UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH AUGUST MARSALA, Petitioner, v. HEIDI LACKNER, Respondent.	No. 2:13-cv-1614 CKD P ORDER

Petitioner is a California prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. On May 17, 2010, petitioner was convicted by a jury in Siskiyou County of false imprisonment, battery, torture, assault by means of force likely to produce great bodily injury and dissuading a witness. He is serving consecutive sentences of 10 years and 8 months imprisonment and 7 years-to-life imprisonment. Respondent filed an answer to the petition, and petitioner filed a traverse. ECF Nos. 23, 46. The parties have consented to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). ECF Nos 6 and 16. Upon careful consideration of the record and the applicable law, the petition is denied.

I. Factual Background

In its affirmation of the judgment on direct appeal, the California Court of Appeal, Third Appellate District summarized the facts presented at trial as follows:

> Defendant's convictions stem from his physical abuse of the victim

> in late May 2009 during an overnight stay at a transient campsite in the woods south of Little Castle Creek and west of Interstate 5 near the Crag View Drive exit. This is in Siskiyou County's southernmost reaches (with Dunsmuir just to the north). On the east side of the interstate (through a culvert for the creek) is a popular local swimming hole.
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> The victim, in her mid-thirties, had known defendant since her childhood in the Weed region of the county. They began "seeing each other off and on" in summer 2008. She had been addicted to methamphetamine and alcohol since her teens. At the time of the trial, she was experiencing the after-effects of her injuries (including chronic pain, seizures, and poor short-term memory), which required her to take analgesics and psychiatric medications. She also had a preexisting bipolar condition that required medication as well.
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> In February 2009, the victim and the defendant left town. They met up with the victim's teenage son, who had stolen a car from his foster parents, and the three began a cross-country trip to Missouri (where defendant's father had lived). The victim testified she left Siskiyou County to keep threats of violence away from her grandmother (with whom she lived) and younger child. She told her probation officer at the time that she was afraid the people with whom she had drug dealings were going to kill her.[1] Defendant left to avoid charges for inflicting great bodily harm on Cliff Taylor.[2] On the way, they stopped in Las Vegas for a couple of days, where the family of defendant's stepfather lived. They stayed in Missouri for a few weeks, after which the victim and her son returned to California by bus.
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> When defendant returned to California, the victim joined him reluctantly in Sacramento. She wanted to keep him away from her grandmother, because his behavior had become volatile while they were in Missouri. They camped for a while in the foothills while defendant panned for gold. The victim testified that defendant was being verbally and physically abusive.
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> Defendant had not been using drugs up to this point. After they had been in the foothills for a couple of months, defendant's brother and his girlfriend met up with them.[3] The quartet stayed a night at a

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[1] At trial, the victim asserted defendant had kidnapped her at gunpoint from her home. Although encountering numerous individuals in her travels with defendant and her son, there is an absence of any evidence that she mentioned this to any of them, as defendant points out (without contradiction from the People).

[2] Taylor testified that defendant had hit him in the face with a baseball bat. Apparently, this took place in March 2008, and was the subject of a separate case that was consolidated into the present one. The record is unclear about its disposition and the parties do not refer to it.

[3] Neither testified at trial.

"pink motel," where defendant inflicted physical abuse on the victim.[4] At some point the following day, the victim asked the girlfriend to get them back to Siskiyou County because defendant would kill her if they left them behind. Defendant started hitting her in the car in front of the others. The victim said she was getting badly bruised, and the quartet spent the following night at a different motel; the victim testified the brother was concerned that defendant's behavior "was going to get them pulled over, and [defendant's] brother told him, 'You can't do this in public. You have to do this in private.'" Again, defendant subjected the victim to physical abuse throughout the night. Although she was screaming to draw attention, no one responded.

The following day, defendant was smoking drugs as they drove in the brother's girlfriend's car. Defendant began hitting the victim in front of the others, and continued his verbal abuse. At one point, the girlfriend stopped the car because she could not tolerate defendant's behavior any longer. Although the victim pleaded with the other two to put a stop to the abuse, neither said anything to defendant. They drove north on Interstate 5, stopping only once in Williams at a gas station (where defendant threatened to break the victim's jaw if she sought help) before they reached the exit for the Little Castle Creek encampment in the late afternoon. The victim again pleaded with the others not to leave her there with defendant. When a truck—parked nearby—departed, defendant punched her in the jaw.

Defendant forced the victim toward the encampment, striking her in the head and back as they walked through the culvert. However, defendant calmed down for a few hours. After it grew dark, someone parked a car at the swimming hole and honked. The victim assumed it was defendant's brother, because defendant returned with drugs. After taking them, defendant became "mean and explosive." He beat her continuously during the night and following day of their stay. She began to have seizures.[5]

On the following afternoon, defendant encountered a group of teenagers near the culvert, and asked them to call the police to summon medical assistance for his companion. When they followed him to the campsite, he claimed Taylor (his great bodily injury victim) had beaten her. He has also told the victim to give the same explanation to the paramedics when they arrived (the victim knew Taylor from past drug purchases).[6] She accordingly told this to a paramedic and a detective, alluding to being a casualty of a "drug war."

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[4] A motel employee came to defendant's and the victim's room that night to reprimand them for smoking. The employee did not see any signs of bruising or other indications of violence.

[5] The victim testified that defendant had also set her belongings on fire and raped her, though the jury did not convict defendant of either crime.

[6] Taylor denied knowing the victim or selling drugs to her, and claimed he had not been in the vicinity of the swimming hold and encampment for six years.

> Defendant had left before assistance arrived, telling a witness that he needed to pursue the attacker. He later told a detective that an unknown assailant had attacked the victim in his absence, and the impetus for his flight was his outstanding warrant for inflicting great bodily injury.
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> When examined at the hospital, the victim had bruising over her entire body, a fractured nose, and a subdural hematoma. The victim also tested positive for methamphetamine. While the victim told a detective that defendant had rubbed her face with creosote, the examination did not find any signs of this. The victim also testified defendant had cut her genitalia with a sharp object, but an exam a week after her rescue did not show any signs of this.

Lodged Document ("Lod. Doc.") 5 at 2-7;[7] see also People v. Marsala, No. C 065614, 2012 WL 592920 at *1-3 (Cal. App. 3d Dist. Feb. 23, 2012).

II. Procedural Background

Following a jury trial in the Siskiyou County Superior Court, petitioner was convicted of false imprisonment (as a lesser included offense of kidnapping for purposes of rape), misdemeanor battery (as a lesser included offense of rape), torture, assault by means of force likely to produce great bodily injury, and dissuading a witness. Lod. Doc. 5 at 1. The jury found the charged enhancements for inflicting great bodily injury and for having served two prior prison terms to be true. Id. The jury also returned a verdict of not guilty on charges of attempted murder, the making of criminal threats, and arson. Id.

The trial court sentenced petitioner to state prison with indeterminate term of life imprisonment with the possibility of parole after seven years, and a consecutive determinate term of ten years and eight months.

Petitioner appealed the judgment to the California Court of Appeal, Third Appellate District. Lod. Doc. 1. With the exception of making a modification to pretrial custody credits, the appellate court denied petitioner's claims on the merits and affirmed his sentence. Lod. Doc. 5.

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[7] Lodged documents refer to documents lodged by respondent on March 11, 2015. ECF No. 24.

Petitioner filed a petition for review in the California Supreme Court. Lod. Doc. 6. On May 16, 2012, the California Supreme Court denied review. Lod. Doc. 7.

Petitioner filed a state habeas petition in the Siskiyou County Superior Court on August 2, 2013, which was denied in a written decision on September 6, 2013. Lod. Docs. 8, 9. Petitioner filed a second state habeas petition in the California Court of Appeal, Third Appellate District on November 1, 2013, which was summarily denied on November 7, 2013. Lod. Docs. 9, 10. Petitioner filed a third state habeas petition in the California Supreme Court on February 18, 2014, which was summarily denied on May 14, 2014. Lod. Doc. 10.

Petitioner filed the instant federal habeas petition on August 5, 2013. ECF No. 1. He subsequently filed the operative first amended petition on April 7, 2014. ECF No. 12. Respondent filed an answer on March 11, 2015. ECF No. 23. Petitioner filed a traverse on July 2, 2015. ECF No. 46.

III. Standard For Habeas Corpus Relief

An application for a writ of habeas corpus by a person in custody under a judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Also, federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (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.

28 U.S.C. § 2254(d) (referenced herein in as "§ 2254(d)"). It is the habeas petitioner's burden to show he is not precluded from obtaining relief by § 2254(d). See Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are different. As the Supreme Court has explained:

> A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we

> have done on a set of materially indistinguishable facts. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in Williams [v. Taylor, 529 U.S. 362 (2000)] that an unreasonable application is different from an incorrect one.

Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8 (2002).

The court will look to the last reasoned state court decision in determining whether the law applied to a particular claim by the state courts was contrary to the law set forth in the cases of the United States Supreme Court or whether an unreasonable application of such law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002).

When a state court rejects a federal claim without addressing the claim, a federal court presumes the claim was adjudicated on the merits, in which case § 2254(d) deference is applicable. Johnson v. Williams, 133 S. Ct. 1088, 1096 (2013). This presumption can be rebutted. Id.

It is appropriate to look to lower federal court decisions to determine what law has been "clearly established" by the Supreme Court and the reasonableness of a particular application of that law. "Clearly established" federal law is that determined by the Supreme Court. Arredondo v. Ortiz, 365 F.3d 778, 782-83 (9th Cir. 2004). At the same time, it is appropriate to look to lower federal court decisions as persuasive authority in determining what law has been "clearly established" and the reasonableness of a particular application of that law. Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 1999); Clark v. Murphy, 331 F.3d 1062 (9th Cir. 2003), overruled on other grounds, Lockyer v. Andrade, 538 U.S. 63 (2003); cf. Arredondo, 365 F.3d at 782-83 (noting that reliance on Ninth Circuit or other authority outside bounds of Supreme Court precedent is misplaced).

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III. Arguments and Analysis

A. Prosecutorial Misconduct

First, petitioner argues that his due process rights were violated as a result of a number of instances of misconduct by the prosecution during petitioner' state court trial. Specifically, petitioner argues that the prosecution engaged in the following instances of misconduct: (1) made an inaccurate comment that petitioner's case was a "Three Strikes" case in a newspaper article published while jury selection was ongoing; (2) delayed discovery of the victim's supplemental statement made to the prosecution's investigator; (3) withheld witness Ruth Kellner's address from petitioner; (4) intercepted confidential defense communications; (5) engaged in witness tampering; (6) knowingly elicited perjured testimony from the victim and witness Mellissa Skallerud; (7) made impermissible inferences in her closing argument; (8) failed to disclose or preserve exculpatory evidence; (9) attempted to use petitioner's post-arrest silence against him; (10) failed to provide victim's medical history; (11) improperly attempted to elicit prior bad acts testimony; and (12) engaged in pervasive misconduct (collectively "prosecutorial misconduct claims").

1. Procedural Default

As an initial matter, respondent argues that all of petitioner's prosecutorial misconduct claims are procedurally defaulted because the state habeas court denied these claims when petitioner raised them for the first time based on an independent and adequate state procedural rule.

The procedural default doctrine forecloses federal review of a state prisoner's federal habeas claims if those claims were defaulted in state court pursuant to an independent and adequate state procedural rule. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). Generally, "federal habeas relief will be unavailable when (1) 'a state court [has] declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds,'" Walker v. Martin, 562 U.S. 307, 316 (2011) (quoting Coleman, 501 U.S. at 729-30). A state procedural rule is "adequate" only if it is clear, consistently applied, and well established

at the time of petitioner's default. Walker, 562 U.S. at 316; Calderon v. United States Dist. Court, 96 F.3d 1126, 1129 (1996). The respondent bears the burden of proof with respect to the "adequacy" of a state procedural bar. Bennett v. Mueller, 322 F.3d 573, 585-86 (9th Cir. 2003). "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." Harris v. Reed, 489 U.S. 255, 263 (1989). Furthermore, a federal habeas court may still consider the merits of an otherwise procedurally defaulted claim if the petitioner successfully makes a showing of "cause" and "prejudice." Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012) ("A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law.").

Here, respondent argues that petitioner's prosecutorial misconduct claims are procedurally defaulted because the state habeas court denied them on the basis of the independent and adequate state procedural rule that plaintiff had failed to raise any of them on direct appeal. Respondent's argument is well taken.

The record shows that petitioner failed to raise any of his prosecutorial misconduct claims on direct appeal. See Lod. Docs. 1, 2, 3. Instead, petitioner first raised these claims in his state habeas petition filed in the Siskiyou County Superior Court. See Lod. Doc. 8. In denying his petition, the Siskiyou County Superior Court provided the following rationale:

> A petition for habeas corpus will be dismissed if it alleges an issue that could have been, but was not, raised on direct appeal. Habeas corpus is not available to review claims of insufficiency of evidence or claims concerning trial court's rulings or procedural errors, which should be presented on direct appeal. In re Lindley (1947) 29 Cal.2d 709.
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> Further any issue that was actually raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus. In re Harris (1993) 5 Cal.4th 813.

Lod. Doc. 9.

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Petitioner also asserted these claims in his subsequent habeas petitions before the California Court of Appeals, Third Appellate District and the California Supreme Court, but petitioner's petitions were denied by both courts without comment. Lod. Docs. 9, 10. Accordingly, the Siskiyou County Superior Court's was the last reasoned state court decision on petitioner's prosecutorial misconduct claims. See Vansickel v. White, 166 F.3d 953, 957 (9th Cir. 1999) (citing Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)) (to determine whether a claim is procedurally barred, the court looks to the last reasoned state court opinion addressing that claim).

More importantly, the Siskiyou County Superior Court denied petitioner's prosecutorial misconduct claims on the adequate and independent state law procedural ground that petitioner failed to assert those claims on direct appeal, and instead raised them for the first time in his state habeas petition. In Ex Parte Dixon, 41 Cal.2d 756 (1953), the California Supreme Court held that a criminal defendant cannot assert claims in a state habeas petition that "could have been, but were not, raised upon a timely appeal from a judgment of conviction." Id. at 759. Recently, the U.S. Supreme Court held that this procedural rule the California Supreme Court announced in Dixon is an adequate and independent state procedural bar sufficient to bar a claim from federal habeas review under the procedural default doctrine. Johnson v. Lee, 136 S. Ct. 1802 (2016) (per curiam).

While the state habeas court here did not cite directly to the procedural rule set forth in Dixon, it nevertheless provided a plain statement of the substance of the procedural rule set forth in that case as its rationale for denying petitioner's claims that he had not previously raised on direct review, which included his prosecutorial misconduct claims. Lod. Doc. 9 ("A petition for habeas corpus will be dismissed if it alleges an issue that could have been, but was not, raised on direct appeal."). Accordingly, the state habeas court's decision adequately demonstrates that that court relied on the Dixon rule as a reason for dismissing any of petitioner's claims that he had not previously raised, thus barring any of petitioner's prosecutorial misconduct claims asserted in his present federal petition. See Harris, 489 U.S. at 263 (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)) (holding that procedural default bars a claim asserted in a federal habeas petition

when "the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar").

Petitioner argues that any procedural default on his prosecutorial misconduct claims should be excused because his appellate counsel acted deficiently by declining to raise the claims on direct appeal despite petitioner's insistence that he do so. In support of this argument, petitioner attaches to his petition a copy of a letter his appellate counsel wrote to him stating that his counsel declined to include many of the prosecutorial misconduct claims petitioner raises in the present petition as claims in petitioner's appellate brief on direct appeal in state court because his counsel believed those claims to lack merit. ECF No. 12 at 149-53.

A demonstration of ineffective assistance of counsel is sufficient to establish cause to excuse a procedural default if the petitioner's counsel was "so ineffective as to violate the Federal Constitution." Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (citing Murray v. Carrier, 477 U.S. 478, 488-89 (1986)). However, as discussed in more detail below with regard to the merits of petitioner's separate ineffective assistance of appellate counsel claim, petitioner fails to show that his counsel acted in a manner that was constitutionally deficient such that petitioner's procedural default is excused. Indeed, as discussed below, petitioner's multitude of prosecutorial misconduct claims all are without merit. Therefore, petitioner's appellate counsel did not act deficiently in deciding to not raise those claims on direct appeal. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) ("In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy."). Because petitioner fails to demonstrate that his appellate counsel acted deficiently, petitioner's procedural default with respect to his prosecutorial misconduct claims is not excused.

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2. Claims on the Merits

In addition to being procedurally defaulted, petitioner's 12 prosecutorial misconduct claims all lack merit for the reasons discussed below.

a. Made an Inaccurate Comment that Petitioner's Case was a "Three Strikes" Case in a Newspaper Article Published While Jury Selection was Ongoing

Petitioner first argues that the prosecutor engaged in misconduct in violation of petitioner's right to due process when she made an inaccurate remark to a reporter that petitioner's case was a "Three Strikes" case due to the nature of the charged felonies that was published in a local newspaper while jury selection was still ongoing in petitioner's criminal case. Petitioner asserts that the prosecutor's erroneous comment effectively tainted the jury pool for his criminal trial because there was no way of definitively knowing whether the prospective jurors, and, ultimately, the members of the jury pool that were empaneled and rendered the verdict, had read the article.

The Supreme Court has held that:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences . . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences . . . . Neither prosecutor, counsel for defense, the accused, witnesses, court staff nor the enforcement officers coming under the jurisdiction of the court, should be permitted to frustrate its function.

Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966). However, in order to rise to the level of a due process violation, the conduct must "render th[e] trial fundamentally unfair." Darden v. Wainwright, 477 U.S. 168, 193 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Furthermore, the jury's exposure to news accounts of the charged crime, standing alone, will not presumptively deprive the defendant of due process. Skilling v. United States, 561 U.S. 358, 380 (2010) (citing Murphy v. Florida, 421 U.S. 794, 798-99 (1975)). Instead, the defendant must show "that actual bias infected the jury that tried him." Skilling, 561 U.S. at 398.

Here, after the news article containing the prosecutor's comment was brought to the trial judge's attention during the voir dire process, he decided to question each prospective juror as to whether he or she had read the newspaper article containing the prosecutor's "Three Strikes" comment. Lod. Doc. 12 at 872-73. If any prospective juror responded that he or she had reviewed or read the text of the article, then the trial court would dismiss that juror. Id. at 873. All 12 members of the jury and the 3 alternative jurors who were ultimately empaneled and rendered a verdict in petitioner's case stated that they had not read the article when asked by the judge during voir dire. Id. at 874.

Petitioner raised this claim in a motion to dismiss before the state trial court at the conclusion of jury selection, and the trial court rejected it as meritless. Lod. Doc. 11 at 325-30; Lod. Doc. 12 at 872-74. In short, the trial court found that the jury had not been tainted by the article because "no member of the jury and . . . none of the three alternate jurors in this case in any way read the article." Lod. Doc. 12 at 874. Because the trial court took appropriate measures to reasonably ensure that none of the jurors who ultimately rendered a verdict in petitioner's case read the article with the prosecutor's erroneous "Three Strikes" comment, the prosecutor's conduct in providing comments to the newspaper did not render petitioner's trial fundamentally unfair. Nor was the jury tainted by the article such that it was unable to impartially render its verdict.

Petitioner argues, however, that the measure the trial court took in questioning the jurors regarding the whether they had read the article was an inadequate remedy to address potential jury bias because the jurors could have simply lied that they had not read the article. However, the trial court found as a matter of fact that none of the jurors or alternative jurors ultimately empaneled in petitioner's case had read the article at issue. Lod. Doc. 12 at 874. Federal courts sitting in habeas are required to presume that the determination of a factual issue by the state court is correct and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Petitioner fails to provide any evidence to support his claim that the jurors lied other than his own conjecture based on the fact that community from which the jurors were selected was small and the article was published in the

local paper, which was a means of spreading information quickly within that community. This is insufficient to meet the high "clear and convincing evidence" standard required to rebut the trial court's factual finding. Therefore, petitioner's argument is without merit.

Finally, for the first time in his traverse, petitioner appears to make the additional argument that the jury was tainted further because the article noted that the Siskiyou County Superior Court's website listed murder as a charge, which was incorrect since petitioner had only been charged with attempted murder. Petitioner contends that the trial court did not question any of the potential jurors on whether they had seen the article's claim that petitioner was charged with murder, therefore there was no way of knowing whether the jurors had seen and been negatively influenced by it.

As an initial matter, it is not appropriate to raise new arguments in a traverse. Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994). Therefore, petitioner's newly-raised argument is improperly presented. Moreover, none of the jurors who decided his case actually read the article, therefore meaning that they did not read the article's mention of the murder charge. Furthermore, the copy of the article attached to the operative petition shows that while the article noted that the trial court's website listed the case as a murder case, it also noted that this statement was contradicted by a police report that stated that petitioner was charged with attempted murder, thus accurately indicating to the reader that petitioner was charged with attempted murder rather than murder. ECF No. 12 at 106. Finally, even had the jurors read the article or the court website's listing, no actual prejudice could have arisen because the jury acquitted petitioner on the attempted murder charge and all murder-related charges, and there is nothing in the record indicating that any of the jurors were biased by a belief that petitioner was a murderer. Lod. Doc. 11 at 605-06.

In short, petitioner fails to show that the prosecutor's comments in the published newspaper article tainted the jury or otherwise rendered his trial fundamentally unfair. Therefore, this claim is without merit.

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b. Delayed Discovery of the Victim's Supplemental Statement made to Detective Blaney

Next, petitioner argues that the prosecution violated the rule announced by the Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963) when she belatedly produced a supplemental report by the prosecutor's investigator, Detective Rachel Blaney, that summarized statements made by the victim about her travel to Missouri with petitioner.

In Brady, the Supreme Court 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 punishment." 373 U.S. at 87. Since Brady, the Supreme Court has clarified that the duty to disclose is applicable even though there has been no request by the accused, United States v. Agurs, 427 U.S. 97, 107 (1976), that the duty encompasses impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985), and that the rule covers information "known only to the police investigators and not the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438 (1995). "There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that 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).

Here, during the trial, the victim testified that she had traveled with petitioner and her son in a stolen car to Missouri, where they stayed for several months with petitioner's father, who warned her that she needed to get away from petitioner. Lod. Doc. 12 at 1786-87, 1928. The victim also testified that she had told Detective Blaney about these events. Id. at 1790. Petitioner's trial counsel tried to impeach the victim by noting that Detective Blaney's report of her conversations with the victim, which had been provided to petitioner through pretrial discovery, did not contain such information. Id. at 1927-30. However, when petitioner's trial counsel cross-examined Detective Blaney later on in the trial, Detective Blaney testified that the victim had provided statements during a subsequent phone interview that she had traveled with petitioner and her son to Missouri and that petitioner's father had warned her about petitioner. Id.

at 2115-17. It was later revealed that Detective Blaney had prepared a supplemental report regarding this additional conversation with the victim and had forwarded that report to the prosecutor, but the prosecutor had not produced the report to petitioner prior to trial and had not read the report herself until after Detective Blaney's initial cross-examination. Id. at 2498-99.

The defense moved for a mistrial or, alternatively, to strike the testimony of both the victim and Detective Blaney, because the prosecution failed to provide petitioner with Detective Blaney's supplemental report prior to trial. Id. at 2117-28. After additional briefing and argument on the issue, the trial court ruled that while Detective Blaney's supplemental report should have been provided as part of pretrial discovery and its omission "to some extent undermine[d]" the defense's efforts to impeach the victim, petitioner's only requested remedies, that the trial court either declare a mistrial or strike the entirety of the testimonies provided by the victim and Detective Blaney, were not warranted in light of the circumstances as the statements contained in the supplemental report were "not facially exculpatory" and their delayed disclosure did not "deprive [petitioner] of a fair trial." Id. at 2498-2501, 2506. Both the victim and Detective Blaney retook the witness stand after the trial court's ruling on petitioner's motion—after Detective Blaney's supplemental report had finally been disclosed to petitioner—and were subject to further cross-examination regarding the subject of their phone conversation with the benefit of Detective Blaney's supplemental report. Id. 2615-19, 2665-2727.

In light of these facts in the record, petitioner fails to demonstrate a Brady violation. "[T]here is no Brady violation so long as the exculpatory or impeaching evidence is disclosed at a time when it still has value." United States v. Houston, 648 F.3d 806, 813 (9th Cir. 2011). The record shows that Detective Blaney's supplemental report was ultimately produced to petitioner, albeit in a delayed fashion, and that both the victim and Detective Blaney retook the stand and were subject to cross-examination after petitioner obtained the report. Because the supplemental report was disclosed at a time when it still had value, i.e., when petitioner could use it to cross-examine the victim and Detective Blaney, no Brady violation occurred. See Houston, 648 F.3d at 813 ("The government also turned over AUSA Martin's notes from his interview with McConaghy during trial but while cross-examination was on-going. At this point, the notes still

had evidentiary value to the defense because they could be used—and were used—during cross examination."); United States v. Vgeri, 51 F.3d 876, 880 (9th Cir. 1995) (impeaching evidence disclosed during trial was still valuable because the defense could use it on cross-examination); United States v. Gordon, 844 F.2d 1397, 1403 (9th Cir.1988) (impeaching evidence disclosed after a witness had finished testifying did not constitute a Brady violation because the court had offered to recall the witness for further cross-examination in light of the new impeaching evidence). Accordingly, petitioner's claim is without merit.

c. Withheld Witness Kellner's Address from Petitioner

Next, petitioner contends that the prosecution improperly withheld the address of prosecution witness Ruth Kellner, petitioner's ex-girlfriend, by falsely claiming on a pretrial witness list that Kellner had requested her address be withheld from the defense and that all contact with her go through her attorney John Lawrence. Petitioner argues that the prosecution's withholding of Kellner's address under the claimed false pretenses constituted a Brady violation.

As an initial matter, petitioner fails to show how Kellner's address was exculpatory in nature such that its non-disclosure constituted a Brady violation. Moreover, to the extent petitioner appears to argue that the lack of Kellner's address unduly hindered his ability to present a defense by depriving the defense team access to that witness, the record belies this claim. The record shows that the defense was given an opportunity to interview Kellner prior to her testimony for the prosecution, but the defense declined to take advantage of this opportunity. Lod. Doc. 12 at 2343. However, the defense subsequently interviewed Kellner and recalled her to testify as a defense witness. Id. at 2747-49. In short, petitioner fails to show how the prosecution's failure to provide petitioner with Kellner's address violated Brady, deprived him of access to Kellner such that he could not adequately present his defense, or violated any of petitioner's other constitutional rights. Accordingly, petitioner's claim is not well taken.

d. Intercepted Confidential Defense Communications

Petitioner also argues that the prosecutor engaged in misconduct that unduly prejudiced petitioner and violated his Sixth Amendment right to counsel by intercepting confidential communications between him and his counsel. Specifically, petitioner contends that the

prosecutor engaged in two instances of such behavior: (1) the prosecutor had her investigator, Detective Rees, glance at defense counsel's handwritten notes during the trial, and (2) the prosecutor herself looked through a pile of documents on the defense's table.

"The Sixth Amendment provides that an accused shall enjoy the right 'to have the Assistance of Counsel for his defense.' This right, fundamental to our system of justice is meant to assure fairness in the adversary criminal process. [Citations omitted.]" U.S. v. Morrison, 449 U.S. 361, 364 (1981). Governmental conduct must be proved to render counsel's assistance to the defendant ineffective in order to constitute a violation of this right. Id. "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Id. "In addition, certain violations of the right to counsel may be disregarded as harmless error." Id. at 365; see also U.S. v. Rogers, 751 F.2d 1074, 1078 (1985) ("When the action of Government agents involves a violation of the defendant's constitutional rights and yet does not require dismissal of the indictment, it would follow, a fortiori, that merely inducing a witness to violate an ethical obligation of confidentiality to a client would not require dismissal of the indictment.")

More specifically with regard to defense communications, the Supreme Court has held that "when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." Weatherford v. Bursey, 429 U.S. 545, 552 (1977). Furthermore, when an agent of the prosecution overhears such conversations, there can be no Sixth Amendment violation "unless [the agent] communicated the substance of the [attorney-client] conversations and thereby created at least a realistic possibility of injury to [the defendant] or benefit to the State." Id. at 558.

Here, petitioner asserts that during trial Detective Rees, the prosecutor's investigator, glanced over at the defense's table and read defense counsel's handwritten notes. Petitioner claims that he and his counsel were made aware of this conduct when Detective Rees leaned over to petitioner's trial counsel and told petitioner's counsel that his name was not spelled "Reece," as petitioner's counsel had been writing in his notes. After this happened, petitioner filed a motion

to dismiss based on an assertion that the prosecutor had violated her duty not to eavesdrop on defense communications. Lod. Doc. 11 at 471-72. The trial court held a hearing on this motion, during which petitioner's counsel, the prosecutor, and Detective Rees testified. Lod Doc. 12 at 2456-90. During his testimony, Detective Rees responded to questioning regarding his viewing of defense counsel's notes by testifying that he had not intentionally read any defense notes and had only inadvertently noticed that his name had been misspelled on the paper pad defense counsel had been writing on because the courtroom's seating arrangements for the prosecution and defense had left him sitting only inches away from defense counsel. Id. at 2470-75. After hearing the testimony, other evidence, and the parties' arguments on the matter, the trial court made a factual determination finding Detective Rees's testimony to be true and denied petitioner's motion to dismiss. Id. at 2488.

Petitioner contends that the court's factual finding was incorrect and that Detective Rees lied in in his testimony. However, under § 2254, "a determination of a factual issue made by a State court shall be presumed to be correct" and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Petitioner provides little more than his own conclusory disbelief of Detective Rees's testimony to support his argument. Such a showing is insufficient to demonstrate that the trial court's factual determination was incorrect under the applicable "clear and convincing evidence" standard.

Moreover, even had Detective Rees intentionally glanced at defense counsel's notes and obtained material information regarding defense's trial strategy as petitioner asserts, there is no indication that Detective Rees relayed any of that information to the prosecutor, let alone any suggestion that the prosecutor used such information to produce evidence at trial against petitioner, or used it in a manner that was unduly prejudicial. Accordingly, even if petitioner's factual assertion were correct, there is no evidence that a Sixth Amendment violation arose out of the Detective Rees's alleged conduct. See Weatherford, 429 U.S. at 558.

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With regard to petitioner's assertion that the prosecutor looked through a pile of documents on the defense's desk, petitioner claims that the prosecutor's statement during trial that she knew that the defense team had 18 copies of a particular document on their desk demonstrates that she had previously looked through the defense's documents. At trial, the prosecutor testified that she knew that the defense had 18 copies of the document because she knew that there needed to be a copy for each of the 12 jurors and 3 alternate jurors and copies for the prosecution, the defense, and the court, not because she had looked at the defense's documents. Lod. Doc. 12 at 2466-67. The trial court found the prosecutor's testimony truthful and denied petitioner's motion to dismiss based on the prosecutor's alleged misconduct. Id. at 2488. As with Detective Rees's alleged conduct, petitioner provides nothing beyond mere conjecture in his petition that the prosecutor lied to support his assertion that she had looked through the defense's documents. This is insufficient to call into question the trial court's factual determination that the prosecutor had not engaged in such misconduct. See 28 U.S.C. § 2254(e)(1).

In short, petitioner fails to show that the above actions by the prosecution violated his Sixth Amendment right to assistance of counsel. Therefore, his argument is not well taken.

e. Engaged in Witness Tampering

Next, petitioner argues that the prosecutor engaged in witness tampering by suggesting to witness Kellner during a pretrial meeting that petitioner was responsible for the death of Kellner's and petitioner's one-week old daughter in 1997. Petitioner asserts that this conduct violated his right to due process because the prosecutor made these statements to Kellner in order to influence Kellner's testimony when she testified at trial.

During a pretrial interview with Kellner, the prosecutor inquired about the cause of death of Kellner's and petitioner's one-week old daughter in 1997. The prosecutor raised the topic because the infant's autopsy report showed that she had had fluid in her lungs at the time of her death and a police report from just prior to the baby's birth and death regarding allegations of a domestic dispute between petitioner and Kellner contained a statement by Kellner that Amanda Moro told her that petitioner caused the baby's death when he accidentally hit the unborn child in

the womb when trying to hit Kellner. Lod. Doc. 12 at 2431-34. Based on this information and the fact that the autopsy report stated that the cause of the infant's death was unknown, the prosecutor thought it necessary to inquire into the infant's death when interviewing Kellner to get her take on what happened. Id. at 2432. However, when the prosecutor asked Kellner during the interview whether she wanted to review the autopsy report and answer questions on the subject, Kellner declined. Id. at 2434. The prosecutor "accepted and respected" Kellner's refusal to discuss the matter and ended her inquiry into the subject. Id.

Petitioner's trial counsel brought a midtrial motion to dismiss all charges asserting that the prosecutor's inquiry into the infant's death was "outrageous conduct" that violated petitioner's right to due process. Lod. Doc. 11 at 390-95. However, the trial court denied the motion following an evidentiary hearing on the issue, finding that "Kellner's testimony was not in any way affected by the conduct of [the prosecutor]." Lod. Doc. 12 at 1252-54.

As the trial court determined, there is no indication that the prosecutor's statements during the pretrial meeting unduly biased Kellner or were otherwise so outrageous as to violate petitioner's right to due process. Indeed, during trial, Kellner briefly took the stand and testified to petitioner's good character, Lod. Doc. 12 at 2747-50, which indicates that the prosecutor's conduct did not negatively influence Kellner's ability to provide unbiased testimony. Furthermore, Kellner testified at trial that the prosecutor's pretrial inquiry into the death of her child did not in any way impact her trial testimony. Id. at 2294-96. Accordingly, petitioner fails to show that the prosecutor's pretrial statements to Kellner unduly prejudiced Kellner to such a degree that her testimony rendered petitioner's trial so fundamentally unfair as to violate due process.

f. Knowingly Elicited Perjured Testimony from the Victim and Witness Skallerud

Petitioner contends that the prosecutor knowingly elicited false testimony from the victim that petitioner had cut her genitals and from petitioner's ex-girlfriend, Melissa Skallerud, that he had struck her back with a belt. Petitioner argues that the prosecution's misconduct in soliciting this perjured testimony violated his right to due process.

It is well established that a conviction obtained through the prosecution's knowing use of false evidence, including false testimony, violates the Fourteenth Amendment's Due Process clause. Napue v. People of State of Ill., 360 U.S. 264, 269 (1959). Similarly, due process is violated "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." Id. at 271. In short, due process is violated, and reversal is required, "if (1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the false testimony was material (i.e., there is a reasonable likelihood that the false testimony could have affected the judgment)." Dow v. Virga, 729 F.3d 1041, 1048 (9th Cir. 2013) (citing Napue, 360 U.S. at 271-72).

i. The Victim's Testimony

With regard to the victim's testimony, petitioner contends that the victim falsely testified that petitioner had cut her on the exterior of her genitalia during the 2009 campsite incident. Petitioner argues that this statement was false because a hospital report from a week after the incident noted that no cuts were detected during a physical examination. Petitioner argues further that the prosecutor knowingly elicited this false statement because she made the following assertion in her closing argument based on the victim's testimony:

> When inflicting the injury, the defendant intended to cause cruel or extreme pain. He cut her genitalia. At the hospital they are more concerned about her head. But it was there, according to the victim. One person's testimony is good enough. The doctor has testified that area heals quickly. He has not found it in that length of time. It wasn't even dealt with until after she got home from the hospital.

Lod. Doc. 12 at 2931.

A review of the record fails to support petitioner's assertion that the prosecutor knowingly elicited false material testimony from the victim. First, the record fails to support petitioner's contention that the victim's statement was demonstrably false. At trial, the victim testified that petitioner "had something in his hand," that "[i]t *felt* like he had cut [her] with it," and that she felt "[a] lot of stinging." Lod. Doc. 12 at 1657-58 (emphasis added). The victim further

acknowledged during direct examination that no cuts were found on the outside of her genitalia during the physical examination conducted a week after the incident. Id. at 1665-66. On cross-examination, she testified that she believed that the cut had healed by the time the physical examination took place. Id. at 2005. Prior to the victim's testimony, Dr. Saunders testified that while external injuries to the vaginal area do not heal as quickly as internal injuries, that area still "heals quickly." Id. at 1379, 1385. Given this evidence indicating that it was at least conceivable that the victim's purported cut could have healed in the week between the campsite incident and the victim's physical examination, petitioner fails to demonstrate that the victim's statement was actually false.

Moreover, even assuming the victim's testimony regarding the cut was false, the above evidence does not give rise to a reasonable inference that the prosecutor was aware that the victim's testimony was false; the testimony provided a sufficient basis for the prosecutor to make her comments during closing arguments regarding the cut the victim described.

Finally, and most importantly, petitioner fails to show how the victim's statement regarding the cut was material to the outcome of the jury's verdict. There exists ample evidence in the record of petitioner engaging in other acts of violence against the victim during the 2009 campsite incident that supported the charges against him, including evidence that petitioner had repeatedly hit and kicked the victim over the course of their stay at the campsite, such that there was not a reasonable likelihood that a false statement regarding the cut to the victim's genitalia could have affected the jury's verdict on any of the charges for which petitioner was found guilty.

ii. Skallerud's Testimony

Petitioner argues that Skallerud falsely testified that petitioner bruised her back by attacking her with a belt during a domestic violence incident carried out by petitioner against her in 2002. Petitioner contends that Skallerud's testimony regarding the injuries she received during that incident was contradicted by a medical report. Specifically, petitioner argues that Skallerud's testimony was refuted by the finding in the medical report that there were no bruises on Skallerud's back. However, the report petitioner cites to in support of his argument noted that

Skallerud had bruising on the upper part of one of her hips. ECF No. 12 at 145. Such a minor discrepancy regarding where the bruising was located fails to compellingly show that Skallerud gave false testimony. Indeed, Skallerud later clarified in her testimony that she had received bruising on her "lower, mid-back region" as a result of petitioner's hitting her with a belt. Lod. Doc. 12 at 1397. A plausible inference can be drawn that Skallerud may have considered the location of the bruising identified in the report as being part of her lower back area.

Moreover, petitioner merely asserts in a conclusory fashion that the prosecutor was aware of the contradiction, but did nothing to try to correct Skallerud's statement. Even assuming Skallerud's testimony was false, petitioner provides no evidence plausibly indicating that the prosecutor knowingly elicited, or was even aware of, the alleged perjury.

Finally, and most importantly, petitioner fails to demonstrate that the minor discrepancy he highlights with regard to the location of Skallerud's bruises created a reasonable likelihood that the jury's judgment in his case was impacted by Skallerud's allegedly false statement. The 2002 incident between petitioner and Skallerud that was the subject of Skallerud's testimony had no direct bearing on the charges that were brought against petitioner in this case, all of which involved a separate incident between petitioner and the victim in 2009. Indeed, Skallerud had no involvement in the events that formed the basis for the charges against petitioner and the prosecution only had her testify for the purpose of introducing evidence pursuant to California Evidence Code § 1109 that petitioner had committed prior acts of domestic violence. See Lod. Doc. 12 at 1389-1404. Accordingly, there was no reasonable likelihood that Skallerud's allegedly false testimony could have impacted the jury's verdict on the charges brought against petitioner.

Because petitioner fails to show that the prosecutor either elicited or was aware of and did not correct materially false statements made by either the victim or Skallerud, his due process claim is without merit.

g. Made Impermissible Inferences in her Closing Argument

Petitioner also argues that during her closing argument the prosecutor misrepresented evidence regarding whether petitioner had engaged in sexual relations with the victim.

Specifically, petitioner asserts that the prosecutor took out of context petitioner's response to a question asked by Detective Rees during an interview regarding whether petitioner had had sex with a female that Detective Rees did not specifically identify. Petitioner argues that petitioner's affirmative response to the question was with regard to a woman other than the victim; he asserts that his answers to Detective Rees's questions both before and after that question demonstrate that petitioner intended his response to mean that he had had sex with another woman he had been married to on their wedding day in 2002. Petitioner claims that the prosecutor improperly mischaracterized petitioner's statement during her closing argument to insinuate that petitioner had taken the victim to the campsite in order to rape her so that he could consecrate a marriage.

Petitioner asserts that a transcript of his interview with Detective Rees was produced by the prosecution during discovery. However, petitioner fails to attach a transcript of that interview to his operative petition, did not attach it to any of his previous habeas petitions in state or federal court, and the interview itself was never introduced at trial. Without any supporting evidence from the record, petitioner's conclusory allegation that the prosecutor mischaracterized his statement to Detective Rees during the interview is insufficient to support his claim. See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.").

Moreover, a review of the trial record shows that there was evidence introduced at trial from which the prosecutor could have reasonably drawn the inference that she did in her closing argument. For instance, Detective Rees testified at trial that when he had asked petitioner whether he had had sex with the victim, petitioner stated that he and the victim "were going to get married" and that "it was his wedding day when he left her." Lod. Doc. 12 at 2557. Such evidence permitted the prosecutor the latitude to draw from it the inference that she did during her closing argument. See Ceja v. Stewart, 97 F.3d 1246, 1243 (9th Cir. 1996) ("Counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom."). Therefore, the prosecutor's argument did not improperly manipulate or misstate the evidence.

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Moreover, even assuming that the prosecution lacked evidentiary support for the inference she drew regarding petitioner's motivation for bringing the victim to the campsite, the prosecutor's argument to that effect did not amount to a due process violation. The Supreme Court has held that it "is not enough that the prosecutors' remarks [be] undesirable or even universally condemned." Darden, 477 U.S. at 181. Rather, the improper comments must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. Here, the jury ultimately acquitted petitioner of the charges of rape, attempted rape, and of kidnapping for rape, demonstrating that the jurors did not accept the prosecution's theory asserted during closing that petitioner brought the victim to the campsite for the purpose of raping her in order to consecrate their marriage. Lod. Doc. 11 at 607, 610-11. Petitioner argues in his traverse that the prosecutor's comment still prejudiced him despite the acquittal of the rape-related charges because he was convicted of the lesser included offense of battery, which could have provided a basis for the jury's guilty verdict with regard to the torture charge. However, as discussed above, there was ample other evidence introduced regarding petitioner's other acts of violence against the victim during the 2009 campsite incident, such as evidence that petitioner repeatedly hit and kicked the victim over the course of their stay, from which the jury could have reasonably found petitioner guilty of those charges. Accordingly, petitioner fails to show that there was a reasonable likelihood that the prosecutor's statement during her closing argument unduly affected the jury's verdict.[8]

h. Failed to Disclose or Preserve Exculpatory Evidence

Petitioner contends further that the prosecution improperly: (1) failed to disclose exculpatory evidence that the victim had suffered 11 prior skull fractures; (2) failed to preserve exculpatory evidence showing that petitioner had left gold panning tools at the campsite where

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[8] Petitioner also appears to argue for the first time in his traverse that the prosecutor also misrepresented evidence regarding the extent of the victim's prior injuries and whether petitioner had cut the victim's genitalia. In addition to the fact that petitioner improperly raises these arguments for the first time in his traverse, Cacoperdo, 37 F.3d at 507, they also appear to be duplicative of petitioner's arguments regarding the evidence of the victim's prior skull fractures addressed below and the victim's allegedly perjured testimony addressed above. Accordingly, the court declines to address these arguments with regard to petitioner's current claim.

the 2009 incident took place; and (3) refused to grant immunity to witness Amanda Moro, who would have testified that petitioner had purchased a metal detector for purposes of gold panning.

i. Prior Skull Fractures

Petitioner first contends that in violation of Brady, the prosecution improperly suppressed evidence that the victim had suffered 11 skull fractures prior to the 2009 campsite incident. During the trial, Detective Blaney testified that the victim had told Detective Blaney that her doctors had told her that she had suffered 11 separate skull fractures prior to the 2009 incident. Lod. Doc. 12 at 2667-69. However, petitioner fails to provide any indication as to what material evidence the prosecution had in its possession regarding the victim's purported skull fractures or other prior head injuries that it suppressed.[9] Indeed, the prosecution noted at trial that it had provided petitioner with the evidence it had in its possession related to the victim's medical health. Lod. Doc. 12 at 1357. Accordingly, petitioner fails to show that the prosecution committed a Brady violation.

Petitioner also appears to argue that the prosecution should have presented the information regarding the victim's prior skull fractures to the jury for purposes of showing that the victim did not require force likely to cause great bodily injury in order to sustain the injuries she did as a result of the 2009 campsite incident. However, the only indication in the record that the victim had 11 skull fractures was the victim's own statement to Detective Blaney, which conflicted with other evidence produced at trial. For example, Dr. Saunders testified that C.T. scans taken of the victim's face soon after the 2009 campsite incident showed that she had only one nasal fracture that was consistent with blunt force trauma that was no more than a few weeks old. Lod. Doc. 12 at 1380-82. Beyond the victim's own testimony at trial, which conflicted with other evidence,

[9] In his traverse, petitioner appears to assert for the first time that the prosecution improperly failed to provide to petitioner a more detailed medical report regarding the extent and impact of the victim's prior head injuries. Petitioner's use of his traverse to raise this argument for the first time with regard to his claim is procedurally improper. See Cacoperdo, 37 F.3d at 507. Moreover, this argument is identical to the argument petitioner makes with regard to petitioner's claim that the prosecution withheld documentation of the victim's medical history in violation of Brady that is addressed in detail below. Therefore, the court declines to address this argument with regard to petitioner's current claim.

there is no indication that the victim had 11 prior skull fractures. The prosecution did not improperly misstate the evidence or otherwise distort the fact-finding process by not emphasizing to the jury that the victim had such prior head injuries. Accordingly, petitioner's claim is without merit.

ii. Gold Panning Equipment

Next, petitioner contends that the prosecution's investigators failed to preserve petitioner's gold panning tools that were located at the scene of the 2009 campsite incident in violation of the Supreme Court's rulings in and California v. Trombetta, 467 U.S. 479 (1984) and Arizona v. Youngblood, 488 U.S. 51 (1988).

In Trombetta, the Supreme Court held that the government violates a criminal defendant's right to due process when it fails to preserve evidence with "exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489. In Youngblood, the Supreme Court added the additional requirement that a defendant demonstrate that the police acted in bad faith in failing to preserve the potentially useful evidence. 488 U.S. at 58.

Here, petitioner argues that he had left gold panning equipment at the scene of the 2009 campsite incident that the prosecution's investigators failed to preserve when they initially gathered evidence at the crime scene after the incident. Petitioner argues that the gold panning equipment was exculpatory in that it corroborated the defense's theory that petitioner was not the one who assaulted the victim because he had been away from the campsite panning for gold at the time she was attacked. Petitioner also contends that the equipment was likely stolen between the time when the prosecution's investigators failed to secure it during their initial examination of the crime scene on May 28, 2009 and when they returned to investigate the site further on June 11, 2009 and did not find any such equipment.

Even assuming that the gold panning equipment was present at the crime scene when the investigators initially examined it for evidence, petitioner fails to show how that equipment's exculpatory value was readily apparent to the investigators at that time. The evidence presented

at trial regarding what occurred in the time between when emergency personnel were dispatched to the crime scene and the time of the initial investigation does not suggest that the gold panning equipment had a readily apparent exculpatory value. Indeed, testimony from witnesses present at the time emergency services arrived on the scene stated that petitioner told them he was present at the campsite during the time the victim was attacked and witnessed the attack himself. Lod. Doc. 12 at 1068, 1126. There is no evidence that petitioner or anyone else had told law enforcement prior to the initial investigation that petitioner had been gold panning at the time of the incident, nor was there any evidence that reasonably suggested that any gold panning equipment at the campsite otherwise needed to be preserved. Accordingly, the exculpatory nature of the gold panning equipment petitioner claims was at the campsite would not have been immediately apparent to investigators under the circumstances.

Furthermore, petitioner fails to show that the prosecution acted in bad faith in failing to secure the gold panning equipment at the crime scene. Petitioner first claimed to law enforcement that he had been gold panning at the time of the incident during a post-arrest interview that took place on June 10, 2009. Lod. Doc. 12 at 2085. The next day, the prosecution's investigators returned to the crime scene in search of gold panning equipment and did not find any, but did find and preserve several other items. Id. at 1217, 1243-49. This evidence, and indeed the rest of the record, does not suggest that the prosecution acted in bad faith when investigating the crime scene. Therefore, petitioner fails to demonstrate that the prosecution's conduct was in violation of the Supreme Court's holdings in Trombetta and Youngblood.

iii. Moro's Testimony

Petitioner also argues that prospective defense witness Amanda Moro would have taken the stand and testified that petitioner had purchased a metal detector for purposes of gold panning had the prosecution granted her use immunity. The prosecution did not grant such immunity, however, and Moro invoked her Fifth Amendment right against self-incrimination and declined to testify. Petitioner claims that the prosecution's failure to grant immunity to Moro was done in an attempt to distort the fact finding process and prevent petitioner from putting on a complete

defense.

As an initial matter, the court notes that petitioner provides no authority or evidence to support his claim. Furthermore, the court is not aware of any clearly established Supreme Court case law that supports petitioner's claim. While the Ninth Circuit Court of Appeals has recognized that a violation of due process occurs when a prosecutor deliberately refuses to grant testimonial use immunity to a relevant witness for the specific purpose of distorting the fact-finding process, United States v. Sedaghaty, 728 F.3d 885, 916 (9th Cir. 2013), such precedent cannot properly support habeas relief. Parker v. Matthews, 132 S. Ct. 2148, 2155 (2012) (quoting Renico v. Lett, 559 U.S. 766, 777 (2010)) ("[C]ircuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court . . . .'"); see also Arredondo, 365 F.3d at 782 (holding habeas petitioner's "reliance on Ninth Circuit or other circuit authority is misplaced" because 28 U.S.C. § 2254(d)(1) requires a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.").

Moreover, petitioner's claim still fails even under the Ninth Circuit's standard. During trial, the defense requested the court to grant use immunity to proposed defense witness Amanda Moro, petitioner's brother's girlfriend, so she could testify that she did not observe petitioner physically harm the victim or hold her against her will while they were all traveling from Placerville to Siskiyou County. Lod. Doc. 11 at 383-89. Without immunity, Moro intended to invoke her Fifth Amendment right to silence during cross examination. Accordingly, petitioner argued at trial that immunity was necessary in order for petitioner to present a complete defense. Id. The trial court ultimately denied the request for judicial immunity for Moro, finding that testimony was not "clearly exculpatory" or "essential" because the charged offenses arose from petitioner's conduct after he and the victim had been dropped off by Moro at the campsite in Siskiyou County. Lod. Doc. 12 at 2536-45, 2550. The trial court did "not find that there has been any government effort to distort the judicial fact-finding process in its decision to not pursue immunity for Ms. Moro under the circumstances of this case." Id. at 2547, 2550. This determination was reasonable in light of the Ninth Circuit's case law as Moro's anticipated

testimony concerned events that occurred before the time the charged offenses allegedly took place and, therefore, was only tangentially related to the case. Accordingly, petitioner's claim is without merit.

i. Attempted to use Petitioner's Post-Arrest Silence Against Him

Petitioner also asserts that the prosecutor improperly attempted to use petitioner's post-arrest silence against him in violation of the Supreme Court's ruling in Doyle v. Ohio, 426 U.S. 610 (1976).

A suspect has a constitutional right not to speak to police after he is arrested and given his Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 479 (1966). As an extension of that right, the Supreme Court held in Doyle that prosecutors are prohibited from commenting on a defendant's post-Miranda silence. 426 U.S. at 618-19; see also United States v. Lopez, 500 F.3d 840, 844 (9th Cir. 2007) (noting that a prosecutor's comment on defendant's post-Miranda silence violates Doyle). The rationale for this rule "rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." Wainwright v. Greenfield, 474 U.S. 284, 291 (1986) (citation and internal quotation marks omitted) (holding that prosecution may not use defendant's silence during case-in-chief).

Here, petitioner contends that the prosecutor improperly elicited testimony from Detective Blaney that referenced petitioner's post-arrest silence. When the prosecutor asked whether Detective Blaney had asked petitioner during a post-arrest interview how petitioner and the victim "got from Placerville to Dunsmuir," Detective Blaney responded as follows: "He told me that a friend dropped him off at the river, but he refused to name who the friend was." Lod. Doc. 12 at 2715. Petitioner's defense counsel immediately objected on the ground that it violated Doyle. Id. After a bench conference was held, the trial court sustained petitioner's objection, struck Detective Blaney's answer from the record, and advised the jury that Detective Blaney's response should not be considered for any purpose in petitioner's case. Id.

The Supreme Court held in Greer v. Miller that a court's use of measures such as those utilized by the trial court in petitioner's case are sufficient to prevent the use of a defendant's

post-arrest silence in violation of Doyle. 483 U.S. 756, 764 (1987) (holding that no Doyle violation occurred when "the court explicitly sustained an objection to the only question that touched upon [the defendant's] postarrest silence[, n]o further questioning or argument with respect to [the defendant's] silence occurred, and the court specifically advised the jury that it should disregard any questions to which an objection was sustained"). Like the trial court in Greer, the trial court here sustained petitioner's objection to Detective Blaney's testimony regarding petitioner's silence, permitted no further questioning or argument regarding petitioner's post-arrest silence, and advised the jury to disregard Detective Blaney's testimony on that subject. In short, petitioner's post-arrest silence was not submitted to the jury as evidence from which it was allowed to draw any inferences. Therefore, no Doyle violation occurred and petitioner's argument regarding the use of his post-arrest silence is without merit.

j. Failed to Provide Victim's Medical History

Petitioner also argues that the prosecutor improperly withheld evidence of the victim's past medical history in violation of the Supreme Court's rulings in Brady and Pennsylvania v. Ritchie, 480 U.S. 39 (1987). Specifically, petitioner asserts that the prosecution deprived him of his ability to effectively question prosecution witness Dr. Saunders regarding the extent of the victim's previously-existing injuries because Dr. Saunders could no longer recall the specifics of such injuries and did not bring copies of the victim's medical records to refresh his recollection.

With regard to petitioner's assertion pursuant to Brady, the trial record demonstrates that the prosecution produced the documents within its possession related to the victim's medical health, including any exculpatory information it had in its possession. Lod. Doc. 12 at 1357. Indeed, petitioner even acknowledges in both his first amended petition and traverse that the prosecution produced the victim's medical records during discovery. ECF Nos. 12 at 52, 46 at 37. Petitioner argues, however, that the prosecution should have been required to provide a more detailed medical history. This argument is without merit; the prosecution did not have a constitutional duty to obtain and produce the more detailed medical information to which petitioner claims he was entitled. See Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (quoting Wardius v. Oregon, 412 U.S. 470, 474 (1973)) ("There is no general constitutional right to

discovery in a criminal case, and Brady did not create one; as the Court wrote recently, 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . .'"). If petitioner wanted more information regarding the victim's medical history, it was incumbent upon him to have sought those more detailed records through subpoenas or other proper methods.

Similarly, petitioner fails to show how the admission of Dr. Saunders's testimony was contrary to the Supreme Court's holding in Ritchie. Petitioner appears to argue that his rights under the Sixth Amendment's Confrontation Clause were violated because he was unable to effectively cross-examine Dr. Saunders given the limited information petitioner had with regard to the victim's medical history with which he could prepare his examination and Dr. Saunders's inability to testify to the details of that topic without further information to refresh his recollection. However, as the Supreme Court provided in Ritchie:

> The ability to question adverse witnesses . . . does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. In short, the Confrontation Clause only guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

480 U.S. at 52-53 (internal citations and quotation marks omitted). Here, the record shows that petitioner enjoyed the sort of wide latitude to examine Dr. Saunders and the other witnesses that the Supreme Court in Ritchie found sufficient to meet the Confrontation Clause's requirements. Accordingly, petitioner's argument is without merit.[10]

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[10] Petitioner also appears to argue in his traverse that Dr. Saunders's testimony to the extent he was able to provide it failed to meet the standards for expert testimony that the Supreme articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Aside from the fact that this claim is inappropriately raised for the first time in petitioner's traverse, see Cacoperdo, 37 F.3d at 507, it also is not cognizable under § 2254. A federal court may not grant habeas relief based on a belief that the state trial court made an incorrect evidentiary ruling under state evidence law. Briceno v. Scribner, 555 F.3d 1069, 1077 (9th Cir. 2009) (citing Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)) ("Our habeas powers do not allow us to vacate a conviction 'based on a belief that the trial judge incorrectly interpreted the California Evidence Code in

k. Improperly Attempted to Elicit Prior Bad Acts Testimony

Petitioner contends that the prosecutor impermissibly presented propensity evidence in the form of petitioner's prior acts of drug use and domestic violence, in violation of petitioner's right to due process.

With regard to the evidence of past drug use, witness Kellner speculated during her trial testimony as to whether petitioner had been drinking or doing drugs during a 1997 encounter she had with him. Lod. Doc. 12 at 1418-19. Petitioner's counsel immediately objected to this statement. Id. The trial court sustained the objection, struck the testimony, and instructed the jury to disregard Kellner's statement. Id. With regard to the evidence of domestic violence, Ms. Kellner testified that during the 1997 incident, petitioner hit her while she was 8-months pregnant, an act for which petitioner pleaded guilty to a felony. Id. at 1415-24.

In Estelle v. McGuire, the Supreme Court expressly declined to express an opinion on the issue of whether the Due Process Clause is violated by the admission of prior bad acts evidence to show that the defendant has a propensity to commit a charged crime. 502 U.S. 62, 74 (1991) ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."). Because there does not exist any clearly established Supreme Court precedent providing that a criminal defendant's constitutional right to due process is violated by the introduction of prior bad acts as evidence to show propensity, the state trial court's adjudication was not contrary to or unreasonable in light of clearly established federal law. See Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (noting that the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ"). Accordingly, petitioner request for habeas relief based on this argument is denied. 28 U.S.C. § 2254(d).

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ruling' on the admissibility of evidence."). Furthermore, the California Supreme Court has expressly declined to adopt Daubert as the applicable standard in California. People v. Wilkinson, 33 Cal.4th 821, 843 (2004); People v. Leahy, 8 Cal.4th 587, 593-604 (1994).

1. Engaged in Pervasive Misconduct

Based on the instances of prosecutorial misconduct claimed above, petitioner finally asserts that the prosecutor engaged in pervasive misconduct that violated his due process rights. However, for the reasons discussed above, none of petitioner's claims of prosecutorial misconduct have merit. Furthermore, petitioner fails to demonstrate that any other of the prosecutor's actions amounted to a violation of petitioner's right to due process or any other constitutional right that would warrant habeas relief under § 2254. Accordingly, petitioner's claim that the prosecution engaged in pervasive misconduct in violation of petitioner's due process and other constitutional rights is without merit.

In sum, petitioner's prosecutorial misconduct claims are both procedurally defaulted and without merit. Therefore, they are denied.

B. Judicial Bias

Second, petitioner argues that his right to due process was violated as a result of the state trial court expressing bias against him during his criminal trial. Petitioner contends that this bias was expressed through the trial court's denial of petitioner's trial motions, sentencing decision, and appointment of counsel to certain witnesses. More specifically, petitioner asserts that the following seven instances show that the trial court improperly acted with bias against him during his criminal trial: (1) denied petitioner's motion to dismiss based on the prosecutor's "Three Strikes" comment in the newspaper; (2) denied petitioner's motion to dismiss based on the delayed disclosure of the victim's supplemental statement to Detective Blaney; (3) denied petitioner's motion to dismiss based on the prosecution's withholding of Kellner's address and questioning of Kellner at a meeting; (4) denied petitioner's motion for mistrial based on the victim's outbursts while testifying; (5) refused to dismiss juror number 11 after that juror had glimpsed petitioner in the courthouse hallway; (6) imposed consecutive sentences pursuant to California Penal Code § 654 despite petitioner's objection; and (7) appointed a conflicted attorney to represent petitioner's brother and brother's girlfriend (collectively "judicial bias claims").

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1. Procedural Default

As with his prosecutorial misconduct claims, petitioner did not raise his judicial bias claims until he filed his first state habeas petition, which the state habeas court denied on the adequate and independent state law ground that petitioner had failed to first raise those claims on direct appeal. See Lod. Docs. 1, 2, 3, 8, 9. Also similar to his prosecutorial misconduct claims, petitioner argues that any procedural default with regard to his judicial bias claims should be excused as his appellate counsel on direct appeal provided ineffective assistance in declining to raise those claims at that time. However, as discussed above with regard to the prosecutorial misconduct claims and below with regard to plaintiff's claim for ineffective assistance of appellate counsel, documents attached to petitioner's present habeas petition demonstrate that petitioner's appellate counsel did not act deficiently in refusing to raise the meritless judicial bias claims petitioner now raises. Accordingly, plaintiff's argument that the procedural default with respect to his judicial bias claims should be excused due to his appellate counsel's conduct is without merit and petitioner's judicial claims are denied under the doctrine of procedural default.

2. Claims on the Merits

Moreover, even if petitioner's judicial bias claims were not procedurally defaulted, his arguments in support of his claims also lack merit for the following reasons.

a. Denied Petitioner's Motion for Dismissal Based on the Prosecutor's "Three Strikes" Comment in the Newspaper

Petitioner first argues that the state trial court engaged in misconduct by denying petitioner's motion for dismissal based on the prosecutor's erroneous "Three Strikes" comment published in a local newspaper. As discussed above with regard to petitioner's prosecutorial misconduct claim based on the prosecutor's comment in the newspaper article, the trial court took reasonable steps to ensure that none of the members of the jury empaneled in petitioner's case had read the article. The trial court's decision to deny petitioner's motion to dismiss based on the article was reasonable in light of the clearly established Supreme Court precedent. Furthermore, the trial court's response with regard to assessing whether the jurors were aware of the newspaper article in question was adequate and did not exhibit bias against petitioner. The trial judge

provided a thorough and well-reasoned explanation for why he denied petitioner's motion; there is no evidence whatsoever of any bias towards petitioner. See Lod. Doc. 12 at 867-75. Accordingly, petitioner's argument is rejected.

b. Denied Petitioner's Motion to Dismiss Based on the Delayed Disclosure of Detective Blaney's Supplemental Report

Second, petitioner argues that the trial court erred by denying his motion to dismiss based on the prosecution's delayed disclosure of Detective Blaney's supplemental report. As discussed above with regard to petitioner's prosecutorial misconduct claims, the delayed disclosure of Detective Blaney's supplemental report did not constitute a Brady violation. The trial court similarly found when denying petitioner's motion to dismiss that the belated disclosure of the supplemental report did not constitute a Brady violation. Lod. Doc. 2498-501. Because no Brady violation occurred as a result of the prosecution's delayed disclosure, the trial court's dismissal petitioner's motion based on that alleged violation was reasonable in light of the clearly established Supreme Court precedent. Therefore, petitioner's claim is without merit.

c. Denied Petitioner's Motion to Dismiss Based on the Prosecution's Withholding of Kellner's Address and Questioning of Kellner at a Pretrial Meeting

Third, petitioner argues that the trial court erred by denying his motion to dismiss on the basis that the prosecution improperly withheld witness Kellner's address and improperly questioned Kellner regarding the 1997 death of her infant child during a pretrial interview. As discussed above with regard to petitioner's prosecutorial misconduct claims, neither the prosecutor's failure to provide Kellner's address, nor her pretrial questioning of Kellner regarding Kellner's deceased infant violated petitioner's right to due process, or any other federal right. The trial court also reached this conclusion as to both claims in denying petitioner's trial motion. Lod. Doc. 12 at 2450-54. Accordingly, the trial court's decision was not contrary to clearly established Federal law and petitioner's argument is not well taken.

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d. Denied Petitioner's Motion to Dismiss Based on the Victim's Outbursts while Testifying

Fourth, petitioner contends that the trial court violated petitioner's right to due process by denying petitioner's two motions to dismiss based on the victim's outbursts and overall demeanor while testifying at trial. Specifically, petitioner identifies in his petition the following statements as having had an unduly prejudicial impact on his trial: (1) the victim's statement that she was no longer afraid of petitioner because "right now he's in cuffs"; (2) the victim's statement that "there was so much drugs involved" when she described her drive with petitioner, petitioner's brother, and petitioner's brother's girlfriend; and (3) her disavowal of any involvement by "Jordan" regarding the events at issue in the case. Lod. Doc. 12 at 1731, 1733-34, 1736.

As an initial matter, the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Holley, 568 F.3d at 1101. Petitioner asserts that the victim's statements he highlights in his petition constituted overtly prejudicial evidence. Even assuming, arguendo, however, that petitioner correctly characterizes the statements as prejudicial, the trial court's decision to deny petitioner's motion to dismiss on this basis was not contrary to or an unreasonable application of federal law within the meaning of § 2254.

Furthermore, petitioner fails to demonstrate that the victim's outbursts and general demeanor during her testimony rendered petitioner's trial unfair to such a degree that it violated petitioner's right to due process. In the context of the many hours of testimony the victim gave and the trial court's apparent need to balance the interest in affording petitioner with a full and fair ability to cross-examine the victim with the victim's ability to undergo examination given her fragile mental state, it cannot be reasonably said that the statements petitioner contests gave rise to the sort of undue prejudice needed to sustain a due process claim. Moreover, with regard to the second and third statements petitioner contests, the trial court struck them from the record and advised the jury to disregard them after an objection was raised by petitioner's counsel. Lod. Doc. 12 at 1733, 1736. In short, the state trial court properly rejected petitioner's motions for mistrial based on the victim's outbursts and general demeanor while testifying as such behavior

did not deprive petitioner of a fair trial. Accordingly, petitioner's claim on this basis is without merit.

e. Refused to Dismiss Juror Number 11 after that Juror had Glimpsed Petitioner in the Courthouse Hallway

Fifth, petitioner argues that the trial court improperly refused to dismiss juror number 11 after that juror had allegedly glimpsed petitioner in the courthouse hallway while petitioner was being escorted in handcuffs.

Generally, "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury." Deck v. Missouri, 544 U.S. 622, 633 (2005). "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." Id. at 629. Without a particularized determination showing that shackling is justified, visible shackling in the courtroom is "'inherently prejudicial.'" Id. at 635 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Nevertheless, the Ninth Circuit Court of Appeals, interpreting the Supreme Court's holding in Deck, has recently held that some jurors' viewing of the defendant being transported in shackles through the courthouse's public areas does not deprive the defendant of a fair trial in violation of due process. Wharton v. Chappell, 765 F.3d 953, 966 (9th Cir. 2014); see also Ghent v. Woodford, 279 F.3d 1121, 1133 (9th Cir.2002) (holding that there was no inherent prejudice where "a few jurors at most glimpsed [defendant] in shackles in the hallway and as he was entering the courtroom"); Castillo v. Stainer, 983 F.2d 145, 148 (9th Cir. 1992) (holding that, concerning "a brief and accidental viewing of the defendant in a corridor, chained [at the waist]," "[n]o harm that rises to a constitutional level is done by such an unintended, out-of-court occurrence"); United States v. Halliburton, 870 F.2d 557, 559-61 (9th Cir.1989) (holding that a "brief and inadvertent display of [defendant] in handcuffs" when "he was observed handcuffed to a codefendant by at least two jurors as the elevator doors opened" was not inherently prejudicial).

Here, petitioner merely contends that juror number 11 briefly glimpsed him in handcuffs in the courthouse hallway when passing by. This occurrence did not give rise to a violation of

petitioner's due process rights. See Deck, 544 U.S. 622; Wharton, 765 F.3d at 966; Ghent, 279 F.3d at 1133; Castillo, 983 F.2d at 148; Halliburton, 870 F.2d at 559-61.

Nor did the trial court's refusal to dismiss juror number 11 exhibit the sort of bias petitioner asserts. Indeed, after the incident occurred, the trial judge held a brief hearing during which he asked juror number 11 whether he had observed petitioner outside the courtroom, to which juror number 11 stated he had not. Lod. Doc. 12 at 1405. Later, after juror number 11 gave the court a note stating that he remembered that he had actually seen petitioner in the hallway, the trial judge expressed concern that questioning the juror on what he had observed could lead him to draw a prejudicial inference against petitioner and, therefore, declined to conduct a further inquiry. Id. at 1482-83. The trial judge similarly declined to conduct such an inquiry when it was brought to his attention that other jurors might have seen petitioner in the hallway for the same reason expressed with regard to juror number 11, but would address the issue if it later appeared that the situation warranted such intervention. Id. at 1566-67. Such actions on the trial court's part do not demonstrate the existence of the sort of judicial bias petitioner asserts.

Moreover, petitioner fails to point to any evidence in the record plausibly showing that juror number 11 saw petitioner in restraints when he glimpsed petitioner in the hallway. Indeed, petitioner's claim is directly refuted by the record and the attachments to the operative first amended petition. For instance, when the court questioned the bailiff regarding the procedure that was used to transport petitioner to the courtroom, the bailiff responded that petitioner was unshackled and unchained at the bottom of the hall such that he was unrestrained by the time he was brought through the hallway near the courtroom. Lod. Doc. 12 at 1309-10, 1412, 1567. Furthermore, petitioner's own counsel on appeal noted in his letter to petitioner attached to the petition that there was "*no evidence* that [the jurors] had seen [petitioner] in shackles." ECF No. 12 at 150 (emphasis in original). After a review of the record, the court agrees and finds petitioner's assertion regarding juror number 11 to lack merit.

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f. Imposed Consecutive Sentences Pursuant to California Penal Code § 654 Despite Petitioner's Objection

Petitioner also argues that the trial court exhibited bias when it overruled petitioner's objection to the imposition of consecutive sentences under California Penal Code § 654. As an initial matter, the court notes that "[t]he decision whether to impose sentences concurrently or consecutively is a matter of state criminal procedure and is not within the purview of federal habeas corpus." Cacoperdo, 37 F.3d at 507 (citing Ramirez v. Arizona, 437 F.2d 119, 120 (9th Cir. 1971)); see also Watts v. Bonneville, 879 F.2d 685, 687 (9th Cir. 1989) (holding that federal courts cannot review a claim that a consecutive sentence violated California Penal Code § 654 "because 28 U.S.C. § 2254(a) authorizes the federal courts to grant habeas corpus relief only for violations of federal law"). Accordingly, insofar as petitioner asserts that the state court's decision to impose a consecutive sentence was in violation of § 654, such a claim is not cognizable under § 2254.[11]

In addition, the trial court's decision to impose a consecutive sentence does not display judicial bias as petitioner asserts. During sentencing, the trial judge provided an extensive explanation— that separate violent acts supported each conviction—for his decision to sentence petitioner consecutively. Lod. Doc. 12 at 3074-76, 3098-3109, 3117-3126. Nothing in the record indicates that the trial court acted with undue bias in rendering this sentencing decision. Accordingly, petitioner's argument is not well taken.

g. Appointed Conflicted Attorney to Represent Petitioner's Brother and Petitioner's Brother's Girlfriend

Finally, petitioner asserts that the trial court violated his Sixth Amendment right to counsel by appointing an attorney, John Lawrence, to represent petitioner's brother, John Anon, and petitioner's brother's girlfriend, Amanda Moro, who had a conflict due to his "familiarity" with the prosecutor. ECF No. 12 at 60-61. Petitioner argues that this familiarity caused

[11] In an apparent acknowledgement of this fact, petitioner states in his traverse that he "digresses on the issue" after having reviewed the case law respondent cites to in her answer. ECF No. 46 at 47. The court construes this response as an acknowledgement by petitioner that his claim is based entirely on state law and, therefore, is not cognizable under § 2254.

Lawrence to coerce Anon and Moro to refuse to testify on petitioner's behalf. This argument is not well taken for two reasons.

First, petitioner cites to a series of email communications between Lawrence and the prosecutor attached to his operative first amended petition in support of his argument that in no way show that Mr. Lawrence had a "conflict" that would have caused him to improperly coerce Anon or Moro into not testifying on petitioner's behalf. See ECF No. 12 at 116-26. Indeed, the email chain attached to the petition consists merely of a conversation between Lawrence and the prosecutor arranging for the prosecutor to meet with Ruth Kellner, another witness in the case represented by Mr. Lawrence. Id. Moreover, the record shows that Moro was not represented by Lawrence, but by another appointed attorney, William Duncan, and remained ready and willing to testify on petitioner's behalf throughout the trial on the condition that she be granted testimonial immunity. Lod. Doc. 12 at 1515, 1524-27, 1531-33. With regard to Anon, the prosecution attempted to call him as a witness against petitioner, but he invoked his Fifth Amendment right against self-incrimination. Id. at 1517-22, 1528-30, 1537-50. Later, the defense stated its intent to have Anon to testify, but the prosecution objected and stated its intent to impeach Anon if he testified. Lod Doc. 11 at 505-13. Ultimately, the defense rested without calling Anon. Lod Doc. 12 at 2845. Nothing in the record remotely suggests that Lawrence conspired with the prosecutor to coerce Anon and Moro into not testifying. Moreover, nothing suggests that the trial court acted with undue bias towards petitioner in appointing Lawrence to represent Anon and other prospective witnesses.

Second, and more importantly, petitioner fails to point to any clearly established Supreme Court precedent indicating that a court's appointment of a conflicted attorney to represent prospective defense witnesses violates a criminal defendant's Sixth Amendment right to counsel. Indeed, petitioner himself appears to concede in his traverse that no such precedent exists. ECF No. 46 at 47. Because there is no clearly established Supreme Court precedent to support his claim that his Sixth Amendment right to counsel was violated, petitioner's argument is without merit.

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In sum, petitioner's judicial bias claims are both procedurally defaulted and lack merit. Therefore, they are denied.

C. Ineffective Assistance of Appellate Counsel

Third, petitioner contends that the appellate counsel that represented him on direct appeal in the California Court of Appeal, Third Appellate District and California Supreme Court was ineffective because he failed to raise the prosecutorial misconduct and judicial bias claims petitioner presents above.

1. Legal Standards

The Supreme Court has enunciated the standards for judging ineffective assistance of counsel claims. See Strickland v. Washington, 466 U.S. 668 (1984). First, a defendant must show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. To this end, the defendant must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment. Id. at 690. The court must then determine, whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. Id. Second, a defendant must affirmatively prove prejudice. Id. at 693. 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 United States v. Murray, 751 F.2d 1528, 1535 (9th Cir. 1985); United States v. Schaflander, 743 F.2d 714, 717-718 (9th Cir. 1984) (per curiam).

As to ineffective assistance claims in the federal habeas context, the Supreme Court has instructed:

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," id., at 689; Lindh v. Murphy, 521 U.S. 320, 333, n. 7, (1997), and when the two apply in tandem, review is "doubly" so, Knowles, 556 U.S., at ----, 129 S. Ct. at 1420. The Strickland standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at ----, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness

> under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Harrington v. Richter, 131 S. Ct. 770, 787-788 (2011) (parallel citations omitted).

2. Discussion

With regard to petitioner's claim that his appellate counsel acted deficiently by not raising the prosecutorial misconduct and judicial bias claims he asserts above, the court notes that those claims lack merit for the reasons discussed above. Defense counsel has no constitutional obligation to raise every frivolous, or even non-frivolous, issue requested by the defendant. Jones v. Barnes, 463 U.S. 745, 751-54 (1983). Moreover, as the Ninth Circuit Court of Appeals has noted, "[i]n many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989). As discussed above with regard to petitioner's prosecutorial misconduct claims, the petition here shows that plaintiff wrote to his appellate counsel requesting his counsel to raise some of the prosecutorial misconduct and judicial claims he currently asserts, to which his counsel responded that he would not raise such claims as he had conducted research regarding their viability and determined that they would have little likelihood of success. ECF No. 12 at 149-53. Accordingly, the mere fact that petitioner's appellate counsel declined to raise the non-meritorious claims petitioner asserts above does not establish that his counsel was ineffective. See id. Furthermore, because petitioner's multitude of prosecutorial misconduct and judicial bias claims are without merit, petitioner cannot show that he suffered prejudice as a result of his appellate counsel's refusal to raise those claims on direct appeal. Because petitioner cannot demonstrate that his appellate counsel's actions were constitutionally deficient and show that those actions were prejudicial, petitioner's ineffective assistance of appellate counsel claim is denied.

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D. Failure to Give Calcrim 350 Jury Instruction

Fourth, petitioner argues that the state trial court improperly refused to instruct the jury using Calcrim 350, which instructs on how a jury is to consider evidence of a criminal defendant's good character, in violation of petitioner's Fourteenth Amendment rights to due process and equal protection.

1. State Court Decision

The California Court of Appeal, Third Appellate District summarized the facts underlying this claim and ruled as follows:

> In the course of settling instructions, defendant asserted that he was entitled to an instruction on evidence of his good character. When asked for the evidentiary basis for the instruction, defense counsel replied, "I believe there's been testimony by [defendant's stepgrandfather]. There was various witnesses talking about . . . them being a happy, loving couple," otherwise specifying, however, only an ex-girlfriend who testified that defendant "was a good guy." The trial court found this testimony did not "ris[e] to the level of a character trait that is normally encompassed by" the instruction. (CALCRIM No. 350.)
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> In the referenced testimony,[12] the stepgrandfather described defendant and the victim as being affectionate with one another while they stayed a couple of days with him in Las Vegas in the spring of 2009. An ex-girlfriend of defendant's had testified (pursuant to Evid. Code, § 1109) that defendant had hit her in the mouth in 1997 in Dunsmuir when she was eight months pregnant with their child (for which he later pleaded guilty to a felony).[13] However, she also testified as a defense witness, asserting that she did not have any continuing fear of defendant, and made him the godfather of her child with an unnamed brother of defendant's.
>
> *A. State Law*

[12] On appeal, defendant does not attempt to identify any other testimony in this vein. We note, however, defendant's natural father similarly described the couple's behavior as affectionate during the visit to him in Missouri.

[13] A second ex-girlfriend also testified (pursuant to Evid. Code, § 1109) that defendant had struck her two to three times on her back with a belt in 2002 during the course of an argument, after which she engaged in multiple acts of sexual intercourse with him (though later reporting the incident to the police).

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As People v. Bell (1875) 49 Cal. 485 (Bell) observed, "It is important in every criminal case, and especially so when the inculpatory proof is circumstantial in its character, that the jury should be instructed, if the prisoner so request, that in determining whether or not he is guilty beyond a reasonable doubt, his good reputation, if he have such, as to traits involved in the charge, should be weighed as any other fact established, and that it may be sufficient to create a reasonable doubt as to his guilt. Whether or not, in the particular case in hand, it would do so, was a question for the consideration of the jury . . . . [T]here may be cases so made out that no character, however high, can make them doubtful, while there may be other cases in which a high character would produce a reasonable doubt, when without it, the evidence [otherwise] might be considered as establishing guilt beyond a reasonable doubt." (Bell, at p. 490; accord, People v. Jones (1954) 42 Cal.2d 219, 224 (Jones).)

Generally, a defendant may present evidence of character in the form of opinion or reputation evidence, but not in the form of specific acts. (Jones, supra, 42 Cal.2d at p. 224; People v. Felix (1999) 70 Cal.App.4th 426, 431-432; People v. Honig (1996) 48 Cal.App.4th 289, 348; Evid. Code, § 1102.) However, People v. Callahan (1999) 74 Cal.App.4th 356, 379 (Callahan), held that where the prosecution has introduced propensity evidence in the form of uncharged specific criminal sexual acts (Evid. Code, § 1108), a defendant was entitled *in rebuttal* to introduce *any* "of the three types of character evidence—opinion evidence, reputation evidence, and *evidence of specific incidents of conduct*." (Italics added.)

From this defendant argues the proposition that, in light of the prosecution's introduction of the evidence of the two acts of uncharged domestic violence (Evid. Code, § 1109), the testimony regarding specific instances of his kindly behavior with the victim became admissible as rebuttal good character evidence. These specific instances, in turn, were substantial evidence in support of the requested pattern instruction (which flows from Bell) that directs a jury to take this evidence into account in deciding the issue of reasonable doubt.

The People, after we directed them to respond to this issue in supplemental briefing, assert Callahan involved admission of the evidence rather than determining whether the evidence was sufficient to warrant instruction on reasonable doubt from good character evidence. It is true Callahan does not directly make any reference to the latter; however, we believe it is necessarily implicit within Callahan's discussion of admissibility that the excluded

evidence (asking the niece of a defendant charged with molesting another whether he had ever touched her inappropriately) would have warranted an instruction on the effect of the evidence. Otherwise, there would not have been any purpose in reaching the issue. The People also argue in conclusory fashion that the testimony of the stepgrandfather and ex-girlfriend "shed little if any light on [defendant's] proclivity for beating women." This may be true of the stepgrandfather's two-day contact, but does not apply to the father's observations over a period of several weeks, or the ex-girlfriend's present comfort level despite past physical abuse. Tautologically, specific acts are specific acts, not reputation or opinion. The People in point of fact are disputing the weight we should accord this evidence, not its sufficiency to support an instruction.

Ultimately, however, while we agree with the logic of defendant's proposition, we do not find the refusal of the instruction to be prejudicial. The present case is certainly not among those where "the inculpatory proof is circumstantial in its character," and is one of those "cases so made out that no character, however high, can make them doubtful." (Bell, supra, 49 Cal. at p. 490.) The late Justice Jefferson (an authority on evidence) has described even the more pervasive good character evidence of reputation or opinion as having only "slight" probative value "at best." (People v. Pic 'll (1981) 114 Cal.App.3d 824, 892, reversed on different grounds in People v. Pic'l (1982) 31 Cal.3d 731, 734-735.) The mere incidents of good character in the present case were from two witnesses who had at best only limited opportunities to observe defendant's overall behavior with the victim, and a third who was the mother of defendant's brother's child. The victim's testimony provided *direct* evidence of guilt if credited. A physician testified that the victim had injuries that corroborated her account of at least the attack at the campground. Evidence of third party involvement was weak. We are convinced a more favorable result would not be reasonably probable if a jury were instructed to consider the specific instances of good character on the question of reasonable doubt about the victim's credibility.

B. Federal Law

Defendant contends that deprivation of his entitlement to an instruction on good character and reasonable doubt under Bell violated his federal right to due process, relying on Hicks v. Oklahoma (1980) 447 U.S. 343. However, as People v. Breverman (1998) 19 Cal.4th 142, 170-172, explained at length, the erroneous refusal to give an instruction on a lesser included offense to which a defendant might be entitled under state law merely implicates the factfinding process and therefore does not deprive a defendant of

> any liberty interest as in Hicks (which involved the deprivation of a procedural sentencing right). What is true of an instruction regarding a lesser included offense is true of a pinpoint instruction linking evidence of good character with the burden of reasonable doubt.
>
> Alternately, defendant argues a violation of his right to equal protection as compared with "defendants in other cases, where courts have held that [those] defendants [were] entitled to [the] jury instruction . . . ." At our direction, the People responded on the merits of this claim, invoking Beck v. Washington (1962) 369 U.S. 541 [8 L.Ed.2d 98]. The cited pages lay to rest defendant's attempt to assert a violation of equal protection. Responding to the litigant's claim that the failure to provide certain state procedural protections against a biased grand jury unconstitutionally discriminated against him, the United States Supreme Court tersely observed in Beck, "the petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error . . . .' [Citation.] Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." (Beck, at pp. 554-555 [8 L.Ed.2d at p. 110].) Defendant similarly cannot transform what may have been instructional error into error of constitutional magnitude.

Lod. Doc. 5 at 12-18.

2. Legal Standards

A challenge to jury instructions does not generally state a federal constitutional claim. See Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir. 1983). Habeas corpus is unavailable for alleged error in the interpretation or application of state law. Middleton, 768 F.2d at 1085; see also Hayes v. Woodford, 301 F.3d 1054, 1086 (9th Cir. 2002); Lincoln v. Sunn, 807 F.2d 805, 814 (9th Cir. 1987). However, a "claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so infects the entire trial that the resulting conviction violates the defendant's right to due process." Hines v. Enomoto, 658 F.2d 667, 672 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th Cir. 1980)); see also Prantil v. California, 843 F.2d 314, 317 (9th Cir.

1988) (stating that to prevail on such a claim petitioner must demonstrate that an erroneous instruction "so infected the entire trial that the resulting conviction violates due process."). The analysis for determining whether a trial is "so infected with unfairness" as to rise to the level of a due process violation is similar to the analysis used in determining whether an error had "a substantial and injurious effect" on the outcome of the trial. See McKinney v. Rees, 993 F.2d 1378, 1385 (9th Cir. 1993).

In order to warrant federal habeas relief, a challenged jury instruction "cannot be merely 'undesirable, erroneous, or even universally condemned,' but must violate some due process right guaranteed by the fourteenth amendment." Prantil, 843 F.2d at 317 (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)). In making its determination, this court must evaluate the challenged jury instructions "'in the context of the overall charge to the jury as a component of the entire trial process.'" Prantil, 843 F.2d at 817 (quoting Bashor v. Risley, 730 F.2d 1228, 1239 (9th Cir. 1984)). The Supreme Court has cautioned that "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." Middleton v. McNeil, 541 U.S. 433, 437 (2004). Furthermore, in reviewing a challenged instruction, the court "must inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." Estelle, 502 U.S. at 72 (quoting Boyde v. California, 494 U.S. 370, 380 (1990)); see also United States v. Smith, 520 F.3d 1097, 1102 (9th Cir. 2008).

3. Discussion

As an initial matter, the court notes that petitioner argues that the court's refusal to instruct the jury on Calcrim 350 violated California state law. A violation, misapplication, or misinterpretation of state law, without more, cannot provide a basis for habeas relief under § 2254. Estelle, 502 U.S. at 67-68; see also Middleton, 768 F.2d at 1085; Hayes, 301 F.3d at 1086; Lincoln, 807 F.2d at 814. Accordingly, to the extent petitioner's claim is premised on his argument that the trial court violated state law by not instructing the jury using Calcrim 350, it is denied.

Petitioner also argues that the trial court's refusal to instruct the jury using Calcrim 350 violated the clearly established federal rule set forth by the Supreme Court's ruling in Hicks v.

Oklahoma, 477 U.S. 343 (1980). In Hicks, the Court held that a state statute requiring sentencing by jury, and providing the jury with sentencing discretion, created a liberty interest protected by the Due Process Clause. Id. at 346. It further held that the petitioner in that case was denied his due process right to discretionary jury sentencing when the trial judge instructed the jury that it must impose a 40 year sentence pursuant to a recidivist statute that was declared unconstitutional during the pendency of petitioner's direct appeal, and the appellate court did not remand for resentencing. Id. at 347.

Here, petitioner identifies no Supreme Court precedent that specifies or even considers the issue of whether a court's failure to provide an instruction on good character to which a defendant might be entitled under state law under circumstances similar to those presented here violates the Due Process Clause. Nor has petitioner identified any clearly established federal law that applies Hicks to an analogous situation. While the Supreme Court "has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that *in the federal courts* a jury in a proper case *should* be so instructed," Michelson v. United States, 335 U.S. 469, 476 (1948) (citing Edgington v. United States, 164 U.S. 361 (1896) (emphasis added), it has not mandated that such a jury instruction be given in order to protect a defendant's due process rights, nor has it even indicated that state courts should provide such an instruction under certain circumstances. The state appeals court here distinguished the Supreme Court's holding in Hicks from the circumstances presented in petitioner's case on the basis that the trial court's refusal to provide the good character instruction merely implicated the fact-finding process and therefore did not deprive petitioner of any liberty interest as in Hicks. Lod. Doc. 5 at 16-17. In light of the lack of clearly established Supreme Court precedent on this subject, it cannot be said that the state appellate court's ruling was an unreasonable application of Hicks or other clearly established federal law. See Carey v. Musladin, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court …, it cannot be said that the state court 'unreasonbl[y[appli[ed] clearly established Federal law.'").

Moreover, as the state appeals court noted in its decision, "[t]he mere incidents of good character in the present case were from two witnesses who had at best only limited opportunities

to observe defendant's overall behavior with the victim, and a third who was the mother of defendant's brother's child." Lod. Doc. 5 at 16. In contrast, "[t]he victim's testimony provided *direct* evidence of guilt if credited," and a physician's testimony regarding the nature of the victim's injuries corroborated her account of at least the attack at the campground. Lod. Doc. 5 at 16 (emphasis in original.) Furthermore, the trial court instructed the jury on petitioner's presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, and the insufficiency of bad character evidence standing alone to prove guilt. Lod. Doc. 11 at 546, 569-70. In light of the strong evidence indicating petitioner's guilt, the weak evidence of good character presented by the defense at trial, and the instructions given to the jury, it is not reasonably probable that the omission of Calcrim 350 from the trial court's instructions to the jury had a "substantial and injurious effect or influence in the determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

Petitioner also argues that the trial court's failure to provide the instruction violated the Equal Protection Clause of the Fourteenth Amendment. As the state appeals court discussed, petitioner's argument on this basis is essentially an assertion that he was singled out by being denied a procedural safeguard afforded under California state law, i.e., a jury instruction regarding the use of evidence of good character. Such misapplication cannot be shown to be an invidious discrimination. The Supreme Court has held "time and again that the Fourteenth Amendment does not 'assure uniformity judicial decisions (or) immunity from judicial error . . . . Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." Beck v. Washington, 369 U.S. 541, 554-55 (1962) (citation omitted). Here, the state appeals court reasonably applied this clearly established precedent to deny petitioner's equal protection claim. Lod. Doc. 5 at 18. Accordingly, petitioner's request for habeas relief on this basis is denied.

E. Admission of Hearsay Evidence

Fifth, petitioner argues that the trial court erroneously admitted evidence of a recorded phone call between the victim and petitioner's brother, John Anon, as statements against penal interest pursuant to California Evidence Code section 1230. Petitioner argues that the admitted

statements from this phone conversation were inadmissible hearsay because they did not specifically disserve Anon's penal interest and there was insufficient evidence of their reliability.

Absent some federal constitutional violation, a violation of state law does not provide a basis for habeas relief. Estelle, 502 U.S. at 67-68. Accordingly, federal court may not grant habeas relief based on a belief that the state trial court made an incorrect evidentiary ruling under state evidence law. Briceno v. Scribner, 555 F.3d 1069, 1077 (9th Cir. 2009) (citing Estelle, 502 U.S. at 67-68) ("Our habeas powers do not allow us to vacate a conviction 'based on a belief that the trial judge incorrectly interpreted the California Evidence Code in ruling' on the admissibility of evidence."). Because petitioner bases his claim regarding this evidence solely on the assertion that the trial court erroneously applied California Evidence Code section 1230, petitioner fails to assert a cognizable claim for habeas relief pursuant to § 2254. Therefore, his claim is denied.

F. Failure to Grant Use Immunity

Sixth, petitioner argues that his right to due process was violated when the state trial court refused to grant testimonial use immunity to prospective defense witness Amanda Moro, the girlfriend of petitioner's brother, who plaintiff claims would have testified that she did not observe petitioner assault the victim while they were all traveling from Placer County to Siskiyou County and did not believe that the victim was held against her will at that time.

1. State Court Decision

The California Court of Appeal, Third Appellate District summarized the facts underlying this claim and ruled as follows:

> During trial, defense counsel challenged the prosecution's willingness to grant use immunity to the victim but not to the girlfriend of defendant's brother. In his motion, defense counsel represented that the brother's girlfriend could provide evidence contradicting the victim,[14] but would assert her privilege against self-incrimination if called to testify. Defense counsel contended the court should grant judicial use immunity over the prosecutor's objection (the prosecutor being unwilling to allow the brother's girlfriend to escape potential liability as an accomplice).

[14] Defense counsel attached his investigator's report to the motion, which related an interview with the girlfriend. In essence, the girlfriend claimed she did not observe physical abuse. The parties stipulated to use of the report as an offer of proof.

The court held a foundational hearing to determine the extent to which the brother's girlfriend would testify in the absence of a grant of immunity. In the brief examination that the prosecutor conducted before the court recessed for the weekend, the girlfriend refused to answer questions about her own drug use during the period in question or defendant's use of drugs.

When the hearing continued, the parties debated whether the witness was entitled to assert the privilege. The attorney appointed for the brother's girlfriend suggested the prosecutor ought to be able to tailor the cross-examination to avoid any admission on the part of the witness about her own drug use or drug use in her car. However, the prosecutor insisted these subjects were essential to effective cross-examination. Appointed counsel agreed that the girlfriend's own drug use was inexorably entwined with her observations during the time she spent with defendant and the victim. Defense counsel conceded this was a legitimate basis to assert the privilege. The prosecutor represented that she would move to strike direct testimony if there was an assertion of privilege in cross-examination.

Determining that the parties were in agreement that the witness would thus be unavailable absent a judicial grant of use immunity, the court entertained argument before deciding (under criteria hypothetically developed for the application of judicially granted use immunity) that the girlfriend's proposed testimony was not clearly exculpatory or essential to the defense, and that the girlfriend's possible role as an accomplice presented a strong countervailing interest on the part of the prosecution against a grant of immunity. The court declined to find that the prosecutor was attempting to distort the factfinding process in refusing to grant immunity to her.

Defendant renews the issue on appeal. He contends the trial court abused its discretion in evaluating the factors set forth in People v. Hunter (1989) 49 Cal.3d 957, 974 (citing from Government of Virgin Islands v. Smith (3d Cir.1980) 615 F.2d 964, 972) as applying if a court has the power to grant use immunity over a prosecutor's objections. Defendant admits that our Supreme Court has consistently avoided the question of whether a court has power to grant use immunity to implement a defendant's right to due process under federal or state law, and that the theory has fallen on stony jurisprudential ground other than in Smith.[15] He nonetheless asks us to engage in the academic exercise of determining if the

[15] E.g., People v. Stewart (2004) 33 Cal.4th 425, 468 (and state cases cited therein); see United States v. Santini (3d Cir.1992) 963 F.2d 585, 598, footnote 6 (listing uniform rejection of judicially granted use immunity in decisions of the other federal circuits).

> trial court properly resolved the criteria for this presently nonexistent right.
>
> Defendant has made his record in the trial court and preserved the issue on appeal. We reject his argument on the simple ground that, absent a ruling to this effect from the Supreme Court, defendant does not have any such right presently under any controlling state or federal authority. Defendant may now press the issue in the proper forum.

(Lod. Doc. 5 at 18-20.)

2. Discussion

As the state appeals court determined, and respondent persuasively argues, there exists no federal authority, let alone clearly established Supreme Court precedent, requiring, or even permitting, a trial court to grant use immunity to a prospective defense witness when the prosecution has refused to immunize the witness, even when the prospective witness will likely provide testimonial evidence that is beneficial or even essential to the defense's case. Indeed, the Supreme Court has not yet issued an opinion holding that a trial court is even permitted to grant use immunity to a prospective defense witness over the prosecution's objections, let alone requiring a court to grant such immunity under the circumstances petitioner asserts. See United States v. Quinn, 728 F.3d 243, 247 (3d Cir. 2013) ("No statute or Supreme Court ruling authorizes judicial grants of immunity for a defense witness."). Furthermore, virtually every federal court of appeals that has addressed the issue, including the Ninth Circuit Court of Appeals, has held that the trial court does not have the power to grant use immunity, nor does it have the power to force the government to grant such immunity. E.g., U.S. v. Medina, 731 F.2d 1412, 1414 (9th Cir. 1984) ("Lacking the authority to foreclose executive branch discretion in this area, a district court has neither the power to grant use immunity to individuals whom the defendant seeks to call as witnesses, nor the power to force the government to grant such immunity."); United States v. Capozzi, 883 F.2d 608, 614 (8th Cir. 1989); Mattheson v. King, 751 F.2d 1432 (5th Cir.1985), cert. dismissed, 475 U.S. 1138 (1986); United States v. Hunter, 672 F.2d 815, 818 (10th Cir. 1982); United States v. Turkish, 623 F.2d 769 (2d Cir.1980). But

see Quinn, 728 F.3d at 247 (overturning own case law permitting a trial court to immunize a defense witness under certain circumstances and joining the other circuits in rejecting judicial use immunity, but retaining five-part test that permits courts to determine whether the prosecution engaged in misconduct by refusing to grant use immunity).

Because there exists no clearly established Supreme Court precedent that required, or even permitted, the trial court to grant Moro use immunity to compel her to testify in furtherance of petitioner's case at trial—and the lower court case law on the subject indicates that no such authority exists—petitioner fails to show that the state court's denial of his due process claim based on such a theory was unreasonable within the meaning of § 2254. Accordingly, petitioner's claim is denied.

G. Cumulative Error

Finally, petitioner contends that all of the errors he alleges above cumulatively prejudiced him at trial to such a degree that he was denied a fair trial in violation of his right to due process.

The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. Chambers v. Mississippi, 410 U.S. 284, 302-03 (1973). Due process may be violated by the cumulative effect of multiple errors even where no single error rises to the level of a constitutional violation or would independently warrant reversal. Id. at 290, n.3. However, a claim of cumulative error warrants habeas relief only where the errors have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). In other words, the combined effect of the errors must have a "substantial and injurious effect or influence on the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (internal quotations omitted).

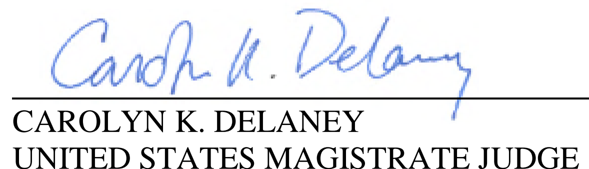
Here, petitioner fails to show that the rejection of this claim by the California Court of Appeal, Third Appellate District and the California Supreme Court was contrary to the clearly established Supreme Court precedent. While neither state appeals court explicitly addressed petitioner's cumulative error claim when he raised it on direct appeal, they both necessarily rejected it by upholding the judgment. As discussed above, none of petitioner's numerous claims

have merit. Moreover, even when the conduct of the prosecution, trial court, witnesses, and jury that forms the basis for petitioner's claims is considered cumulatively, it cannot be reasonably asserted that such conduct had a "substantial and injurious effect or influence on the jury's verdict" such that the verdict would have been different in the absence of all, or even some, of that conduct. Brecht, 507 U.S. at 637; see also U.S. v. Rivera, 900 F.2d 1462, 1471 (9th Cir. 1990) ("[A] cumulative error analysis should evaluate only the effect of matters determined to be errors, not the cumulative effect of non-errors."). Accordingly, it was not unreasonable for the state court to find that any of the conduct that forms the basis of petitioner's claims, even when considered in combination, did not so infect the trial with unfairness as to violate due process.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's petition for writ of habeas corpus is denied;
2. This case is closed; and
3. The court declines to issue the certificate of appealability referenced in 28 U.S.C. § 2253.

Dated: September 7, 2016



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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