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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TERRY PAUL KEEVER,

 Petitioner,

 v.

B. GOWER,

 Respondent.

Case No. 1:15-cv-01504-EPG-HC

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS, DIRECTING
CLERK OF COURT TO CLOSE CASE,
AND DECLINING TO ISSUE
CERTIFICATE OF APPEALABILITY

Petitioner Terry Paul Keever is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In the petition, Petitioner raises the following claims for relief: (1) venue; (2) judicial bias; (3) juror bias; (4) prosecutorial misconduct; (5) ineffective assistance of counsel; and (6) insufficient evidence to support the conviction.

For the reasons discussed herein, the undersigned denies the petition for writ of habeas corpus.

I.
BACKGROUND

On November 30, 2012, Petitioner was convicted by a jury in the Tuolumne County Superior Court of unlawfully and willingly sending or causing to be sent a false bomb, in violation of California Penal Code section 148.1(d). (CT¹ 58). Petitioner was sentenced to an

¹ “CT” refers to the Clerk’s Transcript on Appeal lodged by Respondent on December 29, 2015. (ECF No. 18).

1 imprisonment term of ten years. (CT 97). On July 30, 2014, the California Court of Appeal, Fifth
2 Appellate District affirmed the judgment. People v. Keever, No. F066553, 2014 WL 3738768, at
3 *11 (Cal. Ct. App. July 30, 2014). The California Supreme Court summarily denied the petition
4 for review on October 15, 2014. (LDs² 9, 10).³

5 On September 21, 2015, Petitioner filed the instant federal petition for writ of habeas
6 corpus. (ECF No. 1). Respondent has filed an answer to the petition. (ECF No. 17). The parties
7 have consented to the jurisdiction of a United States magistrate judge to conduct all proceedings
8 in this case pursuant to 28 U.S.C. § 636(c). (ECF Nos. 10–12).

9 II.

10 STATEMENT OF FACTS⁴

11 *Discovery of the false bomb*

12 On November 28, 2011, Charles Combs worked for a private company that
13 assisted the sheriff’s department with security for the Tuolumne County
14 Courthouse, located on West Yaney in Sonora. Combs screened employees and
15 the public as they entered the courthouse. Combs testified it was particularly busy
16 that morning.

17 Around 8:40 a.m., someone advised Combs there was a package in front of the
18 courthouse. It was still very busy, and Combs continued to screen people until
19 there was a break in the rush. He went outside and found a bag in plain sight,
20 about five feet beyond the entryway.

21 In violation of security protocol, Combs brought the bag into the courthouse and
22 ran it through the X-ray machine. The contents looked suspicious, like a starter
23 and a power supply. Combs left it on the X-ray machine and called a deputy
24 sheriff.

25 Tuolumne County Sheriff’s Deputy Brandon Green arrived at the X-ray machine.
26 He looked on the screen and saw a box and wires. He opened the bag and saw
27 three long, black cylindrical objects which were wrapped in tape, with a wire
28 coming out from the middle and going into a black box.

Deputy Green thought it was an explosive device and immediately took the bag
outside the courthouse. He placed it by a cement wall along the street, notified his
superiors, and kept the area clear.

Around 9:15 a.m., the courthouse was evacuated because of the device.

² “LD” refers to the documents lodged by Respondent on December 29, 2015. (ECF No. 18).

³ The record before this Court establishes that Petitioner also filed two state petitions for writ of habeas corpus in the Tuolumne County Superior Court, which denied both petitions. (LDs 11–14). However, these state habeas petitions involved challenges to Tuolumne County Superior Court case number CRF22122, which is unrelated to the conviction under attack in the instant federal petition.

⁴ The Court relies on the California Court of Appeal’s July 30, 2014 opinion for this summary of the facts of the crime. See Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

1 At 9:40 a.m., Calaveras County Sheriff's Detective Josh Crabtree responded to
2 the courthouse lawn where Green had placed the bag. Crabtree served with the
bomb squad. Crabtree learned that someone had already moved the package and it
had not exploded, which meant it was not a victim-activated device.

3
4 Detective Crabtree testified the device was inside a grocery bag. He opened the
bag and found three road flares wrapped together with black electrical tape. There
was a computer cord "like you have hooked up to your laptop," with the top
shaved off to simulate a time fuse. The cord was attached to a power box.

6 Based on his experience, it was immediately apparent to Detective Crabtree that
7 the device in the bag was not an explosive. The courthouse reopened around
10:45 a.m.

8 Detective Crabtree took the device to the investigations office. He used gloves to
9 disassemble the components. He unwrapped the black electrical tape and noticed
there were fibers on the tape, similar to material from a sweater or carpet. He put
the electrical tape and fibers in separate Ziploc plastic bags, and preserved the
10 other parts for analysis.

11 ***Defendant is remanded into custody***

12 Around 3:45 p.m. on November 28, 2011, the same day as the bomb scare,
defendant appeared in court as scheduled on an apparently unrelated matter, and
he was remanded into custody in the jail.

13 ***Defendant contacts the police***

14 On February 29, 2012, defendant called Sergeant Vanderwiel of the Sonora Police
Department and said he had information about the November 2011 bomb scare.
15 Defendant said he also had information about the arson of patrol cars from the
sheriff's department, which happened a few days after the bomb scare. Defendant
16 said he was in custody at the jail, but he was on a day-pass for medical reasons
and wanted to meet with Vanderwiel that day.

17
18 Sergeant Vanderwiel met with defendant that day. Defendant said that while he
was serving time in jail, "he overheard two other inmates bragging about doing
the arson to the patrol vehicles. He also told me that one of them had also
19 admitted to leaving the fictitious bomb at the courthouse." Defendant said one of
the inmates was named "Travis," and the inmates discussed someone named
20 "T.N.T. Mike" as someone involved in the arson.

21 Defendant said he wanted an early release from jail in exchange for cooperating
with the police. Defendant offered to work with Sergeant Vanderwiel and try to
22 tape-record a statement from the inmates.

23 On March 15, 2012, Sergeant Vanderwiel met with defendant in the jail.
Defendant said the culpable inmate's name was "Travis Veysey." According to
24 defendant, Veysey said he was responsible for the fake bomb, and it was in a bag
which said, "Have a nice day."⁵ Defendant also said that "Jeremy Snead" was
25 involved in the arson of the patrol cars.

26 As a result of Sergeant Vanderwiel's meeting with defendant, Sergeant Ford of
the Tuolumne County Sheriff's Department also met with defendant in jail. Ford
27

28 ⁵ At the preliminary hearing, Sergeant Vanderwiel testified the canvas bag which contained the fake bomb had
printed on it: "Have a pleasant day."

1 was investigating the arson of the patrol cars and was advised that defendant said
2 he had information about the crime. Defendant told Ford that he did not have any
3 information about the arson, but “if he were to get out of jail, that he could
4 probably get information regarding that for us.” Ford believed defendant just
5 wanted to be released from custody. Ford did not have further conversations with
6 him.

7 ***Discovery of defendant’s DNA***

8 After Sergeant Vanderwiel met with defendant, he sent the package with the fake
9 bomb components to the Department of Justice for analysis.⁶ A criminalist
10 examined the black electrical tape that had been wrapped around the road flares.
11 A unique DNA profile was generated from a swab taken from the tape.

12 The criminalist entered the DNA profile in the Combined DNA Index System
13 (CODIS), and a “cold hit” matched the profile to defendant, whose DNA profile
14 was already in the database.

15 On June 15, 2012, Sergeant Vanderwiel was advised about the “cold hit” of
16 defendant’s DNA profile on the electrical tape.

17 On June 16, 2012, Sergeant Vanderwiel visited defendant in jail. Vanderwiel told
18 defendant “that I did have a suspect in the case based on D.N.A. evidence, and I
19 advised him that it was him.” Defendant immediately had a “deer in the headlight
20 look.” He became “a little bit visibly nervous and he denied involvement. He told
21 me that he was in custody at the time so it couldn't have been him.” Defendant
22 repeated that “[i]t couldn’t have been me; I was in custody.”

23 Sergeant Vanderwiel checked the jail records and determined defendant appeared
24 in court and was remanded into custody at 3:45 p.m. on November 28, 2011—
25 several hours after the fake bomb had been found at the courthouse at 8:40 a.m.

26 Sergeant Vanderwiel again met with defendant in jail and advised him that he was
27 not in custody when the fake bomb was found. He asked defendant to explain
28 how his D.N.A. was on the device. Defendant said it couldn’t have been his DNA
because he was in custody. Defendant also said he must have been set up.

A sample of defendant’s DNA was obtained. The criminalist who examined the
black tape compared defendant’s known DNA sample with the profile generated
from the tape and again determined they matched.

As for the separate incident of the arson of the patrol cars, Sergeant Vanderwiel
testified Samuel Shockley subsequently pleaded guilty to that crime. Defendant
never gave Shockley’s name, and no one named “T.N.T. Mike” or Jeremy Snead
was implicated in the arson. The arson was apparently unrelated to the fake bomb.

DEFENSE

Eugene Salvetti testified he lived in Sonora. He had known defendant for three or
four years. Salvetti used to live across the street from a garage that defendant
rented and used for storage. Salvetti testified defendant’s garage was full of tools,
car parts, fishing gear and junk. It had been burglarized several times, and
sometimes defendant forgot to close and lock the door. Salvetti did not know

⁶ At the preliminary hearing, Sergeant Vanderwiel testified that he determined “T.N.T. Mike” was “Michael Davis.” He sent the fake bomb components to the Department of Justice for analysis because he hoped to find Davis’s DNA on the pieces to determine whether he could build a case against him.

1 when these incidents occurred, if anything was taken from the garage, or if
2 defendant reported the thefts to the police.

3 Salvetti testified that on November 28, 2011, he was living elsewhere in Sonora.
4 He was listening to his police scanner early that morning and heard about the
5 bomb scare at the courthouse.

6 About 10 to 15 minutes after Salvetti heard about the bomb scare, defendant
7 called Salvetti and asked if he could come by his house on his way to court.
8 Salvetti believed defendant was at home when he made this call because he heard
9 him talking to his girlfriend while he was on the phone.

10 Salvetti testified he told defendant there was a bomb scare at the courthouse, they
11 were looking at a backpack, and the bomb squad had been called. Salvetti testified
12 that during the call, he thought defendant “talked to his girlfriend and, you know,
13 they kind of had a little laugh about it...” “[T]hey thought it was kind of
14 humorous that, you know, things might change” because they had their schedule
15 planned, and “the bomb squad is surrounding the courthouse...” Salvetti testified
16 that defendant was supposed to be in court that day, but “it might be put off for
17 hours. [I]t was just humorous that there was a bomb at the courthouse the day he
18 is supposed to go to court and, you know, I think I joked about, ‘Yeah, it’s just
19 your luck,’ you know?” Salvetti testified defendant and his girlfriend, Donna
20 Ratliff, arrived at his house about an hour after the phone conversation.

21 Donna Ratliff testified that she had lived with defendant for over 16 years. Ratliff
22 testified defendant’s storage garage had been burglarized a few times over the
23 years. In February 2011, Ratliff told defendant they couldn’t afford to pay rent on
24 the garage anymore, and told him to get rid of the contents. Defendant had some
25 garage sales, gave away some things, and threw away a lot of belongings.

26 Ratliff testified defendant was scheduled to report to jail at 1:00 p.m. on
27 November 28, 2011. Ratliff woke up that morning between 7:00 a.m. and 8:00
28 a.m., and defendant was at home. Defendant worked outside while she had coffee.
They went to Salvetti’s house on the way to jail. They used Ratliff’s truck
because defendant’s vehicle was not working. Ratliff did not believe defendant
used her truck earlier that morning, and she did not usually allow him to drive it.
Ratliff did not recall talking about the bomb incident or laughing about it with
defendant.⁷ Ratliff admitted she had been convicted of possession of stolen
property in 2002.

21 ***Rebuttal***

22 Sergeant Vanderwiel testified there were no reports of burglaries or thefts from
23 defendant’s rented garage.

24 Keever, 2014 WL 3738768, at *1–4 (footnotes in original).

25 ///

26 ///

27 ⁷ The prosecutor moved to introduce possible impeachment evidence about Donna Ratliff’s credibility. The
28 prosecutor stated defendant had been convicted of domestic violence after he severely beat Ratliff, but she resumed
living with him after the incident. The prosecutor argued the domestic violence evidence and their reconciliation was
relevant to impeach Ratliff’s credibility about defendant’s alibi, and show that Ratliff would say anything to help
defendant. The court denied the prosecution’s motion and excluded the evidence.

1 **III.**

2 **STANDARD OF REVIEW**

3 Relief by way of a petition for writ of habeas corpus extends to a person in custody
4 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws
5 or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor,
6 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed
7 by the United States Constitution. The challenged convictions arise out of the Tuolumne County
8 Superior Court, which is located within the Eastern District of California. 28 U.S.C. § 2254(a);
9 28 U.S.C. § 2241(d).

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

15 Under AEDPA, relitigation of any claim adjudicated on the merits in state court is barred
16 unless a petitioner can show that the state court’s adjudication of his claim:

17 (1) resulted in a decision that was contrary to, or involved an
18 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

19 (2) resulted in a decision that was based on an unreasonable
20 determination of the facts in light of the evidence presented in the
State court proceeding.

21 28 U.S.C. § 2254(d); Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015); Harrington v. Richter, 562
22 U.S. 86, 97–98 (2011); Williams, 529 U.S. at 413. Thus, if a petitioner’s claim has been
23 “adjudicated on the merits” in state court, “AEDPA’s highly deferential standards” apply. Ayala,
24 135 S. Ct. at 2198. However, if the state court did not reach the merits of the claim, the claim is
25 reviewed *de novo*. Cone v. Bell, 556 U.S. 449, 472 (2009).

26 In ascertaining what is “clearly established Federal law,” this Court must look to the
27 “holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as of the time of the
28 relevant state-court decision.” Williams, 529 U.S. at 412. In addition, the Supreme Court

1 decision must “squarely address[] the issue in th[e] case’ or establish a legal principle that
2 ‘clearly extend[s]’ to a new context to the extent required by the Supreme Court in . . . recent
3 decisions”; otherwise, there is no clearly established Federal law for purposes of review under
4 AEDPA and the Court must defer to the state court’s decision. Moses v. Payne, 555 F.3d 742,
5 754 (9th Cir. 2008) (alterations in original) (quoting Wright v. Van Patten, 552 U.S. 120, 125,
6 123 (2008)).

7 If the Court determines there is clearly established Federal law governing the issue, the
8 Court then must consider whether the state court’s decision was “contrary to, or involved an
9 unreasonable application of, [the] clearly established Federal law.” 28 U.S.C. § 2254(d)(1). A
10 state court decision is “contrary to” clearly established Supreme Court precedent if it “arrives at
11 a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state
12 court decides a case differently than [the Supreme Court] has on a set of materially
13 indistinguishable facts.” Williams, 529 U.S. at 413. A state court decision involves “an
14 unreasonable application of[] clearly established Federal law” if “there is no possibility
15 fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme
16 Court’s] precedents.” Richter, 562 U.S. at 102. That is, a petitioner “must show that the state
17 court’s ruling on the claim being presented in federal court was so lacking in justification that
18 there was an error well understood and comprehended in existing law beyond any possibility for
19 fairminded disagreement.” Id. at 103.

20 If the Court determines that the state court decision was “contrary to, or involved an
21 unreasonable application of, clearly established Federal law,” and the error is not structural,
22 habeas relief is nonetheless unavailable unless it is established that the error “had substantial and
23 injurious effect or influence” on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)
24 (internal quotation mark omitted) (quoting Kotteakos v. United States, 328 U.S. 750, 776
25 (1946)).

26 AEDPA requires considerable deference to the state courts. The Court looks to the last
27 reasoned state court decision as the basis for the state court judgment. See Brumfield v. Cain,
28 135 S. Ct. 2269, 2276 (2015); Johnson v. Williams, 568 U.S. 289, 297 n.1 (2013); Ylst v.

1 Nunnemaker, 501 U.S. 797, 806 (1991). “When a federal claim has been presented to a state
2 court and the state court has denied relief, it may be presumed that the state court adjudicated the
3 claim on the merits in the absence of any indication or state-law procedural principles to the
4 contrary.” Richter, 562 U.S. at 99. Where the state court reaches a decision on the merits but
5 provides no reasoning to support its conclusion, a federal court independently reviews the record
6 to determine whether habeas corpus relief is available under § 2254(d). Walker v. Martel, 709
7 F.3d 925, 939 (9th Cir. 2013). “Independent review of the record is not *de novo* review of the
8 constitutional issue, but rather, the only method by which we can determine whether a silent state
9 court decision is objectively unreasonable.” Himes v. Thompson, 336 F.3d 848, 853 (9th Cir.
10 2003). The federal court must review the state court record and “must determine what arguments
11 or theories . . . could have supported, the state court’s decision; and then it must ask whether it is
12 possible fairminded jurists could disagree that those arguments or theories are inconsistent with
13 the holding in a prior decision of [the Supreme] Court.” Richter, 562 U.S. at 102.

14 IV.

15 DISCUSSION

16 A. Procedural Default

17 A federal court will not review a petitioner’s claims if the state court has denied relief on
18 those claims pursuant to a state law procedural ground that is independent of federal law and
19 adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 729–30 (1991). This
20 doctrine of procedural default is based on the concerns of comity and federalism. Id. at 730–32.
21 However, there are limitations as to when a federal court should invoke procedural default and
22 refuse to review a claim because a petitioner violated a state’s procedural rules. Procedural
23 default can only block a claim in federal court if the state court “clearly and expressly states that
24 its judgment rests on a state procedural bar.” Harris v. Reed, 489 U.S. 255, 263 (1989).

25 In determining whether a state procedural ruling bars federal review, the Court looks to
26 the “last reasoned opinion on the claim.” Ylst, 501 U.S. at 804. Therefore, the Court will “look
27 through” the California Supreme Court’s summary denial and examine the decision of the
28 California Court of Appeal. See Brumfield, 135 S. Ct. at 2276; Ylst, 501 U.S. at 806.

1 With respect to the forfeiture or waiver of certain claims, the California Court of Appeal
2 stated:

3 **II. Forfeiture/waiver**

4 Defendant concedes he did not object to venue, the trial judge, or any aspect of
5 the criminal proceedings. However, defendant asserts he has not forfeited or
6 waived appellate review of his due process contentions because “the facts are
7 undisputed and raise important issues of public concern, namely whether
8 California will allow its criminal jurisprudence to sink to the level of promoting
9 expediency at the expense of a defendant's right to due process and a fair trial.”

10 Defendant contends the “objective evidence” demonstrates he was tried by an
11 “unfair tribunal presided over by a victim of the crime,” and there was a
12 reasonable probability the jurors were exposed to “prejudicial events outside the
13 trial evidence” because the fake bomb “created an inherent and public atmosphere
14 of fear that the jurors could not escape.”

15 Despite his failure to preserve these issues, we will explain how the trial court
16 ensured his constitutional rights to due process and a fair trial were preserved.

17 Keever, 2014 WL 3738768, at *8.

18 Here, the California Court of Appeal found that Petitioner forfeited his venue, judicial
19 bias, and juror bias claims by failing to raise these issues in a motion to change venue. This is
20 known as the contemporaneous objection rule. As the California Court of Appeal clearly and
21 expressly stated that its decision rests on a state procedural bar, procedural default is appropriate
22 if the contemporaneous objection rule is independent and adequate.

23 To qualify as “independent,” a state procedural ground “must not be ‘interwoven with the
24 federal law.’” Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000) (quoting Michigan v.
25 Long, 463 U.S. 1032, 1040–41 (1983)). “To qualify as an ‘adequate’ procedural ground, a state
26 rule must be ‘firmly established and regularly followed.’” Walker v. Martin, 562 U.S. 307, 316
27 (2011) (quoting Beard v. Kindler, 558 U.S. 53, 60 (2009)). The Ninth Circuit has taken a burden-
28 shifting approach to determining the adequacy of a state procedural ground. See Bennett v.
Mueller, 322 F.3d 573, 586 (9th Cir. 2003). First, the state must plead an independent and
adequate state procedural bar as an affirmative defense. The burden then shifts to the petitioner
“to place that defense in issue.” Id. The petitioner’s burden can be satisfied by “asserting specific
factual allegations that demonstrate the inadequacy of the state procedure, including citation to
authority demonstrating inconsistent application of the rule,” Bennett, 322 F.3d at 586. If the

1 petitioner satisfies his burden, the burden shifts back to the state, which bears “the ultimate
2 burden of proving the adequacy” of the state procedural bar. Id. at 585–86.

3 In the instant case, Respondent asserts that California’s contemporaneous objection rule
4 is an adequate and independent state procedural bar. (ECF No. 17 at 28–29, 32, 35).⁸ Petitioner
5 has not raised any challenges to the adequacy of California’s contemporaneous objection rule
6 and thus, has failed to place the defense in issue. Accordingly, the Court finds that the California
7 Court of Appeal applied an independent and adequate state procedural rule, and Petitioner has
8 procedurally defaulted his venue, judicial bias, and juror bias claims. See Kelly v. Swarthout,
9 599 F. App’x 267, 268 (9th Cir. 2015) (citing Paulino v. Castro, 371 F.3d 1083, 1093 (9th Cir.
10 2004)) (“We have previously found that the contemporaneous objection bar is an independent
11 and adequate state law ground that bars federal review of the underlying claim.”).

12 A petitioner, however, may obtain federal review of a defaulted claim by demonstrating
13 either “(1) ‘cause for the default and actual prejudice as a result of the alleged violation of
14 federal law,’ or (2) ‘that failure to consider the claims will result in a fundamental miscarriage of
15 justice.’” Jones v. Ryan, 691 F.3d 1093, 1101 (9th Cir. 2012) (quoting Coleman, 501 U.S. at
16 750). Although attorney error constituting ineffective assistance of counsel provides “cause” to
17 excuse procedural default, Coleman, 501 U.S. at 754, ineffective assistance generally must “be
18 presented to the state courts as an independent claim before it may be used to establish cause for
19 a procedural default,” Murray v. Carrier, 477 U.S. 478, 489 (1986). Here, Petitioner presented an
20 independent ineffective assistance of counsel claim for failure to request a change of venue,
21 thereby denying Petitioner due process and a fair trial. A federal habeas court applies different
22 standards when reviewing ineffective assistance of counsel “as a substantive basis of relief and
23 as cause to avoid default of other claims.” Visciotti v. Martel, 862 F.3d 749, 769 (9th Cir. 2016)
24 (internal quotation mark omitted) (quoting Fischetti v. Johnson, 384 F.3d 140, 154 (3d Cir.
25 2004)), cert. denied sub. nom. Visciotti v. Davis, 138 S. Ct. 1546 (2018).

26 Ordinarily procedural bar issues are resolved first, but courts have recognized that
27 “[p]rocedural bar issues are not infrequently more complex than the merits issues . . . so it may

28 ⁸ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 well make sense in some instances to proceed to the merits if the result will be the same.”
2 Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (citing Lambrix v. Singletary, 520 U.S.
3 518, 525 (1997)). Accordingly, the Court will proceed to review the venue, judicial bias, and
4 juror bias claims on the merits applying AEDPA deference. See Apelt v. Ryan, 878 F.3d 800,
5 825 (9th Cir. 2017) (“[W]hen a state court ‘double-barrels’ its decision—holding that a claim
6 was procedurally barred and denying the claim on its merits—both its procedural default ruling
7 and its merits ruling are entitled to deferential review by federal courts, as intended by
8 AEDPA.”).

9 **B. Venue**

10 In his first claim for relief, Petitioner asserts that he could not receive a fair trial in
11 Tuolumne County given that the fake bomb was planted at the same courthouse in which the trial
12 was conducted. (ECF No. 1 at 5, 9). Respondent argues that this claim was reasonably rejected
13 by the state court. (ECF No. 17 at 24).

14 The challenge to venue was raised on direct appeal to the California Court of Appeal,
15 Fifth Appellate District, which denied the claim in a reasoned decision. The claim was also
16 raised in the petition for review, which the California Supreme Court summarily denied. (LDs 9,
17 10). As federal courts review the last reasoned state court opinion, the Court will “look through”
18 the summary denial and examine the decision of the California Court of Appeal. See Brumfield,
19 135 S. Ct. at 2276; Ylst, 501 U.S. at 806.

20 In denying Petitioner’s claim that he could not receive a fair trial in Tuolumne County,
21 the California Court of Appeal stated:

22 ***I. Change of Venue***

23 We begin with defendant’s assertion that it was impossible for him to receive a
24 fair trial in Tuolumne County because of the nature and circumstances of the
25 charged offense, that he was tried and convicted in the same courthouse where the
fake bomb was planted and found, and everyone involved in the prosecution of
his case—the judge, the prosecutor, the bailiff, the clerk, and the court reporter—
were victims of the crime and the subsequent evacuation of the building.

26 Defendant was charged and convicted of a felony violation of section 148.1,
27 subdivision (d), which states:

28 “Any person who maliciously gives, mails, sends, or causes to be
sent any false or facsimile bomb to another person, or places,

1 causes to be placed, or maliciously possesses any false or facsimile
2 bomb, with the intent to cause another to fear for his or her
3 personal safety or the safety of others, is guilty of a crime
punishable by imprisonment in a county jail not to exceed one
year, or pursuant to subdivision (h) of Section 1170.”

4 Defendant declares the nature of the charged offense “inherently provoke[d]
5 sustained fear in its direct victims—and in the general public—because everyone
6 is highly familiar and uniquely afraid of a bomb’s explosive properties.” “The
7 combination of the nature of this offense and the location where the false bomb
8 was found meant that everyone working in the courthouse was a direct victim of
9 the crime.” Defendant further asserts:

10 “Neither the judge (nor the prosecutor, clerk, reporter or bailiff) in
11 the instant case was likely to be neutral after being victims of a
12 false bombing attributed to [defendant].... The judge, along with
13 the others, necessarily felt the sustained fear, alarm, and disorder
14 that is inherent in any bomb threat. Not only was there a threat of a
15 bomb in this case, but, more tangibly, it was known that a package
16 had been found containing what appeared to be an explosive
17 device. That fear was made more palpable by the forced
18 evacuation of the entire courthouse. No one present could fail to be
19 frightened, annoyed, and angered by the planting of a putative
20 explosive device at their workplace.”

21 Defendant argues that every resident of Tuolumne County was a “victim” of the
22 offense, and the county residents who were selected as jurors in this case were
23 also “victims” of the fake bomb since they “could not escape” the “inherent and
24 public atmosphere of fear” which resulted from the discovery of the fake bomb.
25 “The instant jurors were indirect victims as members of the general public who
26 are considered highly familiar with and uniquely afraid of bombs and who could
27 have been, or at least could imagine themselves to have been, walking or driving
28 past the courthouse or sitting in the jury box when a bomb was discovered.” “It
was their courthouse and their public streets that were threatened and actually
disrupted. The jurors were sitting in a jury box located in the threatened
courthouse.”

All of defendant’s allegations should have been raised by a change of venue
motion. A trial court should grant a motion for a change of venue when publicity
has created a “reasonable likelihood” the defendant will not receive a fair trial in
the county. (§ 1033, subd. (a).) “The phrase ‘reasonable likelihood’ in this context
‘means something less than “more probable than not,” ’ and ‘something more
than merely “possible.” ’ [Citation.]” (*People v. Proctor* (1992) 4 Cal.4th 499,
523.) The defendant has the burden of proving more than a mere possibility of
unfairness. (*People v. Jenkins* (2000) 22 Cal.4th 900, 943.) In assessing the
motion, the trial court considers the gravity and nature of the crime, the extent and
nature of the publicity, the size of the community, and the status of the victim and
the accused. (*Ibid.*) Such a motion should be supported by appropriate exhibits
regarding the relevant factors, particularly press reports and other evidence about
pretrial publicity. (See, e.g., *People v. Farley* (2009) 46 Cal.4th 1053, 1081,
1083–1084.)

Defendant’s due process claims are meritless on the record before this court and
are based on nothing but speculation. His failure to move for a change of venue,
which presumably would have been accompanied by the appropriate supporting

1 exhibits, is fatal to his due process claims and forfeits appellate review of the
2 issue. (See, e.g., *People v. Simon* (2001) 25 Cal.4th 1082, 1103–1104, 1107.)
3 There is nothing in the appellate record to indicate the nature or circumstances of
4 any news reports about the fake bomb, the effect of the discovery of the bomb on
5 the general public and/or the courthouse staff, or even if the trial judge, the
6 prosecutor, and any members of the public who were ultimately selected to sit on
7 his jury were in the courthouse at the time the fake bomb was discovered, or
8 suffered any type of impact or reaction from the event.

9
10 As we will address in section III, *post*, the only reference to pretrial publicity was
11 defense counsel’s statement prior to jury selection that there had been one news
12 article about the fake bomb; defendant interjected that there were two news
13 stories. Nevertheless, there is no evidence in the appellate record about the
14 specific nature and content of these news reports or public reaction, if any, and, as
15 we will discuss below, the court asked the potential jurors about their possible
16 exposure to any news reports during voir dire.

17 ***Turnage and other bomb-related cases***

18 While defendant lacks any evidence in the record to support his due process
19 claims about venue, he has instead cited to *People v. Turnage* (2012) 55 Cal.4th
20 62 (*Turnage*) for the proposition that defendant was tried for an offense that
21 exploited “the public’s *fear* of bombs, and that predictably provoke havoc and
22 alarm.” (*Id.* at p. 72, italics in original.) In that case, the defendant was convicted
23 for violating section 148.1, subdivision (d), after he planted a fake bomb near a
24 government building. On appeal, defendant claimed his felony conviction for
25 violating section 148.1 violated his equal protection rights compared to an entirely
26 different statute, section 11418.1. “The latter provision provides, in pertinent part,
27 that anyone who places ‘any false or facsimile of a weapon of mass destruction’
28 (WMD) with the intent to cause fear in others is guilty of a misdemeanor. A
violation of section 11418.1 (or the false WMD statute) may be punished as a
felony only ‘[i]f the [perpetrator’s] conduct causes another person to be placed in
sustained fear’—an element not necessary under the false bomb statute for either
misdemeanor or felony punishment.” (*Id.* at p. 67.) The appellate court agreed
with the defendant’s equal protection claim. (*Ibid.*)

In *Turnage*, the California Supreme Court disagreed with the appellate court and
held no equal protection violation occurred. (*Turnage, supra*, 55 Cal.4th at p. 67.)

“The challenged distinction—allowing false bomb crimes to be
punished as felonies without proof of sustained fear, while
requiring such a showing for felony violations of the false WMD
statute—is not irrational. The Legislature could reasonably assume
that the public is highly familiar with, and uniquely afraid of, the
explosive properties of bombs. Hence, mere observation or
awareness of an object that looks like a bomb, and that was meant
to instill fear like a bomb, is almost certain to cause the alarm and
disorder associated with sustained fear under the statutory
scheme.”

“Upon close examination, the same reasoning does not apply to
false WMD’s. A WMD is statutorily defined to include a vast array
of chemical and biological substances, and radioactive and
mechanical devices, weaponized for use in both conventional and
unconventional forms against all kinds of targets, not just people. It
is conceivable from a legislative perspective that, given the breadth

1 and relative novelty of WMD's, a facsimile of a WMD would not
2 *necessarily* be recognized or cause fear, even where it is detected
3 and was intended to do so. Requiring sustained fear for felony
4 offenses under the false WMD statute, but not the false bomb
5 statute, promotes a valid state interest in deterring and punishing
6 the societal harm such crimes clearly cause.” (*Id.* at pp. 67–68,
7 italics in original.)

8 In the course of *Turnage*'s equal protection analysis, the California Supreme
9 Court reviewed the history of section 148.1, subdivision (d), and noted there was
10 no statutory definition of the term “bomb.” (*Turnage, supra*, 55 Cal.4th at p. 71.)

11 “Courts have explained that the Legislature is presumably aware of
12 the manner in which bombs are used, and the frequency with
13 which bombings occur. [Citation.] Everyone is assumed to ‘know
14 what a bomb is.’ [Citation.] In fact, bombs are commonly
15 understood to be so ‘inherently dangerous’ [citation] that
16 possession can be unlawful ‘even when [the device is] *not* set to
17 explode.’ [Citation.] Detonation can occur unexpectedly, while the
18 object is concealed or if the bomber loses control over it,
19 threatening intended and unintended victims alike. [Citation.] [¶]
20 Because of these known dangers, section 148.1 has long prohibited
21 various acts that exploit the public's *fear* of bombs, and that
22 predictably provoke havoc and alarm....” (*Ibid.*, italics in original.)

23 In addition to *Turnage*, defendant also cites to two matters outside the record in
24 support of his claim that it was impossible to receive a fair trial in Tuolumne
25 County for the charged offense: An Internet citation to an article in the “Union
26 Democrat” newspaper about the fake bomb; and an Internet citation to an article
27 by Alan Dershowitz in “The Guardian” about the Boston Marathon bombing, with
28 the quote that “virtually every Bostonian regards himself or herself as a victim of
this horrendous crime.”

Based on *Turnage* and the two extraneous sources, defendant asserts it was
impossible for him to receive a fair trial in Tuolumne County because of the
nature of the crime, and the certainty the general public would have reacted in the
same way as the citizens of Boston after the bombing occurred in that city.
Defendant asserts a change of venue should have been ordered even though he
never made such a motion.

As we have already explained, these are issues which could have been explored in
a motion for change of venue with appropriate supporting exhibits. Defendant's
reliance on *Turnage*'s description of the offense could well have applied to the
members of the general public sworn as a jury in any county to hear a case about
a fake bomb in a public place. As we will explain in section III, *post*, the superior
court took appropriate steps to ensure defendant received a fair trial by
questioning the prospective jurors about this issue during voir dire.

We further note that courts have exercised discretion to deny venue-transfer
motions in well known and notorious cases involving substantial pretrial publicity
and community impact, most notably the trial of the conspirators in the 1993
bombing of the World Trade Center in New York City. (See *United States v.*
Yousef (2nd Cir. 2003) 327 F.3d 56, 78, 155–156.) The mere fact that defendant
was charged with planting a fake bomb did not mean that it was impossible for
him to receive a fair trial in the community where the incident occurred. Based on

1 the record before this court, there is no evidence that defendant’s due process
2 rights were violated.

3 Keever, 2014 WL 3738768, at *4–7.

4 “A fair trial in a fair tribunal is a basic requirement of due process.” In re Murchison, 349
5 U.S. 133, 136 (1955). Thus, the Constitution “do[es] not impede transfer of the proceeding to a
6 different district at the defendant’s request if extraordinary local prejudice will prevent a fair
7 trial.” Skilling v. United States, 561 U.S. 358, 378 (2010). In a line of cases addressing whether
8 due process requires a change of venue, the Supreme Court has overturned convictions in cases
9 that were “entirely lacking in the solemnity and sobriety to which a defendant is entitled in a
10 system that subscribes to any notion of fairness and rejects the verdict of a mob,” but the
11 decisions do not “stand for the proposition that juror exposure to . . . news accounts . . . alone
12 presumptively deprives the defendant of due process.” Murphy v. Florida, 421 U.S. 794, 799
13 (1975). “Prominence does not necessarily produce prejudice, and juror *impartiality*, we have
14 reiterated, does not require *ignorance*. A presumption of prejudice, our decisions indicate,
15 attends only the extreme case.” Skilling, 561 U.S. at 381 (citations omitted).

16 For example, in Rideau v. Louisiana, 373 U.S. 723 (1963), the police filmed the
17 defendant’s interrogation, which was conducted without counsel and resulted in a confession. On
18 three separate occasions shortly before trial, a local television station broadcast the filmed
19 interrogation and confession to audiences ranging from 24,000 to 53,000 individuals for a crime
20 that had occurred in a parish with a population of approximately 150,000 people. Id. at 724.
21 Estes v. Texas, 381 U.S. 532, 535 (1965), involved “[m]assive pretrial publicity totaling 11
22 volumes of press clippings.” There were at least twelve cameramen in the courtroom for a two-
23 day pretrial hearing that was “carried live by both radio and television, and news photography
24 was permitted throughout,” which “led to considerable disruption of the hearings,” denied the
25 “judicial serenity and calm to which [the defendant] was entitled,” and resulted in “a
26 bombardment of the community with the sights and sounds” of the hearing. Id. at 536, 538. In
27 Sheppard v. Maxwell, 384 U.S. 333 (1966), “[f]or months virulent publicity about Sheppard and
28 the murder had made the case notorious” before trial, “bedlam reigned at the courthouse during

1 the trial and newsmen took over practically the entire courtroom,” and “jurors were thrust into
2 the role of celebrities by the judge’s failure to insulate them from reporters and photographers.”
3 Id. at 354, 355, 353.

4 Petitioner’s case is manifestly different from the above cases in which the Supreme Court
5 has presumed juror prejudice based on publicity. Here, there is only fleeting mention of at most
6 two news stories in the record, (1 RT 71–72), and there is no indication that any portion of
7 Petitioner’s criminal proceedings were “entirely lacking in the solemnity and sobriety to which a
8 defendant is entitled,” Murphy, 421 U.S. at 799. Additionally, as noted by the California Court
9 of Appeal, courts have denied change of venue requests under Federal Rule of Criminal
10 Procedure 21⁹ in notorious bombing cases, such as the trials of the conspirators in the 1993
11 bombing of the World Trade Center in New York City. United States v. Yousef, 327 F.3d 56, 78,
12 155–156 (2d Cir. 2003); United States v. Salameh, No. S5 93 CR. 0180 (KTD), 1993 WL
13 364486, at *1 (S.D.N.Y. Sept. 15, 1993).

14 Based on the foregoing, the California Court of Appeal’s denial of Petitioner’s venue
15 claim was not contrary to, or an unreasonable application of, clearly established federal law,¹⁰
16 nor was it based on an unreasonable determination of fact. The state court’s decision was not “so
17 lacking in justification that there was an error well understood and comprehended in existing law
18 beyond any possibility for fairminded disagreement.” Richter, 562 U.S. at 103. Accordingly,
19 Petitioner is not entitled to habeas relief on his first claim, and it should be denied.

20 **C. Judicial Bias**

21 In his second claim for relief, Petitioner asserts that he was denied due process because
22 the judge who presided over Petitioner’s trial was a victim of the offense. (ECF No. 1 at 5, 11).
23 Respondent argues that this claim was reasonably rejected by the state court. (ECF No. 17 at 24).

24
25 ⁹ “[T]he court must transfer the proceeding against that defendant to another district if the court is satisfied that so
26 great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and
27 impartial trial there.” Fed. R. Crim. P. 21.

28 ¹⁰ Although the California Court of Appeal did not cite to any United States Supreme Court authority on this issue,
the pertinent inquiry is whether it “reasonably applied the principles contained in relevant Supreme Court
precedent.” Parker v. Small, 665 F.3d 1143, 1148 n.1 (9th Cir. 2011) (citing Early v. Packer, 537 U.S. 3, 8 (2002)).
The Supreme Court has noted that a state court is not required to cite or even be aware of its cases under § 2254(d).
Early, 537 U.S. at 8.

1 This judicial bias claim was raised on direct appeal to the California Court of Appeal,
2 Fifth Appellate District, which denied the claim in a reasoned decision. The claim was also
3 raised in the petition for review, which the California Supreme Court summarily denied. (LDs 9,
4 10). As federal courts review the last reasoned state court opinion, the Court will “look through”
5 the summary denial and examine the decision of the California Court of Appeal. See Brumfield,
6 135 S. Ct. at 2276; Ylst, 501 U.S. at 806.

7 In denying Petitioner’s judicial bias claim, the California Court of Appeal stated:

8 ***IV. Neutral and detached magistrate***

9 As noted above, defendant insists his failure to object to the trial judge or move
10 for a change of venue has not resulted in forfeiture or waiver of his due process
11 contentions because he was tried by an “unfair tribunal presided over by a victim
12 of the crime” and, as a result, this state’s criminal jurisprudence has sunk “to the
13 level of promoting expediency at the expense of a defendant's right to due process
14 and a fair trial.”

15 “[A] defendant has a due process right to an impartial judge, and ... violation of
16 this right is a fatal defect in the trial mechanism.” (*People v. Brown* (1993) 6
17 Cal.4th 322, 333.) Thus, a defendant has a right to a trial “before a judge with no
18 actual bias against the defendant or interest in the outcome of his particular
19 case....” (*People v. Harris* (2005) 37 Cal.4th 310, 346; see also *Bracy v. Gramley*
20 (1997) 520 U.S. 899, 904–905.)

21 When judicial bias is raised as an issue on appeal, the “role of a reviewing court
22 ‘is not to determine whether the trial judge’s conduct left something to be desired,
23 or even whether some comments would have been better left unsaid. Rather, we
24 must determine whether the judge’s behavior was so prejudicial that it denied [the
25 defendant] a fair, as opposed to a perfect, trial. [Citation.]’ [Citation.]” (*People v.*
26 *Harris, supra*, 37 Cal.4th at p. 347.)

27 There is no evidence in the appellate record to show the trial judge had any actual
28 or implied bias against defendant, or that defendant was not tried before a neutral
and detached magistrate. There is no evidence the trial judge in this case was in
the courthouse when it was briefly evacuated because of the fake bomb, the judge
was a witness to the incident, or that the discovery of the fake bomb and
evacuation had a particular impact which would have raised questions about the
trial judge’s impartiality. The court did not make any comments indicating a
personal interest, particular knowledge, or sensitivities about the case. The court
did not make any rulings or engage in any conduct to manifest bias in the
presentation of evidence, usurp the duties of the prosecutor, or create the
impression it was allied with the prosecution. (*People v. Harris, supra*, 37 Cal.4th
at p. 346.)

Defense counsel was well aware of the circumstances of the charges against
defendant. Defense counsel was also aware of the appropriate procedures to
disqualify a judge. At the beginning of the criminal proceedings, defense counsel
moved to disqualify Judge Boscoe, who was originally assigned to the case,
pursuant to Code of Civil Procedure section 170.6. When Judge Provost was

1 assigned, defense counsel did not raise any objections, attempt to disqualify her
2 from presiding over defendant's case, or challenge her for cause or bias.

3 The entirety of the record refutes defendant's general assertions and claims of
4 certainty the trial judge was biased against him. The court denied the
5 prosecution's motion to impeach defendant's girlfriend with defendant's prior act
6 of domestic violence against her, agreed with defendant that the evidence was
7 prejudicial, and granted the defense motion to exclude this evidence. The court
8 also granted defendant's motion not to impose any sanctions against the defense
9 for possible violations of the discovery order. More importantly as to the issues
10 raised by defendant, the court recognized the importance of questioning the
11 prospective jurors about their possible exposure to news stories about either the
12 fake bomb or the arson of the patrol cars.

13 There is no evidence that defendant was not tried before a neutral and detached
14 magistrate. As with defendant's other issues, defense counsel was not ineffective
15 for failing to challenge the trial judge given the absence of any evidence to
16 support that challenge. (*People v. Diaz, supra*, 3 Cal.4th at p. 562.)

17 Keever, 2014 WL 3738768, at *9–10.

18 The Supreme Court has long recognized that due process “clearly requires a ‘fair trial in a
19 fair tribunal’ before a judge with no actual bias against the defendant or interest in the outcome
20 of his particular case.” Bracy v. Gramley, 520 U.S. 899, 904–05 (1997) (quoting Withrow v.
21 Larkin, 421 U.S. 35, 46 (1975)). “The Constitution requires recusal where ‘the probability of
22 actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’”
23 Hurles v. Ryan, 752 F.3d 768, 788 (9th Cir. 2014) (quoting Withrow, 421 U.S. at 47). Thus, to
24 establish a due process violation Petitioner need not prove actual bias, just an intolerable risk of
25 bias. Hurles, 752 F.3d at 789. However, Petitioner must “overcome a presumption of honesty
26 and integrity in those serving as adjudicators.” Withrow, 421 U.S. at 47.

27 As noted by the California Court of Appeal, there is no evidence in the record that the
28 trial judge was present in the courthouse when it was evacuated due to the fake bomb or that the
trial judge was otherwise a witness to the incident. Petitioner has not pointed to any evidence in
the record demonstrating that the trial judge harbored bias against him or that there was an
intolerable risk of bias. Petitioner has failed to “overcome [the] presumption of honesty and
integrity in those serving as adjudicators.” Withrow, 421 U.S. at 47.

Based on the foregoing, the California Court of Appeal's denial of Petitioner's judicial
bias claim was not contrary to, or an unreasonable application of, clearly established federal law,

1 nor was it based on an unreasonable determination of fact. The state court’s decision was not “so
2 lacking in justification that there was an error well understood and comprehended in existing law
3 beyond any possibility for fairminded disagreement.” Richter, 562 U.S. at 103. Accordingly,
4 Petitioner is not entitled to habeas relief on his second claim, and it should be denied.

5 **D. Juror Bias**

6 In his third claim for relief, Petitioner asserts that his right to due process and a fair trial
7 was violated by the absence of an impartial jury. (ECF No. 1 at 5). Respondent argues that the
8 unfair jury claim was reasonably rejected by the state court. (ECF No. 17 at 34).

9 The juror bias claim was raised on direct appeal to the California Court of Appeal, Fifth
10 Appellate District, which denied the claim in a reasoned decision. The claim was also raised in
11 the petition for review, which the California Supreme Court summarily denied. (LDs 9, 10). As
12 federal courts review the last reasoned state court opinion, the Court will “look through” the
13 summary denial and examine the decision of the California Court of Appeal. See Brumfield, 135
14 S. Ct. at 2276; Ylst, 501 U.S. at 806.

15 In denying Petitioner’s juror bias claim, the California Court of Appeal stated:

16 **III. Jury selection**

17 The federal and state Constitutions guarantee criminal defendants a fair trial by a
18 panel of unbiased, impartial jurors. (U.S. Const., 6th & 14th Amends.; Cal.
19 Const., art. I, § 16; *People v. Roldan* (2005) 35 Cal.4th 646, 689, disapproved on
20 another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) “A
21 prospective juror’s ability to be fair and impartial is explored during the process
of voir dire,” which may result in challenges for cause or peremptory challenges
based on the prospective juror’s responses. (*People v. Duran* (1996) 50
Cal.App.4th 103, 111; e.g., *People v. Valdez* (2012) 55 Cal.4th 82, 165; *People v.*
Carasi (2008) 44 Cal.4th 1263, 1325.)

22 Defendant repeatedly complains that his due process rights were violated because
23 the jury was biased against him, without any evidence to support these claims. In
24 making these arguments, however, he fails to account for what actually happened
on the record.

25 Just before the beginning of jury selection, the prosecutor advised the court that
26 the newspaper had covered the fake bomb threat, and the issue should be
27 addressed during voir dire to determine if the potential jurors heard about it. The
28 court asked the parties whether it should also ask the potential jurors about the
arson of the patrol cars, even though it was not related to the fake bomb and
defendant was not charged with that offense. Defense counsel agreed the court

1 should ask about the arson and the fake bomb since both incidents were going to
2 be addressed during trial.¹¹

3 The court stated it would ask the potential jurors about both incidents, and noted
4 the arson of the patrol cars “got a lot of coverage, probably more than” the fake
5 bomb. Defense counsel replied the arson received “[m]uch more” coverage, and
6 she thought there was only one article about the fake bomb. Defendant interrupted
7 and said there were two articles about his case. Defense counsel did not introduce
8 any newspaper reports or evidence about any media reports about the fake bomb
9 into evidence, and they were not referred to again.

10 Defendant did not request the transcription of the voir dire proceedings for
11 purposes of appeal. Based on our review of the minute order for voir dire,
12 however, there is no evidence that these two topics prevented the court and the
13 parties from agreeing on the selection of a jury. Defendant did not object to the
14 voir dire process or to the jurors who were ultimately selected and sworn. If
15 defendant had been concerned about the outcome of voir dire, he could have
16 moved for a change of venue after the conclusion of jury selection and argued that
17 voir dire showed that it was impossible to receive a fair trial in Tuolumne County.
18 (See, e.g., *People v. Farley* (2009) 46 Cal.4th 1053, 1085.) Defendant’s failure to
19 make a motion for change of venue, either before or after voir dire, constitutes his
20 forfeiture of that issue. (*People v. Bolin* (1998) 18 Cal.4th 297, 312–313.)

21 Defendant asserts that defense counsel was prejudicially ineffective for failing to
22 make the necessary motions to preserve his appellate contentions. Based on the
23 record before this court, however, defense counsel was not ineffective for
24 declining to bring an apparently meritless motion. (*People v. Diaz, supra*, 3
25 Cal.4th at p. 562; *People v. Bolin, supra*, 18 Cal.4th at p. 314.)

26 Keever, 2014 WL 3738768, at *8–9 (footnote in original).

27 “No hard-and-fast formula dictates the necessary depth or breadth of *voir dire*.” Skilling,
28 561 U.S. at 386 (citing United States v. Wood, 299 U.S. 123, 145–46 (1936) (“Impartiality is not
a technical conception. It is a state of mind. For the ascertainment of this mental attitude of
appropriate indifference, the Constitution lays down no particular tests and procedure is not
chained to any ancient and artificial formula.”)). The Supreme Court has “repeatedly
emphasized” that jury selection is “particularly within the province of the trial judge,” and
“[r]eviewing courts are properly resistant to second-guessing the trial judge’s estimation of a
juror’s impartiality, for that judge’s appraisal is ordinarily influenced by a host of factors
impossible to capture fully in the record—among them, the prospective juror’s inflection,

¹¹ As explained in the factual statement above, Deputy Vanderwiel testified defendant contacted him and claimed he had information about who was responsible for both the fake bomb and the apparently unrelated arson of several patrol cars. Vanderwiel also testified that someone else was convicted for the arson of the patrol cars, and defendant was not involved in that case.

1 sincerity, demeanor, candor, body language, and apprehension of duty.” Skilling, 561 U.S. at 386
2 (quoting Ristaino v. Ross, 424 U.S. 589, 594–95 (1976)) (citing Reynolds v. United States, 98
3 U.S. 145, 156–57 (1879)).

4 There is no transcript of the *voir dire* proceedings in the state record. However, prior to
5 jury selection, the trial court indicated that it would ask the potential jurors about their exposure
6 to coverage of the fake bomb threat and the arson of patrol cars. Additionally, the minute order
7 of the *voir dire* proceedings does not indicate that defense counsel objected to any aspect of the
8 jury selection process or to the venire members who were ultimately seated on the jury.

9 Based on the foregoing, the California Court of Appeal’s denial of Petitioner’s juror bias
10 claim was not contrary to, or an unreasonable application of, clearly established federal law, nor
11 was it based on an unreasonable determination of fact. The state court’s decision was not “so
12 lacking in justification that there was an error well understood and comprehended in existing law
13 beyond any possibility for fairminded disagreement.” Richter, 562 U.S. at 103. Accordingly,
14 Petitioner is not entitled to habeas relief on his third claim, and it should be denied.

15 **E. Prosecutorial Misconduct**

16 In his fourth claim for relief, Petitioner asserts that the prosecutor committed misconduct
17 by emphasizing the fear and disruption inflicted upon the prosecutor and court and the proximity
18 of the bomb threat to the jury box. (ECF No. 1 at 5, 14). Respondent argues that the prosecutorial
19 misconduct claim has been procedurally defaulted and was reasonably rejected by the state court.
20 (ECF No. 17 at 36).

21 The prosecutorial misconduct claim was raised on direct appeal to the California Court of
22 Appeal, Fifth Appellate District, which denied the claim in a reasoned decision. The claim was
23 also raised in the petition for review, which the California Supreme Court summarily denied.
24 (LDs 9, 10). As federal courts review the last reasoned state court opinion, the Court will “look
25 through” the summary denial and examine the decision of the California Court of Appeal. See
26 Brumfield, 135 S. Ct. at 2276; Ylst, 501 U.S. at 806.

27 ///

28 ///

1 In denying the prosecutorial misconduct claim, the California Court of Appeal stated:

2 **V. Prosecutorial misconduct**

3 Finally, defendant contends the prosecutor committed prejudicial misconduct
4 during trial by referring to facts not in evidence about the fake bomb. As we will
explain, defense counsel did not object to these instances and the context of the
prosecutor’s remarks refutes any claim of misconduct.

5 **A. Background**

6 The prosecutor’s first witness was Charles Combs, the private security guard who
found the fake bomb. The prosecutor asked Combs several questions to verify that
7 he worked in “this courthouse,” and he contacted Deputy Green in the bailiff’s
area of Department 2 and told him about the suspicious package.

8 In closing argument, the prosecutor stated:

9 “We know that this bag with this device is located outside of the
10 courthouse at 8:40 in the morning on November 28th. And we know that
at 9:15, the decision is made to evacuate the courthouse. *We were all*
11 *evacuated out.* The bomb squad arrives at 9:20 and determines it is a fake
bomb. So at 10:45, *we’re allowed to come back into court and resume our*
12 *business.* The defendant is set for sentencing, actually, at 1:30 that day.”
(Italics added.)

13 Defense counsel did not object to any of these incidents.

14 **B. Analysis**

15 We begin with the well settled law on prosecutorial misconduct. “A prosecutor’s
misconduct violates the Fourteenth Amendment to the United States Constitution
16 when it ‘infects the trial with such unfairness as to make the conviction a denial of
due process.’ [Citations.] In other words, the misconduct must be ‘of sufficient
17 significance to result in the denial of the defendant’s right to a fair trial.’
[Citation.] A prosecutor’s misconduct that does not render a trial fundamentally
18 unfair nevertheless violates California law if it involves ‘the use of deceptive or
reprehensible methods to attempt to persuade either the court or the jury.’
19 [Citations.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1202.)

20 Defendant cites the italicized portion of the prosecutor’s closing argument and
argues the prosecutor committed misconduct. “To preserve for appeal a claim of
21 prosecutorial misconduct, the defense must make a timely objection at trial and
request an admonition; otherwise, the point is reviewable only if an admonition
22 would not have cured the harm caused by the misconduct. [Citation.]” (*People v.*
Price (1991) 1 Cal.4th 324, 447; *People v. Silva* (2001) 25 Cal.4th 345, 373.)

23 Defense counsel did not make prosecutorial misconduct objections or request
admonitions to any of the instances which defendant now raises on appeal, which
24 precludes his appellate claims of misconduct. (*People v. Cunningham* (2001) 25
Cal.4th 926, 1000; *People v. Cain* (1995) 10 Cal.4th 1, 48.)

25
26 In the alternative, defendant claims counsel was prejudicially ineffective for
failing to preserve the objections because the prosecutor’s comments made the
27 jury understand “it was not some other courthouse that was threatened but their
courthouse, the very one in which they were sitting in judgment of the false
28 bomber. It would take a superhuman effort to resist thinking of one’s own
reaction under the threat allegedly imposed by [defendant].”

1 The prosecutor’s closing argument cited to admissible evidence about the fake
2 bomb incident, and was not based on any facts outside the record. As we have
3 already explained, defendant failed to move for a change of venue supported by
4 appropriate exhibits to support his claims about the alleged impossibility of
5 obtaining a fair trial in Tuolumne County, or that the trial judge was not neutral
6 and detached. Defendant has also failed to account for the trial judge’s decision to
7 question the prospective jurors about their possible exposure to any pretrial
8 publicity about the fake bomb, and the absence of any objections to the jurors
9 who were ultimately selected and sworn in this case.

10 We similarly conclude that defense counsel was not prejudicially ineffective for
11 failing to object to the prosecutor’s isolated comments about the nature and
12 circumstances of the charged offense.

13 Keever, 2014 WL 3738768, at *10–11.

14 1. Procedural Default

15 Here, the California Court of Appeal clearly and expressly stated that Petitioner forfeited
16 the prosecutorial misconduct claim by failing to contemporaneously object to any of the
17 instances of misconduct. As discussed in section IV(A), *supra*, the contemporaneous objection
18 rule is adequate to bar federal habeas review. See Kelly, 599 F. App’x at 268. A petitioner,
19 however, may obtain federal review of a defaulted claim by demonstrating either cause for the
20 default and prejudice or that failure to consider the claim will result in a fundamental miscarriage
21 of justice. Jones, 691 F.3d at 1101. Ineffective assistance of counsel provides “cause” to excuse
22 procedural default, Coleman, 501 U.S. at 754, but the Court applies different standards when
23 reviewing ineffective assistance of counsel “as a substantive basis of relief and as cause to avoid
24 default of other claims.” Visciotti, 862 F.3d at 769. If the procedural bar issue is more complex
25 than the merits issue, courts may “proceed to the merits if the result will be the same.” Franklin,
26 290 F.3d at 1232. Accordingly, the Court will proceed to review the prosecutorial misconduct
27 claim on the merits applying AEDPA deference. See Apelt, 878 F.3d at 825.

28 2. Merits Analysis

1 A prosecutor’s improper comments violate the Constitution if they “so infected the trial
2 with unfairness as to make the resulting conviction a denial of due process.” Darden v.
3 Wainwright, 477 U.S. 168, 181 (1986) (internal quotation marks omitted) (quoting Donnelly v.
4 DeChristoforo, 416 U.S. 637, 643 (1974)); Parker v. Matthews, 567 U.S. 37, 45 (2012). As “the
5 appropriate standard of review for such a claim on writ of habeas corpus is ‘the narrow one of

1 due process, and not the broad exercise of supervisory power,” it “is not enough that the
2 prosecutors’ remarks were undesirable or even universally condemned.” Darden, 477 U.S. at 181
3 (citations omitted). “On habeas review, constitutional errors of the ‘trial type,’ including
4 prosecutorial misconduct, warrant relief only if they ‘had substantial and injurious effect or
5 influence in determining the jury’s verdict.’” Wood v. Ryan, 693 F.3d 1104, 1113 (9th Cir.
6 2012) (quoting Brecht, 507 U.S. at 637–38).

7 In support of his prosecutorial misconduct claim, Petitioner cites to the prosecutor’s
8 elicitation of testimony from Mr. Combs and Deputy Green. (ECF No. 1 at 14). The prosecutor
9 engaged in the following pertinent exchange with Charles J. Combs on direct examination:

10 Q. And do you recall what your assignment was on November
11 28th of 2011?

12 A. Uh, I was working the screening station here at what we call
13 Post 2, which is 41 West Yaney.

14 Q. That is this courthouse?

15 A. That is this courthouse.

16 Q. Okay. And what time did you arrive at work that day?

17 A. Uh, about ten minutes to 7:00.

18 Q. And when you first arrived, what did you do?

19 A. At that time, the routine was to just go ahead and open up the
20 courthouse, so I proceeded directly from the parking garage
21 across the street, up to the second floor, entered the building
22 that way, and then proceeded with the morning opening
23 routines.

24 Q. So let me just get a clear picture. Where exactly did you enter
25 this courthouse that day? Not here (indicating)?

26 A. Not here. The second floor.

27 (1 RT 93–94).

28 The prosecutor engaged in the following pertinent exchange with Deputy Brandon Green
on direct examination:

Q. And what was your assignment at that time?

A. I was assigned as a bailiff to this court.

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Q. Department 2 right here?

A. No, the court system here.

Q. Oh, okay. And that day, November 28th, 2011, do you recall which courthouse you were working in, either this one or the one on Washington?

A. I was actually assigned to a roving position and I went back and forth between the courthouses. That day, I was primarily at this courthouse.

Q. Okay. And do you recall C.J. Combs, who works for Universal Protection Services, at some point the morning of November 28th, 2011 getting your attention?

A. Yes, I do.

Q. What do you recall about that?

A. I was sitting in the Department 2 bailiff's area of the judge's chambers. There was a knock on the door.

Q. Is that this door right out here (indicating)?

A. Right; yes. It says "Judge's Chambers."

There was a knock at the door. I answered the door, and C.J. asked me to come take a look at a bag.

(1 RT 104–05).

Courts "have consistently cautioned against prosecutorial statements designed to appeal to the passions, fears and vulnerabilities of the jury." United States v. Weatherspoon, 410 F.3d 1142, 1149 (9th Cir. 2005). "[I]f the purpose and effect of the prosecutor's emotionally charged appeal was 'wholly irrelevant to any facts or issues in the case,' then it 'could only have been to arouse passion and prejudice.' [If] the statements and arguments in question were relevant, they fall outside the prohibited arena." Tak Sun Tan v. Runnels, 413 F.3d 1101, 1115 (9th Cir. 2005) (quoting Viereck v. United States, 318 U.S. 236, 247 (1943)). Viewed in context, the prosecutor's questions were not designed to appeal to the jury's fears and vulnerabilities. Rather, the prosecutor elicited admissible testimony regarding the circumstances of the offense and the witnesses' actions and locations at the time of the offense.

Petitioner also challenges portions of the prosecutor's closing argument as "provok[ing] sympathy to the prosecution and anger at [Petitioner] for his alleged acts." (ECF No. 1 at 15).

1 The prosecutor stated in pertinent part:

2 So, I would like to refer to this sort of story we got from the
3 defense witnesses as the tangled web, because it really doesn't add
4 up at all. So let's look at the timeline.

5 We know that this bag with this device is located outside of the
6 courthouse at 8:40 in the morning on November 28th. And we
7 know that at 9:15, the decision is made to evacuate the courthouse.
8 We were all evacuated out. The bomb squad arrives at 9:20 and
9 determines it is a fake bomb. So at 10:45, we're allowed to come
10 back into court and resume our business. The defendant is set for
11 sentencing, actually, at 1:30 that day.

12 (2 RT 270). Viewed in context, the prosecutor's statement was not designed to appeal to the
13 jury's fears and vulnerabilities. Rather, this portion of the prosecutor's closing argument was a
14 quick factual summation of the timeline of the offense based on admissible evidence that was
15 presented at trial.

16 As the prosecutor's elicitation of testimony and "argument did not manipulate or misstate
17 the evidence, nor did it implicate other specific rights of the accused such as the right to counsel
18 or the right to remain silent," Petitioner was not deprived of a fair trial. Darden, 477 U.S. at 181-
19 82. Accordingly, Petitioner is not entitled to habeas relief on his fourth claim, and it should be
20 denied.

21 **F. Ineffective Assistance of Counsel**

22 In his fifth claim for relief, Petitioner asserts ineffective assistance of counsel for failure
23 to effectuate Petitioner's desired results regarding his other claims for relief (i.e., change of
24 venue, judicial bias, juror bias, and prosecutorial misconduct). (ECF No. 1 at 5). Respondent
25 argues that the state court's rejection of the ineffective assistance of counsel claim was
26 reasonable. (ECF No. 17 at 40).

27 The ineffective assistance of counsel claim was raised on direct appeal to the California
28 Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned decision. The
claim was also raised in the petition for review, which the California Supreme Court summarily
denied. (LDs 9, 10). As federal courts review the last reasoned state court opinion, the Court will
"look through" the summary denial and examine the decision of the California Court of Appeal.
See Brumfield, 135 S. Ct. at 2276; Ylst, 501 U.S. at 806.

1 In denying the ineffective assistance of counsel claim, the California Court of Appeal
2 stated:

3 ***Ineffective assistance***

4 In the alternative, defendant argues his defense attorney was prejudicially
5 ineffective for failing to make whatever motions were required to effectuate these
6 results. To prevail on an ineffective assistance claim, “defendant must first show
7 that ‘ ‘counsel’s representation fell below an objective standard of reasonableness
8 ... under prevailing professional norms.’ ” [Citation.] Second, defendant must
9 show that the inadequacy was prejudicial, that is, ‘ ‘there is a reasonable
10 probability that, but for counsel’s unprofessional errors, the result of the
11 proceeding would have been different. A reasonable probability is a probability
12 sufficient to undermine confidence in the outcome.’ ” [Citation.] [¶] If ‘counsel’s
13 omissions resulted from an informed tactical choice within the range of
14 reasonable competence, the conviction must be affirmed.’ [Citation.] When,
15 however, the record sheds no light on why counsel acted or failed to act in the
16 manner challenged, the reviewing court should not speculate as to counsel’s
17 reasons. To engage in such speculations would involve the reviewing court ‘ ‘in
18 the perilous process of second-guessing.’ ” [Citation.] Because the appellate
19 record ordinarily does not show the reasons for defense counsel’s actions or
20 omissions, a claim of ineffective assistance of counsel should generally be made
21 in a petition for writ of habeas corpus, rather than on appeal. [Citations.]” (*People*
22 *v. Diaz* (1992) 3 Cal.4th 495, 557–558.)

23 As we have already explained, there is no evidence in the appellate record to
24 support defendant’s due process contentions, or to show that a motion for change
25 of venue should have been filed or would have been successful. Based on the
26 record before this court, defense counsel was not ineffective for declining to bring
27 a meritless motion. (*People v. Diaz, supra*, 3 Cal.4th at p. 562.)

28 Keever, 2014 WL 3738768, at *7–8.

1. Strickland Legal Standard

The clearly established federal law governing ineffective assistance of counsel claims is
Strickland v. Washington, 466 U.S. 668 (1984), which requires a petitioner to show that (1)
“counsel’s performance was deficient,” and (2) “the deficient performance prejudiced the
defense.” Id. at 687. To establish deficient performance, a petitioner must demonstrate that
“counsel’s representation fell below an objective standard of reasonableness” and “that counsel
made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the
defendant by the Sixth Amendment.” Id. at 688, 687. Judicial scrutiny of counsel’s performance
is highly deferential. A court indulges a “strong presumption” that counsel’s conduct falls within
the “wide range” of reasonable professional assistance. Id. at 687. To establish prejudice, a
petitioner must demonstrate “a reasonable probability that, but for counsel’s unprofessional

1 errors, the result of the proceeding would have been different. A reasonable probability is a
2 probability sufficient to undermine confidence in the outcome.” Id. at 694. A court “asks whether
3 it is ‘reasonable likely’ the result would have been different. . . . The likelihood of a different
4 result must be substantial, not just conceivable.” Richter, 562 U.S. at 111–12 (citing Strickland,
5 466 U.S. at 696, 693).

6 When § 2254(d) applies, “[t]he pivotal question is whether the state court’s application of
7 the Strickland standard was unreasonable. This is different from asking whether defense
8 counsel’s performance fell below Strickland’s standard.” Richter, 562 U.S. at 101. Moreover,
9 because Strickland articulates “a general standard, a state court has even more latitude to
10 reasonably determine that a defendant has not satisfied that standard.” Knowles v. Mirzayance,
11 556 U.S. 111, 123 (2009) (citing Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). “The
12 standards created by Strickland and § 2254(d) are both ‘highly deferential,’ and when the two
13 apply in tandem, review is ‘doubly’ so.” Richter, 562 U.S. at 105 (citations omitted). Thus, “for
14 claims of ineffective assistance of counsel . . . AEDPA review must be ‘doubly deferential’ in
15 order to afford ‘both the state court and the defense attorney the benefit of the doubt.’” Woods v.
16 Donald, 135 S. Ct. 1372, 1376 (2015) (quoting Burt v. Titlow, 571 U.S. 12, 15 (2013)). When
17 this “doubly deferential” judicial review applies, the appropriate inquiry is “whether there is any
18 reasonable argument that counsel satisfied Strickland’s deferential standard.” Richter, 562 U.S.
19 at 105.

20 2. Analysis

21 “Generally, a defendant claiming ineffective assistance of counsel for failure to file a
22 particular motion must not only demonstrate a likelihood of prevailing on the motion, but also a
23 reasonable probability that the granting of the motion would have resulted in a more favorable
24 outcome in the entire case.” Styers v. Schriro, 547 F.3d 1026, 1030 n.5 (9th Cir. 2008). As set
25 forth in section IV(B), *supra*, Petitioner’s case was manifestly different from the cases in which
26 the Supreme Court has presumed juror prejudice based on publicity. Therefore, Petitioner has not
27 established that defense counsel would have prevailed on a motion to change venue.

28 Additionally, as discussed in sections IV(C)–(E), Petitioner has not established that the judge and

1 jury were biased or that the prosecutor engaged in misconduct. Accordingly, Petitioner has not
2 demonstrated that but for counsel’s deficient performance there is “a reasonable probability
3 that . . . the result of the proceeding would have been different.” Strickland, 466 U.S. at 694.
4 Therefore, under the “doubly deferential” AEDPA review of ineffective assistance of counsel
5 claims, the California Court of Appeal’s denial was not contrary to, or an unreasonable
6 application of, clearly established federal law, nor was it based on an unreasonable determination
7 of fact. The decision was not “so lacking in justification that there was an error well understood
8 and comprehended in existing law beyond any possibility for fairminded disagreement.” Richter,
9 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief on his fifth claim, and it
10 should be denied.

11 **G. Sufficiency of the Evidence**

12 In his sixth claim for relief, Petitioner appears to assert there was insufficient evidence to
13 support his conviction. (ECF No. 1 at 17). This claim was not raised on appeal. If a petitioner has
14 not sought relief in the highest state court for a claim raised in a federal petition, the Court
15 cannot proceed to the merits of that claim. 28 U.S.C. § 2254(b)(1). However, pursuant to 28
16 U.S.C. § 2254(b)(2), the Court may deny an unexhausted claim on the merits “when it is
17 perfectly clear that the [petitioner] does not raise even a colorable federal claim.” Cassett v.
18 Stewart, 406 F.3d 614, 624 (9th Cir. 2005) (adopting the standard set forth in Granberry v. Greer,
19 481 U.S. 129, 135 (1987)).

20 The Supreme Court has held that when reviewing a sufficiency of the evidence claim, a
21 court must determine whether, viewing the evidence and the inferences to be drawn from it in the
22 light most favorable to the prosecution, any rational trier of fact could find the essential elements
23 of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Viewing
24 the record in the light most favorable to the prosecution, a rational trier of fact could have found
25 true beyond a reasonable doubt that Petitioner planted the false bomb in front of the courthouse.
26 There was evidence presented at trial that Petitioner was not in custody at the time of the
27 incident, Petitioner was familiar with the bag in which the fake bomb was found, and the DNA
28 swabbed from the fake bomb’s black electrical tape matched Petitioner’s DNA profile. (1 RT

1 128–29, 133–34, 151; 2 RT 195–200). Although witnesses also testified that Petitioner claimed
2 to have overheard others bragging about the details of the fake bomb, Petitioner’s garage was
3 burglarized multiple times over the years, and Petitioner sold, gave away, and disposed of the
4 contents of the garage, (1 RT 135–36, 148–49, 156; 2 RT 230–31), a reviewing court “faced with
5 a record of historical facts that supports conflicting inferences must presume—even if it does not
6 affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of
7 the prosecution, and must defer to that resolution.” Jackson, 443 U.S. at 326.

8 Petitioner argues there was no evidence introduced that directly showed who planted the
9 false bomb. However, “[c]ircumstantial evidence and inferences drawn from it may be sufficient
10 to sustain a conviction.” Ngo v. Giurbino, 651 F.3d 1112, 1114 (9th Cir. 2011) (internal
11 quotation marks omitted) (quoting Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995)).
12 “When ‘determining the sufficiency of circumstantial evidence, the question is not whether the
13 evidence excludes every hypothesis except that of guilt but rather whether the trier of fact could
14 reasonably arrive at its conclusion.’” United States v. Doe, 842 F.3d 1117, 1120 (9th Cir. 2016)
15 (quoting United States v. Nevils, 598 F.3d 1158, 1165 (9th Cir. 2010)).

16 Petitioner also argues that he had an alibi in the form of Donna Ratliff’s testimony that he
17 had been at home with her the morning of the incident. (ECF No. 1 at 17). In light of the verdict,
18 the jury clearly did not find Donna Ratliff to be credible. “[U]nder Jackson, the assessment of
19 credibility of witnesses is generally beyond the scope of review.” Schlup v. Delo, 513 U.S. 298,
20 330 (1995). See Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (“A jury’s credibility
21 determinations are . . . entitled to near-total deference under Jackson.”).

22 Based on the foregoing, the Court finds it is “perfectly clear” that Petitioner does not
23 raise a colorable sufficiency of the evidence claim under Jackson. See Cavazos v. Smith, 556
24 U.S. 1, 2 (2011) (Jackson “makes clear that it is the responsibility of the jury—not the court—to
25 decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may
26 set aside the jury’s verdict on the ground of insufficient evidence only if no rational trier of fact
27 could have agreed with the jury.”). Accordingly, the Court may deny Petitioner’s sufficiency of
28 the evidence claim on the merits pursuant to 28 U.S.C. § 2254(b)(2).

1 **H. Certificate of Appealability**

2 Having found that Petitioner is not entitled to habeas relief, the Court now turns to the
3 question of whether a certificate of appealability should issue. See Rule 11, Rules Governing
4 Section 2254 Cases. A state prisoner seeking a writ of habeas corpus has no absolute entitlement
5 to appeal a district court’s denial of his petition, and an appeal is only allowed in certain
6 circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335–36 (2003). The controlling statute in
7 determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides:

8 (a) In a habeas corpus proceeding or a proceeding under section
9 2255 before a district judge, the final order shall be subject to
10 review, on appeal, by the court of appeals for the circuit in which
11 the proceeding is held.

12 (b) There shall be no right of appeal from a final order in a
13 proceeding to test the validity of a warrant to remove to another
14 district or place for commitment or trial a person charged with a
15 criminal offense against the United States, or to test the validity of
16 such person’s detention pending removal proceedings.

17 (c) (1) Unless a circuit justice or judge issues a certificate of
18 appealability, an appeal may not be taken to the court of
19 appeals from—

20 (A) the final order in a habeas corpus proceeding in which
21 the detention complained of arises out of process issued by
22 a State court; or

23 (B) the final order in a proceeding under section 2255.

24 (2) A certificate of appealability may issue under paragraph (1)
25 only if the applicant has made a substantial showing of the
26 denial of a constitutional right.

27 (3) The certificate of appealability under paragraph (1) shall
28 indicate which specific issue or issues satisfy the showing
 required by paragraph (2).

28 U.S.C. § 2253.

 If a court denies a habeas petition on the merits, the court may only issue a certificate of
appealability “if jurists of reason could disagree with the district court’s resolution of [the
petitioner’s] constitutional claims or that jurists could conclude the issues presented are adequate
to deserve encouragement to proceed further.” Miller-El, 537 U.S. at 327; Slack v. McDaniel,
529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of his case, he

1 must demonstrate “something more than the absence of frivolity or the existence of mere good
2 faith on his . . . part.” Miller-El, 537 U.S. at 338.

3 In the present case, the Court finds that reasonable jurists would not find the Court’s
4 determination that Petitioner’s federal habeas corpus petition should be denied debatable or
5 wrong, or that the issues presented are deserving of encouragement to proceed further. Petitioner
6 has not made the required substantial showing of the denial of a constitutional right. Therefore,
7 the Court declines to issue a certificate of appealability.

8 **V.**

9 **ORDER**

10 Accordingly, the Court HEREBY ORDERS that:

- 11 1. The petition for writ of habeas corpus is DENIED;
12 2. The Clerk of Court is DIRECTED to CLOSE the case; and
13 3. The Court DECLINES to issue a certificate of appealability.

14 IT IS SO ORDERED.

15 Dated: June 26, 2018

16 /s/ Eric P. Gray
17 UNITED STATES MAGISTRATE JUDGE