on the narrowest
22 grounds. . . .’” Marks v. United States, 430 U.S. 188, 193 (1977)
23 (citation omitted). “[W]hen applying Marks to a fractured Supreme
24 Court decision, [the Court] look[s] to those opinions that
25 concurred in the judgment and determine whether one of those
26 opinions sets forth a rationale that is the logical subset of
27 other, broader opinions. When, however, no ‘common denominator of
28 the Court’s reasoning’ exists, we are bound only by the ‘specific
result.’” United States v. Davis, 825 F.3d 1014, 1028 (9th Cir.
2016) (en banc). In Williams, “there is no such common denominator
between the plurality opinion and Justice Thomas’s concurring
opinion. Neither of these opinions can be viewed as a logical
subset of the other. Rather, Justice Thomas expressly disavows
what he views as ‘the plurality’s flawed analysis[.]’” United
States v. Duron-Caldera, 737 F.3d 988, 994 n.4 (5th Cir. 2013)
(citation omitted); see also Williams, 132 S. Ct. at 2265 (Kagan,
J., dissenting) (explaining that although there are “five votes to
approve the admission of the Cellmark report,” the Supreme Court
“cannot settle on a reason why” the report’s admission does not
violate the Confrontation Clause). “As Williams does not yield a

1 "clearly established federal law" applicable here - where the
2 laboratory analyst who wrote the DNA report received into evidence
3 testifies, but the analyst's report "was based on [350 pages of]
4 raw data [not admitted into evidence] generated by machines which
5 she described as 'robots' operated by nontestifying automation
6 technologists."¹² (Lodgment 4 at 20); see Melendez-Diaz, 557 U.S.
7 at 311 n.1 ("[W]e do not hold, and it is not the case, that anyone
8 whose testimony may be relevant in establishing the chain of
9 custody, authenticity of the sample, or accuracy of the testing
10 device, must appear in person as part of the prosecution's case.");
11 Bullcoming, 564 U.S. at 672-73 (Sotomayor, J., concurring)
12 (Bullcoming is not a case in which the testifying witness had a

13 _____
14 'narrowest' holding that enjoys the support of five Justices, it
15 does not provide a controlling rule useful to resolving this case."
16 Duron-Caldera, 737 F.3d at 994 n.4; see also United States v.
17 James, 712 F.3d 79, 95 (2d Cir. 2013) ("Williams does not, as far
18 as we can determine, using the Marks analytic approach, yield a
19 single, useful holding relevant to the case before us. It is
20 therefore for our purposes confined to the particular set of facts
21 presented in that case.").

19 ¹² Moreover, Crawford "applies only to testimonial hearsay,"
20 Wahchumwah, 710 F.3d at 871, and "machine statements aren't
21 hearsay." United States v. Lizarraga-Tirado, 789 F.3d 1107, 1110
22 (9th Cir. 2015); see also United States v. Moon, 512 F.3d 359, 362
23 (7th Cir. 2008) ("A physician may order a blood test for a patient
24 and infer from the levels of sugar and insulin that the patient
25 has diabetes. The physician's diagnosis is testimonial, but the
26 lab's raw results are not, because data are not 'statements' in
27 any useful sense. . . . Thus, . . . the Sixth Amendment does not
28 demand that a chemist or other testifying expert have done the lab
work himself."); United States v. Washington, 498 F.3d 225, 230
(4th Cir. 2007) ("[W]e reject the characterization of the raw data
generated by the lab's machines as statements of the lab
technicians who operated the machines. The raw data generated by
the diagnostic machines are the 'statements' of the machines
themselves, not their operators. But 'statements' made by machines
are not out-of-court statements made by declarants that are subject
to the Confrontation Clause." (italics in original)).

1 connection to the scientific test at issue or "in which an expert
2 witness was asked for his independent opinion about underlying
3 testimonial reports that were not themselves admitted into
4 evidence"); Flournoy v. Small, 681 F.3d 1000, 1004-05 (9th Cir.
5 2012) (no clearly established federal law holds that a forensic
6 laboratory analyst's testimony based on the tests and reports of
7 other crime lab employees violates the Confrontation Clause where
8 the testifying analyst participated in and reviewed the crime lab's
9 work, even though she did not personally conduct all of the testing
10 herself); Grim v. Fisher, 816 F.3d 296, 309 (5th Cir.) ("[T]he
11 Supreme Court has not clearly established what degree of
12 involvement with the forensic testing is required of an in-court
13 witness offered to prove a particular fact in a testimonial
14 certification, beyond what was deemed insufficient in
15 Bullcoming."), cert. denied, __ S. Ct. __, 2016 WL 4083026 (Oct.
16 3, 2016); United States v. James, 712 F.3d 79, 102 (2d Cir. 2013)
17 ("As Justice Breyer pointed out in Williams, it is still unsettled
18 under the [Supreme] Court's recent Confrontation Clause
19 jurisprudence whether there is a 'logical stopping place between
20 requiring the prosecution to call as a witness one of the laboratory
21 experts who worked on the matter and requiring the prosecution to
22 call all of the laboratory experts who did so.'" (quoting Williams,
23 132 S. Ct. at 2246 (Breyer, J., concurring)), cert. denied, 134 S.
24 Ct. 2660 (2014). Accordingly, "[t]he California court's decision
25 that the admission of [Rogers's] testimony . . . did not violate
26 the Confrontation Clause was not contrary to or an unreasonable
27 application of clearly established federal law." Flournoy, 681
28 F.3d at 1004; see also Wright v. Van Patten, 552 U.S. 120, 126

1 (2008) ("Because our cases give no clear answer to the question
2 presented, . . . it cannot be said that the state court
3 unreasonabl[y] appli[ed] clearly established Federal law. Under
4 the explicit terms of § 2254(d)(1), therefore, relief is
5 unauthorized." (citation and internal quotation marks omitted;
6 brackets in original)); Stenson v. Lambert, 504 F.3d 873, 881 (9th
7 Cir. 2007) ("Where the Supreme Court has not addressed an issue in
8 its holding, a state court adjudication of the issue not addressed
9 by the Supreme Court cannot be contrary to, or an unreasonable
10 application of, clearly established federal law.").

11
12 **D. Petitioner Is Not Entitled To Relief On His Miranda Claim**

13
14 In Ground Four, Petitioner claims a police officer
15 transporting him to jail improperly questioned him in violation of
16 Miranda. (Petition at 8; Reply Mem. at 37-43).

17
18 **1. Background**

19
20 The California Court of Appeal set forth the following facts
21 underlying this claim:

22
23 Detective Frettlhor testified at an Evidence Code
24 [§] 402 hearing he advised [Petitioner], in Spanish, of
25 his Miranda rights. This was during an interview at the
26 Olympic station on January 5, 2010 at 2:30 a.m.
27 [Petitioner] said he understood his rights. The
28 interview ended at approximately 4:00 a.m. At that

1 point, Detective Matthew Gares arranged for Officer Dana
2 Grant and her partner to transport [Petitioner] for
3 booking. He told Officer Grant that [Petitioner] had
4 been Mirandized, interviewed, and was ready for booking.
5 While at the Twin Towers jail facility, [Petitioner]
6 initiated a conversation with Officer Grant in English.
7 The conversation culminated in his statement that he had
8 a knife in his possession when he went to Bradley's
9 apartment on the day of the murder because he was a
10 recycler. [Petitioner] argues this statement should not
11 have been admitted.

12
13 The trial court found that [Petitioner] was properly
14 advised of his Miranda rights and that he waived them.
15 Defense counsel argued that [Petitioner] should have been
16 readvised of his Miranda rights by Officer Grant because
17 there was a change in interrogator, a change of location,
18 and [Petitioner] was not reminded that he had been
19 advised of his Miranda rights. She argued that
20 [Petitioner] was not sophisticated in that he used a
21 Spanish interpreter, did not grow up here, and had no
22 formal education. He did not have an extensive criminal
23 history involving prior contacts with the police and
24 familiarity with Miranda warnings. She contended that
25 Officer Grant was mistaken in believing that [Petitioner]
26 understood everything she said to him in English. The
27 prosecutor argued that only a few hours had passed
28 between the time [Petitioner] was advised of his Miranda

1 rights, and [Petitioner] initiated the conversation with
2 Officer Grant by asking how long he would be in jail.
3 The prosecutor observed that [Petitioner] had been
4 arrested in 2007 on a narcotics charge and on one other
5 occasion.

6
7 The trial court ruled that Officer Grant would be
8 allowed to testify to [Petitioner's] statements because
9 he had been properly advised of his rights and had waived
10 his right to remain silent only a few hours before.
11 Defense counsel then argued that [Petitioner's] question
12 about how long he would be in jail should not be seen as
13 allowing Officer Grant to start questioning him about
14 the crime. The court said it would review the relevant
15 authority. The parties do not advise us that the court
16 changed its ruling thereafter, and Officer Grant
17 testified about the statements.

18
19 Before the jury, Officer Grant testified that she
20 was assigned to transport [Petitioner] to jail. While
21 at the Twin Towers jail, [Petitioner] asked her in
22 English how long he would be in jail. She said she did
23 not know much about the case, but that it was a serious
24 charge. She asked how long he had known "the other guy."
25 [Petitioner] said he met Bradley when he was 16, got
26 drunk with him, and then had sex with him, which made
27 him feel ashamed and dirty. They had lost touch until
28 recently ([Petitioner] was then 25 years old) and started

1 Here, [Petitioner] acknowledges that the five hours
2 that elapsed between the time he was advised of his
3 Miranda rights by Detective Frettlhor and his admission
4 about the knife to Officer Grant is shorter than the time
5 frames found sufficiently contemporaneous in a number of
6 cases which did not require readvisement. But he argues
7 that his second statement was made in a different
8 location to a different officer. He also contends that
9 he was unsophisticated, citing his limited English
10 skills, lack of education, and childhood in Mexico. He
11 discounts his two prior arrests for narcotics-related
12 offenses. He asserts: "It would be reasonable for
13 [Petitioner] to believe the questioning by Officer Grant
14 was not something that would be used against him since
15 it was done in a police car, in English, by a different
16 interrogator, and without any reference to Miranda."

17
18 Officer Grant testified at trial that [Petitioner]
19 initiated the conversation with her "[w]hile at Twin
20 Towers" when she was "next to [him]." [Petitioner] had
21 been arrested and was waiting for booking in a jail
22 facility, accompanied by a police officer. He had two
23 prior arrests from which we can reasonably assume he was
24 familiar with criminal procedures, including Miranda
25 warnings. Only five hours before, he had been given his
26 rights and waived them. Significantly, he initiated the
27 conversation with Officer Grant. Under the totality of
28 these circumstances, we find no error in admission of

1 his statement to Officer Grant about bringing a knife to
2 the crime scene.

3
4 (Lodgment 4 at 23-24 (citations omitted)).

5
6 **3. Analysis**

7
8 The Fifth Amendment privilege against self-incrimination
9 provides that “[n]o person . . . shall be compelled in any criminal
10 case to be a witness against himself.” In Miranda, the Supreme
11 Court established a prophylactic procedural mechanism to safeguard
12 a defendant’s Fifth Amendment privilege against the inherently
13 coercive effects of custodial interrogation. Miranda, 384 U.S. at
14 457-58. Thus, Miranda requires that before questioning a suspect
15 in custody, law enforcement officials must inform the suspect that:

16
17 He has the right to remain silent, that anything he
18 says can be used against him in a court of law, that he
19 has the right to the presence of an attorney, and that
20 if he cannot afford an attorney one will be appointed
21 for him prior to any questioning if he so desires.

22
23 Id. at 444, 478-79; Thompkins, 560 U.S. at 380.

24
25 Petitioner does not dispute the validity of his initial
26 Miranda waiver, which was made before Detective Frettlhor
27 interviewed him at the police station. (Petition at 8; Reply Mem.
28 at 37-43). Rather, Petitioner argues that Officer Grant should

1 have re-administered Miranda warnings before questioning him while
2 en route from the police station to jail. (Reply Mem. at 38-43).

3
4 Petitioner has not identified, and the Court is not aware, of
5 any clearly established federal law requiring Officer Grant to re-
6 administer Miranda warnings in the circumstances presented here.
7 See Thompkins, 560 U.S. at 386 ("Police are not required to rewarn
8 suspects from time to time."); United States v. Rodriguez-Preciado,
9 399 F.3d 1118, 1128 (9th Cir. 2005) (Rodriguez-Preciado "does not
10 cite a Supreme Court or Ninth Circuit decision – and we are aware
11 of none – holding that statements made after Miranda warnings are
12 administered are nonetheless inadmissible if the warnings become
13 'stale.'"). To the contrary, "[t]here is no requirement that an
14 accused be continually reminded of his rights once he has
15 intelligently waived them." United States v. Andaverde, 64 F.3d
16 1305, 1312 (9th Cir. 1995) (citations omitted); McClain v. Hill,
17 52 F. Supp. 2d 1133, 1141 (C.D. Cal. 1999). Furthermore, "[a]
18 rewarning is not required simply because there is a break in
19 questioning[,]" People of Territory of Guam v. Dela Pena, 72 F.3d
20 767, 769-70 (9th Cir. 1995); Rodriguez-Preciado, 399 F.3d at 1128;
21 see also Wyrick v. Fields, 459 U.S. 42, 47 (1982) (per curiam)
22 (defendant, who requested polygraph and waived Miranda rights, did
23 so not only for the polygraph but also "validly waived his right
24 to have counsel present at 'post-test' questioning, unless the
25 circumstances changed so seriously that his answers no longer were
26 voluntary, or unless he no longer was making a 'knowing and
27 intelligent relinquishment or abandonment' of his rights."), and
28 courts have determined that breaks of much longer than the five

1 hours at issue here did not render a statement inadmissible. See,
2 e.g., Rodriguez-Preciado, 399 F.3d at 1128 (upholding admissibility
3 of statements made approximately sixteen hours after Miranda
4 warnings were given and waived); Dela Pena, 72 F.3d at 770 (fifteen
5 hours between Miranda warning and waiver and confession did not
6 render confession inadmissible); Andaverde, 64 F.3d at 1313 (one
7 day interval between Miranda warning and waiver and incriminating
8 statement did not render statement inadmissible).

9
10 Petitioner nevertheless asserts that re-warning was required
11 because a different officer questioned him in a different location.
12 (Reply Mem. at 39-42). But "a Miranda warning does not lose its
13 efficacy if a defendant is warned by one officer and then
14 interrogated by another[,]" even if the interrogation takes place
15 in a different location than the warning. Andaverde, 64 F.3d at
16 1312-13; see also Rodriguez-Preciado, 399 F.3d at 1129 (change in
17 interrogator and change in location (from motel to jail) did not
18 require rewarning); Jarrell v. Balkcom, 735 F.2d 1242, 1254 (11th
19 Cir. 1984) ("[W]e do not view a confession given less than four
20 hours after the issuance of Miranda warnings inadmissible because
21 of the failure to reissue the warnings" even though Miranda
22 warnings were given by a different officer in a different
23 location). This is particularly true here since Petitioner "was
24 in custody continually from the time warnings were first
25 administered through" his conversation with Officer Grant and
26 "there were no intervening events which might have given
27 [Petitioner] the impression that his rights had changed in a
28 material way." Rodriguez-Preciado, 399 F.3d at 1129.

1 Accordingly, the California courts' rejection of this claim
2 was not contrary to, or an unreasonable application of, clearly
3 established federal law.

4
5 **E. Petitioner Is Not Entitled To Relief On His Claim That The**
6 **Trial Court Inadequately Responded To A Jury Question**

7
8 In Ground Five, Petitioner claims the trial court failed to
9 adequately respond to the jury's question about the difference
10 between first and second degree murder. (Petition at 8; Reply Mem.
11 at 43-49).

12
13 **1. Background**

14
15 The California Court of Appeal found the following facts
16 underlying this claim:

17
18 The jury was given CALCRIM Nos. 520 and 521. As
19 given, CALCRIM No. 520 was titled: "**First or Second**
20 **Degree Murder With Malice Aforethought (Pen. Code,**
21 **§ 187).**"^[fn. 3]

22
23 [Fn. 3] As given, CALCRIM No. 520 read: "The defendant
24 is charged with murder. [¶] To prove that the defendant
25 is guilty of this crime, the People must prove that: [¶]
26 1. The defendant committed an act that caused the death
27 of another person; [¶] 2. When the defendant acted, he
28 had a state of mind called malice aforethought; [¶] AND

1 [¶] 3. He killed without lawful excuse or justification.
2 [¶] There are two kinds of malice aforethought, express
3 malice and implied malice. Proof of either is sufficient
4 to establish the state of mind required for murder. [¶]
5 The defendant acted with *express malice* if he unlawfully
6 intended to kill. [¶] The defendant acted with *implied*
7 *malice* if: [¶] 1. He intentionally committed an act; [¶]
8 2. The natural and probable consequences of the act were
9 dangerous to human life; [¶] 3. At the time he acted, he
10 knew his act was dangerous to human life; [¶] AND [¶] 4.
11 He deliberately acted with conscious disregard for human
12 life. [¶] Malice aforethought does not require hatred
13 or ill will toward the victim. It is a mental state that
14 must be formed before the act that causes death is
15 committed. It does not require deliberation or the
16 passage of any particular period of time. [¶] If you
17 decide that the defendant committed murder, you must then
18 decide whether it is murder of the first or second
19 degree.”

20
21 As given, CALCRIM No. 521 was titled: “**First Degree**
22 **Murder (Pen. Code, § 189)**” It read: The defendant is
23 guilty of first degree murder if the People have proved
24 that he acted willfully, deliberately, and with
25 premeditation. The defendant acted *willfully* if he
26 intended to kill. The defendant acted *deliberately* if
27 he carefully weighed the considerations for and against
28 his choice and, knowing the consequences, decided to

1 kill. The defendant acted with *premeditation* if he
2 decided to kill before completing the act that caused
3 death. [¶] The length of time the person spends
4 considering whether to kill does not alone determine
5 whether the killing is deliberate and premeditated. The
6 amount of time required for deliberation and
7 premeditation may vary from person to person and
8 according to the circumstances. A decision to kill made
9 rashly, impulsively, or without careful consideration is
10 not deliberate and premeditated. On the other hand, a
11 cold, calculated decision to kill can be reached quickly.
12 The test is the extent of the reflection, not the length
13 of time. [¶] The requirements for second degree murder
14 based on express or implied malice are explained in
15 CALCRIM No. 520, *First or Second Degree Murder With*
16 *Malice Aforethought*. [¶] The People have the burden of
17 proving beyond a reasonable doubt that the killing was
18 first degree murder rather than a lesser crime. If the
19 People have not met this burden, you must find the
20 defendant not guilty of first degree murder.”

21
22 During deliberations, the jury sent the following
23 note to the court: “‘We need a clear definition, please,
24 between first and second degree murder.’” The court
25 informed counsel that it had asked the jury to be more
26 specific. The jury responded: “‘There is some confusion
27 due to instructions, its wording, in particular, page 9
28 re: 521 mentioned explanation in 520, but we need some

1 clarification.'" The court concluded that this question
2 referred to the following language in CALCRIM number 521:
3 "'Requirements for second degree murder, based on
4 expressed or implied malice, are explained in CALCRIM
5 number 520, first or second degree murder with malice
6 aforethought.'" The court observed: "[I]t does stand
7 out because there's nothing in 520 that makes mention of
8 second degree murder or expressed or implied malice."
9

10 After further colloquy, it was agreed the jury would
11 be brought into the courtroom. The court told the jury
12 there were two options, to reread the particular
13 instructions, or to have the foreperson ask for further
14 clarification. The foreperson said: "We've read them a
15 couple times already, the instructions. 521 states that
16 the definition of second degree is found in 520." The
17 court interjected that this was correct. The foreperson
18 continued: "But 520, the title is first and second
19 degree." The court suggested that the jury ignore the
20 titles of the instructions and asked if this would help
21 deliberations. The foreperson answered: "Right." The
22 court explained that titles of instructions are used only
23 for quick reference. He inquired whether the foreperson
24 wanted to go back into the jury room to ask the fellow
25 jurors whether further clarification was needed. No
26 additional questions or notes were sent by the jury.
27
28

1 The trial court judge told the jury that he would
2 be absent the next day, but if it wanted to continue
3 deliberations, it could do so with another judge
4 presiding. Although it is not reflected in the record,
5 apparently this was the choice of the jurors because they
6 resumed deliberations the next day with a different trial
7 court judge presiding. At the outset of the day, outside
8 the presence of the jury, that judge stated his
9 understanding that there was an issue about the jury and
10 asked counsel for background. Defense counsel recounted
11 the foreperson's concern about the title of CALCRIM No.
12 520, but said it was not clear exactly what the jury was
13 unclear about. She said that overnight she had become
14 uncertain as to whether the trial judge's suggestion to
15 ignore the titles of the instructions cured the jury's
16 confusion. The substitute judge indicated that the
17 titles for instructions are not part of the instruction
18 to be considered by the jury. The prosecutor agreed.
19 The court asked whether the jury had sent out any
20 questions since the direction to ignore the titles the
21 previous day. The prosecutor said that it had not. The
22 court said it wanted to be certain that there was no
23 pending jury question. It indicated: "If there's no
24 pending jury question, it seems to be prudent just to
25 allow the jury to continue to deliberate based upon
26 whatever answer or response Judge Landin gave, and if
27 they have a need for further clarification, we can always
28 address it if it comes to pass."

1 Defense counsel asked the court to make it clear
2 that CALCRIM No. 520 does describe first and second
3 degree murder and to remind the jury that the third
4 element, whether it was a justifiable or excusable
5 homicide, was addressed in other instructions the jury
6 already had received. The court expressed reluctance to
7 do so since it had not heard the previous discussion with
8 the jurors or the colloquy between Judge Landin and
9 counsel. It was not inclined to "bring the jury out and
10 tell them something that I don't know needs to be told."
11 The prosecutor concurred. The court made it clear that
12 it would be willing to respond to any further question
13 from the jury after consultation with counsel. Later
14 that day, following a recess, the jury reached a guilty
15 verdict on second degree murder.

16
17 (Lodgment 4 at 25-27 (*italics in original*); see also CT 246, 255-
18 56; RT 3912-14, 4204-15, 4501-06).

19
20 **2. California Court of Appeal's Opinion**

21
22 The California Court of Appeal, construing Petitioner's
23 allegations as raising only a state law claim, rejected
24 Petitioner's claim, stating:

25
26 The jury was understandably confused about the
27 definition of second degree murder as treated in CALCRIM
28 Nos. 520 and 521, but [Petitioner] is not raising a

1 separate issue of instructional error. Instead, his
2 argument is that the trial court did not adequately
3 respond to the jury's questions. These instructions
4 required the jury to determine whether [Petitioner] acted
5 with malice aforethought, and if it found he did, whether
6 the killing was premeditated, willful, or deliberate in
7 order to eliminate first degree murder, and then consider
8 second degree murder, an analysis made more difficult by
9 these instructions. But the instructions made it clear
10 that if the jury found that [Petitioner] acted with
11 malice aforethought, he was guilty of either first or
12 second degree murder rather than voluntary manslaughter
13 or was not guilty because the killing was a justified
14 homicide on a self-defense theory. Since the jury did
15 reject the first degree murder theory, we find no
16 prejudicial error in the trial court's response to the
17 jury's questions. In addition, the court gave the jury
18 ample opportunity to express any continuing confusion
19 about these instructions and it did not. There is no
20 support for [Petitioner's] speculative argument
21 regarding prejudice. The jury had no questions about
22 the instructions on voluntary manslaughter, self-
23 defense, or imperfect self-defense.

24
25 A claim that the trial court failed to adequately
26 answer a jury's question under [P.C. §] 1138^[13] is

27 ¹³ P.C. § 1138 provides:
28

1 subject to the standard of [People v. Watson, 46 Cal. 2d
2 818 (1956)¹⁴]: whether the error “resulted in a reasonable
3 probability of a less favorable outcome.” Since the jury
4 had to conclude that [Petitioner] acted with malice in
5 order to convict him of second degree murder, there is
6 no reasonable probability of a better outcome.

7
8 (Lodgment 4 at 27 (citation omitted; footnotes added)).

9
10 **3. Analysis**

11
12 Instructional error warrants federal habeas relief only if
13 the “instruction by itself so infected the entire trial that the
14 resulting conviction violates due process[.]’” Waddington v.
15 Sarausad, 555 U.S. 179, 191 (2009) (citation and internal quotation
16 marks omitted); Middleton v. McNeil, 541 U.S. 433, 437 (2004) (per
17 curiam). The instruction must be more than merely erroneous.
18 Instead, Petitioner must show there was a “reasonable likelihood

19
20 _____
21 After the jury have retired for deliberation, if there
22 be any disagreement between them as to the testimony, or
23 if they desire to be informed on any point of law arising
24 in the case, they must require the officer to conduct
them into court. Upon being brought into court, the
information required must be given in the presence of,
or after notice to, the prosecuting attorney, and the
defendant or his counsel, or after they have been called.

25 ¹⁴ “The Watson harmless error standard is the standard applied by
26 California appellate courts in reviewing non-constitutional
27 magnitude trial errors by determining whether ‘it is reasonably
28 probable that a result more favorable to the appealing party would
have been reached in the absence of the error.’” Merolillo v.
Yates, 663 F.3d 444, 452 n.4 (9th Cir. 2011) (quoting Watson, 46
Cal. 2d at 836).

1 that the jury has applied the challenged instruction in a way that
2 violates the Constitution.” McNeil, 541 U.S. at 437 (citations
3 and internal quotation marks omitted); Sarausad, 555 U.S. at 190-
4 91; see also Cupp v. Naughten, 414 U.S. 141, 146 (1973) (“Before a
5 federal court may overturn a conviction resulting from a state
6 trial in which [an allegedly faulty] instruction was used, it must
7 be established not merely that the instruction is undesirable,
8 erroneous or even ‘universally condemned,’ but that it violated
9 some right which was guaranteed to the defendant by the Fourteenth
10 Amendment.”). Further, “[i]t is well established that the
11 instruction ‘may not be judged in artificial isolation,’ but must
12 be considered in the context of the instructions as a whole and
13 the trial record.” McGuire, 502 U.S. at 72 (citation omitted);
14 Sarausad, 555 U.S. at 191. Moreover, if a constitutional error
15 occurred, federal habeas relief remains unwarranted unless the
16 error caused prejudice, i.e., unless it had a substantial and
17 injurious effect or influence in determining the jury’s verdict.
18 Hedgpeth v. Pulido, 555 U.S. 57, 61-62 (2008) (per curiam); Brecht,
19 507 U.S. at 623.

20
21 Here, as the California Court of Appeal noted (Lodgment 4 at
22 28), Petitioner does not allege that the court provided erroneous
23 instructions to the jury. (Petition at 8; Reply Mem. at 43-49);
24 see also People v. Johnigan, 196 Cal. App. 4th 1084, 1092 (2011)
25 (CALCRIM 520 is an “accurate statement[] of the law [regarding
26 second degree murder] and complete.”). Rather, Petitioner
27 complains that the trial court did not adequately respond to the
28

1 jury's evident confusion about the difference between first and
2 second degree murder. (Petition at 8; Reply Mem. at 43-49).

3
4 "The Supreme Court has clearly stated that it is reversible
5 error for a trial judge to give an answer to a jury's question that
6 is misleading, unresponsive, or legally incorrect." United States
7 v. Anekwu, 695 F.3d 967, 986 (9th Cir. 2012) (quoting United States
8 v. Frega, 179 F.3d 793, 810 (9th Cir. 1999)). Instead, "[w]hen a
9 jury makes explicit its difficulties a trial judge should clear
10 them away with concrete accuracy." Bollenbach v. United States,
11 326 U.S. 607, 612-13 (1946); Anekwu, 695 F.3d at 986.

12
13 After receiving the jury's note and discussing the matter with
14 counsel, the trial court brought the jury into the courtroom and
15 inquired into the nature of the jury's confusion, and the jury
16 foreperson stated "We've read [CALCRIM 520 and 521] a couple [of]
17 times already. . . . 521 states that the definition of second
18 degree [murder] is found in 520 . . . but 520, the title is first
19 and second degree." (RT 4204-11). The trial court responded:

20
21 That just occurred to me, that sometimes we get hung up
22 on the titles of the instructions, and . . . they are
23 not always very specific. So I suggest you ignore the
24 titles to the instructions. Do you think that would help
25 . . . if you went back there and crossed out all the
26 titles? The only reason I think we include the titles
27 is for quick reference to look up, for example,
28 involuntary manslaughter, instead of the number.

1 Sometimes, if we describe it too much, that could cause
2 some confusion. Do you want to go back and talk to your
3 fellow jurors to see if you need further clarification?
4

5 (RT 4211-12). The trial court also advised the jury to “report
6 back whether you need more clarification[,]” but the jury raised
7 no further issues and instead reached a verdict. (RT 4213, 4501-
8 09).

9
10 “A jury is presumed to follow its instructions” and “to
11 understand a judge’s answer to its question[,]” Weeks, 528 U.S. at
12 234; see also Sarausad, 555 U.S. at 196 (“Where a judge ‘respond[s]
13 to the jury’s question by directing its attention to the precise
14 paragraph of the constitutionally adequate instruction that answers
15 its inquiry,’ and the jury asks no followup question, this Court
16 has presumed that the jury fully understood the judge’s answer and
17 appropriately applied the jury instructions.” (citation omitted)).
18 Petitioner has failed to provide any reason to believe the jury
19 was incapable of following the trial court’s instructions. Miller,
20 483 U.S. at 766 n.8. Accordingly, Ground Five is without merit.
21 Sarausad, 555 U.S. at 196; Weeks, 528 U.S. at 234-37; Anekwu, 695
22 F.3d at 987.

23
24 **F. Petitioner Is Not Entitled To Relief On His Insufficient**
25 **Evidence Claim**
26

27 In Ground Six, Petitioner claims there was insufficient
28 evidence to convict him of second degree murder because the

1 evidence demonstrated he committed voluntary manslaughter, not
2 murder. (Petition at 8-9; Reply Mem. at 50-55).

3
4 **1. California Court of Appeal's Opinion**

5
6 The California Court of Appeal rejected Petitioner's claim,
7 stating:

8
9 There was sufficient evidence to support an
10 instruction on voluntary manslaughter committed in the
11 heat of passion and the jury was instructed on that
12 theory. But it rejected it. There was evidence from
13 [Petitioner's] statement to Officer Grant that he brought
14 the knife used in the killing to Bradley's apartment.
15 Respondent also cites the telephone conversation
16 overheard by Bradley's neighbor, in which Bradley said
17 that he would not pay for sex. The bedroom had been
18 ransacked and cash and other valuables were missing from
19 the apartment. The jury could reasonably conclude that
20 the murder was committed for financial motives rather
21 than in the heat of passion. "" "[I]f the circumstances
22 reasonably justify the jury's findings, the judgment may
23 not be reversed simply because the circumstances might
24 also reasonably be reconciled with a contrary
25 finding.'"" The conviction of second degree murder is
26 supported by substantial evidence.

27
28 (Lodgment 4 at 30 (citation omitted)).

1 **2. Analysis**

2

3 To review the sufficiency of the evidence in a habeas corpus

4 proceeding, the court must determine “whether, after viewing the

5 evidence in the light most favorable to the prosecution, any

6 rational trier of fact could have found the essential elements of

7 the crime beyond a reasonable doubt.” Jackson v. Virginia, 443

8 U.S. 307, 319 (1979) (emphasis omitted); Parker v. Matthews, 132

9 S. Ct. 2148, 2152 (2012) (per curiam); see also Coleman v. Johnson,

10 132 S. Ct. 2060, 2065 (2012) (per curiam) (“[T]he only question

11 under Jackson is whether [the jury’s] finding was so insupportable

12 as to fall below the threshold of bare rationality.”). “[A]

13 reviewing court must consider all of the evidence admitted by the

14 trial court,’ regardless [of] whether that evidence was admitted

15 erroneously,” McDaniel v. Brown, 558 U.S. 120, 131 (2010) (per

16 curiam) (citation omitted), all evidence must be considered in the

17 light most favorable to the prosecution, Jeffers, 497 U.S. at 782;

18 Jackson, 443 U.S. at 319, and if the facts support conflicting

19 inferences, reviewing courts “must presume - even if it does not

20 affirmatively appear in the record - that the trier of fact resolved

21 any such conflicts in favor of the prosecution, and must defer to

22 that resolution.” Jackson, 443 U.S. at 326; Cavazos v. Smith, 132

23 S. Ct. 2, 6 (2011) (per curiam). Furthermore, under AEDPA, federal

24 courts must “apply the standards of [Jackson] with an additional

25 layer of deference.” Juan H. v. Allen, 408 F.3d 1262, 1274 (9th

26 Cir. 2005); Boyer v. Belleque, 659 F.3d 957, 964-65 (9th Cir.

27 2011). These standards are applied to the substantive elements of

28 the criminal offense under state law. Jackson, 443 U.S. at 324

1 n.16; Boyer, 659 F.3d at 964; see also Johnson, 132 S. Ct. at 2064
2 (“Under Jackson, federal courts must look to state law for the
3 substantive elements of the criminal offense, but the minimum
4 amount of evidence that the Due Process Clause requires to prove
5 the offense is purely a matter of federal law.” (citation and
6 quotation marks omitted)).

7
8 Under California law, “[s]econd degree murder is the unlawful
9 killing of a human being with malice aforethought but without the
10 additional elements, such as willfulness, premeditation, and
11 deliberation, that would support a conviction of first degree
12 murder.” People v. Elmore, 59 Cal. 4th 121, 133 (2014) (quoting
13 People v. Knoller, 41 Cal. 4th 139, 151 (2007)); People v. Beltran,
14 56 Cal. 4th 935, 942 (2013). “Malice aforethought may be express
15 or implied.” Beltran, 56 Cal. 4th at 941; P.C. § 188. “Express
16 malice is an intent to kill.” People v. Gonzalez, 54 Cal. 4th 643,
17 653 (2012); Beltran, 56 Cal. 4th at 941. “Malice is implied when
18 an unlawful killing results from a willful act, the natural and
19 probable consequences of which are dangerous to human life,
20 performed with conscious disregard for that danger.” Elmore, 59
21 Cal. 4th at 133; Beltran, 56 Cal. 4th at 941-42; see also People
22 v. Olivas, 172 Cal. App. 3d 984, 987-88 (1985) (“Phrased in everyday
23 language, the state of mind of a person who acts with conscious
24 disregard for life is, ‘I know my conduct is dangerous to others,
25 but I don’t care if someone is hurt or killed.’”).

26
27 Here, there is no dispute that Petitioner killed the victim.
28 (See, e.g., RT 3972 (Petitioner “did take [the victim’s] life, and

1 that is a horrible thing, but that doesn't make him a murderer.");
2 Reply Mem. at 55 (The "evidence proved [overwhelmingly] that
3 [P]etitioner killed [the victim] in the heat of passion. . . .").
4 Indeed, Petitioner conceded he cut the victim's neck with a knife.
5 (RT 3158-59). Moreover, coroner Dr. James Ribe testified that the
6 victim died from a "slash wound which was made by a bladed
7 instrument such as a knife . . . made using a large amount of force
8 by an assailant" who inflicted "extensive and very deep cutting of
9 the structures of the [victim's] anterior neck, including all of
10 the muscles down to the vertebral column, the larynx, a number of
11 branch arteries within the neck and the right common carotid artery
12 and right internal carotid artery." (RT 2140-44). Such evidence
13 is sufficient to support the jury's conclusion that Petitioner
14 killed the victim, and did so with malice aforethought, i.e.,
15 express or implied malice. See, e.g., People v. Bolden, 29 Cal.
16 4th 515, 561 (2002) ("[T]he victim died from a single stab wound
17 to the back that penetrated the victim's lungs and spleen. The
18 stab wound was five inches long and five to six inches deep
19 In plunging the knife so deeply into such a vital area of the body
20 of an apparently unsuspecting and defenseless victim, defendant
21 could have had no other intent than to kill.");¹⁵ People v. Moore,
22 96 Cal. App. 4th 1105, 1114 (2002) (stabbing the victim in "an
23 extremely vulnerable area of the body" supports an intent to kill).

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25 \\

26
27 ¹⁵ As stated above, "[i]ntent to unlawfully kill and express malice
28 are, in essence, 'one and the same.'" People v. Smith, 37 Cal.
4th 733, 739 (2005) (citation omitted).

1 Petitioner nevertheless argues that his conviction should be
2 reduced to voluntary manslaughter because the evidence
3 overwhelmingly established he acted in the heat of passion.¹⁶
4 (Petition at 8-9; Reply Mem. at 50-55). As the California Court
5 of Appeal noted, “[t]here was sufficient evidence to support an
6 instruction on voluntary manslaughter committed in the heat of
7 passion and the jury was instructed on that theory.”¹⁷ (Lodgment
8 4 at 30; see also CT 257-60). However, the jury rejected
9 Petitioner’s evidence, as it was entitled to do. See Smith, 132
10 S. Ct. at 4 (“[I]t is the responsibility of the jury - not the
11 court - to decide what conclusions should be drawn from evidence
12 admitted at trial.”); Long v. Johnson, 736 F.3d 891, 896 (9th Cir.

14 ¹⁶ “Heat of passion is one of the mental states that precludes the
15 formation of malice and reduces an unlawful killing from murder to
16 manslaughter.” People v. Nelson, 1 Cal. 5th 513, 538 (2016);
17 Beltran, 56 Cal. 4th at 942. “Heat of passion arises if, at the
18 time of the killing, the reason of the accused was obscured or
19 disturbed by passion to such an extent as would cause the ordinarily
20 reasonable person of average disposition to act rashly and without
21 deliberation and reflection, and from such passion rather than from
22 judgment.” Beltran, 56 Cal. 4th at 942 (citation and internal
23 quotation marks omitted); Nelson, 1 Cal. 5th at 538-39. “Heat of
24 passion, then, is a state of mind caused by legally sufficient
25 provocation that causes a person to act, not out of rational thought
26 but out of unconsidered reaction to the provocation. While some
27 measure of thought is required to form either an intent to kill or
28 a conscious disregard for human life, a person who acts without
reflection in response to adequate provocation does not act with
malice.” Beltran, 56 Cal. 4th at 942; Nelson, 1 Cal. 5th at 539.

17 Among other things, the trial court properly instructed the
jury that “[t]he People have the burden of proving beyond a
reasonable doubt that [Petitioner] did not kill as the result of a
sudden quarrel or in the heat of passion.” (CT 260); see also
Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) (“[T]he Due Process
Clause requires the prosecution to prove beyond a reasonable doubt
the absence of the heat of passion on sudden provocation when the
issue is properly presented in a homicide case.”).

1 2013) (“Although the evidence presented at trial could yield an
2 alternative inference, we ‘must respect the exclusive province of
3 the [jury] to determine the credibility of witnesses, resolve
4 evidentiary conflicts, and draw reasonable inferences from proven
5 facts.’” (citation omitted)). As the California Court of Appeal
6 found, the prosecution presented sufficient evidence for the “jury
7 [to] reasonably conclude that the murder was committed for
8 financial motive rather than in the heat of passion[,]”¹⁸ (Lodgment
9 4 at 30). Accordingly, the California courts’ rejection of Ground
10 Six was not contrary to, or an unreasonable application of, clearly
11 established federal law.

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19 ¹⁸ This evidence included testimony that: Petitioner had indicated
20 he had a history of trading sex with the victim for drugs (RT
21 3650); on the afternoon of the victim’s murder, the victim’s
22 neighbor overheard the victim talking to someone on the phone and
23 telling that person “If you’re coming over for sex, I don’t pay
24 for sex. I’m not like that” and “I don’t loan people out because
25 it’s hard to get back” (RT 915-18, 3658-59); the victim had made a
26 telephone call to Petitioner at around the time of the conversation
27 the victim’s neighbor overheard (RT 2517); Petitioner had a knife
28 with him when he went to the victim’s home (RT 2461); the victim
was killed without any sign of struggle, suggesting he was taken
by surprise and contradicting Petitioner’s claim that he fought
off the victim who was attempting to rape him (RT 2455-57, 2474-
75); and the victim’s bedroom had been “ransacked,” his jewel
collection and new cell phone were missing, and the victim’s wallet
was found near his body with a bank card in it but no cash. (RT
1229-30, 1517-22, 1577-78, 1922-23, 2434-37, 2476-77, 2510-12).

