

1 **I. BACKGROUND**

2 **A. Facts¹**

3 The state court recited the following facts, and petitioner has not offered any clear
4 and convincing evidence to rebut the presumption that these facts are correct:

5 In July 2006, Alida Torres, Augustine Torres, Adriana Virrueta,
6 and Taurino Ochoa went to a Motel 6 to rent room. (footnote omitted).
7 Alida and Augustine were driving a Camry and Virrueta and Ochoa were
8 driving a Lincoln. Alida and Virrueta waited outside with the cars while
9 Augustine and Ochoa entered the motel office.

10 Virrueta left the Lincoln to start removing some of her clothing
11 from inside the Camry. At that point, defendants drove up in a
12 multicolored car and parked beside the Camry. Defendant Ambriz exited
13 the multicolored car and approached Alida, who was also taking her
14 clothing out of the Camry. He asked if she had a boyfriend. Fearing her
15 husband Augustine would start a fight with defendant Ambriz, Alida told
16 him that her father was inside the motel office and asked him to leave.

17 Defendant Ambriz returned to the multicolored car and moved it
18 forward a short distance. Defendant Talamantes then exited the
19 multicolored car and approached the Lincoln. He announced the keys to
20 the Lincoln were still in the ignition. He then entered the Lincoln and
21 drove it out of the motel parking lot.

22 Alida and Virrueta ran into the motel office. They told Augustine
23 and Ochoa that the Lincoln had been taken. Defendant Ambriz was still in
24 the multicolored car in the parking lot. Ochoa confronted him, but he was
25 able to drive out of the parking lot.

26 Ochoa and Virrueta borrowed the Camry to pursue defendants.
27 They called the police while they were driving. They eventually found the
28 Lincoln on a residential street, parked, with no one inside. Ochoa exited
29 the Camry and entered the Lincoln. Defendants then appeared and
30 attacked Ochoa. Defendant Ambriz began hitting Ochoa. Ochoa got out
31 of the car. Defendant Talamantes tripped Ochoa. Defendant Ambriz then
32 kicked Ochoa in the face. Defendants then took the Lincoln and drove
33 away.

34 Ochoa and Virrueta followed the Lincoln in the Camry again. The
35 Lincoln stopped on a different street. Defendants exited the Lincoln and
36 started walking toward the Camry, so Ochoa and Virrueta left the area.
37 Soon afterwards, Ochoa and Virrueta were contacted by the police. The
38 police had found the Lincoln and took Ochoa and Virrueta to the Lincoln's
39 new location. The car was wrecked.

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41 ¹ Pursuant to 28 U.S.C. § 2254(e)(1), “. . . a determination of a factual issue made
42 by a State court shall be presumed to be correct.” Petitioner bears the burden of rebutting this
43 presumption by clear and convincing evidence. See id. These facts are, therefore, drawn from
44 the state court’s opinion(s), lodged in this court. Petitioner may also be referred to as
45 “defendant.”

1 petition de novo where state court had issued a ruling on the merits of a related claim, but not the
2 claim alleged by petitioner). When the state court does not reach the merits of a claim,
3 “concerns about comity and federalism . . . do not exist.” Pirtle, 313 F. 3d at 1167.

4 Where AEDPA is applicable, federal habeas relief under 28 U.S.C. § 2254(d) is
5 not available for any claim decided on the merits in state court proceedings unless the state
6 court’s adjudication of the claim:

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

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

13 Under § 2254(d)(1), federal habeas relief is available only where the state court’s decision is
14 “contrary to” or represents an “unreasonable application of” clearly established law. Under both
15 standards, “clearly established law” means those holdings of the United States Supreme Court as
16 of the time of the relevant state court decision. See Carey v. Musladin, 549 U.S. 70, 74 (2006)
17 (citing Williams, 529 U.S. at 412) . “What matters are the holdings of the Supreme Court, not
18 the holdings of lower federal courts.” Plumlee v. Masto, 512 F.3d 1204 (9th Cir. 2008) (en
19 banc). Supreme Court precedent is not clearly established law, and therefore federal habeas
20 relief is unavailable, unless it “squarely addresses” an issue. See Moses v. Payne, 555 F.3d 742,
21 753-54 (9th Cir. 2009) (citing Wright v. Van Patten, 552 U.S. 120, 28 S. Ct. 743, 746 (2008)).
22 For federal law to be clearly established, the Supreme Court must provide a “categorical answer”
23 to the question before the state court. See id.; see also Carey, 549 U.S. at 76-77 (holding that a
24 state court’s decision that a defendant was not prejudiced by spectators’ conduct at trial was not
25 contrary to, or an unreasonable application of, the Supreme Court’s test for determining prejudice
26 created by state conduct at trial because the Court had never applied the test to spectators’
conduct). Circuit court precedent may not be used to fill open questions in the Supreme Court’s
holdings. See Carey, 549 U.S. at 74.

1 In Williams v. Taylor, 529 U.S. 362 (2000) (O'Connor, J., concurring, garnering a
2 majority of the Court), the United States Supreme Court explained these different standards. A
3 state court decision is "contrary to" Supreme Court precedent if it is opposite to that reached by
4 the Supreme Court on the same question of law, or if the state court decides the case differently
5 than the Supreme Court has on a set of materially indistinguishable facts. See id. at 405. A state
6 court decision is also "contrary to" established law if it applies a rule which contradicts the
7 governing law set forth in Supreme Court cases. See id. In sum, the petitioner must demonstrate
8 that Supreme Court precedent requires a contrary outcome because the state court applied the
9 wrong legal rules. Thus, a state court decision applying the correct legal rule from Supreme
10 Court cases to the facts of a particular case is not reviewed under the "contrary to" standard. See
11 id. at 406. If a state court decision is "contrary to" clearly established law, it is reviewed to
12 determine first whether it resulted in constitutional error. See Benn v. Lambert, 283 F.3d 1040,
13 1052 n.6 (9th Cir. 2002). If so, the next question is whether such error was structural, in which
14 case federal habeas relief is warranted. See id. If the error was not structural, the final question
15 is whether the error had a substantial and injurious effect on the verdict, or was harmless. See id.

16 State court decisions are reviewed under the far more deferential "unreasonable
17 application of" standard where it identifies the correct legal rule from Supreme Court cases, but
18 unreasonably applies the rule to the facts of a particular case. See Wiggins v. Smith, 539 U.S.
19 510, 520 (2003). While declining to rule on the issue, the Supreme Court in Williams, suggested
20 that federal habeas relief may be available under this standard where the state court either
21 unreasonably extends a legal principle to a new context where it should not apply, or
22 unreasonably refuses to extend that principle to a new context where it should apply. See
23 Williams, 529 U.S. at 408-09. The Supreme Court has, however, made it clear that a state court
24 decision is not an "unreasonable application of" controlling law simply because it is an erroneous
25 or incorrect application of federal law. See id. at 410; see also Lockyer v. Andrade, 538 U.S. 63,
26 75-76 (2003). An "unreasonable application of" controlling law cannot necessarily be found

1 even where the federal habeas court concludes that the state court decision is clearly erroneous.
2 See Lockyer, 538 U.S. at 75-76. This is because “[t]he gloss of clear error fails to give proper
3 deference to state courts by conflating error (even clear error) with unreasonableness.” Id. at 75.
4 As with state court decisions which are “contrary to” established federal law, where a state court
5 decision is an “unreasonable application of” controlling law, federal habeas relief is nonetheless
6 unavailable if the error was non-structural and harmless. See Benn, 283 F.3d at 1052 n.6.

8 III. DISCUSSION

9 Petitioner argues that the trial court erred by not allowing him to challenge the
10 credibility of victims by cross-examining them regarding their immigration status. A writ of
11 habeas corpus is available under 28 U.S.C. § 2254 only on the basis of a transgression of federal
12 law binding on the state courts. See Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985);
13 Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). It is not available for alleged error in
14 the interpretation or application of state law. Middleton, 768 F.2d at 1085; see also Lincoln v.
15 Sunn, 807 F.2d 805, 814 (9th Cir. 1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir.
16 1986). Habeas corpus cannot be utilized to try state issues de novo. See Milton v. Wainwright,
17 407 U.S. 371, 377 (1972).

18 However, a “claim of error based upon a right not specifically guaranteed by the
19 Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so
20 infects the entire trial that the resulting conviction violates the defendant’s right to due process.”
21 Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th
22 Cir. 1980)); see also Lisenba v. California, 314 U.S. 219, 236 (1941). Because federal habeas
23 relief does not lie for state law errors, a state court’s evidentiary ruling is grounds for federal
24 habeas relief only if it renders the state proceedings so fundamentally unfair as to violate due
25 process. See Drayden v. White, 232 F.3d 704, 710 (9th Cir. 2000); Spivey v. Rocha, 194 F.3d
26 971, 977-78 (9th Cir. 1999); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991); see

1 also Hamilton v. Vasquez, 17 F.3d 1149, 1159 (9th Cir. 1994). To raise such a claim in a
2 federal habeas corpus petition, the “error alleged must have resulted in a complete miscarriage of
3 justice.” Hill v. United States, 368 U.S. 424, 428 (1962); Crisafi v. Oliver, 396 F.2d 293, 294-95
4 (9th Cir. 1968); Chavez v. Dickson, 280 F.2d 727, 736 (9th Cir. 1960). In any event, an
5 evidentiary error is considered harmless if it did not have a substantial and injurious effect in
6 determining the jury’s verdict. See Padilla v. Terhune, 309 F.3d 614, 621 (9th Cir. 2002); see
7 also Laboa v. Calderon, 224 F.3d 972, 976 (9th Cir. 2001).

8 Regarding this claim, the state court outlined the following background:

9 Before trial, the prosecutor filed a motion in limine to exclude any
10 questioning regarding the victims’ immigration status. At a hearing on the
11 motion, the trial court established that neither side knew whether the
12 victims were illegal immigrants. The prosecutor argued the potential
13 testimony was barred because it was irrelevant, illegal immigration was
14 not a crime of moral turpitude, it was irrelevant to show credibility, it
15 would be unduly prejudicial, and there was no probative value to the
16 inquiry. Defendants contended illegal immigration is a crime of moral
17 turpitude, “depending on how the entry was made, whether it was by use
18 of false documents.”

19 The trial court stated, “I couldn’t find anything labeling illegal
20 immigration as a crime of moral turpitude, but we do have a definition, it’s
21 readiness to do evil and/or would this give rise to reason for disbelieving
22 someone. First of all, [defendants] don’t have a rational basis to ask the
23 question and trial is not the time to do discovery so I’m not going to allow
24 you to ask the questions of Alida . . . [Y]ou don’t have a rational basis.
25 I’m still going to exercise my discretion and I’m going to do an [Evidence
26 Code section] 352 analysis into this. With regard to immigration status,
that’s not something the Court ever asks. Whenever I advise the defendant
of their plea, I never ask them what their immigration status is. I do give
them the admonition, ‘If you’re an illegal immigrant, any conviction can
result in your deportation,’ but the Court never asks that and that’s because
justice is blind. Just because they’re here illegally doesn’t mean they can’t
be a victim of a crime and they shouldn’t be allowed the laws of
protection. It’s not just a crime when you’re illegally here. It’s a crime
period. People who are here illegally would be more likely than not to
report being the victim of a crime because then now they’re involved in
law enforcement and then the immigration status becomes a concern.
Also, here in our country, what’s going on right now in our world, there’s
a big hot issue about immigration right now and that would be another
reason that it would be unduly prejudicial to ask that question. The current
environment against illegal aliens is not favorable. There are lots of
reasons that people are here in this country, and as I mentioned before,
they’re more likely than not to report. I find that it has very little, if no
probative value, and the prejudice outweighs it. So the Court is not going

1 to allow you to ask that question.”

2 * * *

3 Neither party has provided this court with any published case law
4 determining whether illegal immigration is a crime of moral turpitude.
5 Our own research has not found any case law on this question either. Even
6 assuming, however, that illegal immigration is a crime of moral turpitude,
7 we conclude the trial court did not err in precluding defendants from
8 questioning the victims on their immigration status.

9 The state court then went on to conclude that the trial court’s analysis under California Evidence
10 Code § 352 was correct.

11 Respondents argue first that the claim is unexhausted because petitioner did not
12 present the federal component of the claim to the state courts.³ Under 28 U.S.C. § 2254(b), the
13 exhaustion of available state remedies is required before claims can be presented to the federal
14 court in a habeas corpus case. See Rose v. Lundy, 455 U.S. 509 (1982); see also Kelly v. Small,
15 315 F.3d 1063, 1066 (9th Cir. 2003); Hunt v. Pliler, 336 F.3d 839 (9th Cir. 2003). “A petitioner
16 may satisfy the exhaustion requirement in two ways: (1) by providing the highest state court with
17 an opportunity to rule on the merits of the claim . . . ; or (2) by showing that at the time the
18 petitioner filed the habeas petition in federal court no state remedies are available to the
19 petitioner and the petitioner has not deliberately by-passed the state remedies.” Batchelor v.
20 Cupp , 693 F.2d 859, 862 (9th Cir. 1982) (citations omitted). The exhaustion doctrine is based
21 on a policy of federal and state comity, designed to give state courts the initial opportunity to
22 correct alleged constitutional deprivations. See Picard v. Connor, 404 U.S. 270, 275 (1971); see
23 also Rose, 455 U.S. at 518.

24 Regardless of whether the claim was raised on direct appeal or in a post-
25 conviction proceeding, the exhaustion doctrine requires that each claim be fairly presented to the
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24 ³ Respondents incorrectly argue at some points in their brief that the failure to
25 present the federal claim to the state courts presents a procedural bar scenario. It does not.
26 Procedural bars only arise when the state court imposed a state procedural default, which did not
happen in this case. The California court addressed petitioner’s claim on the merits and never
concluded that the claim was default in some way.

1 state's highest court. See Castille v. Peoples, 489 U.S. 346 (1989). Although the exhaustion
2 doctrine requires only the presentation of each federal claim to the highest state court, the claims
3 must be presented in a posture that is acceptable under state procedural rules. See Sweet v.
4 Cupp, 640 F.2d 233 (9th Cir. 1981). Thus, an appeal or petition for post-conviction relief that is
5 denied by the state courts on procedural grounds, where other state remedies are still available,
6 does not exhaust the petitioner's state remedies. See Pitchess v. Davis, 421 U.S. 482, 488
7 (1979); Sweet, 640 F.2d at 237-89.⁴

8 In addition to presenting the claim to the state court in a procedurally acceptable
9 manner, exhaustion requires that the petitioner make the federal basis of the claim explicit to the
10 state court by including reference to a specific federal constitutional guarantee. See Gray v.
11 Netherland, 518 U.S. 152, 162-63 (1996); see also Shumway v. Payne, 223 F.3d 982, 998 (9th
12 Cir. 2000). It is not sufficient for the petitioner to argue that the federal nature of the claim is
13 self-evident. See Lyons v. Crawford, 232 F.3d 666, 668 (9th Cir. 2000), amended by 247 F.3d
14 904 (9th Cir. 2001). Nor is exhaustion satisfied if the state court can only discover the issue by
15 reading a lower court opinion in the case. See Baldwin v. Reese, 541 U.S. 27, 32 (2004).

16 A review of petitioner's opening brief on direct appeal reveals that he argued that
17 the trial court's refusal to allow cross-examination of the victims on their immigration status was
18 "reversible error." As part of his argument, petitioner asserted that the alleged error was not
19 harmless. He stated: "[The harmless error] standard applies because the error violated
20 appellant's basic constitutional trial rights – the right to due process of law, the right to confront
21 and cross examine, and the right to a jury trial, itself." In support of this argument, petitioner
22 cited to several United States Supreme Court cases. Petitioner similarly argued against harmless
23 error in his petition for review to the California Supreme Court. Because the state courts

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25 ⁴ This situation of procedural deficiency is distinguishable from a case presented to
26 the state court using proper procedures but where relief on the merits is precluded for some
procedural reason, such as untimeliness or failure to raise the claim on direct appeal. The former
represents an exhaustion problem; the latter represents a procedural default problem.

1 resolved the issue on state law grounds (i.e., whether the trial judge had erred in his section 352
2 analysis), the question of harmless error was never addressed. On this record, the court finds that
3 petitioner sufficiently raised the constitutional dimension of his claim to the state courts. The
4 claim is, therefore, exhausted.

5 Turning to the merits, as discussed above federal habeas relief is only available on
6 an alleged error of state law if the error rendered the trial fundamentally unfair. Petitioner argues
7 that basic fairness dictates that he should have been allowed to conduct reasonable cross-
8 examination. See Olden v. Kentucky, 488 U.S. 227, 231 (1988). He also contends that the
9 impartiality and credibility of witnesses is always relevant and, therefore, is a reasonable line of
10 inquiry. See Davis v. Alaska, 415 U.S. 308, 316 (1974).

11 Accepting petitioner's position that he had a due process right to reasonable cross-
12 examination and that impartiality and credibility are always reasonable subjects to ask about, the
13 court does not agree that the analysis ends there. As petitioner states, he is constitutionally
14 guaranteed the ability to conduct a reasonable cross-examination. Whether the cross-
15 examination he sought in this case was reasonable was a question of state law the trial court
16 decided under California Evidence Code § 352. And, the question of whether the trial judge
17 correctly applied § 352 is a matter of state law this court cannot upset. Here, the state court
18 concluded on direct appeal that the trial court was correct in concluding that the prejudicial effect
19 of the proposed cross-examination testimony was outweighed by its limited and uncertain
20 probative value.

21 Finally, even assuming error of constitutional magnitude, the court finds that
22 petitioner has not demonstrated that the error produced a substantial and injurious effect on the
23 verdict. In other words, any error was harmless. First, petitioner only speculates that the victims
24 in this case may have been illegal immigrants. Second, if they were, petitioner only speculates as
25 to their method of entry (i.e., by forged or false documents). Finally, there is no showing that,
26 even had the jury heard testimony to the effect that the victims were in the country illegally, this

1 fact would have made any difference to the jury. Given the jury's verdicts, it is clear that the jury
2 believed the victims and disbelieved the defendants. Petitioner can only speculate what the jury
3 would have found had they been presented with evidence that the victims were illegal aliens. Or,
4 looking at it another way, petitioner has not demonstrated that the jury would have believed his
5 story more had they known of the victims' immigration status.

6 For these reasons, the court simply cannot say that the state court's denial of
7 petitioner's claim was either contrary to or an unreasonable application of any clearly established
8 federal law.

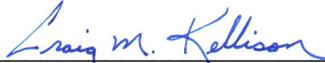
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10 **IV. CONCLUSION**

11 Based on the foregoing, the undersigned recommends that petitioner's petition for
12 a writ of habeas corpus (Docs. 1 & 2) be denied.

13 These findings and recommendations are submitted to the United States District
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
15 after being served with these findings and recommendations, any party may file written
16 objections with the court. Responses to objections shall be filed within 14 days after service of
17 objections. Failure to file objections within the specified time may waive the right to appeal.

18 See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

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20 DATED: December 21, 2010

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22 **CRAIG M. KELLISON**
23 UNITED STATES MAGISTRATE JUDGE
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