IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH GERMINO,

Petitioner, No. CIV S-08-3010 JAM DAD P

vs.

JOHN MARSHALL,

Respondent. FINDINGS AND RECOMMENDATIONS

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Petitioner is a state prisoner proceeding pro se with an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his amended habeas petition before this court petitioner challenges his 2004 judgment of conviction entered in the Amador County Superior Court for attempted murder in violation of California Penal Code § 187(a), assault by means of force likely to produce great bodily injury in violation of California Penal Code § 245(a)(1), kidnapping in violation of California Penal Code § 207(a), second degree robbery in violation of California Penal Code § 211, false imprisonment by violence in violation of California Penal Code § 236, aggravated mayhem in violation of California Penal Code § 205, and unlawfully driving or taking a vehicle in violation of California Vehicle Code § 10851(a).

Petitioner seeks federal habeas relief on the grounds that: (1) his private diaries were illegally seized and admitted into evidence at his trial; (2) his conviction was based solely

on the illegal admission of his private diaries into evidence; (3) his "vicinage rights" were violated; (4) his trial counsel rendered ineffective assistance; (5) his right to a fair trial was violated by prosecutorial misconduct; (6) his appellate counsel rendered ineffective assistance; and (7) he was improperly sentenced.

Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner's application for habeas corpus relief be denied.

PROCEDURAL BACKGROUND

On January 20, 2004 an Amador County Superior Court jury found petitioner guilty of attempted murder, assault, kidnapping, robbery, false imprisonment, aggravated mayhem, and vehicle theft. (Notice of Lodging Documents on April 1, 2009 (Doc. No. 14), Clerk's Transcript on Appeal (CT) at 570-77.) Additionally the jury found enhancement allegations for inflicting great bodily injury and the use of a deadly or dangerous weapon to be true. (Id. at 578-79.) Following his conviction, petitioner was sentenced on March 1, 2004, to state prison for an indeterminate term of life with the possibility of parole, plus a determinate term of 13 years. (Id. at 634-37.)

Petitioner appealed his judgment of conviction to the California Court of Appeal for the Third Appellate District. On May 26, 2006, the judgment of conviction was affirmed in a reasoned opinion. (Resp't's Lod. Doc. 4.) Petitioner then filed a petition for review with the California Supreme Court. (Resp't's Lod. Doc. 5.) On September 13, 2006, the California Supreme Court summarily denied that petition. (Resp't's Lod. Doc. 6.)

On November 21, 2007, petitioner filed a petition for writ of habeas corpus in the California Supreme Court. (Resp't's Lod. Doc. 7.) That petition was summarily denied on May 14, 2008. (Resp't's Lod. Doc. 8.) Petitioner thereafter filed a petition for writ of habeas corpus in the Amador County Superior Court on February 9, 2007. (Resp't's Lod. Doc. 9.) The Amador County Superior Court denied that petition in reasoned opinions on June 27, 2007 and

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October 15, 2007.[1] (Resp't's Lod. Doc. 10, 13.) On October 25, 2007, petitioner filed a petition for a writ of habeas corpus in the California Court of Appeal for the Third Appellate District. (Resp't's Lod. Doc. 11.) That petition was summarily denied on November 1, 2007. (Resp't's Lod. Doc. 12.)

On December 11, 2008, petitioner filed his original petition for a writ of habeas corpus in this court. (Doc. No. 1.) Thereafter, on December 24, 2008, petitioner filed the amended petition now before the court. (Doc. No. 5. - "Am. Pet.") Respondent filed an answer on April 1, 2009. (Doc. No. 15 - "Answer.") Petitioner filed his traverse on June 22, 2009. (Doc. No. 20 - "Traverse.")

FACTUAL BACKGROUND

In its unpublished memorandum and opinion affirming petitioner's judgment of conviction, the California Court of Appeal for the Third Appellate District provided the following factual summary:

> Defendant bludgeoned the victim with a manzanita club in the mobile home they shared in Columbia, a town located in Tuolumne County. Defendant took the keys to the mobile home, which the victim owned, and drove it to Reno, Nevada. While passing through Amador County, defendant dumped the victim's body on a turnout off Highway 49. The victim survived the attack, but suffered permanent injuries.
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> A jury convicted defendant of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)- subsequent undesignated statutory references are to this Code), assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), kidnapping (§ 207, subd. (a)), robbery (§ 211), false imprisonment by violence (§ 236), aggravated mayhem (§ 205), and vehicle theft (Veh. Code, § 10851, subd. (a)), as well as multiple enhancements for great bodily injury (§ 12022.7, subd. (a)) and use of a deadly or dangerous weapon (§ 12022, subd.

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[1] In its June 27, 2007 opinion the Amador County Superior Court rejected all but one of petitioner's state habeas claims. As to the remaining claim that the trial court improperly imposed an aggravated term at the time of sentencing, that court ordered respondent to file a return to the petition. (Resp't's Lod. Doc. No. 10.) Respondent did so and on October 15, 2007, the Amador County Superior Court rejected petitioner's sentencing claim. (Resp't's Lod. Doc. No. 13.)

> (b)(1)). The court imposed concurrent terms of life with the possibility of parole for the attempted murder and aggravated mayhem convictions, but imposed a section 654 stay on the latter. The court imposed a concurrent upper term sentence for the section 245, subdivision (a)(1) conviction, but issued a section 654 stay of this sentence as well. Defendant's aggregate sentence consisted of an indeterminate term of life with the possibility of parole plus a determinate term of 13 years.

(Resp't's Lod. Doc. 4 at 2 (hereinafter Opinion).)

ANALYSIS

I. Standards of Review Applicable to Habeas Corpus Claims

A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860, 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085. Habeas corpus cannot be utilized to try state issues de novo. Milton v. Wainwright, 407 U.S. 371, 377 (1972).

This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003). Title 28 U.S.C. § 2254(d) sets forth the following standards for granting habeas corpus relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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

See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v. Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001). If the state court's decision does not meet the criteria set forth in § 2254(d), a reviewing court must conduct a de novo review of a habeas petitioner's claims. Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008). See also Frantz v. Hazey, 513 F.3d 1002, 1013 (9th Cir. 2008) (en banc) ("[I]t is now clear both that we may not grant habeas relief simply because of § 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering de novo the constitutional issues raised.").

The court looks to the last reasoned state court decision as the basis for the state court judgment. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). If the last reasoned state court decision adopts or substantially incorporates the reasoning from a previous state court decision, this court may consider both decisions to ascertain the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). Where the state court reaches a decision on the merits but provides no reasoning to support its conclusion, a federal habeas court independently reviews the record to determine whether habeas corpus relief is available under § 2254(d). Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002). When it is clear that a state court has not reached the merits of a petitioner's claim, or has denied the claim on procedural grounds, the AEDPA's deferential standard does not apply and a federal habeas court must review the claim de novo. Nulph v. Cook, 333 F.3d 1052, 1056 (9th Cir. 2003).

II. Petitioner's Claims

A. Procedural Default

Respondent asserts that federal habeas review of all of petitioner's claims except his prosecutorial misconduct (claim five) and sentencing error (claim seven) are procedurally

barred. (Answer at 19.[2]) Respondent notes that petitioner raised his other five claims (claims one through four and six) in his February 9, 2007, state habeas petition filed with the Amador County Superior Court. Respondent argues that court denied relief citing the decision in In re Dixon, 41 Cal.2d 756, 759 (1953) and stating that petitioner should have raised these claims on appeal but failed to do so. (Id. at 21-22.) Respondent contends that the Amador County Superior Court's ruling in this regard constitutes a procedural bar which precludes this court from addressing the merits of the specified claims.

State courts may decline to review a claim based on a procedural default. Wainwright v. Sykes, 433 U.S. 72, 81-82 (1977). As a general rule, a federal habeas court "'will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" Calderon v. United States District Court (Bean), 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991)). The state rule for these purposes is only "adequate" if it is "firmly established and regularly followed." Id. (quoting Ford v. Georgia, 498 U.S. 411, 424 (1991)). See also Bennett v. Mueller, 322 F.3d 573, 583 (9th Cir. 2003) ("[t]o be deemed adequate, the state law ground for decision must be well-established and consistently applied.") The state rule must also be "independent" in that it is not "interwoven with the federal law." Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000) (quoting Michigan v. Long, 463 U.S. 1032, 1040-41 (1983)). Even if the state rule is independent and adequate, the challenged claims may be reviewed by the federal court if the petitioner can show: (1) cause for the default and actual prejudice as a result of the alleged violation of federal law; or (2) that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 749-50.

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[2] Page number citations such as this one are to the page number reflected on the courts CM/ECF system and not to page numbers assigned by the parties.

A reviewing court need not invariably resolve the question of procedural default prior to ruling on the merits of a claim where the default issue turns on difficult questions of state law. Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997); see also Busby v. Dretke, 359 F.3d 708, 720 (5th Cir. 2004). Under the circumstances presented here, this court finds that petitioner's claims can be resolved more easily by addressing them on the merits. Accordingly, this court will assume that petitioner's claims are not procedurally defaulted.

B. Admission of Private Diaries

Petitioner claims that his private diaries were illegally seized "without probable cause." (Am. Pet. at 8.) In addition, petitioner argues that "extrajudicial statements" from those diaries were admitted into evidence before all the elements of the charged crimes were established and that doing so denied him "a proper recourse to cross-examine." (Id.)

The United States Supreme Court has held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone v. Powell, 428 U.S. 465, 494 (1976).

Here, petitioner argues that he did not have an opportunity for full and fair litigation of his Fourth Amendment claim because the trial judge denied defense counsel's written and oral objections to introduction of the diaries into evidence without making a "decision on the oral objections" or a "hear[ing] [on] the written objection[s]." (Traverse at 8.) First, there is no factual basis to support petitioner's bare allegations in this regard. The portions of the record that petitioner cites in support of this claim relate to his preliminary hearing, not his trial. At the preliminary examination, then-defense counsel objected to the admission of petitioner's journals into evidence on the grounds that their admission would violate petitioner's right to privacy, his constitutional right not to incriminate himself and pursuant to California Evidence Code § 352. (CT at 102-04; 170-71.) The court overruled those objections at the preliminary examination. (CT at 171.) Prior to trial, defense counsel sought to exclude from

evidence only portions of petitioner's journals on relevance and Evidence Code § 352 grounds. (See generally RT 345-425). The trial court ruled on those objections, making various redactions to the journal entries in response to the defense objections. (Id.) As petitioner concedes, none of his counsel ever filed a motion to suppress the journals from admission into evidence pursuant to California Penal Code § 1538.5 even though they certainly were provided the opportunity to do so.[3] (Traverse at 8.) Of course, claims of erroneous evidentiary rulings under state law by the trial court cannot form an independent basis for federal habeas relief.

Moreover, even assuming arguendo that petitioner's suggestion that the state court failed to properly rule on his objections to the admission of the journals into evidence were true, his Fourth Amendment claim presented in this federal habeas petition would still be without merit. This is so because "[t]he relevant inquiry is whether petitioner had the opportunity to litigate his [Fourth Amendment] claim, not whether he did in fact do so or whether the claim was correctly decided." Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996). See also Gordon v. Duran, 895 F.2d 610, 613 (9th Cir. 1990); Locks v. Sumner, 703 F.2d 403, 408 (9th Cir. 1983), cert. denied, 464 U.S. 933 (1983).

Here, petitioner clearly had the opportunity to litigate his Fourth Amendment claim both before the trial court and on appeal. There is no evidence before this court indicating that petitioner was denied a full and fair opportunity to litigate any Fourth Amendment claim he wished to present in state court. Accordingly, this claim for relief is barred in this federal habeas proceeding. Stone, 428 U.S. at 494.

With respect to petitioner's argument that his diaries were improperly admitted into evidence at his trial, absent some federal constitutional violation, a violation of state law

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[3] Petitioner has failed to present any persuasive argument that a motion to suppress evidence directed at his journals would have had any possibility of success since the probable cause showing in the search warrant application was based in large part on petitioner's recorded conversation with his son over the jail telephone in which petitioner told his son of the nature of the journals and directed him to retrieve them. (See RT at 177-79.)

regarding the admissibility of evidence does not provide a basis for habeas relief. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Rhoades v. Henry, 596 F.3d 1170, 1177 n.5 (9th Cir. 2010). A state court's evidentiary ruling, even if erroneous, is grounds for federal habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due process. Duncan v. Ornowski, 528 F.3d 1222, 1244 n. 10 (9th Cir. 2008); Drayden v. White, 232 F.3d 704, 710 (9th Cir. 2000); Spivey v. Rocha, 194 F.3d 971, 977-78 (9th Cir. 1999); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991) ("the issue for us, always, is whether the state proceedings satisfied due process; the presence or absence of a state law violation is largely beside the point"). In this regard, the United States Supreme Court has admonished that the category of infractions that violate "fundamental fairness" has been defined very narrowly. Estelle, 502 U.S. at 72. See also Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (Noting that the "Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process.") Thus, a habeas petitioner "bears a heavy burden in showing a due process violation based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005), amended by 421 F.3d 1154 (9th Cir. 2005).

A writ of habeas corpus will be granted due to the erroneous admission of evidence "only where the 'testimony is almost entirely unreliable and . . . the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.'" Mancuso v. Olivarez, 292 F.3d 939, 956 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 899 (1983)). Evidence violates due process only if "there are no permissible inferences the jury may draw from the evidence." Jammal, 926 F.2d at 920. Even then, evidence must "be of such quality as necessarily prevents a fair trial." Id. (quoting Kealohapauole v. Shimoda, 800 F.2d 1463 (9th Cir. 1986)).

Here, petitioner has not met his heavy burden of showing a due process violation based on the admission of his diary entries into evidence at his trial. While he generally objects

to their introduction petitioner does not claim that the statements made in his diaries were unreliable, admittedly a difficult argument as he was the author of those statements. Moreover, petitioner does not argue that there was no permissible inferences the jury could have drawn from the statements in his diaries. Even if petitioner offered such an argument it would be meritless since the statements included a precise retelling of petitioner's thoughts and actions leading up to, during and after the time of the alleged crimes, from which the jury could have drawn the reasonable inference of petitioner's guilt. (Reporter's Transcript On Appeal ("RT") at 686-94.)

Accordingly, for the reasons set forth above, petitioner is not entitled to federal habeas relief with respect to this claim.

C. Conviction Based Solely on Diaries

Petitioner asserts that the "only evidence . . . presented against petitioner was his uncorroborated extrajudicial statements" found in his "illegally seized private diaries." (Am. Pet. at 13.) Petitioner argues that there was no evidence introduced at his trial to support his conviction other than his "extrajudicial statements" found in the diaries. (Id. at 14.)

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). There is sufficient evidence to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). "[T]he dispositive question under Jackson is 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir. 2004) (quoting Jackson, 443 U.S. at 318). "A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging the sufficiency of the evidence used to obtain a state conviction on federal due process grounds." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In order to grant the writ, the federal habeas court must find that the decision of the state court

reflected an objectively unreasonable application of Jackson and Winship to the facts of the case. Id. at 1275 & n. 13.

Portions of petitioner's diaries were read to the jury, including the following incriminating entries by petitioner[4]:

> We got back to camp yesterday about 4:00. I got my hand saw and Ginger and I went up to the hillside where I cut some 12 or 14 inch lengths of manzanita specifically for selecting one to use as a club to beat this mother-fucker on the head with, should I decide to go through with my crime.
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> * * *
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> I thought today of how, because I've never hit anyone in the head before, I don't really know what to expect. I hope to knock him unconscious so I can bound him with rope. If I kill him, don't want to do it right away because I don't want to haul around a dead body until I find a place to dump it.
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> * * *
>
> I will get revenge on this pig fucker yet for he betrayed my friendship, and maybe soon I think about how I might wait until after dark when he's all folded up in his cramped corner, beat him with this hard stick of manzanita, pack the truck, and leave.
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> * * *
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> I did it. I smashed his skull with a manzanita club, and took the truck, and I'm at Kruger's. He'll meet me here this evening. It's 2:10 now. It was brutal, and the meanest, coldest thing I've ever done. I'm even in a little shock. Ginger, I don't think, is sure what happened. He came in about 11:30 last night lit as high as a kite. He folded up in his corner, and I thought that was my time, but I chickened out. When he woke me up at 3:00 o'clock this morning to take a beer and booze piss, I was really mad. After he climbed in bed, I stewed. Then I got up, had a cigarette, and thought I'll nail him in his sleep. It was only light enough in here to see that he was lying close to the outside edge facing me which gave me plenty of room to swing the club as hard as I could. I stewed for several more minutes, and then just did it. I cracked him several times, and he snorted real loud, like a snore. I swung a few more times, and still he snorted continuously, so I just put my stuff in the

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[4] In arguing in support of this claim petitioner repeats his contention that his diaries were improperly admitted into evidence at trial. The undersigned has rejected that argument above.

truck that was in the shed behind us, and unhooked the power and drain hose, and drove off.

He moaned and grunted continuously. A few miles down the road he fell off the bunk with his bloody head down in the well by the door with his legs up in the air resting against the seat where I sit. I had the curtain up, and could only hear him. Everything on the table scattered, and there was blood splashed, but not everywhere. I think it was about 4:00 when I hit him, and only a few minutes later when I left. I pulled over as soon as I could after he fell, laid out my foam pad, and laid him on it, then I drove off. There was a pool of blood in the well. He kept moaning and struggling to get up, but didn't have the strength or coordination.

It began to get light out about the time I made San Andreas. I'll drop him off somewhere so somebody might see him and call for help, I thought. I waited until this side of Dry Town, I think, and pulled him out of the truck onto the shoulder and drove off. He'd shit all over, I think, before Jackson. A few minutes before Placerville I threw the foam pad out with the shit and blood. He seemed to want to fight and struggle, so I pulled him out, and was still moaning when I drove off.

I don't know if he'll live, but if he does, I can't imagine he'll ever be the same. I guess I'm still really fucking mad that I don't feel as bad as I expect a person should feel after such a brutal attack, and probably most of my anger still burning is jealousy that he was doing so well while I was doing so poorly. But still, I justify it because of how betrayed I felt and have felt over tens and tens of incidents over many years.

In Placerville I stopped at a supermarket parking lot to clean up the blood and shit. When I came back in the truck, a load of stuff after hitting him, there was an unfamiliar and sickening odor which must have come from his skull. It seems to still be in the truck even after cleaning up as best I could. His pillow and sheets are still up there, though, and they have a lot of blood. I don't know yet how or where I will discard them so as not to draw suspicion, but I can't leave them in there long.

* * *

I stopped in Sutter Hill for gas. He was still in the truck. I got out his wallet, and only found $19 until, when in Placerville, I checked hidden pockets and found only one $100 bill. The son-of-a-bitch has blown, drank up, and pissed away hundreds and hundreds of dollars in the last month. And when I checked for pot, he smoked all whatever he had, so I'm not set very well, maybe $120. I forgot to say that all he was wearing was a T-shirt.

* * *

> Boy it's hard not to think about this. It's about all I've thought about since. After I parked at Kruger's, I went looking for a pay phone to call him.
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> I dug deeper into his wallet and found two more C notes, so I have $300. And I counted his food stamps, and there are $194.
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> * * *
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> I probably shouldn't have been so brutal. I suppose I'd rather see him live. I don't know what I would have felt had I killed him. This is bad enough.
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> * * *
>
> I started yesterday afternoon working on a phony journal that says I hitchhiked over here when I got disgusted with old pig fuck. If I get called on anything, maybe this will prove an alibi, who knows?
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> * * *
>
> I still think of old pig fuck often, but every time I do it's with clenched teeth and anger. I feel no remorse or guilt for what I did. Fuck that asshole.

(RT at 672-98.)

In addition to these journal entries the jury heard testimony from Kenneth Kruger, who testified that petitioner visited him at his studio in Reno, Nevada immediately after the alleged crimes were committed. (Id. at 515.) According to Kruger, petitioner was driving the victim's motor home. (Id. at 519.) Kruger testified that petitioner told him that he had attacked the victim and that there was blood inside the motor home. (Id. at 516-19.) A neighbor also testified to seeing petitioner and the motor home at Kruger's during this time period. (Id. at 539-44.)

The jury also heard testimony from Sergeant Lawrence of the Amador County Sheriff's Office that the victim was found early in the morning on a dirt turnout on Highway 49 between Sutter Creek and Amador City. (Id. at 546-47.) When found, the victim was wearing only a T-shirt and was covered in blood and feces. (Id. at 548.) A piece of foam rubber was also found at the scene. (Id. at 551.) Sergeant Lawrence testified that several years after the attack,

after the investigation "went cold" and was suspended, police discovered the victim's motor home at a wrecking yard in Reno, Nevada. (Id. at 555-57.) The jury heard that found inside the motor home were a pillow with a very large blood stain, a 14-inch piece of manzanita wood, and a foam rubber pad similar to that found at the scene where the victim was discovered. (Id. at 566, 656.) The motor home was traced back to Kruger's studio in Reno where petitioner had stayed for a brief time after the attack. (Id. at 557-59.) Although petitioner's entries in his own diaries were powerful evidence against him, the additional evidence linking petitioner to the motor home and the incriminating evidence eventually found by law enforcement inside that motor home provided compelling evidence of petitioner's guilt as well.

Viewing this evidence in the light most favorable to the verdict, the undersigned concludes that there was sufficient evidence introduced at petitioner's trial from which a rational trier of fact could have found beyond a reasonable doubt that petitioner was guilty of the crimes he was convicted of. Accordingly, petitioner is not entitled to federal habeas relief with respect to his claim that the evidence introduced at his trial was insufficient to support his conviction.

D. Vicinage Rights

Petitioner next claims that all the alleged crimes were committed outside of Amador County where he was tried. (Am. Pet. at 9.) Petitioner asserts, therefore, that Amador County did not have jurisdiction to prosecute him. (Traverse at 23.)

The last reasoned state court decision on this claim is from the California Court of Appeal. That court specifically rejected petitioner's lack of jurisdiction argument, reasoning as follows:

> Prior to submission of the case to the jury, defendant moved to dismiss the counts alleging attempted murder, assault by means of force likely to produce great bodily injury, and aggravated mayhem because they were completed in Tuolumne County, thereby depriving Amador County of territorial jurisdiction of these offenses. The trial court denied the motion.
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> On appeal, defendant renews his venue argument with respect to the assault by means of force likely to produce great bodily injury

and aggravated mayhem convictions, and adds that the court's ruling resulted in a denial of his due process rights. Noting that the general venue statute states, "the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed" (§ 777), defendant posits, "These crimes were completed in Tuolumne County, and there is no statutory exception which grants Amador County venue or territorial jurisdiction."

Contrary to defendant's assertion, there is ample authority to uphold venue on the two challenged counts. Section 781 provides: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory."

"'Section 781 constitutes an exception to the rule when acts or effects of an offense occur in multiple counties. Section 781 is remedial and, thus, we construe the statute liberally to achieve its purpose of expanding criminal jurisdiction beyond rigid common law limits. [Citations.] We therefore interpret section 781 in a commonsense manner with proper regard for the facts and circumstances of the case rather than technical niceties. [Citation.] [¶] Courts have construed the phrase "requisite to the consummation of the offense" to mean requisite to achieving the offender's unlawful purpose. [Citation.]'" People v. Gutierrez (2002) 28 Cal.4th 1083, 1118 (Gutierrez).) "On review, a trial court's determination of territorial jurisdiction will be upheld as long as there is 'some evidence' to support its holding. [Citations.]" (Id. at p. 1117.)

In light of this rule of liberal construction, it is not surprising that by 1940 the court of appeal had rejected the argument defendant makes herein, namely, that the act committed in the territorial jurisdiction in which the criminal action is prosecuted must be one which involves a necessary element of the crime. As noted in the later case of People v. Williams (1973) 36 Cal.App.3d 262 (Williams), the court of appeal "said that such an interpretation 'would completely disregard the phrase "or the acts or effects thereof constituting or requisite to the consummation of the offense" ' " contained in the section. Obviously, the phrase, "'or requisite to the consummation of the offense" means requisite to the completion of the offense-to the achievement of the unlawful purpose-to the ends of the unlawful enterprise. By the use of the word "consummation" the Legislature drew a distinction between an act or an effect thereof which is essential to the commission of an offense, and an act or effect thereof which, although unessential to the commission of the offense, is requisite to the completion of the offense - that is, to the achievement of the unlawful purpose of

the person committing the offense.'" (Williams, supra, 36 Cal.App.3d at p. 268.)

In Williams, the court upheld venue in Ventura County on an embezzlement charge against a gasoline truck driver who misappropriated 2,000 gallons of fuel in Los Angeles County. The driver thereafter delivered the rest of the fuel to a legitimate customer in Ventura County, where he falsified the delivery ticket to show he had delivered the entire load in Ventura. The falsification of the ticket was not essential to the crime, but the court upheld jurisdiction, writing: "Under the circumstances of this case the trip to Ventura County and falsification of the delivery records there were so closely connected in time to the misappropriation of the gasoline, and so obviously required if appellant was to successfully complete his run, that Ventura County had jurisdiction under the above interpretation . . . ." (Williams, supra, 36 Cal.App.3d at p. 269.)

Applied to the present case, Williams supports the conclusion that venue was proper in Amador County for the charges of assault with intent to commit great bodily injury and aggravated mayhem. To begin with, venue for the greater attempted murder charge was proper in Amador County because defendant's decision to dump the victim's prostrate body there was the final step in the murder attempt, and effectively brought his crimes of violence against the victim to a close.[FN1] The act also served to increase the chances that defendant would evade detection not only for the attempted murder, but for the section 205 and 245, subdivision (a)(1) offenses. In applying section 654 to these two offenses, the court expressly found that the crimes were part of an indivisible course of conduct that included the attempted murder. The crimes also were of the same class and were properly tried together. (§ 954; People v. Britt (2004) 32 Cal.4th 944, 954.) Furthermore, the section 205 and 245, subdivision (a)(1) offenses were committed to facilitate the kidnapping and vehicle theft, which were crimes properly tried in Amador County.[FN2] In these circumstances, logic and common sense dictate that all of the charges should have been tried in a single county, as they were, rather than split into duplicative trials in different counties, thereby taxing the public fisc and forcing defendant to station his defenses on two fronts rather than one.

> FN1. Section 790, subdivision (a) extends venue in murder cases to the county where the victim's body is found. While defendant here was charged with attempted murder only, section 790's alternative venue provision reflects a policy determination by the Legislature that the discovery of the victim's body is a sufficient basis to invoke the territorial jurisdiction of the county in which the discovery is made. This policy would support venue in Amador

> County. Its significance is not diminished merely because the victim herein was fortunate enough to have survived defendant's murder attempt.
>
> FN2. Kidnapping is a continuous offense and venue extends to every county through which the victim is transported. (§ 784; People v. Simon (2001) 25 Cal.4th 1082, 1094, fn. 6 [the "offense of kidnapping, false imprisonment, or seizure for slavery may be tried in the county in which the offense was committed, or the county out of which the person was taken, or a county 'in which an act was done by defendant in instigating, procuring, promoting, or aiding in the commission of the offense' "].) Similarly, venue for the theft offense is proper in a county into which the property is taken. (§ 786, subd. (a); People v. Simon, supra, 25 Cal.4th at p. 1094 ["section 786 has provided, since the original enactment of the Penal Code in 1872, that when property taken by burglary, robbery, theft, or embezzlement in one county has been brought into another county, the trial of the initial burglary, robbery, theft, or embezzlement offense may be held in either county"].)

Defendant's reliance on Gutierrez, supra, 28 Cal.4th 1083 is unavailing. In Gutierrez, the defendant murdered a woman in Kern County, stuffed her body in the back of her van, and drove to his ex-wife's residence in San Bernardino County, where he shot and killed her lover and kidnapped his ex-wife. (Id. at pp. 1107-1109.) Thereafter, while driving in Riverside County, defendant attempted to kill a patrol officer who pulled him over because one of the van's headlamps was out. (Id. at pp. 1109-1110.) Defendant was arrested, and the van impounded and towed to a storage facility in San Bernardino County, where the murdered woman's body was discovered in the van. (Id. at p. 1110.) Defendant was tried on all charges in San Bernardino County, including the attempted murder of the officer in Riverside County. (Id. at pp. 1106-1107.)

The Supreme Court held that venue was proper in San Bernardino County for the attempted murder of the patrol officer, even though that criminal act took place entirely in Riverside County. The court reasoned that the kidnapping of the ex-wife was a continuing offense, and that the attempted murder was undertaken to avoid detection. (Gutierrez, supra, 28 Cal.4th at pp. 1117-1118.) As applied to the instant action, Gutierrez stands for the proposition that venue properly would lie in the county where the kidnapping occurred - Tuolumne County - for crimes committed thereafter in Amador County that prolonged the kidnapping. Gutierrez, though, did not have occasion to consider the converse - whether venue would have been proper in Riverside County for the crimes committed in Kern or San Bernardino counties - which would be analogous to the fact pattern in the present case. Since cases are not authorities for propositions not

> considered (People v. Superior Court (Zamudio) (2000) 23 Cal.4th 183, 198), Gutierrez does not assist defendant.

(Opinion at 3-8.)

"The vicinage clause of the Sixth Amendment guarantees an accused 'the right to a . . . jury of the . . . district wherein the crime shall have been committed, which district shall have been previously ascertained by law.'" Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004) (quoting U.S. CONST. AMEND. VI.), cert. denied 543 U.S. 1191 (2005). As part of the Bill of Rights, at the time of its adoption the Sixth Amendment applied only to the federal government and thus only to federal prosecutions. (Id.) Later, certain rights guaranteed by the Bill of Rights were extended to protect against state action by the Fourteenth Amendment Due Process Clause. (Id.) However, [n]ot all of the rights guaranteed by the Sixth Amendment were incorporated; rather, only those rights that are 'fundamental to the American scheme of justice' or 'essential to a fair trial' apply to the states." (Id.) (quoting Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

Neither the U.S. Supreme Court or the Ninth Circuit Court of Appeals have decided whether the Fourteenth Amendment incorporated the Sixth Amendment's vicinage right. Stevenson, 384 F.3d at 1071. The California Court of Appeal's conclusion that there was a sufficient connection between the crimes with which petitioner was charged and Amador County so as to permit a trial by an Amador County jury is, therefore, not contrary to, or an unreasonable application of, clearly-established federal law. Stevenson, 384 F.3d at 1072; see also Olagues v. Brown, No. C 07-3918 JSW (PR), 2010 WL 3749422, at *5-6 (N.D. Cal. Sept. 23, 2010) (rejecting petitioner's federal habeas claim that the Vicinage Clause of the Sixth Amendment was violated in his state court prosecution). Accordingly, petitioner is not entitled to federal habeas relief with respect to this claim.

E. Ineffective Assistance of Counsel

Petitioner claims that his trial counsel rendered ineffective assistance of counsel by: (1) failing to conduct reasonable pre-trial investigation and trial preparation; (2) failing to "put

the prosecution's case to a true adversarial test"; and (3) failing to present evidence of mitigating circumstances at his sentencing. (Am. Pet. at 9-11.)

The last reasoned state court decision in response to this claim is that of the Amador County Superior Court. That court denied habeas relief as to this claim, finding that petitioner had "failed to demonstrate prejudice, as a result of any alleged ineffective assistance of counsel." (Lod. Doc. 10 at 3.) After setting forth the applicable legal principles, the court will address each aspect of petitioner's ineffective assistance of counsel claim in turn below.

1. Legal Standards

The Sixth Amendment guarantees the effective assistance of counsel. The United States Supreme Court set forth the test for demonstrating ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). To support such a claim, a petitioner must first show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 687-88. After a petitioner identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521 (2003). Second, a petitioner must establish that he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. See also Williams, 529 U.S. at 391-92; Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000). A reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be

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followed." Pizzuto v. Arave, 280 F.3d 949, 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 697).

In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption that counsel's performance falls within the 'wide range of professional assistance.'" Kimmelman, 477 U.S. at 381 (quoting Strickland, 466 U.S. at 689). There is, in addition, a strong presumption that counsel "exercised acceptable professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland, 466 U.S. at 689).

2. Failing to Conduct Reasonable Pre-Trial Investigation and Trial Preparation

Petitioner claims that his trial counsel rendered ineffective assistance by failing properly investigate and prepare for trial. (Am. Pet. at 10.) Specifically, petitioner argues that his trial counsel failed to review medical reports, photographs and petitioner's journals, and did not interview the victim until the day before trial commenced. (Id.) Petitioner asserts that his trial counsel acknowledged several times on the first day of the trial that he "was not prepared and was concerned his client might suffer the consequences." (Id.)

Defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "This includes a duty to . . . investigate and introduce into evidence records that demonstrate factual innocence, or that raise sufficient doubt on that question to undermine confidence in the verdict." Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (citing Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999)). In this regard, it has been recognized that "the adversarial process will not function normally unless the defense team has done a proper investigation." Siripongs v. Calderon (Siripongs II), 133 F.3d 732, 734 (9th Cir. 1998) (citing Kimmelman v. Morrison, 477 U.S. 365, 384 (1986)). Therefore, counsel must, "at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." Hendricks v. Calderon, 70 F.3d 1032, 1035 (9th Cir. 1995) (quoting

Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) (internal citation and quotations omitted). On the other hand, where an attorney has consciously decided not to conduct further investigation because of reasonable tactical evaluations, his or her performance is not constitutionally deficient. See Siripongs II, 133 F.3d at 734; Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998); Hensley v. Crist, 67 F.3d 181, 185 (9th Cir. 1995). "A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'" Wiggins, 539 U.S. at 533 (quoting Strickland, 466 U.S. at 691). See also Kimmelman, 477 U.S. at 385 (counsel "neither investigated, nor made a reasonable decision not to investigate"); Babbitt, 151 F.3d at 1173-74. A reviewing court must "examine the reasonableness of counsel's conduct 'as of the time of counsel's conduct.'" United States v. Chambers, 918 F.2d 1455, 1461 (9th Cir. 1990) (quoting Strickland, 466 U.S. at 690). Furthermore, "'ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.'" Bragg, 242 F.3d at 1088 (quoting Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986)).

With respect to petitioner's allegations concerning his trial counsel's failure to review the medical reports, photographs, and petitioner's own journals, and the alleged failure to interview the victim at an earlier time, petitioner has not alleged what a review of these documents or an earlier interview of the victim would have uncovered or how it would have favorably impacted the result in his case. Petitioner does not state how his decision to proceed to trial or his defense was harmed by his trial counsel's alleged deficiencies. As such petitioner has failed to allege, let alone establish, prejudice. See Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001) (no ineffective assistance where petitioner did "nothing more than speculate that, if interviewed," a witness might have given helpful information); Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995) ("conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief"); United States v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987) (appellant failed to satisfy the prejudice prong of an ineffective assistance claim because he offered no indication of what potential witnesses would have testified to or how their testimony

might have changed the outcome of the hearing); Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986) (no ineffective assistance where defendant fails to state what additional information would be gained by discovery he claims was necessary and record shows trial counsel was well-informed).

Moreover, as noted above, "'ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.'" Rhoades v. Henry, 611 F.3d 1133, 1142 (9th Cir. 2010) (quoting Rios v. Rocha, 299 F.3d 796, 808-09 (9th Cir. 2002). Here, the prosecution's case against petitioner was exceptionally strong, as demonstrated by the evidence reviewed above. Indeed, in denying defense counsel's motion for a new trial the trial judge noted that he had "never seen evidence stronger in any criminal case in [his] life." (RT at 992.)

With respect to petitioner's claim that his trial counsel was not adequately prepared for trial, petitioner has cited instances in which his trial counsel allegedly expressed concern about his readiness and ability to prepare for petitioner's trial in light of extenuating circumstances and a heavy case load. For example, petitioner's trial counsel stated at a hearing one week before petitioner's trial commenced that:

> For the record, what I told the Court is unfortunately over the weekend my investigator gave me her resignation. She didn't give me any notice. That has affected me. In addition to that, she had been sick last week and that's affected my ability to complete some investigation that was warranted and needs to be finished. In addition to that the additional problems that I've had is for essentially the most of the month of December and the first week in January one of my attorneys was out. I was having to assist to cover some of his cases. I had to go out to Mule Creek twice, cover video calendar. I apologize. The nature of this business sometimes gets very hurried, last minute. I'm sure [petitioner] doesn't like it, but it is the situation that I'm operating under. What I've done, I've made arrangements for a licensed private investigator to complete the investigation. That gentleman accompanied me to the interview of [petitioner] to kind of get a picture of what I want him to do. We did that today. The investigation will hopefully be complete by Friday is what we're hoping.
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> * * *

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> I have done my - - I have done my utmost best to be prepared. This case has certain complexities in terms of voluminous amounts of reports as the Court aware (sic), client journals. There are factual issues that I've attempted to grasp. There are also legal issues regarding the admissibility of certain (sic) of the evidence, the elements of the offenses, but done (sic) everything that I can in order to be prepared at this point. My client is not waiving time. I am doing everything I can to be sure that I'm ready. I am doing that, that's my obligation to my client, obligation (sic) that I take very seriously. So at this point in time I believe I will be ready by Tuesday. That I will represent my client in a zealous manner.

(RT at 313-15.) In rejecting a plea bargain offer that was on the table at that time and responding to his lawyer's statement, petitioner told the trial judge that "I have all the confidence I need in [trial counsel] to represent me in due time." (Id. at 316.)

Petitioner also points to another aspect of the record in support of this claim. Just prior to the commencement of trial, defense counsel announced the possibility of calling additional witnesses to testify as to petitioner's good character. (Id. at 411-25.) In response, the deputy district attorney came forward with approximately twenty pages of petitioner's voluminous personal journal which the prosecutor indicated he would seek to enter into evidence to rebut any such character testimony. (Id.) Defense counsel objected, arguing that petitioner himself had requested and been denied copies of all sixty volumes of his journals that were in the custody of law enforcement and yet these particular pages were unfairly being brought forward by the prosecution on the eve of trial. (Id.) The deputy district attorney countered that petitioner's previous attorneys had not made a discovery request for the production of copies of all sixty journal volumes, that current counsel had been free to review all of the journals and that the prosecution had no intention of offering the twenty pages in question into evidence until the defense announced the possibility of calling character witnesses at the last minute.[5] (Id.) The

[5] As indicated during this exchange, and as will be discussed further below, petitioner had been represented by two other attorneys before trial counsel substituted into the case. (RT at 416; see also RT 354-55.) Petitioner had filed a Marsden motion against both which resulted in his first two appointed counsel being replaced. (RT at 354.) Following trial counsel's entry into the case, the defense at some point elected to pursue the strategy of withdrawing the previously entered time-waiver thereby requiring that petitioner's trial be "short set." (RT at 417.)

trial judge then denied defense counsel's request for production of copies of all sixty journal volumes and for a jury instruction informing jurors that the prosecution had belatedly provided discovery they were required to produce. (Id. at 423-25.) In this context, and in response to the trial court's ruling, defense counsel stated:

> Like I said, I'm handling 450 felony cases. According to the American Bar Association, I'm only supposed to handle 150. I do my best. This is a big case.
>
> * * *
>
> You know, but could I have spent more time? Absolutely. And it's unfortunate that [petitioner] is going to be punished for that.

(Id. at 424-25.)

While petitioner has cited these statements by his trial counsel as evidence that counsel was not prepared, in order to establish prejudice petitioner must show that his trial counsel's errors were so serious as to deprive him of a fair trial with a reliable result. Strickland, 466 U.S. at 687. Here, petitioner has not alleged any actual errors or deficient performance by his counsel during the trial. Rather, he has merely offered conclusory allegations that his trial counsel was not prepared. "Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).

Accordingly, for the above reasons, petitioner is not entitled to federal habeas relief on this aspect of his ineffective assistance of counsel claim.

3. Failing to "Put the Prosecution's Case to a True Adversarial Test"

Petitioner next asserts that his trial counsel "failed to put the prosecution's case to a true adversarial test" because counsel's cross-examination "amounted to no more than getting these witnesses to reiterate" their direct examination testimony. (Am. Pet. at 10.) Petitioner also alleges that his trial counsel failed to call rebuttal witnesses who, according to petitioner, "could have shown the victim's injuries were not life threatening." (Id.) Petitioner also accuses his trial counsel of failing to investigate the search warrant authorizing the search for and seizure of his

journals, which petitioner claims would "have proven [the warrant] deficient in probable cause on which to issue," and of failing to move to suppress the journals. (Id.) Petitioner also asserts that his trial counsel never called a psychologist who examined petitioner or the person who found the victim to testify at trial. (Id. at 11.) According to petitioner, the psychologist witness would have testified that petitioner "did not premeditate the charge of first degree attempted murder" and the other witness would have testified that the victim "was not hidden from sight as testified by the prosecution." (Id.) In short, petitioner argues that his trial counsel "failed to plan, prepare, and present any defense at all." (Id.)

Petitioner's broad brush assertion that his trial counsel failed to "present any defense at all" is unpersuasive. Certainly petitioner does not specify what defense he contends his trial counsel should have proffered in the face of petitioner's own damning admissions which appeared in his journal. Moreover, in a motion that petitioner himself attempted to file with the trial court, and which was read into the record by the court at petitioner's sentencing hearing, petitioner acknowledged that he had pleaded with his trial counsel to rest prior to putting on a defense, stating:

> On January 19th even before the defense would have presented its case in my trial[,] my attorney . . . informed me that my daughter . . . had been subpoenaed . . . and was in town prepared to testify against me.
>
> Since she knew nothing of the offenses I was being tried on the only purpose for her as a prosecution witness would have been to defame my character on unfounded accusations of sexual misconduct.
>
> It was established during that trial before [my daughter] being interviewed by the prosecution that such testimony would not be allowed into the trial.
>
> Learning of my daughter's readiness and proximity to testify against me, forced me to radically alter the course of my trial.
>
> I implored upon my attorney to rest my case before even presenting it in order to prevent certain travesty of my daughter taking the witness stand on behalf of the prosecution.

(RT at 973-74.) Accordingly, petitioner's after-the-fact complaint regarding his counsel's failure to present an effective defense rings particularly hollow in this case.

With respect to the search warrant authorizing the search and seizure of petitioner's journals, while detained pending trial petitioner was recorded telling his son:

> You're going to have to go and dig out my journals, I think.
>
> You're also going to find out some pretty heavy things. We can't talk about it. These phones are monitored.
>
> One of my journals is doubled up on. Do you understand?
>
> I made one up. One of them I made up.
>
> You can go ahead and read it. I'm afraid it will pretty well blow your mind.
>
> I'm playing this right to the fucking edge.
>
> Call Kruger and find out where he is on this business. I hate to admit this, but he knows. He knows the truth. He knows that you don't know, but it was like I had to tell somebody.

(RT at 177-79.) Armed with this information obtained from petitioner himself, police officers prepared an affidavit, obtained a search warrant, and subsequently seized petitioner's journals. (Id. at 180.)

In his pending petition petitioner has not alleged in what way he believes the search warrant authorizing the seizure of his journals was "deficient in probable cause" or on what ground's his counsel could have moved to suppress the admission of the journals into evidence. Indeed, petitioner apparently concedes as much in his traverse, stating that he "didn't suppose" that his trial counsel could "prevent" the admission of his journals into evidence, but argues only that counsel should have "move[d] the court for a hearing on their admissibility." (Traverse at 37.) Moreover, petitioner's trial counsel did in fact file a motion seeking to exclude portions of petitioner's journals from admission into evidence and arguing against the admission of "a large chunk of the entries of the journals" into evidence as "not relevant." (RT at 351, 735-40; Clerk's Transcript on Appeal ("CT") at 465-472.)[6]

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[6] Prior to preliminary examination petitioner's first counsel also filed an "Objection to Introduction to the Contents of Diary." (CT 102–04.) The objection was overruled. (CT at 112.)

Ultimately portions of petitioner's journals relating to the attack on the victim were introduced into evidence and read to the jury. As a result, the jury learned that petitioner had written in his journal of wanting to "get revenge on this pig fucker yet." (RT at 681.) They heard how petitioner fantasized about waiting until after dark to beat the victim with a manzanita stick, pack the victim's truck and steal it. (Id.) The jury also heard petitioner's explicit written admission that he "did it," that he "smashed [the victim's] skull with a manzanita club, and took the truck," and was "at Kruger's." (Id. at 686) The jury learned that petitioner had recounted in his diary how he "cracked" the victim multiple times with the stick, drove off in the victim's vehicle and stole money out of the victim's pockets. (Id.) Perhaps most devastating to the defense, the jury learned that in his journal petitioner acknowledged thinking "of old pig fuck often" but felt no remorse for what he had done, proclaiming of the victim, "fuck that asshole." (Id. at 697-98.)

Thus, even assuming arguendo that trial counsel's performance was somehow deficient, petitioner's claim of ineffective assistance of counsel would still fail because petitioner cannot establish prejudice. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, at 694. Here, even if petitioner's trial counsel had more vigorously cross-examined every prosecution witness, called a rebuttal witness to testify that the victim's injuries were not life threatening, presented a psychologist to testify that petitioner "did not premeditate the charge of first degree attempted murder" and called a witness to testify that the victim "was not hidden from sight" as reported by police, there would still not be a reasonable probability that the result of petitioner's trial would have been different. In this regard, petitioner's own admissions recorded in his journals would have disputed such testimony and acknowledged his guilt of the crimes for which he was convicted. Presented with the overwhelming evidence of petitioner's guilt, the jury would have reached the same verdict even if trial counsel had performed as petitioner now argues he should have.

Accordingly, petitioner is not entitled to federal habeas relief on this aspect of his ineffective assistance of counsel claim.

4. Mitigating Circumstances

Petitioner claims that his trial counsel was ineffective in failing to present "mitigating evidence" at his sentencing hearing. (Am. Pet. at 11.) Specifically, petitioner notes that he "knew the victim for many years [and] many times over proved his friendship." (Id.) Petitioner also claims that his trial counsel could have shown that petitioner had "never in the 50 years before this incident been in any trouble of any kind" and had not had any incidents between committing his crimes and his arrest. (Id.)

Petitioner's argument that the fact that he knew the victim for many years and "many times over proved his friendship," should somehow mitigate his sentence for the deliberate and premeditated attempted murder of his friend by repeatedly striking him in the head with a wooden stick, is illogical and wholly without merit. Indeed, if petitioner's trial counsel had made such an argument it most likely would only have served to highlight the disturbing nature of petitioner's crimes.

Moreover, the United States Supreme Court "has not delineated a standard which should apply to ineffective assistance of counsel claims in noncapital sentencing cases," therefore there is no clearly established federal law in this context pursuant to which petitioner would be entitled to federal habeas relief. Davis v. Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006); Cooper-Smith v. Palmateer, 397 F.3d 1236, 1244 (9th Cir. 2005).

Accordingly, petitioner is not entitled to federal habeas relief on this aspect of his ineffective assistance of counsel claim.

F. Prosecutorial Misconduct

Petitioner asserts that the deputy district attorney who prosecuted him committed misconduct by failing to disclose requested discovery and by making an impermissible rebuttal argument to the jury at trial. Specifically, petitioner argues that the prosecutor failed to "turn

over to defense . . . all of petitioner's diaries." (Am. Pet. at 11-12.) Petitioner argues that the prosecutor "exhibited intemperate behavior" during his rebuttal argument by using a wooden stick to "violently beat on a book . . . many times" while "exclaiming in great anger, 'He didn't just hit him once, he hit him again and again and again" to demonstrate to the jury how petitioner beat the victim. (Id. at 12.)

A defendant's due process rights are violated when a prosecutor's misconduct renders a trial fundamentally unfair. Darden v. Wainwright, 477 U.S. 168, 181 (1986). However, such misconduct does not, per se, violate a petitioner's constitutional rights. Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993) (citing Darden, 477 U.S. at 181 and Campbell v. Kincheloe, 829 F.2d 1453, 1457 (9th Cir. 1987)). Rather, claims of prosecutorial misconduct are reviewed "on the merits, examining the entire proceedings to determine whether the prosecutor's [actions] so infected the trial with unfairness as to make the resulting conviction a denial of due process." Johnson v. Sublett, 63 F.3d 926, 929 (9th Cir. 1995). See also Greer v. Miller, 483 U.S. 756, 765 (1987); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Turner v. Calderon, 281 F.3d 851, 868 (9th Cir. 2002). Habeas relief is limited to cases in which the petitioner can establish that prosecutorial misconduct resulted in actual prejudice to the defense. Johnson, 63 F.3d at 930 (citing Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993)); see also Darden, 477 U.S. at 181-83; Turner, 281 F.3d at 868. Put another way, prosecutorial misconduct violates due process when it has a substantial and injurious effect or influence in determining the jury's verdict. See Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996).

The Supreme Court has held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). See also Bailey v. Rae, 339 F.3d 1107, 1113 (9th Cir. 2003). The duty to disclose such evidence is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97, 107 (1976), and encompasses impeachment

evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676 (1985). A Brady violation may also occur when the government fails to turn over evidence that is "known only to police investigators and not to the prosecutor." Youngblood v. West Virginia, 547 U.S. 867, 870 (2006) (quoting Kyles v. Whitley, 514 U.S. 419, 438 (1995)).[7] There are three components of a Brady violation: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). See also Banks v. Dretke, 540 U.S. 668, 691 (2004); Silva v. Brown, 416 F.3d 980, 985 (9th Cir. 2005).

In order to establish prejudice in connection with a Brady violation, a petitioner must demonstrate that "'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Strickler, 527 U.S. at 289. "The question is not whether petitioner would more likely than not have received a different verdict with the evidence, but whether "in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (Id.) (quoting Kyles, 514 U.S. at 434). See also Silva, 416 F.3d at 986 ("a Brady violation is established where 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'") Once the materiality of the suppressed evidence is established, no further harmless error analysis is required. Kyles, 514 U.S. at 435-36; Silva, 416 F.3d at 986. "When the government has suppressed material evidence favorable to the defendant, the conviction must be set aside." Silva, 416 F.3d at 986.

Here, petitioner cannot demonstrate the presence of a single required element of a Brady violation entitling him to federal habeas relief, let alone the necessary three. Petitioner

[7] "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995).

claims that "[a]t the in limine motions the day before the trial began, defense requested the discovery but the judge denied the motion." (Am. Pet. at 11-12.) In his traverse, petitioner provides further details regarding this claim, explaining:

> Petitioner requested of his first appointed attorney, Mr. Rooney, to get copies of all the notebooks in discovery. He refused. So petitioner then submitted a written request directly of the District Attorney. It was requested that [the] prosecution produce for defendant all writings seized. This written request was made on August 12, 2002, a year and a half before trial. It was done pursuant to California Penal Code § 1054.1.
>
> Petitioner Marsdened Mr. Rooney and was appointed another attorney, Mr. Reynolds.[8] This attorney also refused to advocate defendant's written request for discovery. But he did procure a copy of one more notebook, one which the prosecutor dubbed the "alibi journal."
>
> After some fourteen months petitioner Marsdened Mr. Reynolds and was appointed Mr. Allan Dollison. This attorney became trial counsel and didn't have time to deal with these undiscovered journals until the day before trial.
>
> * * *
>
> The prosecuting attorney willfully withheld exculpatory evidence, deliberately waiting until the last minute to inform defense he would use these notebooks to impeach witness testimony about the defendant's character.
>
> A discussion ensued between the prosecuting attorney, defense counsel, and the court the day before trial incidental to in limine [motions]. A few days prior to this discussion defense counsel gave the prosecutor a list of five potential character witnesses. Prosecution at that time told counsel that it would introduce evidence from the never discovered journals.

(Traverse at 41-42.)

While petitioner argues that his journals were "exculpatory" he fails to cite a single example of their exculpatory nature. To the contrary, petitioner's journals not only explicitly, graphically, and conclusively detailed his commission of the crimes charged against him, they also referenced unrelated sexual fantasies involving underage girls, as well as inappropriate sexual conduct with his daughter. (RT at 357-59.) Petitioner has therefore failed to establish that

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[8] Under California law a defendant may move to relieve his appointed trial counsel pursuant to the decision in People v. Marsden, 2 Cal.3d 118 (Cal. 1970).

the journals contained any exculpatory evidence or impeachment evidence applicable to anyone other than petitioner.

Moreover, the journals were not suppressed by the prosecution. As petitioner explained, neither his first or second appointed counsel sought copies of all of petitioner's voluminous journals through discovery, although both defense counsel were aware of their existence. Petitioner's third appointed counsel did request copies of all the journals, many of which were written before petitioner knew the victim and dated back to 1973, on the eve of trial, after the prosecution indicated an intent to use some of petitioner's journal entries to impeach the character witnesses belatedly disclosed by the defense. (Id. at 353-55.) As noted above, that discovery motion was denied by the court as untimely. Regardless, as the prosecutor noted during pretrial motions argument, petitioner's trial counsel could have inspected the journals at any time in the sheriff's office by making an appointment to do so. (Id. at 360, 412-13, 422-23.) Moreover, petitioner was the author of his journals and therefore was obviously aware of their content. Where a defendant is aware of the evidence allegedly being withheld, the prosecution cannot be found to have suppressed the evidence. See Raley v. Ylst, 470 F.3d 792, 804 (9th Cir. 2006), cert. denied, 552 U.S. 833 (2007) (holding that, where "[p]etitioner possessed the salient facts regarding the existence of the records that he claims were withheld," his "trial counsel could have sought the documents through discovery"); United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991) (where defendant has enough information to be able to ascertain the supposed Brady material on his own, there is no suppression).

Finally, even assuming arguendo that the prosecution had suppressed some of petitioner's journals and that they did contain potentially exculpatory information, petitioner has not even alleged, let alone demonstrated, that he suffered any prejudice as a result. Petitioner does not address in any manner how there is a reasonable probability that the result of the trial would have been different if he only had copies of every one of the sixty journal which he had authored.

Turning to petitioner's argument concerning the prosecutor's rebuttal argument, in considering claims of prosecutorial misconduct involving allegations of improper argument the court is to examine the likely effect of the statements in the context in which they were made and determine whether they so infected the trial with unfairness as to make the resulting conviction a denial of due process. Turner v. Calderon, 281 F.3d 851, 868 (9th Cir. 2002); Sandoval v. Calderon, 241 F.3d 765, 778 (9th Cir. 2001); see also Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Darden, 477 U.S. at 181-83. In fashioning closing arguments, prosecutors are allowed "reasonably wide latitude," United States v. Birges, 723 F.2d 666, 671-72 (9th Cir. 1984), and are free to argue "reasonable inferences from the evidence." United States v. Gray, 876 F.2d 1411, 1417 (9th Cir. 1989). See also Ducket v. Godinez, 67 F.3d 734, 742 (9th Cir. 1995). "[Prosecutors] may strike 'hard blows,' based upon the testimony and its inferences, although they may not, of course, employ argument which could be fairly characterized as foul or unfair." United States v. Gorostiza, 468 F.2d 915, 916 (9th Cir. 1972).

After reviewing the record, the undersigned concludes that petitioner has failed to demonstrate any prejudice with respect to his claim of prosecutorial misconduct with respect to the prosecutor's rebuttal argument in this case. Following trial petitioner's counsel made a motion for a new trial arguing, in part, that the prosecutor had engaged in a "violent outburst during the closing argument" that was "designed solely for the purpose of swaying the passion and prejudice of the jury." (RT at 971-72.) The prosecutor disputed defense counsel's characterization of his rebuttal argument, stating, "What I did was I went to evidence and took a manzanita club that had been entered into evidence and I brought it down hard twice on a book that was on counsel table." (Id. at 975.) The deputy district attorney asserted that his use of the manzanita club in his argument was supported by the evidence. (Id. at 975-76.)

The trial judge agreed, denying the motion for a new trial and ruling as follows:

> Motion for a new trial is denied. Regarding [the prosecutor's] striking the books during the argument, it's my recollection that his striking those books was completely consistent with the information in the journals

> written by the defendant as to how many times he struck the victim and had he misrepresented himself in that respect, I would have climbed all over him for misrepresenting himself to the jury.

(Id. at 991-92.)

The prosecutor's use of the manzanita stick to strike a book while arguing that the petitioner had repeatedly struck the victim in the head, appears to be a reasonable argument based on the evidence introduced at petitioner's trial. "It is not misconduct for the prosecutor to argue reasonable inferences based on the record." United States v. Younger, 398 F.3d 1179, 1190 (9th Cir. 2005) (quoting United States v. Cabrera, 201 F.3d 1243, 1250 (9th Cir. 2000)). Moreover, the possible impact of the prosecutor's striking of the book with the stick during his rebuttal argument is disproportionately minor in comparison to the overwhelming evidence of petitioner's guilt and cannot be said to have infected the trial with unfairness so as to make the resulting conviction a denial of due process.

Accordingly, for the reasons stated above, petitioner is not entitled to federal habeas relief with respect to his Brady/prosecutorial misconduct claim.

G. Ineffective Assistance of Appellate Counsel

Petitioner's next claim is that his appellate counsel rendered ineffective assistance. In this regard petitioner argues his appellate counsel was ineffective for two reason: (1) for failing to raise, or properly argue, on appeal the arguments petitioner asserts in the petition pending before this court (violation of vicinage rights, ineffective assistance of trial counsel, inadmissibility of petitioner's journals, prosecutorial misconduct and the insufficiency of the evidence); and (2) for failing to request reporter's transcripts of the parties opening arguments at trial. (Am. Pet. at 12-13.)

The last reasoned state court decision as to this claim is from the Amador County Superior Court. That court rejected this claim finding that petitioner had "failed to demonstrate prejudice, as a result of any alleged ineffective assistance of counsel." (Lod. Doc. 10 at 3.)

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The Strickland standards apply to appellate counsel as well as trial counsel. Smith v. Murray, 477 U.S. 527, 535-36 (1986); Miller v. Keeney, 882 F.2d 1428, 1433 (9th Cir. 1989). However, an indigent defendant "does not have a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 751 (1983). Counsel "must be allowed to decide what issues are to be pressed." Id. Otherwise, the ability of counsel to present the client's case in accord with counsel's professional evaluation would be "seriously undermined." Id. See also Smith v. Stewart, 140 F.3d 1263, 1274 n.4 (9th Cir. 1998) (counsel not required to file "kitchen-sink briefs" because it "is not necessary, and is not even particularly good appellate advocacy.") There is, of course, no obligation to raise meritless arguments on a client's behalf. See Strickland, 466 U.S. at 687-88 (requiring a showing of deficient performance as well as prejudice). Thus, counsel is not deficient for failing to raise a weak issue. See Miller, 882 F.2d at 1434. In order to demonstrate prejudice in this context, petitioner must show that, but for appellate counsel's errors, he probably would have prevailed on appeal. Id. at 1434 n. 9

For the reasons set forth above, this court has not found merit in any of petitioner's claims. Had petitioner's appellate counsel raised those claims on appeal they would likely have been rejected as meritless. Petitioner has not shown otherwise. Of course, petitioner's appellate counsel had no obligation to raise meritless issues on appeal. Strickland, 466 U.S. at 687-88. Accordingly, petitioner has not demonstrated that, but for his appellate counsel's alleged errors, he probably would have prevailed on appeal. Therefore, he is not entitled to federal habeas relief with respect to this aspect of his ineffective assistance of appellate counsel claim.

Regarding petitioner's claim that his appellate counsel failed to request transcripts of opening arguments, petitioner merely argues that "if" his trial counsel "promised to prove anything in petitioner's defense and then failed to do so he could be held for ineffective assistance of counsel; or at least it should have been argued." (Am. Pet. at 13.)

Petitioner's argument that "if" his trial counsel promised in opening argument to the jury to prove something and then failed to do so, he could be found to have provided ineffective assistance is obviously speculative. Petitioner has certainly presented no evidence to support such speculation. Indeed, petitioner concedes in his traverse that "it might be only speculation" but argues that nevertheless "appellate counsel should have recognized a duty to explore the matter." (Traverse at 50.) Such a mere possibility is obviously insufficient to establish prejudice. See Cooks v. Spalding, 660 F.2d 738, 740 (9th Cir. 1981) (mere speculation is insufficient to demonstrate prejudice). Accordingly, petitioner is not entitled to federal habeas relief on this aspect of his ineffective assistance of appellate counsel claim.

H. Sentencing

Petitioner asserts that the he was improperly sentenced to the upper term of thirteen years with respect to his conviction for kidnapping. (Am. Pet. at 14.) He contends that the sentence was imposed based on facts not found true by the jury. (Id.) Petitioner also argues that in imposing consecutive sentences the sentencing judge was required to "make[] this choice after finding additional facts." (Id.)

Petitioner was sentenced to the upper term applicable to the kidnapping conviction, with the sentencing judge stating:

> With regard to the indeterminate sentence crimes: It's the judgment of this Court that in punishment for the felony offense of kidnapping, a violation of Section 207(a) of the Penal Code, which shall be the base term under this determinate sentencing scheme, the Court is going to impose the upper term of eight years in the State prison because the aggravating circumstances substantially outweigh the mitigating ones.
>
> To wit: The crime involved a great degree of cruelty, viciousness and callousness. The crime was particularly vicious and brutal. The crime indicates planning. The defendant and the victim were friends living together.
>
> The victim was particularly vulnerable and the defendant's violent conduct indicates a serious danger to society.
>
> The only mitigating factor that I can find is the lack of a prior criminal record of the defendant. Although the defendant stated remorse in his

> letter to the Probation Office, I question the validity of that statement.
>
> The upper term that the Court is imposing for that sentence is eight years in State Prison.

(RT at 1013-14.)

The Amador County Superior Court issued the last reasoned decision by a state court in response to this claim. That court specifically rejected petitioner's argument in its October 15, 2007, order denying habeas relief to petitioner. Therein, the Superior Court reasoned as follows:

> Petitioner contends his Sixth Amendment rights were violated when the facts relied upon [by] the trial judge in imposing an aggravated term of imprisonment were not determined by the jury. Respondent does not dispute the petitioner has demonstrated error, pursuant to Cunningham v. California (2007) 127 S. Ct. 856. However, Respondent contends the sentencing error has harmless beyond a reasonable doubt. Thus, the only issue before the Court is whether Petitioner is entitled to resentencing, pursuant to Cunningham, supra.
>
> * * *
>
> The California Supreme Court addressed the issue of the appropriate remedy for Cunningham violations in People v. Sandoval (2007) 41 Cal.4th 825. In that case, the Court held the denial of the right to a jury trial on aggravated circumstances is reviewed by the harmless error analysis. (id. at 597.) The Court further opined:
>
> > If a reviewing court concludes, beyond a reasonable doubt, that the jury, applying the beyond-a-reasonable-doubt standard, unquestionably would have found true at least a single aggravating circumstance had it been submitted to the jury, the *Sixth Amendment* error may properly be found harmless. (id. at 598 (emphasis in original).)
>
> In this instance, the trial court found the following aggravating circumstances:
>
> > The crime involved a great degree of cruelty, viciousness and callousness. The crime was particularly vicious and brutal. The crime indicates planning. The defendant and the victim were friends and living together. The victim was particularly vulnerable and the defendant's violent conduct indicates a serious danger to society. (Reporter's Transcript dated March 1, 2004, 45:22-46:3.)

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> Based upon the evidence presented at trial, the court finds that beyond a reasonable doubt, the jury would have found at least a single aggravating circumstance true and, therefore, any error was harmless. The victim was intoxicated and sleeping in the motor home he shared with the petitioner when the petitioner attacked him. As indicated by the petitioner's diaries, he was planning the attack on the victim for some time prior thereto. Petitioner dumped the victim along the side of the highway.

(Lod. Doc. 13 at 1-2.)

The United States Supreme Court held as a matter of constitutional law that, other than the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). In Blakely v. Washington, 542 U.S. 296, 303 (2004), the Supreme Court held that the "statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

In People v. Black, 35 Cal.4th 1238 (2005) ("Black I"), the California Supreme Court held that California's statutory scheme providing for the imposition of an upper term sentence did not violate the constitutional principles set forth in Apprendi and Blakely. The court in Black I reasoned that the discretion afforded to a sentencing judge in choosing a lower, middle or upper term rendered the upper term under California law the "statutory maximum." Black I, 35 Cal.4th at 1257-61. However, in Cunningham v. California, 549 U.S. 270 (2007), the United States Supreme Court held that a California judge's imposition of an upper term sentence based on facts found by the judge (other than the fact of a prior conviction) violated the constitutional principles set forth in Apprendi and Blakely. In this regard, the United States Supreme Court expressly disapproved the holding and the reasoning of Black I, finding that the middle term in California's determinate sentencing law was the relevant statutory maximum for purposes of applying the principles announced in Blakely and Apprendi. Cunningham, 549 U.S. at 291-94.[9]

[9] The Ninth Circuit subsequently held that the decision in Cunningham may be applied retroactively on collateral review. Butler v. Curry, 528 F.3d 624, 639 (9th Cir. 2008).

In light of its decision in Cunningham, the United States Supreme Court vacated Black I and remanded that case to the California Supreme Court for further consideration. See Black v. California, 549 U.S. 1190 (2007). On remand, the California Supreme Court held that:

> so long as a defendant is eligible for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury.

People v. Black, 41 Cal.4th 799, 813 (2007) ("Black II"). In other words, the California Supreme Court found that as long as one aggravating circumstance has been established in a constitutional manner, a defendant's upper term sentence withstands Sixth Amendment challenge. Thereafter, relying on the California Supreme Court's decision in Black II, the Ninth Circuit Court of Appeals has confirmed that, under California law, only one aggravating factor is necessary to authorize an upper term sentence. Butler v. Curry, 528 F.3d 624, 641-43 (9th Cir.), cert. denied ___U.S.___, 129 S. Ct. 767 (2008).

Even if, however, none of the aggravating factors on which a judge relies in sentencing a defendant to an upper term sentence is established in a manner consistent with the Sixth Amendment, reversal would not be required if the error was harmless. Washington v. Recuenco, 548 U.S. 212, 221-22 (2006) (sentencing errors subject to harmless error analysis); see also Butler, 528 F.3d at 648 (harmless error standard under Brecht v. Abrahamson, 507 U.S. 619 (1993), will prevent the granting of relief unless the error had a "substantial and injurious effect" on a defendant's sentence)). Thus, to grant federal habeas relief in a case involving a constitutional error in the imposition of an upper term sentence under California law, the federal court must have "grave doubt" as to whether a jury would have found the relevant aggravating factor beyond a reasonable doubt. Butler, 528 F.3d at 648. "Grave doubt" exists "when, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." O'Neal v. McAninch, 513 U.S. 432, 435 (1995). See also Butler,

528 F.3d at 648; Baker v. Kramer, No. 2:07-cv-1170-JAM-JFM (HC), 2010 WL 3057757, at *23 (E.D. Cal. Aug. 3, 2010) ("[B]ecause the trial judge could have legally imposed the upper term solely for the existence of petitioner's prior adult convictions, petitioner's aggravated sentence . . . is not unconstitutional.")

Here, the jury was presented with petitioner's own writings which reflected that he had planned the attack on the victim. The jury heard in petitioner's own written words how he had taken the manzanita club and "smashed [the victim's] skull with" it while he was sleeping and "cracked [the victim] several times." (RT 686-87.) Petitioner described how the victim lived through the assault and "moaned and grunted continuously." (Id. at 687.) Petitioner's writings detailed how he passively listened to the victim as he was "moaning and struggling to get up, but didn't have the strength or coordination." (Id. at 688.) Petitioner characterized his own actions as "brutal, and the meanest, coldest thing [he had] ever done." (Id. at 686.) The jury also heard the written description of how after the brutal attack petitioner stole the victim's money and truck, while transporting the body to another location to dump it.

In light of this evidence, the undersigned does not have "grave doubt" as to whether a jury would have found that petitioner's crime involved the aggravating factors (the crime involved a great degree of cruelty, viciousness and callousness, the victim was particularly vulnerable, the manner the crime was carried out indicates planning, and the defendant's violent conduct indicates a serious danger to society) cited by the sentencing court beyond a reasonable doubt. See Cal. Rules of Court, Rule 4.421.

Turning to petitioner's claim that consecutive sentences were impermissibly imposed, the United States Supreme Court has reviewed precisely the issue presented here by petitioner, that is whether, "[w]hen a defendant has been tried and convicted of multiple offenses, each involving discrete sentencing prescriptions, does the Sixth Amendment mandate jury determination of any fact declared necessary to the imposition of consecutive, in lieu of concurrent, sentences?" Oregon v. Ice, ___U.S.___, 129 S. Ct. 711, 714 (2009). The court held

that the Sixth Amendment does not so require, because determination of facts underlying a consecutive sentence lies outside the historical province of the jury and because no "impelling reason" counsels in favor of abrogating the states' interest in providing rules to guide courts in making such determinations. 129 S. Ct. at 717-19.

For these reasons, the rejection of this claim by the California courts was neither contrary to, nor an unreasonable application of clearly established federal law. Accordingly, petitioner is not entitled to federal habeas relief on his claim of sentencing error.

CONCLUSION

For the reasons set forth above, IT IS HEREBY RECOMMENDED that petitioner's amended application for a writ of habeas corpus (Doc. No. 5) be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, 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 Recommendations." Any reply to the objections shall be served and filed within seven days after service of the objections. Failure to file objections within the specified time may waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In any objections he elects to file petitioner may address whether a certificate of appealability should issue in the event he elects to file an appeal from the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant).

DATED: October 30, 2010.

Dale A. Drozd

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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