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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

10 JAVIER SUAREZ FLORES, ) 1:07-cv-01194-OWW-JMD-HC  
11 Petitioner, ) FINDINGS AND RECOMMENDATIONS  
12 v. ) REGARDING PETITION FOR WRIT OF  
13 KEN CLARK ) HABEAS CORPUS  
14 Respondent. ) OBJECTIONS DUE WITHIN THIRTY DAYS

16 Petitioner Javier Suarez Flores (“Petitioner”) is a state prisoner proceeding with a petition for  
17 writ of habeas corpus pursuant to 28 U.S.C. § 2254.

## **Procedural History**

19 On November 16, 2005, Petitioner was sentenced to fifteen years to life imprisonment after a  
20 conviction in the Superior Court of California, Kern County, for violation of California Penal Code  
21 section 289 (a)(1) (sexual penetration with a foreign object).<sup>1</sup> (Pet. at 1).

22 The California Court of Appeal affirmed Petitioner's conviction in a reasoned decision issued  
23 on March 22, 2007. (Pet., Ex. A). Petitioner filed a petition for review in the California Supreme  
24 Court on April 24, 2007. (Lodged Doc. No. 9). The California Supreme Court denied the petition  
25 for review on June 20, 2007. (Lodged Doc. No. 12).

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<sup>1</sup> Petitioner was also convicted of failure to register as a sex offender, however, the California Court of Appeal reversed that conviction. (Pet., Ex. A)

1 On August 16, 2007, Petitioner filed the instant petition for writ of habeas corpus in the  
2 United States District Court, Eastern District of California. The Court ordered Respondent to file  
3 responsive pleading on November 28, 2007.

## **Factual Background**

7 Petitioner asserts five claims for relief: 1) prosecutorial misconduct based on the prosecutor's  
8 reference to Petitioner's demeanor during trial; 2) uninformed waiver of Petitioner's right to testify  
9 based on instructional error by the trial court; 3) ineffective assistance of counsel; 4) prosecutorial  
10 misconduct based on the prosecutor's use of inappropriate character evidence; and 5) admission of  
11 hearsay evidence in violation of Petitioner's Sixth Amendment rights.<sup>2</sup> (Traverse at 2). The  
12 California Court of Appeal summarized the factual record of Petitioner's trial as follows:

13 Defendant Javier Suarez Flores stands convicted of a violent sexual assault for which  
14 he received a sentence of 15 years to life. We affirm that conviction, rejecting  
15 defendant's several claims of prejudicial error, including his claim that the trial court  
abused its discretion when it rejected defendant's bid to deny or explain prior offenses  
the prosecution planned to use to impeach his credibility. Any mistake the court made  
in this regard was harmless because the evidence of guilt was overwhelming....

16 D., the victim, arrived at Kern Medical Center by ambulance on December 19, 2004.  
17 She told a paramedic and a nurse that she had been sexually assaulted. Emergency  
18 room personnel examined her and found that she was hemorrhaging from five wounds  
19 to her genitals, two internal and three external. Two of the lacerations were 10  
20 centimeters long and a third was seven centimeters long. There were also bruises on  
21 her genitals and thighs. The sexual assault nurse examiner concluded that D. had been  
forcefully penetrated by something larger than a penis. Another nurse who was  
present believed that, of more than 600 sexual assault cases she had seen, this was  
only the third with a similar amount of injury and bleeding. The injuries were no more  
than a day old. D. underwent surgery to repair the lacerations.

22 By the time D. was released from the hospital the following day, the Shafter Police  
23 Department had begun an investigation. A detective showed her a photographic  
lineup, including a picture of defendant, whom D. identified as the assailant.

24 The district attorney filed an information charging defendant with one count of sexual  
25 penetration with a foreign object. (Pen. Code, § 289, subd. (a).) 1 With respect to this  
26 count, the information alleged that defendant caused great bodily injury. (§ 667.61,  
subd. (e)(3).) The information also charged one count of being required to register as  
a sex offender and failing to do so. (§ 290, subd. (g)(1).)

<sup>2</sup> Petitioner initially asserted seven grounds for relief. However, Petitioner concedes in the traverse that grounds six and seven are not cognizable. (Traverse at 2). Accordingly, the Court will not address claims six and seven.

1 At trial, D. described the assault. On the night of December 18, 2004, she was at a  
2 cabin court in Shafter, waiting outside her friend's cabin for the friend to come home.  
3 Defendant, who lived in another cabin, approached. D. identified defendant in the  
4 courtroom. He asked D. her name and invited her to his cabin for a soda. D. went with  
5 him. Inside his cabin, defendant went to the kitchen momentarily and then returned  
6 and attacked D. He got on top of her and tried to pull her pants off. She said no and  
7 resisted, but he put his fingers in her vagina. Then she felt him pulling from the  
8 inside. She saw that she was bleeding. Defendant became angry, saying D. was  
9 making a mess. He began trying to clean up the blood. D. fled to the cabin of her  
friend. The ambulance came to take her to the hospital early the next morning.

6  
7 Several items of evidence relevant to D.'s credibility were introduced. She was  
8 arrested "for drugs" the morning of the day she was assaulted and did not know if she  
9 was still under the influence at the time of the attack. Between 1992 and 2003, she  
was convicted of second degree felony burglary, felony forgery, escaping from jail  
while charged with a felony, misdemeanor petty theft (on two separate occasions),  
and "possessing a bad check."

10 A nurse who examined D. testified that, at the hospital, D. said "she was out in  
11 Shafter near a field, walking, and that somebody came and attacked her and tried to  
12 penetrate her. And then because he was unable to, that he put his fingers and his fist  
inside of her." Defense counsel argued that this was inconsistent with D.'s trial  
testimony.

13 The prosecution introduced DNA evidence that placed the injured victim inside  
14 defendant's cabin. Officer Robert Courtney testified that he searched the cabin. He  
15 found fresh blood on defendant's mattress. The mattress had been turned over so that  
16 the bloody side faced downward. Courtney cut samples from the bloody mattress and  
sent them to the Kern County Crime Lab. A laboratory technician testified that she  
performed DNA tests on the blood from the mattress samples. The odds were 469  
quadrillion to one against the blood belonging to anyone but D.

17 There was additional DNA evidence. On the afternoon after the attack, defendant was  
18 taken to the Shafter police station. There, Officer Courtney read him his Miranda  
19 rights, took his statement, and arrested him. Before taking defendant to the county jail  
20 for booking, Courtney had defendant remove his outer clothes. He found blood on  
defendant's t-shirt and underpants. When Courtney saw the blood, defendant said,  
"Oh, shit. These are not mine. You put that there." These items were also sent to the  
crime lab, where DNA testing determined that the blood was that of the victim.

21 Mark Cooter, another officer who participated in the investigation, testified about still  
22 more bloody items. When Officer Cooter drove up to defendant's cabin, he saw  
23 defendant placing a duffel bag in a car. The bag was open and he saw a bloody bed  
sheet or pillowcase inside. He seized the bag and found a pair of coveralls that also  
had blood on them. Inside a dumpster a few hundred feet from defendant's cabin,  
Cooter found bloody rags. DNA from the blood on the coveralls was tested and found  
to belong to the victim.

25 Defendant told Officer Courtney he did not know where the blood on all these items  
26 came from and denied that it had been there when he woke up that morning. In a  
27 second interview, he told Courtney there was no blood when he went to bed, but  
while he was sleeping someone brought in the bloody sheets and coveralls and put  
blood on the mattress. He admitted that the underwear belonged to him and claimed  
the police put blood on them. He also claimed that the victim was accusing him  
because she had asked him for a loan and he had refused, angering her.

1 The Shafter Police Department employee responsible for sex-offender registration  
2 testified. She said defendant's most recent registration was on February 13, 2004, at  
3 an address on Alamo Street. He had never registered at 1035 South Central Valley  
4 Highway, where his cabin was located. To prove that defendant was required to  
5 register, the People introduced a certified court docket showing that he pleaded guilty  
6 in 1989 to a violation of section 647.6 (annoying or molesting a child). The People  
7 also introduced a certified rap sheet showing this conviction. The rap sheet was  
8 unredacted and also showed additional convictions: misdemeanor sexual battery,  
9 felony driving under the influence, and misdemeanor battery. It also contained a long  
list of charges that did not result in convictions, including lewd acts with a child  
under 14, oral copulation with a child under 16, rape, kidnapping, and domestic  
battery.

7  
8 A friend of defendant testified about how long defendant lived in the cabin. The  
9 prosecutor asked, "Do you know about how long he was living at 1035 South Central  
Valley Highway?" The friend replied, "The truth, I don't know if it's two months or  
something like that."

10 After the prosecution completed its presentation of evidence, defense counsel told the  
11 court that, against counsel's advice, defendant wanted to testify. Defense counsel and  
12 the court then advised defendant of his rights and admonished him regarding the use  
13 of prior offenses to impeach him. In a motion in limine, the People had sought to  
14 introduce two prior misdemeanors of moral turpitude to prove intent and motive. The  
15 court had denied the motion but indicated that at least one of these offenses would be  
admissible for purposes of impeachment if defendant testified. These prior offenses  
were the principal focus of the discussion among defendant, defense counsel, and the  
court regarding defendant's decision to testify or not to testify. When this discussion  
took place, the certified court docket and certified rap sheet had already been admitted  
into evidence.

16 "[DEFENSE COUNSEL]: Do you understand once you testify, any prior convictions  
17 of moral turpitude or dishonesty can be brought up to impeach your credibility?

18 "THE DEFENDANT: I believe I understand.

19 "[DEFENSE COUNSEL]: In other words, the jury wouldn't necessarily hear that  
unless you take the stand and testify.

20 "THE DEFENDANT: I don't know-I don't know what that-what it means. Can you  
repeat it? Can you repeat it?

21 "[DEFENSE COUNSEL]: Yes. Let me say it differently. There are two prior  
convictions both involving children. If you testify in this case, [the prosecutor] can  
bring those convictions up before this jury. The jury is allowed to use those in  
judging your credibility.

22 "THE DEFENDANT: About those problems that I've been accused of previously,  
they didn't want to take any fingerprints nor my saliva analysis.

23 "[DEFENSE COUNSEL]: Those aren't an issue. Those are convictions.

24 "THE DEFENDANT: But I wasn't found guilty.

25 "[DEFENSE COUNSEL]: Those are convictions.

26 "THE COURT: Okay. And that's incorrect, you were found guilty. At least that's

1 apparently what the record shows.

2 "[DEFENSE COUNSEL]: The record shows that.

3 "THE COURT: The record shows that you were guilty and the jury is going to have  
4 the right to know that you committed two felonies, which they will be able to consider  
in weighing your truthfulness when you're testifying.

5 "[THE PROSECUTOR]: Your Honor, they're not felonies, they're misdemeanors.

6 "THE COURT: Okay. Two prior crimes involving moral turpitude which the jury will  
7 be able to consider in weighing your testimony-the truthfulness of your testimony.

8 "THE DEFENDANT: About these questions, I wanted to clear these things up about  
what I was charged with.

9 "[DEFENSE COUNSEL]: This is not a trial on those issues and you cannot do that.  
10 This trial is not on your prior convictions. Those are simply going to be used to show  
11 that you have prior crimes that involve children, crimes of moral turpitude. If you  
chose not to testify, those issues do not come up. And the court will instruct the jury  
that they can infer nothing negative from you not taking the stand in your own  
12 defense. You don't have to prove anything.

13 "THE DEFENDANT: Well, I was told that on those charges that I wasn't guilty of  
anything because they didn't want to give me the analysis that I asked for.

14 "[DEFENSE COUNSEL]: Those are convictions. There's nothing I can do about that.

15 "THE DEFENDANT: They have to prove the evidence back in Los Angeles.

16 "[DEFENSE COUNSEL]: They are proved, and [the prosecutor] has the paperwork  
17 that will, in fact, be admitted.

18 "THE DEFENDANT: I'll answer those questions later when that's dealt with. I'm not  
guilty. I'm not guilty of those charges. And those charges that I was charged with  
before, I'm also not guilty.

19 "[DEFENSE COUNSEL]: You understand that this trial is about the rape?

20 "THE DEFENDANT: Yes. Yes, I understand.

21 "[DEFENSE COUNSEL]: You cannot defend yourself against the prior convictions.

22 "THE DEFENDANT: Well-

23 "[DEFENSE COUNSEL]: Well, what?

24 "THE COURT: What year were those prior convictions?

25 "[DEFENSE COUNSEL]: '88 for the female, '05 for the little boy.

26 "THE COURT: Okay. Earlier this year.

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1        "[THE PROSECUTOR]: No, it was '01 not '05 with the little boy. The little boy was  
2        just simple battery. The court already said I wasn't allowed to impeach on the little  
3        boy.

4        "THE COURT: Okay. One prior.

5        "[THE PROSECUTOR]: But then he also has a 1988 conviction for annoying and  
6        molesting children, 647.6, and then a 1995 conviction for sexual battery on an adult  
7        woman. Those are both misdemeanors and I provided the court with the case of  
8        People versus Duran-yeah, People versus Duran that allows the People just to  
9        impeach with the conviction, itself, and not be required to bring in other evidence.

10       "THE COURT: The convictions that occurred in 1995 are not going to be heard in  
11       this courtroom. If you contend you're not guilty, you had to do it back in 1995 and in  
12       that particular court. Not going to be able to try and prove your innocence in this court  
13       because you've already been found guilty. As long as you understand that. Now, also,  
14       [defense counsel] has told you the jury would not hear about these prior incidents  
15       unless you testify. If you do testify, then they can hear about those. Also they can use  
16       your testimony against you if you do testify. If you do not testify, the jury will be told  
17       that they cannot use your silence or your failure to testify against you in any way. Not  
18       only can they not consider it, they're not even allowed to discuss it during their  
19       deliberations. Do you understand all of that?

20       "THE DEFENDANT: Yes, I understand.

21       "THE COURT: Understanding that, do you wish to testify?

22       "THE DEFENDANT: No, no, no. I don't understand a lot of things.

23       "THE COURT: Okay. So do you not want to testify?

24       "THE DEFENDANT: It depends on the questions later.

25       "THE COURT: Okay. And the thing is, if you decide to testify, you cannot refuse to  
26       answer a question. You can't pick and choose the questions you want to answer.

27       "THE DEFENDANT: Yes, correct.

28       "THE COURT: So what I'm going to suggest you do-

29       "THE DEFENDANT: But there's a lot of questions that I'm asked.

30       "THE COURT: Yes. There will be a lot of questions that you'll be asked. I suggest  
31       you talk to your attorney and decide whether or not you want to testify. It's your right  
32       to testify. It is your right to not testify. Go talk to your attorney."

33       After a discussion off the record between defendant and defense counsel, defense  
34       counsel told the court, "Judge, based on this recent conversation with Mr. Flores, it's  
35       my understanding he wishes to remain silent in the matter." The court obtained  
36       confirmation of this from defendant. Defendant did not testify. Defense counsel called  
37       no witnesses and introduced no other evidence. The jury found defendant guilty as  
38       charged and found true the allegation of great bodily injury.

39       (Pet., Ex. A at 3-9).

## Discussion

## I. Jurisdiction and Venue

A person in custody pursuant to the judgment of a state court may file a petition for a writ of habeas corpus in the United States district courts if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a);<sup>3</sup> 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375, n.7 (2000). Venue for a habeas corpus petition is proper in the judicial district where the prisoner is held in custody. See 28 U.S.C. § 2241(d).

Petitioner asserts that he is currently incarcerated at the Controlled Substance Abuse Treatment Facility at Corcoran Prison in Kings County, California, in violation of his right to due process under the United States Constitution. As Kings County is within the Eastern District of California, the Court has jurisdiction over the instant petition and venue is proper in the Eastern District. 28 U.S.C. § 84; 28 U.S.C. § 2241(c)(3).

## II. Standard of Review

Section 2254 “is the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment, even when the petitioner is not challenging his underlying state court conviction.” Sass v. California Board of Prison Terms, 461 F.3d 1123, 1126 (9th Cir. 2006) (quoting White v. Lambert, 370 F.3d 1002, 1009-10 (9th Cir. 2004)). Under section 2254, a petition for habeas corpus may not be granted unless the state court decision denying Petitioner’s state habeas petition “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

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<sup>3</sup> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320, (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997), cert. denied, 522 U.S. 1008, 118 S.Ct. 586 (1997) (quoting Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir.1996), cert. denied, 520 U.S. 1107, 117 S.Ct. 1114 (1997), overruled on other grounds by Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding AEDPA only applicable to cases filed after statute's enactment). The instant petition was filed after the enactment of the AEDPA and is therefore governed by its provisions.

1     “A federal habeas court may not issue the writ simply because that court concludes in its independent  
2     judgment that the relevant state-court decision applied clearly established federal law erroneously or  
3     incorrectly...rather, that application must be objectively unreasonable.” Lockyer v. Andrade, 538  
4     U.S. 63, 75 (2003) (citations omitted).

5     **III. Analysis**

6         **A. Prosecutor’s Comments on Petitioner’s Demeanor During Trial**

7         During closing argument in Petitioner’s trial, the prosecutor commented on the fact that the  
8     Petitioner allegedly laughed during the victim’s testimony. The prosecutor stated, “as many of you  
9     may have seen while she was testifying, while defense counsel was giving opening statements, the  
10    defendant was laughing, again exerting power and control over [the victim]. Rape is not a crime  
11    about sex; it’s a crime about control.” (Pet., Ex. A at 19). The California Court of Appeal evaluated  
12    Petitioner’s claim as an inappropriate use of character evidence and held that, although the  
13    prosecutor’s comment was inappropriate, it was not reasonably likely that the jury would have  
14    returned a more favorable verdict if the prosecutor had never made comments about Petitioner’s  
15    courtroom behavior or if the court had admonished the jury to disregard the comments.” Id.<sup>4</sup>

16         Where the defendant does not testify at trial, a prosecutor’s comment on the defendant’s  
17    off-the-stand behavior constitutes a violation of due process. United States v. Schuler, 813 F.2d 978,  
18    980 (9th Cir. 1987). A prosecutor’s comment on a defendant’s off-the-stand behavior raises several  
19    issues, “including whether such remarks (1) introduce character evidence solely to prove guilt, (2)  
20    violate a defendant’s fifth amendment right not to be convicted except on the basis of evidence  
21    adduced at trial, and (3) violate fifth amendment rights by indirectly commenting on a defendant’s  
22    failure to testify at trial.” Id. Comments on a defendant’s off-the-stand behavior are subject to  
23    harmless error analysis. See id. at 982.

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26         <sup>4</sup> Petitioner contends that the Court of Appeal’s should have applied the “harmless beyond a reasonable doubt standard” set  
27     forth in Chapman v. California, 386 U.S. 18, 24 (1967). The Court need not decide whether the Court of Appeals applied  
28     the correct standard to Petitioner’s claim, as it seems clear that the error was harmless even under the more onerous Champan  
standard. In any event, “in § 2254 proceedings a court must assess the prejudicial impact of constitutional error in a  
state-court criminal trial under the ‘substantial and injurious effect’ standard set forth in Brecht, whether or not the state  
appellate court recognized the error and reviewed it for harmlessness under the ‘harmless beyond a reasonable doubt’ standard  
set forth in Chapman.” Fry v. Pliler, 127 S.Ct. 2321,2328 (2007).

1 On collateral review of a state-court criminal judgment under section 2254, an error is harmless  
2 unless it “had substantial and injurious effect or influence in determining the jury’s verdict.” Fry v.  
3 Pliler, 127 S.Ct. 2321, 2325 (2007) (citing Brecht v. Abrahamson, 507 U.S. 619, 631 (1993)).

4 As the Court of Appeal stated, “the prosecutor’s improper comments were not of great  
5 significance under the circumstances. The bottom line here is ...[that]‘[t]he evidence presented  
6 against defendant at trial was overwhelming. While the prosecutor’s closing argument should have  
7 avoided reference to defendant’s courtroom conduct, it does not justify disturbing the guilty verdict.’”  
8 Id. (citations omitted). After a careful review of the record, the Court cannot say that the  
9 prosecutor’s comments had a substantial and injurious effect or influence in determining the jury’s  
10 verdict. Fry, 127 S.Ct. at 2325. The prosecutor’s comment does not appear to have been an attempt  
11 to direct the jury’s attention to the fact that Petitioner refused to testify. See Schuler, 813 F.2d at 981  
12 (recognizing that not all comments on a defendant’s off-the-stand demeanor implicate due process).  
13 Further, the prosecution’s isolated reference to Petitioner’s demeanor during closing argument was  
14 insignificant in light of the powerful evidence of Petitioner’s guilt, such as the fact that the victim’s  
15 blood was found on Petitioner’s underpants after his arrest. The physical evidence against  
16 Petitioner, coupled with victim’s testimony and the testimony of the investigating officers, render the  
17 prosecutor’s inappropriate comments harmless. Accordingly, Petitioner is not entitled to relief based  
18 on his claim of prosecutorial misconduct during closing argument.

19 **B. Waiver of Right to Testify**

20 Petitioner contends that the trial court erroneously instructed him that, if he testified, he  
21 would not be able to assert his innocence with respect to past crimes the prosecution intended to use  
22 to impeach his credibility. Petitioner contends that the trial court’s instruction was a “material  
23 falsity” that invalidates the validity of his waiver of his right to testify. (Pet. at 25).

24 As a general matter, it is only the most extraordinary of trials in which a denial of the  
25 defendant’s right to testify can be said to be harmless. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th  
26 Cir. 1991). However, where the state’s case is overwhelming, other evidence may render a  
27 defendant’s testimony incredible, and thus the defendant’s inability to testify may be harmless. Id.  
28 In denying Petitioner’s state habeas claim regarding waiver of his right to testify, the Court of Appeal

1 stated “this is an unusual case in that there is both overwhelming evidence of defendant's guilt and an  
2 extensive record of his attempts to account for the facts, both to the police and to the sentencing  
3 court. Under the circumstances, we do not believe we need a formal proffer of testimony to  
4 determine that any error in the ruling at issue was harmless beyond a reasonable doubt.” (Pet., Ex. A  
5 at 18). After reviewing the record, the Court cannot say that the Petitioner's decision to waive his  
6 right to testify had a substantial and injurious effect or influence in determining the jury's verdict.  
7 Fry, 127 S.Ct. at 2325. As the Court of Appeal noted:

8 Defendant's several versions of the facts not only were implausible but also conflicted  
9 with one another in multiple ways. He first told police there was no blood on him or  
10 in the cabin when he woke up in the morning, then later told them someone came in  
11 and placed it there while he was sleeping. He also said police put the victim's blood  
12 on the undershirt and underpants he was wearing. At the sentencing hearing,  
13 defendant gave yet another account, saying that the victim, bleeding from a previous  
14 attack by someone else, broke into his cabin, attacked him, robbed him, and spread  
15 her blood around in the process.

16 We must compare the weakness of any testimony along these lines with the strength  
17 of the prosecution's case. The proof of the victim's blood on defendant's mattress and  
18 on the undergarments he wore to the police station constituted overwhelming  
19 evidence that defendant was the person who inflicted her injuries.

20 (Pet., Ex. A at 15). Even assuming constitutional error occurred, the error was harmless given the  
21 weakness of Petitioner's testimony and the strength of the prosecution's case. Had Petitioner  
22 testified, Petitioner's past crimes would have been highlighted for the jury during cross-examination,  
23 and Petitioner would have had to explain the multiple inconsistent stories he gave to investigators,  
24 which would have seriously diminished his credibility. Accordingly, the Court finds that Petitioner's  
25 decision not to testify did not have a substantial and injurious effect or influence in determining the  
26 jury's verdict, and therefore Petitioner is not entitled to relief on this claim. See Fry, 127 S.Ct. at  
27 2325.

### 28 **C. Ineffective Assistance of Counsel Claim**

29 Petitioner contends he was denied effective assistance of trial counsel due to his counsel's  
30 failure to 1) object to the admission of evidence of Petitioner's prior convictions, 2) move for a  
31 bifurcated trial on the failure to register as a sex offender charge, and 3) request a limiting instruction  
32 with respect to the evidence of Petitioner's prior convictions. (Pet. at 34-37). For Petitioner to  
33 prevail on his ineffective assistance of counsel claim, he must show: 1) that counsel's performance

1 was deficient, and 2) that he was prejudiced by the deficient performance. Strickland v. Washington,  
2 466 U.S. 668, 687 (1984). A court evaluating an ineffective assistance of counsel claim does not  
3 need to address both components of the test if the petitioner cannot sufficiently prove one of them.  
4 Id. at 697; Thomas v. Borg, 159 F.3d 1147, 1151-52 (9th Cir. 1998). Establishing counsel's  
5 deficient performance does not warrant setting aside the judgment if the error had no effect on the  
6 judgment. Seidel v. Merkle, 146 F.3d 750, 757 (9th Cir. 1998). A petitioner must show prejudice  
7 such that there is a reasonable probability that, but for counsel's unprofessional errors, the result  
8 would have been different. Strickland, 466 U.S. at 694.

9 The California Court of Appeal applied the appropriate standard to Petitioner's ineffective  
10 assistance of counsel claim and determined that: "[t]he evidence of guilt was overwhelming, so it is  
11 not reasonably likely that, absent counsel's deficient conduct, defendant would have obtained a more  
12 favorable result." (Pet., Ex. A at 26) (quoting Strickland v. Washington, 466 U.S. at p. 694). The  
13 Court cannot say that the California Court of Appeal's application of Strickland was contrary to, or  
14 involved an unreasonable application of, clearly established Federal law or was based on an  
15 unreasonable determination of the facts in light of the evidence presented in the State court  
16 proceeding. 28 U.S.C. § 2254(d). The Court agrees with the California Court of Appeal's decision  
17 that the physical evidence against Petitioner, coupled with victim's testimony and the testimony of  
18 the investigating officers, rendered the alleged deficiencies of Petitioner's trial counsel harmless.  
19 First, had Petitioner's counsel moved for a bifurcated trial and objected to the entry of Petitioner's  
20 rap sheet into evidence, the only possible effect would have been to prevent the jury from learning of  
21 Petitioner's prior offenses. Even absent knowledge of Petitioner's priors, the evidence of  
22 Petitioner's guilt would have still been sufficient to convince the jury that Petitioner was guilty  
23 beyond a reasonable doubt. Second, although a limiting instruction from the trial court might have  
24 helped ensure that the jury did not convict Petitioner based on his prior crimes, it is extremely  
25 unlikely that Petitioner's prior crimes played a significant role in determining the jury's verdict given  
26 the overwhelming evidence of Petitioner's guilt. Accordingly, Petitioner is not entitled to relief  
27 based on his ineffective assistance of counsel claim.

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1                   **D. Prosecutor's Conduct in Entering Petitioner's Rap Sheet Into Evidence**

2                   Petitioner contends that the prosecutor committed misconduct by entering Petitioner's rap  
3 sheet into evidence, despite an *in limine* order entered by the trial court that the rap sheet was  
4 inadmissible under California Evidence Code section 352. (Pet., Ex. A at 23). In some instances,  
5 prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a  
6 denial of due process. Greer v. Miller, 482 U.S. 756, 765-66 (1987) (citations omitted). "To  
7 constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to  
8 result in the denial of the defendant's right to a fair trial." Id. In rejecting Petitioner's prosecutorial  
9 misconduct claim, the California Court of Appeal held:

10                  that the prosecutor acted improperly, whether deliberately or negligently, in moving  
11 the rap sheet into evidence. It is unnecessary to make the further determination of  
12 whether the prosecutor's conduct "involve[d] the use of deceptive or reprehensible  
13 methods to attempt to persuade either the court or the jury" (People v. Gionis (1995) 9  
14 Cal.4th 1196, 1215) and whether the conduct satisfied the first element of reversible  
prosecutorial misconduct. The second element, prejudice, was not satisfied. For the  
reasons we have discussed, the evidence of defendant's guilt was overwhelming.  
There is no reasonable likelihood that, absent the error, defendant would have  
obtained a more favorable verdict.

15 (Pet., Ex. A at 24).

16                  In order for Petitioner to obtain federal habeas relief, Petitioner must demonstrate that the  
17 prosecution's misconduct had a substantial and injurious effect or influence in determining the jury's  
18 verdict. Fry, 127 S.Ct. at 2325. The Court agrees with the Court of Appeal that the prosecution's  
19 misconduct did not harm Petitioner. The jury knew that Petitioner had been convicted of at least one  
20 sexual offense in the past, as there was already evidence on the record indicating that Petitioner was  
21 required to register as a sex offender. (Pet. at 44). In light of the testimony at trial and the powerful  
22 physical evidence presented against Petitioner, the Court cannot say that the prosecution's alleged  
23 misconduct had a substantial effect on the outcome of Petitioner's trial. Nor can the Court say that  
24 the prosecution's misconduct was especially egregious or indicative of a pattern of prosecutorial  
25 misconduct that "so infect[ed] the integrity of the proceedings as to warrant the grant of habeas  
26 relief." Brecht, 507 U.S. at 638 n.9. Accordingly, Petitioner is not entitled to relief.

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## **E. Hearsay Evidence Admitted Against Petitioner**

2 Petitioner contends that the trial court erroneously admitted hearsay statements against him in  
3 violation of Petitioner's Confrontation Clause Rights under the Sixth Amendment. Petitioner also  
4 contends that his counsel was ineffective for failing to object to the hearsay evidence. The Court of  
5 Appeal summarized Petitioner's hearsay claim:

Defendant argues that the prosecution introduced inadmissible hearsay when Officer Courtney testified as follows about his conversation with defendant: "I asked him who he had argued with last night. Flores told me that he hadn't argued with anyone. I told him that his neighbor saw him arguing with the lady that was hurt. And he, again, said that he drank his beers and went to bed. Flores said he was alone all night, no visitors." Defendant says the information that a neighbor claimed to have heard defendant arguing with the victim was hearsay for which there was no exception.

10 || (Pet., Ex. A at 26 ).

## 1. Evidentiary Claim

12        Respondent correctly points out that Petitioner’s hearsay claim is procedurally barred. “In all  
13 cases in which a state prisoner has defaulted his federal claims in state court pursuant to an  
14 independent and adequate state procedural rule, federal habeas review of the claims is barred unless  
15 the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged  
16 violation of federal law, or demonstrate that failure to consider the claims will result in a  
17 fundamental miscarriage of justice.” Coleman v. Thompson, 501 U.S. 722, 750 (1991). Procedural  
18 default can only block a claim in federal court if the state court “clearly and expressly states that its  
19 judgment rests on a state procedural bar.” Harris v. Reed, 489 U.S. 255, 263 (1989) (internal  
20 quotation marks omitted). For a state procedural rule to be “adequate” to support the judgment, “the  
21 state’s legal grounds for its decision must be firmly established and consistently applied.” King v.  
22 LaMarque, 464 F.3d 963, 965 (9th Cir. 2006). The procedural bar imposed by the court of appeal is  
23 California’s “contemporaneous objection rule.” California’s contemporaneous objection rule is  
24 applied independently of federal law, See Vansickel v. White, 166 F.3d 953, 957 (9th Cir. 1999),  
25 and is applied consistently for the purposes of procedural bar analysis, Melendez v. Pliler, 288 F.3d  
26 1120, 1125 (9th Cir. 2002).

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1        The Court of Appeal stated clearly that it declined to reach the merits of Petitioner's hearsay  
2 argument because Petitioner failed to preserve the issue at trial: "we decline to reach the merits of  
3 this argument because defendant did not object or make a motion to strike at trial, so the issue is not  
4 preserved for appeal. (Evid. Code, § 353)." (Pet., Ex. A at 26). Even assuming Petitioner can  
5 demonstrate cause for his failure to preserve the issue based on his counsel's failure to object,  
6 Petitioner cannot demonstrate prejudice and thus cannot overcome the procedural bar. See Coleman,  
7 501 U.S. at 750. As discussed above, the evidence of Petitioner's guilt was overwhelming. The  
8 alleged hearsay evidence of which Petitioner complains is insignificant in light of the wealth of  
9 competent, admissible evidence presented by the prosecution. Accordingly, Petitioner's hearsay  
10 claim is procedurally barred. See id.

11        **2. Ineffective Assistance of Counsel Claim**

12        The California Court of Appeal reached the merit's of Petitioner's ineffective assistance of  
13 counsel claim and held that Petitioner could demonstrate neither deficient performance nor prejudice  
14 under Strickland. First, the Court of Appeal identified a plausible tactical reason supporting  
15 Petitioner's counsel's decision not to move to strike the alleged hearsay testimony: Petitioner's  
16 counsel attempted to impeach the officer who offered the hearsay testimony by cross-examining him  
17 as to why the neighbor' statement was not in the officer's report. (Pet., Ex. A at 27-28). Second, the  
18 Court of Appeal held that Petitioner was not prejudiced by his counsel's alleged deficient  
19 performance, as the hearsay evidence at issue was not of great importance to the people's case and  
20 other evidence of guilt was overwhelming. Id. After reviewing the record, the Court concludes that  
21 the Court of Appeal's rejection of Petitioner's ineffective assistance of counsel claim was not  
22 contrary to, or an unreasonable application of, clearly established Federal law. 28 U.S.C. § 2254(d).  
23 Nor was the Court of Appeal's holding based on an unreasonable determination of the facts in light  
24 of the evidence presented in the State court proceeding. Id. Accordingly, Petitioner is not entitled to  
25 relief.

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## F. Cumulative Error

Petitioner contends that the cumulative effect of the errors allegedly committed at his trial entitles him to habeas relief. Cumulative error comes into play when no single trial error is, on its own, sufficiently prejudicial to warrant reversal. E.g., Wooten v. Kirkland, 540 F.3d 1019 (9th Cir. 2008). “Briefing a number of isolated errors that turn out to be insufficient to warrant reversal does not automatically require the court to consider whether the cumulative effect of the alleged errors prejudiced the petitioner.” Id. (citations omitted). “Under traditional due process principles, cumulative error warrants habeas relief only where the errors have ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process’...such ‘infection’ occurs where the combined effect of the errors had a ‘substantial and injurious effect or influence on the jury’s verdict.’” Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). “If the evidence of guilt is otherwise overwhelming, the errors are considered ‘harmless’ and the conviction will generally be affirmed.” Id.

14 The Court finds that the California Court of Appeal correctly rejected Petitioner's cumulative  
15 error claim. The evidence of Petitioner's guilt was overwhelming, and thus the Court cannot say that  
16 the errors of which Petitioner complains had a substantial and injurious effect or influence on the  
17 jury's verdict. The Court is confident that the combined effect of the individually harmless errors in  
18 Petitioner's case did not render Petitioner's defense "far less persuasive than it might otherwise have  
19 been." Id. at 927. Assuming 1) that the prosecutor had not commented on the Petitioner's  
20 demeanor; 2) that Petitioner had not waived his right to testify; 3) that Petitioner's counsel had  
21 objected to the introduction of Petitioner's rap sheet and requested bifurcated trials and a limiting  
22 instruction; 4) that the prosecutor had not entered Petitioner's rap sheet into evidence; and 5) and that  
23 the trial court had excluded the alleged hearsay testimony against Petitioner; the case against  
24 Petitioner would still have included evidence sufficient to convince the jury that Petitioner was  
25 guilty beyond a reasonable doubt, such as testimony that the victim's blood was found throughout  
26 Petitioner's residence and on Petitioner's underpants, the victim's testimony, and the testimony  
27 regarding Petitioner's inconsistent statements to law enforcement officers. Petitioner is not entitled  
28 to relief on his claim of cumulative error.

## RECOMMENDATION

Accordingly, the Court RECOMMENDS that the petition for writ of habeas corpus be DENIED WITH PREJUDICE and the Clerk of Court be DIRECTED to enter judgment for Respondent.

This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636(b)(1)(c). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991).

IT IS SO ORDERED.

/s/ John M. Dixon  
UNITED STATES MAGISTRATE JUDGE