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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

AARON PACHITO,

Petitioner,

v.

CYNTHIA Y. TAMPKINS,

Respondent.

Case No.: 15cv2457-JAH (KSC)

**ORDER ADOPTING THE  
MAGISTRATE JUDGE’S REPORT  
AND RECOMMENDATION AND  
DENYING PETITION FOR WRIT  
OF HABEAS CORPUS AND  
DENYING CERTIFICATE OF  
APPEALABILITY**

**INTRODUCTION**

Pending before the Court is Aaron Pachito’s (“Petitioner”) Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. section 2254. Respondent filed an answer and Petitioner filed a traverse. Pursuant to 28 U.S.C. section 636(b)(1), the Honorable Karen S. Crawford, United States Magistrate Judge, submitted a Report and Recommendation (“Report”) to this Court recommending this Court deny the petition. Petitioner filed objections to the Report. After careful consideration of the pleadings and relevant exhibits submitted by the parties, and for the reasons set forth below, this Court OVERRULES the objections, ADOPTS Judge Crawford’s Report, DENIES the petition and DENIES a certificate of appealability.

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## FACTUAL BACKGROUND

The following facts are taken from the California Court of Appeal's unpublished decision denying Petitioner's direct appeal:

Durae Delisle and [Petitioner] began a relationship in 2007, and she gave birth to their daughter, in 2009. [Petitioner] has a history of domestic violence toward Delisle, particularly when under the influence of alcohol.

In the Spring of 2008, he slapped her in the face after hearing a message a man left on her phone. A few months later, he threw a cup of coffee at her face. It split her lip and broke a front tooth, requiring a root canal. In December 2008, he came home from a sporting event 'very, very drunk,' 'went on and on' about how much he hated her religion, and struck her 'very hard' on the side of her head, popping her eardrum. As she lay on the floor crying, he kicked her and smashed her head several times into a cupboard. She went to urgent care, and had pain in her ear for two to three weeks and difficulty hearing.

On December 12, 2008, an officer with the San Diego Police Department responded to a call from Delisle. She had been crying, and she told the officer that she broke up with [Petitioner] a few days earlier and he 'wanted to physically fight with her and punch her face.' She reported the cup incident to the officer.

In February 2009, when Delisle was two months pregnant, [Petitioner] punched her in the stomach because he was upset about the pregnancy. About a month later, he became upset because she was crying while reading an e-mail. He was drunk, and he put both hands around her neck and choked her 'really bad' until she 'start[ed] to get dizzy.' He stopped for a few seconds, but then resumed choking her. She knew from experience that if she pretended to be calm, he would calm down.

On or about April 2010, [Petitioner] punched Delisle in the leg while she was seated on a bed with their daughter. He had agreed to stop drinking and abusing her. He was not drinking this time, which made her believe he would never stop the abuse. After this incident, she took her daughter and left the area for several months.

At one point, Delisle went to Seattle, Washington, and stayed with a friend. [Petitioner] joined her in Seattle and they spent the night in a hotel. The following day 'he got really mad that he was spending so much money on hotel rooms' when he could be staying at the friend's house. The friend was afraid of [petitioner] and Delisle promised not to reveal the friend's address to him. He screamed at her as she was driving, and she pulled over and told him to get out of the car. He refused. She

1 went into a cafe and called the police because she was afraid of him. When the police  
2 arrived, he fled.

3 In September 2010, Delisle returned to San Diego because she wanted to get  
4 orders for custody and child support. In October 2010, she reported to a police officer  
5 that ‘she got into an argument with her boyfriend, and he pushed her while she was  
6 holding their one-year-old daughter.’ She told the officer ‘[s]he was afraid of him  
7 and ran out of the house to the neighbor’s house next door and had the neighbors  
8 call 911.’

9 In January 2011, Delisle obtained a restraining order against [Petitioner].  
10 According to Delisle, child protective services intended to remove their daughter  
11 from her custody unless she obtained one. Delisle and [Petitioner] agreed he would  
12 have reasonable visitation with their daughter.

13 [Petitioner] broke the restraining order by calling her ‘nonstop’ about  
14 resuming their relationship. She did not want to do so because he was ‘drinking  
15 continuously,’ and sometimes when he drank, he was ‘very violent.’

16 In January 2011, Delisle reported to a police officer that he made 35 calls to  
17 her within a few hours. The officer arrested [Petitioner] for violating the restraining  
18 order. [Petitioner] told the officer he knew about the order, but he continued to call  
19 her because he needed to know whether or not she was dating someone else so that  
20 if she was, he could move on with his life.’ He admitted to the officer that he had  
21 physically abused her.

22 In one of [Petitioner]’s calls to Delisle, he commented that he could pick the  
23 lock of her apartment door. That concerned her because she lived in ‘a very old  
24 building’ and ‘it would have been so easy to break inside.’ She asked the police to  
25 give her safety tips, and they helped her with window locks and showed her ‘how to  
26 block a door with a chair.’

27 One night in February or March 2011, Delisle left her apartment to retrieve  
28 something from her car. [Petitioner] was outside her apartment, and he was ‘very  
upset’ because he had gotten into her e-mail account and saw she was corresponding  
with a man. He put one hand around her neck and choked her for approximately five  
seconds. After this incident, she obtained a criminal protective order against him.

The night of March 24, 2011, Delisle received between 10 and 15 phone calls  
while she was driving home. She believed they were from [Petitioner] and she  
ignored them. When she arrived outside of her apartment, she called him. She could  
tell from his tone of voice that he was ‘very, very angry: angrier than usual.’ He

1 wanted to see their daughter the following day, and Delisle had not called him for  
2 several days to schedule visitation.

3 During the call, [Petitioner] stated, 'You're lucky you called me, you fucking  
4 bitch, because I was just about to come over there and knock down your front door  
5 and murder you.' He added, 'I'm not going to hurt you, I'm going to murder you,  
6 and the restraining order is not going to protect you and the police aren't going to  
7 protect you.' He also said something to the effect of, 'Why the fuck didn't you  
8 answer your phone after I called you 10 times, you fucking bitch.'

9 Delisle knew [Petitioner] was at his home, which was approximately 10 to 15  
10 minutes from her apartment by car. She testified, 'I was afraid he was going to come  
11 over,' and, 'when he's drinking, if he comes over to my house, it's not a good  
12 situation.' When asked whether he could be violent, she responded, 'Of course.'  
13 Further, child protective services had been at her home that morning, and she  
14 believed she should report the incident to avoid having their daughter being removed  
15 from her custody. Delisle testified child protective services had visited her three  
16 times after their daughter's name showed up in police reports pertaining to  
17 petitioner's conduct. She testified, 'I'm afraid of him. I'm afraid of child protective  
18 services. I'm afraid of there being proof that he's calling me and I'm not reporting  
19 it. I'm afraid of the whole situation. It's a nightmare.'

20 She decided to flag down a police officer to report the threats. She also  
21 decided to spend the night in a hotel, and as a 'safety precaution' she asked the  
22 officer, Cary Ochab, to escort her to her apartment and wait outside with her  
23 daughter while she grabbed some clothes. She returned home the next day and  
24 [Petitioner] left her alone for several months.

25 Officer Ochab testified Delisle 'appeared nervous, anxious, almost like  
26 physically shaking, like she was concerned about something.' His report stated she  
27 told him [Petitioner] said, 'Why the fuck didn't you answer the phone after I called  
28 you 10 times, you fucking bitch? I was about to come over and knock down your  
front door and kill you. I'm not going to hurt you, I'm just going to come over and  
murder you.'

While Delisle was speaking with Ochab, [Petitioner] phoned her. She put the  
call on speaker phone. She told [Petitioner] he should not be calling her, and he  
responded, 'I don't care if you have a restraining order. It can't protect you,' and,  
I'm not afraid of the police.' Ochab could 'hear a male's voice going on a rant,  
yelling and screaming over the phone, making some reference to seeing his  
daughter.' Ochab attempted to interrupt [petitioner] several times, but he 'continued  
with his yelling and screaming.'

1 Ochab later phoned [Petitioner] and ‘asked him about the threat that he made  
2 and kind of cautioned him about making such threats, especially if he was concerned  
3 about child custody in the future.’ [Petitioner] asked Ochab, ‘am I going out with  
4 her, if I was fucking her.’ [Petitioner] did not deny threatening Delisle, but said ‘he  
5 would never hurt her.’ [Petitioner] ‘tended to agree ... that he should probably be a  
6 little more cautious with what he says towards Delisle.’ He asked Ochab ‘numerous  
7 times if I could just drop the case.’

8 John Serrano, an investigator with the district attorney’s office, conducted a  
9 recorded interview of Delisle in May 2011. When asked whether she denied being  
10 afraid of [petitioner], Serrano testified, ‘No. She was definitely afraid of him.’ He  
11 added, ‘She said that she was constantly having to watch her back; she wasn’t sure  
12 if he was perhaps sitting down the street, watching her come home, so she was  
13 definitely fearful of him.’ Delisle told Serrano she was afraid to spend the night of  
14 March 24, 2011, at her home, ‘and she said she wanted to spend the money [on a  
15 hotel room] to make sure that she was safe.’

16 Lodg. 5 (Doc. No. 10-17).

### 17 **PROCEDURAL BACKGROUND**

18 On December 12, 2012, a jury convicted Petitioner of making a criminal threat in  
19 violation of California Penal Code Section 422. Lodg. 2, Reporter’s Transcript (“RT”) v.  
20 11 (Doc. No. 10-13). Petitioner was sentenced to a total of eleven (11) years in state prison:  
21 three years for the violation of Section 422, doubled to six years because Petitioner had a  
22 prior conviction that qualified as a strike under California’s Three Strike’s law, and five  
23 years additional because Petitioner had a prior conviction that qualified as a serious felony  
24 under California Penal Code Section 677(a)(1). Lodg. 2, RT v. 12 (Doc. No. 10-14).

25 Petitioner appealed his conviction to the California Court of Appeal which affirmed  
26 the decision in an unpublished opinion filed on October 27, 2014. Lodg. 5 (Doc. No. 10-  
27 17). Petitioner raised the same arguments in a Petition for Review before the California  
28 Supreme Court. Lodg. 6 (Doc. No. 10-18). The California Supreme Court summarily  
denied the Petition on January 21, 2015. Lodg. 7 (Doc No. 10-19).

On October 28, 2015, Petitioner filed the instant Petition for Writ of Habeas Corpus  
pursuant to 28 U.S.C. Section 2254 challenging his California state court conviction,

1 asserting an insufficiency of evidence claim in violation of the Fourteenth Amendment.  
2 Doc. No. 1. Respondent filed an answer and Petitioner filed a traverse. Doc. Nos. 9, 11.  
3 Judge Crawford filed a Report recommending the Court deny the petition. Doc. No.  
4 12. Petitioner filed objections to the Report. Doc. No. 13. Respondent did not file  
5 objections or a reply to Petitioner’s objections.

## 6 LEGAL STANDARDS

### 7 I. Scope of Review of Report and Recommendation

8 The district court’s role in reviewing a magistrate judge’s report and  
9 recommendation is set forth in 28 U.S.C. section 636(b)(1). Under this statute, the district  
10 court “shall make a de novo determination of those portions of the report . . . to which  
11 objection is made,” and “may accept, reject, or modify, in whole or in part, the findings or  
12 recommendations made by the magistrate [judge].” 28 U.S.C. section 636(b)(1). When  
13 no objections are filed, the Court may assume the correctness of the magistrate judge’s  
14 findings of fact and the district court is not required to conduct a de novo review of the  
15 magistrate judge’s report and recommendation. *See Wang v. Masaitis*, 416 F.3d 992, 1000  
16 n. 13 (9th Cir. 2005) (stating that “de novo review of a R & R is only required when an  
17 objection is made”); *United States v. Reyna–Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)  
18 (*en banc*) (holding that 28 U.S.C. section 636(b)(1)(c) “makes it clear that the district judge  
19 must review the magistrate judge’s findings and recommendations de novo if objection is  
20 made, but not otherwise”).

### 21 II. Scope of Review of Federal Habeas Petition Pursuant to 28 U.S.C. 2254

22 Under Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a federal  
23 court will not grant habeas relief with respect to any claim adjudicated on the merits in  
24 state court unless the decision was: (1) contrary to or involved an unreasonable application  
25 of clearly established federal law as determined by the Supreme Court; or (2) based on an  
26 unreasonable determination of the facts in light of the evidence presented. 28 U.S.C.  
27 §2254(d); *Early v. Packer*, 537 U.S. 3, 7-8 (2002). That standard under AEDPA is difficult  
28

1 to meet and “demands that state court decisions be given the benefit of the doubt.” *Cullen*  
2 *v. Pinholster*, 563 U.S. 170, 181 (2011) (internal quotes omitted).

3 A federal court may grant habeas relief where the state court decides a case “contrary  
4 to” federal law by applying a rule different from the governing law set forth in Supreme  
5 Court cases or decides a case differently than the Supreme Court on a set of  
6 indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A court may  
7 also grant habeas relief where a state court decision is an unreasonable application of  
8 clearly established federal law, such as where the state court correctly identifies the  
9 governing legal principle from Supreme Court decisions but unreasonably applies those  
10 decisions to the facts at issue. *Id.* at 407. The state court decision must be more than  
11 incorrect; to warrant habeas relief the state court’s application of “clearly established  
12 federal law” must be “objectively unreasonable.” *Lockyer v. Andrade*, 538 U.S. 63, 75  
13 (2003). “Objectively unreasonable” differs from “clear error” in that a federal court cannot  
14 grant relief only because it believes the state court erroneously applied clearly established  
15 federal law; rather, the application must be objectively unreasonable. *Id.* at 75-76 (internal  
16 citation omitted).

17 If a state supreme court silently denies a petitioner’s appeal with a summary  
18 dismissal, the reviewing federal habeas court must review the last reasoned state court  
19 opinion in making a decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04, 806 (1991).  
20 Where the state courts supply no reasoned decision on the claims presented for review, this  
21 Court must perform an “‘independent review of the record’ to ascertain whether the state  
22 court decision was objectively unreasonable.” *Himes v. Thompson*, 336 F. 3d 848, 853  
23 (9th Cir. 2003) (internal citations omitted).

## 24 **DISCUSSION**

### 25 **I. Petitioner’s Claim**

26 Petitioner asserts he was denied due process under the Fourteenth Amendment  
27 because there is insufficient evidence to support his conviction. Initially, Petitioner  
28 contends the State’s ruling is not entitled to AEPDA deference because it omitted or

1 misinterpreted facts essential to evaluation of the sufficiency of the evidence. If AEDPA  
2 applies and the state court accurately assessed the facts, he contends the words he spoke  
3 during the phone call at issue do not establish the elements of a criminal threat.  
4 Specifically, he argues the evidence was insufficient because the words did not convey an  
5 immediate threat and were expressly conditional to a past event. If AEDPA does not apply,  
6 Petitioner argues the result is the same because the evidence does not support a finding  
7 beyond a reasonable doubt.

8 Respondent argues Petitioner cannot demonstrate the state court's rejection of his  
9 claim that there was insufficient evidence to support his conviction was contrary to, or an  
10 unreasonable application of, controlling United States Supreme Court authority or the facts  
11 presented. To the extent Petitioner challenges the state court's interpretation of California  
12 law and its conclusion that the statute does not require an unconditional threat, Respondent  
13 argues this Court is bound by the state court's determination and is limited to determining  
14 whether the state court's construction of the evidence and application of Supreme Court  
15 law was error.

#### 16 **A. Report and Recommendation**

17 In the Report, Judge Crawford found Petitioner challenges the California Court of  
18 Appeal's interpretation of section 422 as contrary to California law. Citing *Estelle v.*  
19 *McGuire*, 502 U.S. 62, 67-68 (1991), Judge Crawford determined Petitioner's argument  
20 regarding the interpretation of section 422 is an issue of state law, and as such, is not  
21 cognizable on federal habeas review.

22 Judge Crawford further found Petitioner's arguments that the Court of Appeal  
23 focused on some of his statements while ignoring others and made factual omissions,  
24 including the victim's conflicting testimony, presents conflicts in the evidence and  
25 challenges to the weight of the evidence. Relying on the standard of review set forth in  
26 *Jackson v. Virginia*, 443 U.S. 307 (1979), Judge Crawford reasoned the court could not  
27 reweigh the evidence or resolve any conflicts but must presume the jury resolved any  
28 conflicts in favor of the prosecution.

1 Judge Crawford determined that a rational jury could infer that Petitioner  
2 specifically intended his words at the time in question to be taken by the victim as a threat  
3 to carry out acts of physical violence against the victim, possibly resulting in death or  
4 bodily injury and could also conclude from the evidence that Petitioner’s statements to the  
5 victim at the time in question were “so unequivocal, unconditional, immediate and specific  
6 as to convey to the victim a gravity of purpose and an immediate prospect of execution of  
7 the threat” and Petitioner’s words caused the victim to “be in sustained fear” for her safety.  
8 Report at 15 (Doc. No. 12). As such, Judge Crawford concluded the California Court of  
9 Appeal did not unreasonably apply the clearly established Supreme Court law set forth in  
10 *Jackson* and the California Court of Appeal’s rejection of Petitioner’s sufficiency of the  
11 evidence argument was not contrary to clearly established Supreme Court law.

12 Additionally, Judge Crawford recommended this Court reject Petitioner’s contention  
13 that his claim be reviewed outside of AEDPA deference determining the Supreme Court’s  
14 decision in *Panetti v. Quarterman*, 551 U.S. 930, and the Ninth Circuit’s decision in *Frantz*  
15 *v. Haze*y, 533 F.3d 724, do not apply.

## 16 **B. Petitioner’s Objections**

17 Petitioner objects to the Report and argues Judge Crawford incorrectly frames his  
18 arguments as challenging the court’s interpretation of California law. He maintains he is  
19 not challenging California definitional law of the elements of section 422 and he did not  
20 assert that under California law the threat had to be solely unconditional.

21 Petitioner also objects to Judge Crawford’s determination that he relies on disputes  
22 in the evidence. He maintains the Report views the context of the call as conflicts in the  
23 record and improperly focuses on the out of context fragments of the statement to support  
24 an immediate threat.

25 He also challenges the Report’s determination that a court must presume the trier of  
26 fact resolved conflicting inferences in favor of the prosecution. Petitioner maintains the  
27 due process doctrine accepted in the First, Second, Fifth, Seventh and Eleventh circuits  
28 holds that if an equal or nearly equal theory of guilt and a theory of innocence is supported

1 by the evidence viewed in the light most favorable to the prosecution, a reasonable jury  
2 must necessarily entertain a reasonable doubt.

### 3 **C. Analysis**

4 While Judge Crawford correctly explained a challenge to the Court of Appeal’s  
5 interpretation of state law is not cognizable on habeas review, Petitioner now clarifies he  
6 does not challenge the definition of the offense. Instead, he explains he argues the evidence  
7 does not meet the constitutional minimum for proof of the elements. Specifically, he  
8 argues there is insufficient evidence to support his conviction because the threat was not  
9 “so clear, immediate, unconditional and specific that it communicated to [the victim] a  
10 serious intention and the immediate prospect that the threat would be carried out” and “that  
11 the threat actually caused [the victim] to be in sustained fear for her own safety or for the  
12 safety of her immediate family.” Objection at 2-3 (Doc. No. 13). He contends his words  
13 did not convey the prospect of immediate action because they were partially conditional in  
14 that he said she was lucky she called him back because he was about to go to her home and  
15 kill her but he will not because she called him. Moreover, Petitioner contends his  
16 statements could not impose a threat of immediate harm or death because his intention  
17 behind his phone call was to discuss seeing his daughter. He maintains the California Court  
18 of Appeal unreasonably pulled a fragment from the middle of the statement at issue to  
19 artificially give it present tense meaning of a true threat.

20 The Court of Appeal recognized that it was required to review the entire record in  
21 the light most favorable to the judgment and determine whether a reasonable trier of fact  
22 could find the defendant guilty beyond a reasonable doubt based upon the evidence. Lodg.  
23 5, Opinion at 9 (Doc. No. 10-17). The court found the circumstances supported the  
24 conviction even with Petitioner’s use of conditional language. *Id.* at 13. Relying on *United*  
25 *States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011), Petitioner argues the Court of Appeal  
26 could not embellish the words to make the law reach them and argues he was not saying  
27 he was going to murder the victim and she did not fear he would do so. “When our law  
28 punishes words, we must examine the surrounding circumstances to discern the

1 significance of those words' utterance but must not distort or embellish their plain meaning  
2 so that the law may reach them." *Id.* This Court finds the Court of Appeal did not embellish  
3 or distort the words. As discussed below, the Court of Appeal reviewed the plain meaning  
4 of the words and looked to the context in finding a trier of fact could find guilt beyond a  
5 reasonable doubt.

6 Petitioner maintains the undisputed context of the entire statement demonstrates it  
7 conveyed no immediate threat and points to the victim's testimony that she did not feel like  
8 she was in danger at the moment and she wrote a letter to Petitioner's attorney stating she  
9 did not take his words literally and she did not feel Petitioner was going over to her home  
10 that night. However, the Court of Appeal pointed to evidence of record, including the  
11 victim's testimony in finding the circumstances support the conviction. Petitioner appears  
12 to challenge the court's reliance on certain evidence and omission of other evidence in its  
13 decision.

14 The Report addresses Petitioner's argument that the Court of Appeal improperly  
15 focused on some of his statements while ignoring others and found, at most, Petitioner  
16 cited conflicting evidence in the record. Judge Crawford determined, under the standard  
17 of review set forth in *Jackson*, a reviewing court cannot re-weigh the evidence but, rather,  
18 must presume that the trier of fact resolved any conflicts in favor of the prosecution.

19 Petitioner objects maintaining there is no conflict concerning the context of the call.  
20 Petitioner argues the only conflict is the victim's testimony which he describes as  
21 "varying." He maintains the evidence demonstrates Petitioner made many unanswered  
22 calls to the victim because he wanted to see his child and the victim knew Petitioner would  
23 become angry when she did not answer his calls. He also maintains the evidence  
24 demonstrates they were miles apart when Petitioner made the call and the physical  
25 separation supports the unreasonableness of a fear of immediate threat of great bodily  
26 harm. Additionally, Petitioner points to the evidence that the call concluded with a  
27 discussion about his visitation with his daughter and that he denied he intended to harm the  
28 victim when questioned by Officer Ochab. Petitioner also contends the victim was fearful

1 of losing her child if Child Protective Services (“CPS”) found out she had contact with  
2 Petitioner rather than fear Petitioner was coming to harm her. In support, he points to  
3 evidence that CPS visited her earlier in the day and she was told she could have no contact  
4 with Petitioner. Petitioner further contends the victim had an agenda, in that she wanted  
5 Petitioner to register their daughter with his Indian tribe to receive monetary benefits but  
6 Petitioner failed to do so. He also maintains the victim later re-initiated a relationship with  
7 Petitioner. He argues the undisputed context demonstrates his words in the telephone call  
8 were not a punishable criminal threat because, in context, they were not so unequivocal or  
9 unconditional as to convey a gravity of purpose and immediacy of execution.

10 In addition to the evidence Petitioner relies upon, there is testimony and evidence  
11 that supports that his threatening statement conveyed an immediate prospect of execution  
12 of the threat to the victim and put her in sustained fear for her safety or that of her family.  
13 The victim testified she wanted the police officer to escort her home because she was  
14 concerned Petitioner may show up and could become violent based upon the threat and the  
15 history of violence during their relationship. Lodg. 2, RT v. 8 184:3-186:19 (Doc. No. 10-  
16 10). Additionally, the Court agrees that whether the victim had a sustained fear for her  
17 safety in light of the 10-mile distance between she and Petitioner at the time of the call  
18 goes to the weight of the evidence.

19 This Court agrees with Judge Crawford’s reliance on the direction in *Jackson* that a  
20 court reviewing a federal habeas petition “must presume - even if it does not affirmatively  
21 appear in the record - that the trier of fact resolved any such conflicts in favor of the  
22 prosecution, and must defer to that resolution.” 443 US at 326. Petitioner asks the Court  
23 to utilize an alternate due process analysis in resolving conflicts in the evidence. Relying  
24 on court decisions from the First, Second, Fifth, Seventh and Eleventh circuits, Petitioner  
25 contends after viewing the evidence in the light most favorable to the verdict, this Court  
26 should reverse the conviction if the evidence gives equal circumstantial support to a theory  
27 of guilt and a theory of innocence, because a reasonable jury must necessarily entertain a  
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1 reasonable doubt. As noted by Petitioner, the Ninth Circuit does not utilize this alternate  
2 analysis and this Court is not persuaded that this analysis is proper on this habeas review.

3 The Court also agrees with and adopts Judge Crawford’s recommendation that this  
4 Court should reject Petitioner’s contention that his claim be reviewed outside of AEDPA  
5 deference. Petitioner maintains the Court of Appeal’s ruling is not entitled to AEDPA  
6 deference because it omitted facts and misinterpreted facts essential to evaluation of the  
7 sufficiency of the evidence. However, as discussed above, the Court of Appeal opinion is  
8 not contrary to clearly established Supreme Court law and does not involve an  
9 unreasonable application of clearly established Supreme Court law. Furthermore, the  
10 Court agrees with Judge Crawford’s determination that there is sufficient evidence to  
11 support the verdict even without the deference required by AEDPA.

12 Accordingly, Petitioner’s objections are OVERRULED. The Court ADOPTS the  
13 Report and DENIES the petition.

## 14 **II. Certificate of Appealability**

15 Pursuant to Rule 11 of the Rules following 28 U.S.C. section 2254, which was  
16 amended effective December 1, 2009, a district court now “must issue or deny a certificate  
17 of appealability when it enters a final order adverse to the applicant.” A state prisoner may  
18 not appeal the denial of a section 2254 habeas petition unless he obtains a certificate of  
19 appealability from a district or circuit judge. 28 U.S.C. § 2253(c)(1)(A); *see also United*  
20 *States v. Asrar*, 116 F.3d 1268, 1269–70 (9th Cir. 1997) (holding that district courts retain  
21 authority to issue certificates of appealability under AEDPA). A certificate of appealability  
22 is authorized “if the applicant has made a substantial showing of the denial of a  
23 constitutional right.” 28 U.S.C. § 2253(c)(2). To meet this threshold showing, petitioner  
24 must show: (1) the issues are debatable among jurists of reason, (2) a court could resolve  
25 the issues in a different manner, or (3) the questions are adequate to deserve encouragement  
26 to proceed further. *Lambright v. Stewart*, 220 F.3d 1022, 1024–25 (9th Cir. 2000) (citing  
27 *Slack v. McDaniel*, 529 U.S. 473 (2000)).  
28

1 The Court finds no issues are debatable among jurists of reason. This Court further  
2 finds no issues could be resolved in a different manner. Lastly, this Court finds no  
3 questions are adequate to deserve encouragement to proceed further. Accordingly, this  
4 Court DENIES Petitioner a certificate of appealability.

5 **CONCLUSION AND ORDER**

6 Based on the foregoing, IT IS HEREBY ORDERED:

- 7 1. Petitioner's objections to the Magistrate Judge's report and  
8 recommendation are **OVERRULED**.
- 9 2. The Magistrate Judge's report and recommendation is **ADOPTED**.
- 10 3. The petition is **DENIED** in its entirety.
- 11 4. Petitioner is **DENIED** a certificate of appealability.

12 DATED: June 3, 2021

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15 JOHN A. HOUSTON  
16 United States District Judge  
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