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MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFREDO PROVENCIO,

Petitioner-Appellant,

v.

JOE LIZARRAGA,

Respondent-Appellee.

No. 18-15170

D.C. No.

1:15-cv-01327-LJO-MJS

Eastern District of California,  
Fresno

ORDER

Before: SCHROEDER and HURWITZ, Circuit Judges.

This appeal is from the denial of appellant's 28 U.S.C. § 2254 petition and subsequent Federal Rule of Civil Procedure 59(e) motion. The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir.

1993) (order).

Any pending motions are denied as moot.

**DENIED.**

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Petitioner-Appellant,

D.C. No. 1:15-cv-01327-LJO  
Eastern District of California,  
Fresno

v.

JOE LIZARRAGA,

ORDER

Respondent-Appellee.

Before: GRABER and M. SMITH, Circuit Judges.

Appellant has filed a petition for rehearing and request for en banc review (Docket Entry No. 8), which is construed as a combined motion for reconsideration and motion for reconsideration en banc.

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX  
"D"

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ALFREDO PROVENCIO,

Case No. 1:15-cv-01327-LJO-MJS (HC)

Petitioner,

## **FINDINGS AND RECOMMENDATION TO DENY PETITION FOR WRIT OF HABEAS CORPUS**

SHAWN HATTON, Warden

(ECF NO. 1)

**Respondent.**

## **THIRTY (30) DAY OBJECTION DEADLINE**

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus under 28 U.S.C. § 2254. Shawn Hatton, Warden of Correctional Training Facility, is hereby substituted as the proper named respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. Respondent is represented by Lewis Albert Martinez of the Office of the California Attorney General.

The petition raises the following claims: (1) portions of Petitioner's interview with police should have been suppressed pursuant to Miranda; (2) instructional error resulted in confusion as to the applicable state of mind for the offense of continuous sexual abuse of a minor; and (3) there was insufficient evidence to support a finding that Petitioner caused great bodily harm to the victim. (ECF No. 1.)

1 As discussed below, the undersigned recommends the petition be denied.

2 **I. Procedural History**

3 Petitioner is in the custody of the California Department of Corrections and  
4 Rehabilitation pursuant to the September 10, 2012 judgment of the Kings County  
5 Superior Court, imposing a term of fifty years to life for continuous sexual abuse of a  
6 child, with allegations that Petitioner inflicted great bodily harm on the victim and had a  
7 prior "strike" conviction. (Lodged Doc. 1 at 243-44.) Petitioner also was convicted of  
8 exhibiting lewd material to a minor in a separate judgment. (Lodged Doc. 1 at 242.)

9 On April 3, 2014, the California Court of Appeal, Fifth Appellate District, reversed  
10 the judgment for exhibiting lewd material to a minor but otherwise affirmed. On June 11,  
11 2014, the California Supreme Court denied Petitioner's petition for review. (Lodged Doc.  
12 17).

13 On August 31, 2015, Petitioner filed the instant petition for writ of habeas corpus.  
14 (ECF No. 1.) On October 30, 2015, Respondent filed an answer. (ECF No. 16.)  
15 Petitioner filed no traverse. The matter is submitted.

16 **II. Factual Background**

17 The following facts are taken from the Fifth District Court of Appeal's April 3, 2014  
18 opinion. They and are presumed correct. 28 U.S.C. § 2254(e)(1).

19 ***The Information***

20 The information originally contained 23 counts. The trial court  
21 granted the prosecution's motion to dismiss five of the counts  
22 before the matter was submitted to the jury. The jury  
23 considered 16 counts of molestation related to five different  
24 incidents described by the victim. Specifically, there were six  
25 counts charging Provencio with violating section 288,  
26 subdivision (a), and separate counts alleging Provencio  
violated each of the following sections once: sections 269,  
subdivision (a)(1), (3), (4), (5), 288, subdivision (b)(1), 288a,  
subdivision (c)(1), (2)(B), 286, subdivision (c)(2)(B), 261,  
subdivision (a)(2), and 289, subdivision (a)(1)(B).

27 In the alternative, the information charged Provencio with  
28 continuous sexual abuse of a child, in violation of section

1 288.5, subdivision (a). Finally, Provencio was charged with  
2 exhibiting harmful material to a child, in violation of section  
288.2, subdivision (a).

3 The information also alleged two enhancements. Several  
4 counts alleged Provencio personally inflicted bodily harm as  
5 defined in section 667.61, subdivision (a). The second  
6 enhancement alleged Provencio had suffered a prior  
conviction that constituted a strike within the meaning of  
section 667, subdivisions (b) through (i).

7 ***The Testimony***

8 The victim (Victim) testified she was 14 years old at the time  
9 of trial. Her first sexual encounter with Provencio occurred  
10 shortly after she and her family moved into an apartment with  
11 him when she was approximately seven years old. The family  
12 had purchased an air mattress for camping, and Victim  
13 wanted to sleep on it in the living room. Sometime during the  
14 night Provencio joined her on the air mattress. Victim woke  
up in the middle of the night and discovered Provencio  
touching her vagina underneath her underwear. After a few  
minutes, Victim rolled onto her side, got up, went to the  
bathroom, and then joined her mother in bed.

15 Approximately one year later, Victim and Provencio were in  
16 the bedroom he shared with Victim's mother. The two were  
17 playing around and making jokes. Suddenly, Provencio  
18 stated he wanted to "nail [Victim] so bad." He then started  
19 touching her body, including her breasts and genital area.  
She attempted to push him away, but he would not stop. He  
stopped when Victim's mother returned home.

20 After this second incident, the molestation happened more  
21 frequently and eventually escalated. Victim was able to relate  
22 an incident that occurred when she and her brother spent the  
23 night in a tent in their backyard. She awoke in the middle of  
24 the night to find Provencio next to her removing her pants. He  
rubbed her vagina with his fingers and placed his finger  
inside it. He also rubbed his penis against her vagina and  
then inserted his penis into her vagina. When he finished,  
Provencio left the tent.

25 The events of molestation continued and eventually  
26 escalated into nightly abuse. Provencio started telling Victim  
27 what he wanted her to do to him and how to do it. His  
28 requests included instructing her to copulate him orally. He  
also would copulate her orally. She explained that whenever

she wanted money to buy things, he would demand a sexual encounter before he would give it to her.

Victim testified Provencio sodomized her "almost every time." She claimed that every time he sodomized her it was painful. A few times after being sodomized, she would bleed, and it would hurt to walk for a few days.

Victim also testified to incidents where her arms were bruised by Provencio. She explained that she attempted to get away from him when he wanted to sodomize her. He would grab her arms and push her back onto the bed. The force used by him to restrain her left bruises. This type of incident occurred often.

Two nights before Victim reported the molestations to the police, Provencio had intercourse with her. She did not report the molestations for a long time because she was scared. Provencio told her that if she ever told anyone about the molestation, he or his friends would hurt her, her brother, and her mother. He also would take things away from her if she made him angry and threatened that the family would end up on the streets if he was arrested. She finally confided in her godmother because Provencio began verbally and physically abusing her brother and mother.

Finally, Victim described an occasion when she watched pornography with Provencio. She was watching television when he called her over to see something on his computer, which turned out to be pornographic videos. She tried to walk away, but he pulled her back and made her watch the videos. She remembered the girls in the video were dressed in provocative Valentine's Day or Christmas Day themed clothes.

Victim described a bottle of lubricant used by Provencio and described where he stored the bottle. Investigating officers located the bottle of lubricant in the location described by Victim. Investigating officers also found black underwear in Victim's bedroom in the location she described after her last encounter with Provencio.

DNA testing of a biological stain found on the underwear located two male contributors. Analysis of the major contributor was consistent with Provencio and other males who were related to Provencio. In terms of probability, the sequence obtained from the sample would occur in one in

1 every 942 African-Americans, one in every 704 Caucasians,  
2 and one in every 572 Hispanics.

3 Lucy Sager, the nurse examiner for the Sexual Assault  
4 Response Team, examined Victim. Sager found bruising on  
5 the back of Victim's upper right thigh, although she could not  
6 determine if the bruising was related to a sexual assault. She  
7 noted redness and tenderness in one part of the vaginal area  
8 that was the result of an object rubbing the area, possibly  
9 caused by a sexual assault. In another part of the vaginal  
10 area she observed a laceration of recent origin. She  
11 observed scarring to the perineum, indicating there had been  
12 some type of trauma, possibly multiple traumas, resulting in  
13 multiple healed injuries. She observed redness and  
14 tenderness in the anal area. There also were bruises on  
15 Victim's buttocks. These injuries were consistent with the  
16 history described by Victim, although the injuries could have  
17 been caused by a mechanism other than a sexual assault.

18 Robert Waggle, an investigator for the district attorney's  
19 office, examined various electronic devices related to  
20 Provencio. The first was a memory stick that was removed  
21 from a portable gaming device. Waggle found two files that  
22 contained adult pornographic videos. On a flash drive Waggle  
23 found several pornographic video files, including one that  
24 suggested a Valentine's Day themed video and another that  
25 contained a Christmas Day themed video. Other files  
26 depicted a boy sleeping with his friend's mother, girl-on-girl  
27 videos, and a girl sleeping with her friend's brother. Waggle  
28 described the videos as "Complete hardcore porn." An  
external hard drive contained a password-protected file  
entitled "O.K. Raiders" that contained adult pornographic  
videos.

Provencio testified in his defense. He denied ever having  
sexual contact with Victim and explained some of the  
incidents in a manner that did not involve sexual contact. He  
also explained the pornography found on his computer  
paraphernalia, but he denied ever having shown it to Victim.  
Outside the presence of the jury, Provencio admitted his prior  
strike conviction.

**25 *Closing Arguments***

26 The prosecution suggested the jury focus on the continuous  
27 sexual abuse of a child allegation. If the jury found Provencio  
28 guilty of that count, it could ignore the individual charges. The  
prosecution then asserted there was more than ample

1 evidence that Provencio committed more than three acts of  
2 molestation over a period in excess of three months.

3 Defense counsel argued Victim fabricated the charges,  
4 essentially parroting the testimony she had heard on a  
5 television news program. In addition, defense counsel argued  
there was insufficient evidence Victim had suffered bodily  
harm within the meaning of the enhancement.

6 ***Verdict and Sentencing***

7 The jury accepted the prosecutor's suggestion and found  
8 Provencio guilty of continuous sexual abuse of a child, in  
9 violation of section 288.5, subdivision (a), and exhibiting  
10 harmful material to a child, in violation of section 288.2,  
11 subdivision (a). The jury also found true the allegation that  
Provencio had inflicted bodily harm within the meaning of  
section 667.61, subdivision (a).

12 The trial court sentenced Provencio to a term of 50 years to  
13 life for the continuous sexual abuse of a child count. The term  
14 for this count starts with a triad of six, 12, or 16 years. This  
15 term was increased to 25 years to life pursuant to section  
16 667.61 because the jury concluded Provencio personally  
17 inflicted bodily harm on Victim, who was under the age of 14.  
(Id., subds. (a), (c)(9), (d)(7).) The term was then doubled  
because Provencio admitted he had a prior conviction that  
constituted a strike within the meaning of section 667,  
subdivisions (b) through (i). The sentence on the remaining  
count was imposed concurrently

18 People v. Provencio, No. F065755, 2014 WL 1327984, at \*1-3 (Cal. Ct. App. Apr. 3,  
19 2014)

20 **III. Jurisdiction and Venue**

21 Relief by way of a writ of habeas corpus extends to a prisoner under a judgment  
22 of a state court if the custody violates the Constitution, laws, or treaties of the United  
23 States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362,  
24 375 n.7 (2000). Petitioner asserts that he suffered a violation of his rights as guaranteed  
25 by the U.S. Constitution. Petitioner was convicted and sentenced in this district. 28  
26 U.S.C. § 2241(d); 2254(a). The Court concludes that it has jurisdiction over the petition  
27 and that venue is proper.

1           **IV. Applicable Law**

2           The petition was filed after April 24, 1996 and is governed by the Antiterrorism  
3 and Effective Death Penalty Act of 1996 ("AEDPA"). Lindh v. Murphy, 521 U.S. 320, 326  
4 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997). Under AEDPA, federal  
5 habeas corpus relief is available for any claim decided on the merits in state court  
6 proceedings if the state court's adjudication of the claim:

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

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

13           28 U.S.C. § 2254(d).

14           **A. Standard of Review**

15           A state court decision is "contrary to" federal law if it "applies a rule that  
16 contradicts governing law set forth in [Supreme Court] cases" or "confronts a set of facts  
17 that are materially indistinguishable from" a Supreme Court case, yet reaches a different  
18 result." Brown v. Payton, 544 U.S. 133, 141 (2005) (citing Williams, 529 U.S. at 405-06).  
19 "AEDPA does not require state and federal courts to wait for some nearly identical  
20 factual pattern before a legal rule must be applied. . . . The statute recognizes . . . that  
21 even a general standard may be applied in an unreasonable manner" Panetti v.  
22 Quarterman, 551 U.S. 930, 953 (2007) (citations and quotation marks omitted). The  
23 "clearly established Federal law" requirement "does not demand more than a 'principle'  
24 or 'general standard.'" Musladin v. Lamarque, 555 F.3d 830, 839 (2009). For a state  
25 decision to be an unreasonable application of clearly established federal law under  
26 § 2254(d)(1), the Supreme Court's prior decisions must provide a governing legal  
27 principle (or principles) to the issue before the state court. Lockyer v. Andrade, 538 U.S.  
28 63, 70-71 (2003).

1           A state court decision will involve an “unreasonable application of” federal law  
2 only if it is “objectively unreasonable.” Id. at 75-76 (quoting Williams, 529 U.S. at 409-  
3 10); Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002). “[A]n unreasonable application of  
4 federal law is different from an incorrect application of federal law.” Harrington v. Richter  
5 562 U.S. 86, 101 (2011) (citing Williams, 529 U.S. at 410) (emphasis in original). “A state  
6 court’s determination that a claim lacks merit precludes federal habeas relief so long as  
7 ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” Id.  
8 (citing Yarborough v. Alvarado, 541 U.S. 653, 664 (2004)). Further, “[t]he more general  
9 the rule, the more leeway courts have in reading outcomes in case-by-case  
10 determinations.” Id.; Renico v. Lett, 130 S. Ct. 1855, 1864 (2010). “It is not an  
11 unreasonable application of clearly established Federal law for a state court to decline to  
12 apply a specific legal rule that has not been squarely established by [the Supreme  
13 Court].” Knowles v. Mirzayance, 556 U.S. 111, 122 (2009).

14           B.     **Requirement of Prejudicial Error**

15           In general, habeas relief may only be granted if the constitutional error  
16 complained of was prejudicial. That is, it must have had “a substantial and injurious  
17 effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S.  
18 619, 623 (1993); see also Fry v. Pliler, 551 U.S. 112, 121-22 (2007) (holding that the  
19 Brecht standard applies whether or not the state court recognized the error and reviewed  
20 it for harmlessness). Some constitutional errors, however, do not require a showing of  
21 prejudice. See Arizona v. Fulminante, 499 U.S. 279, 310 (1991); United States v. Cronic,  
22 466 U.S. 648, 659 (1984). Furthermore, claims alleging ineffective assistance of counsel  
23 are analyzed under the Strickland prejudice standard; courts do not engage in a  
24 separate analysis applying the Brecht standard. Strickland v. Washington, 466 U.S. 668  
25 (1984); Avila v. Galaza, 297 F.3d 911, 918, n.7 (2002); Musalin v. Lamarque, 555 F.3d  
26 830, 834 (9th Cir. 2009).

### C. Deference to State Court Decisions

[S]tate courts are the principal forum for asserting constitutional challenges to state convictions," not merely a "preliminary step for a later federal habeas proceeding." Richter, 562 U.S. at 103. Whether the state court decision is reasoned and explained, or merely a summary denial, the approach to evaluating unreasonableness under § 2254(d) is the same: "Under § 2254(d), a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." Id. at 102. In other words:

11 As a condition for obtaining habeas corpus relief from a  
12 federal court, a state prisoner must show that the state  
13 court's ruling on the claim being presented in federal court  
14 was so lacking in justification that there was an error well  
understood and comprehended in existing law beyond any  
possibility for fairminded disagreement.

15 Id. at 103. Thus, the Court may issue the writ only “in cases where there is no possibility  
16 fairminded jurists could disagree that the state court’s decision conflicts with [the  
17 Supreme Court’s] precedents.” Id. at 102.

18 "Where there has been one reasoned state judgment rejecting a federal claim,  
19 later unexplained orders upholding that judgment or rejecting the claim rest on the same  
20 grounds." See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). Thus, the court will "look  
21 through" a summary denial to the last reasoned decision of the state court. Id. at 804;  
22 Plascencia v. Alameida, 467 F.3d 1190, 1198 (9th Cir. 2006). Furthermore, the district  
23 court may review a habeas claim, even where the state court's reasoning is entirely  
24 unexplained. Richter, 562 U.S. at 98. "Where a state court's decision is unaccompanied  
25 by an explanation, the habeas petitioner's burden still must be met by showing there was  
26 no reasonable basis for the state court to deny relief." Id. ("This Court now holds and

1 reconfirms that § 2254(d) does not require a state court to give reasons before its  
2 decision can be deemed to have been 'adjudicated on the merits.'").

3 **V. Review of Petition**

4 **A. Claim One: Miranda**

5 As described in greater detail below, Petitioner participated in a recorded  
6 interview with police. While much of the interview was uneventful, the interviewing  
7 detective eventually accused Petitioner of molesting the victim. During this accusation,  
8 Petitioner nodded his head repeatedly. Immediately thereafter, he requested counsel  
9 and the interview was terminated. The prosecution was permitted to introduce at trial  
10 evidence of the nodding through the testimony of the interviewing detective. Petitioner  
11 argues that the nodding was part of his exercise of his Miranda rights and should have  
12 been suppressed.

13 **1. State Court Decision**

14 The California Supreme Court summarily denied this claim. Accordingly, the Court  
15 "looks through" the Supreme Court's decision to the reasoned decision of the Fifth  
16 District Court of Appeal. See Ylst, 501 U.S. at 804. The Court of Appeal rejected  
17 Petitioner's claim as follows:

18 Provencio was interviewed by the police after Victim reported  
19 the molestation. This interview was recorded with audio and  
20 video equipment. Much of the interview was not relevant to  
21 the proceedings. After about one hour, however, the  
22 interrogating detective accused Provencio of molesting  
23 Victim. Seconds after the accusation, Provencio invoked his  
24 right to counsel and the interview was terminated.

25 When the interrogating detective accused Provencio of  
26 molesting Victim, Provencio nodded his head. The  
27 prosecution contended these movements were an admission  
28 and elicited this information from the interviewing detective at  
trial. Provencio objected to this testimony, asserting he was in  
custody, and the nods were part of his invocation of his  
constitutional rights pursuant to Miranda. The trial court  
overruled the objection after an Evidence Code section 402  
hearing and after viewing the videotape of the interview.  
Defense counsel, for tactical reasons, then decided to

1 introduce the entire invocation process to put the nods of  
2 Provencio's head into context.

3 Provencio contends the trial court erred when it permitted the  
4 prosecution to elicit evidence that he nodded his head,  
5 relying on the same two grounds as urged in the trial court.  
6 "In reviewing constitutional claims of this nature, it is well  
7 established that we accept the trial court's resolution of  
8 disputed facts and inferences, and its evaluations of  
9 credibility, if supported by substantial evidence. We  
10 independently determine from the undisputed facts and the  
11 facts properly found by the trial court whether the challenged  
12 statement was illegally obtained." [Citation.]" (People v.  
13 Thomas (2011) 51 Cal.4th 449, 476.)

14 Provencio's first argument is that he was in custody at the  
15 time he nodded his head. "An interrogation is custodial, for  
16 purposes of requiring advisements under Miranda, when "a  
17 person has been taken into custody or otherwise deprived of  
18 his freedom of action in any significant way." [Citations.]  
19 Whether a person is in custody is an objective test; the  
20 pertinent question being whether the person was formally  
21 arrested or subject to a restraint on freedom of movement of  
22 the degree associated with a formal arrest. [Citation.]' "  
23 (People v. Linton (2013) 56 Cal.4th 1146, 1167.)

24 The only witness to testify at the Evidence Code section 402  
25 hearing was the detective who interrogated Provencio. He  
26 testified Provencio was contacted in the front yard of his  
27 home as he returned from work. The detective identified  
28 himself as a police officer and was displaying a badge and  
29 weapon. He asked Provencio if he would be willing to come  
30 to the police department to discuss "an allegation." Provencio  
31 agreed and was transported in a police car to the police  
32 station. He was not placed in handcuffs.

33 The interrogating detective met Provencio in the interrogation  
34 room at the police station for the interview, which was  
35 recorded.[FN3] At the beginning of the interview, the  
36 detective advised Provencio he was not under arrest and that  
37 he was free to leave at any time. The two then engaged in a  
38 conversation that was not adversarial, nor which suggested  
39 Provencio could not leave. This tone continued until the  
40 detective left the room for a short time. Up to this point,  
41 Provencio concedes he was not in custody for Miranda  
42 purposes.

1 [FN3: We have reviewed the recording of the  
2 interview.]

3 When the detective returned to the room, he was  
4 accompanied by a second detective who took a seat near the  
5 back wall, away from the door. At this point the interrogating  
6 detective accused Provencio of molesting Victim, with the  
7 accompanying nodding of the head by Provencio. The issue  
8 is whether the change in tenor and the presence of the  
9 second detective converted this consensual interview into a  
10 custodial interrogation. We conclude that Provencio was not  
11 in custody.

12 Comparison of the facts in this case to those in People v.  
13 Moore (2011) 51 Cal.4th 386 (Moore) explains our  
14 conclusion. Moore's neighbor was murdered, and it appeared  
15 to investigating officers that Moore had knowledge relevant to  
16 the crime. Moore initially was interviewed in a patrol car  
17 because his trailer did not have heat or electricity. Although  
18 the detectives were armed and in uniform, and the doors to  
19 the patrol car were closed and locked, the Supreme Court  
20 concluded Moore was not detained. The Supreme Court  
21 observed that Moore was asked to give a statement as a  
22 percipient witness, and he readily agreed to do so. (Id. at p.  
23 396.)

24 At the end of the interview in the patrol car, the investigating  
25 officer requested Moore come to the police station to give a  
26 detailed statement. Although somewhat reluctant, Moore  
27 agreed to do so. He was driven to the police station in a  
28 patrol car. During the ride Moore conversed with the police  
officer driving him, and there was some discussion related to  
the investigation, generally instigated by Moore. The  
Supreme Court concluded Moore was not in custody during  
the drive. “[The officer] did not interrogate defendant during  
the ride; defendant was at the least an equal partner in  
initiating and maintaining the conversation, which ranged  
widely in subject matter. On arriving at the station, defendant  
sought confirmation that the officers only wanted a statement  
and would drive him home afterward. Receiving that  
confirmation, he again agreed to give the statement. Nothing  
indicates defendant thought he was not free to leave during  
the ride to the station, and no reasonable person would have  
thought so in these circumstances.” (Moore, supra, 51  
Cal.4th at pp. 397–398.)

Once Moore arrived at the police station, he was placed in an interview room to give a recorded statement. Moore was not

1 handcuffed or otherwise restrained. Two detectives were in  
2 the room when Moore was interviewed. Moore was informed  
3 he was not under arrest, was free to leave, and was at the  
station to give a statement as a percipient witness.

4 The detectives then began to ask Moore about the victim, her  
5 family, and any other relevant information he may have had  
6 about the murder. Both detectives joined in questioning  
7 Moore. Eventually, the detectives asked Moore about his past  
8 drug use and prior arrests. Moore was asked if he had  
9 burglarized the victim's residence. Detectives then began  
10 asking questions suggesting Moore was in the victim's  
11 residence before the murder and might have direct  
12 knowledge about the murder. Moore answered each of these  
13 questions in the negative, but he admitted he carried a stick  
14 with him as a walking aid.

15 Up to this point, it appears Moore had not been informed the  
16 victim had been murdered. When he was informed, Moore  
17 denied any involvement. The questioning continued along a  
18 line suggesting Moore had murdered the victim, including  
19 questions about a knife Moore carried with him. Detectives  
20 asked for permission to search Moore's trailer to find the  
21 knife, but Moore refused, stating he would retrieve the knife  
22 for the detectives when he returned home.

23 Detectives continued to question Moore in a manner that  
24 suggested they suspected him of murdering the victim,  
25 perhaps when she surprised him while he was burglarizing  
26 the residence. Moore denied the accusation and asked if he  
27 was under arrest. The detectives stated he was not under  
arrest. Moore asked for a ride home, but the detectives  
continued questioning Moore about the murder. Moore  
continued to deny any involvement in the murder and again  
asked for a ride home. The detectives then instructed Moore  
to return to his seat and asked if he would volunteer his  
clothes to be checked for evidence. Moore agreed to this  
proposition. Moore again asked for a ride home while waiting  
for someone to collect his clothes. The detectives told Moore  
they would give him a ride home after they collected his  
clothes but continued to question him about his possible  
involvement in the murder. Moore's clothes were collected  
and his body photographed, with the detectives pointing out  
scratches and bruises to be photographed. Moore again was  
asked if he was involved in the victim's death and again he  
denied any involvement. The detectives instructed Moore to  
sit down and informed him he would be taken home as soon  
as a patrol officer could be found to give him a ride.

1 The questioning continued about various topics and then the  
2 detectives left the room. One detective testified that at this  
3 point he was informed that evidence from the crime scene  
4 connected Moore to the murder, including property from the  
5 victim's residence recovered from Moore's trailer. This  
6 detective then returned to the interview room and asked  
7 Moore if he would allow technicians to swab his hands.  
Moore refused and demanded a ride home. He refused a  
further request to stay at the station voluntarily. The detective  
then told Moore he could not go home and informed him of  
his constitutional rights pursuant to Miranda.

8 "We agree with the trial court that the sheriff's station  
9 interview did not, in its entirety, constitute custodial  
10 interrogation. As already discussed, defendant, the  
11 last person known to have seen the victim and  
12 obviously an important witness, was asked—and freely  
13 agreed—to come to the station to give a statement. In  
14 context, [the detective's] statement that 'we have to do  
15 [it] now' rather than the next day clearly referred only  
16 to the importance of getting information promptly and  
17 did not convey a command that defendant go to the  
18 station. On arriving at the station, defendant asked  
19 whether, and was again assured, he was there only to  
20 give a statement. Once in the interview room at the  
21 station, [the detective] expressly told defendant he was  
22 not under arrest and was free to leave. Defendant said  
23 he understood. Defendant was not handcuffed or  
24 otherwise restrained, and there was no evidence the  
interview room door was locked against his leaving.  
The interview was fairly long—one hour 45 minutes—but not, as a whole, particularly intense or  
confrontational. The interview focused, initially, on defendant's encounter with [the victim], the missing  
fence boards, and information defendant might have  
had about the man he reported seeing in [the victim's]  
backyard or others connected with [the victim's family].  
For a substantial period, while defendant filled in his  
previous statements with details, the questioning did  
not convey any suspicion of defendant or skepticism  
about his statements.

25 "After a while, to be sure, the detectives interjected  
26 some more accusatory and skeptical questions, with  
[one detective] asking defendant straight out, 'Did you  
27 burglarize the house?' and, later, urging him to begin  
being 'honest with me.' The detectives' questions

1 about defendant's prior arrests, drug use, need for  
2 money, and carrying of a knife and other weapons on  
3 the day of the crimes conveyed their suspicion of  
4 defendant's possible involvement. But Miranda  
5 warnings are not required 'simply because the  
6 questioning takes place in the station house, or  
7 because the questioned person is one whom the  
8 police suspect.' [Citation.] While the nature of the  
9 police questioning is relevant to the custody question,  
10 police expressions of suspicion, with no other  
11 evidence of a restraint on the person's freedom of  
12 movement, are not necessarily sufficient to convert  
13 voluntary presence at an interview into custody.  
14 [Citation.] At least until defendant first asked to be  
15 taken home and his request was not granted, a  
16 reasonable person in defendant's circumstances  
17 would have believed, despite indications of police  
18 skepticism, that he was not under arrest and was free  
19 to terminate the interview and leave if he chose to do  
20 so." (Moore, *supra*, 51 Cal.4th at pp. 402–403.)

21 As Provencio concedes, nothing that occurred prior to the  
22 break converted this voluntary interview into a custodial  
23 interrogation. Undoubtedly, after the break, the detective's  
24 accusatory statement (I know you molested Victim, I am just  
25 trying to determine why) certainly conveyed to Provencio that  
26 at a minimum he was a suspect. That statement, in and of  
27 itself, however, did not convert the interview into a custodial  
28 interrogation. Provencio voluntarily came to the police station  
to be interviewed. He was told he could leave at any time and  
there was no apparent restriction on his ability to do so, even  
though he did not try to do so. He was not placed in  
handcuffs, nor did the door appear to be locked.

29 Nor did the presence of the second detective convert the  
30 interview into a custodial interrogation. The second detective  
31 entered the interview room after the break, sat down, and did  
32 not appear to participate in any aspect of the interview until  
33 after Provencio requested an attorney. No reasonable person  
34 immediately would believe he or she was in custody simply  
35 because two detectives entered the room instead of one  
36 detective.

37 As stated in Moore, police expressions of suspicion without  
38 other evidence of restraint on a person's freedom of  
39 movement do not necessarily convert a voluntary interview  
40 into a custodial interrogation. (Moore, *supra*, 51 Cal.4th at p.  
41 403.) The complete absence of restraint on Provencio's

1 movement, along with police assurances, would not cause a  
2 reasonable person to believe he or she was under arrest and  
3 could not terminate the interview and leave. Accordingly, as  
4 in Moore, we conclude Provencio was not in custody and  
Miranda warnings were not necessary.

5 Provencio's second argument is that his nodding of the head  
6 was part of his request for an attorney and therefore  
7 inadmissible. We do not agree.

8 We have reviewed the recording of the interview and  
9 conclude there are only two possible interpretations of the  
10 nods of the head by Provencio. One interpretation is an  
11 acknowledgment that the charges were true as suggested by  
12 the prosecution. The more likely interpretation is that  
13 Provencio was acknowledging what the detective was saying,  
14 not agreeing with the statements. Even though Provencio  
15 requested an attorney shortly after nodding his head, we  
16 cannot see any logical path that would lead to the conclusion  
17 that the nods of the head were a request for counsel.

18 Our analysis means the nodding of the head is admissible  
19 and its import is for the jury to decide. We thus reject this  
20 argument along with the first one and conclude the trial  
21 court's ruling was correct.

22 People v. Provencio, No. F065755, 2014 WL 1327984, at \*3-7 (Cal. Ct. App. Apr. 3,  
23 2014).

## 2. Applicable Law

24 In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the United States Supreme  
25 Court held that "[t]he prosecution may not use statements, whether exculpatory or  
26 inculpatory, stemming from custodial interrogation of the defendant unless it  
27 demonstrates the use of procedural safeguards effective to secure the privilege against  
self-incrimination." Thus, "suspects interrogated while in police custody must be told that  
they have a right to remain silent, that anything they say may be used against them in  
court, and that they are entitled to the presence of an attorney, either retained or  
appointed, at the interrogation. Thompson v. Keohane, 516 U.S. 99, 107 (1995);  
Miranda, 384 U.S. at 473-74. Once Miranda warnings have been given, "all questioning

1 must cease" if a suspect makes a clear and unambiguous statement invoking his  
2 constitutional rights. Smith v. Illinois, 469 U.S. 91, 98 (1984).

3 Miranda warnings are required only when a suspect interrogated by the police is  
4 "in custody." Thompson, 516 U.S. at 102. Custodial interrogation means "questioning  
5 initiated by law enforcement officers after a person has been taken into custody or  
6 otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at  
7 444. The relevant question is whether a "reasonable person [would] have felt he or she  
8 was not at liberty to terminate the interrogation and leave." Thompson, 516 U.S. at 112.  
9 Resolving this question requires consideration of the following two inquiries: (1) what  
10 were the overall circumstances surrounding the interrogation; and (2) given those  
11 circumstances, would a reasonable person in the suspect's situation have felt free to  
12 terminate the interrogation and leave. J.D.B. v. North Carolina, 564 U.S. 261, 270  
13 (2011). This is an objective inquiry. Thus, "subjective views harbored by either the  
14 interrogating officers or the person being questioned are irrelevant." Id. (internal  
15 quotation marks and citation omitted).

16 In order for an accused's statement, made during custodial interrogation, to be  
17 admissible at trial, police must have given the accused a Miranda warning. See Miranda,  
18 384 U.S. at 471. "If that condition is established, the court can proceed to consider  
19 whether there has been an express or implied waiver of Miranda rights." Berghuis v.  
20 Thompkins, 560 U.S. 370, 388 (2010) (citation omitted).

21 **3. Analysis**

22 The dispositive issue is whether Petitioner was in custody for purposes of Miranda  
23 at the time he nodded his head in response to the interviewing detective's statements.  
24 The Court concludes that the state court's determination that Petitioner was not in  
25 custody was not an unreasonable application of Supreme Court precedent. See  
26 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

1       First, there appears to be no dispute that Petitioner was not in custody at the  
2 outset of the interview. Petitioner came voluntarily to the police station. He was not  
3 handcuffed or restrained in any way. He was expressly told that he was not under arrest  
4 and was free to leave. The interview proceeded conversationally for approximately one  
5 hour. At no time during that period did the interviewing detective pressure Petitioner to  
6 continue the interview, nor did Petitioner express a desire to leave.<sup>1</sup> See Oregon v.  
7 Mathiason, 429 U.S. 492, 435 (1977) (per curiam) (holding that suspect was not in  
8 custody where he had come voluntarily to police station, was informed he was not under  
9 arrest, and was allowed to leave at end of interview).

10      Thus, the question becomes whether something changed when the interviewing  
11 detective re-entered the interview room with his colleague, such that a reasonable  
12 person would no longer have felt that he was free to leave. This inquiry presents a closer  
13 call. The officers arrested Petitioner immediately upon his termination of the interview,  
14 suggesting that Petitioner may no longer have been free to leave once both officers  
15 entered the room. However, the mere fact that the officers planned to arrest Petitioner  
16 does not trigger the need for Miranda warnings. Oregon v. Mathiason, 429 U.S. 492, 495  
17 (1977); see also Berkemer v. McCarty, 468 U.S. 420, 442 (1984) ("A policeman's  
18 unarticulated plan has no bearing on the question whether a suspect was 'in custody' at  
19 a particular time.") Rather, "the only relevant inquiry is how a reasonable man in the  
20 suspect's position would have understood his situation." Berkemer, 468 U.S. at 442.

21      Here, the detective's accusations against Petitioner are relevant to the custody  
22 inquiry, but only to the extent they would affect how a reasonable person in Petitioner's  
23 position would gauge the restraint on his freedom to leave:

24           Even a clear statement from an officer that the person under  
25 interrogation is a prime suspect is not, in itself, dispositive of  
26 the custody issue, for some suspects are free to come and go  
until the police decide to make an arrest. The weight and

27           

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<sup>1</sup> The Court has reviewed the videotaped interview, which was lodged with the Court on September 22,  
28 2017.

1                   pertinence of any communications regarding the officer's  
2 degree of suspicion will depend upon the facts and  
3 circumstances of the particular case. In sum, an officer's  
4 views concerning the nature of an interrogation, or beliefs  
5 concerning the potential culpability of the individual being  
6 questioned, may be one among many factors that bear upon  
7 the assessment whether that individual was in custody, but  
only if the officer's views or beliefs were somehow manifested  
to the individual under interrogation and would have affected  
how a reasonable person in that position would perceive his  
or her freedom to leave.

8                   Stansbury v. California, 511 U.S. 318, 325 (1994).

9                   The Court of Appeal's determination that Petitioner was not in custody at the time  
10 he nodded his head was not objectively unreasonable in light of the overall  
11 circumstances surrounding the interrogation. Again, Petitioner clearly was informed at  
12 the beginning of the interview that he was free to leave and, while that fact was not  
13 reconfirmed when the detectives re-entered the room, neither was it contradicted.  
14 Neither detective blocked the door or attempted to physically or verbally dissuade  
15 Petitioner from exiting. Petitioner was not handcuffed or otherwise restrained. The tenor  
16 of the interview remained conversational despite the accusations. Furthermore, the  
17 remainder of the interview was brief. In effect, it ended immediately once Petitioner was  
18 informed of the accusations against him. In light of all these circumstances, a fairminded  
19 jurist could conclude that Petitioner was not in custody at the time he nodded his head.  
20 The state court's determination that the nodding need not be suppressed pursuant to  
21 Miranda was not objectively unreasonable.

22                   Furthermore, even assuming Petitioner was in custody and the nodding should be  
23 suppressed, any error in admitting this evidence did not have a "substantial and injurious  
24 effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 629. Having  
25 reviewed the video interview, the Court agrees with the Court of Appeals that it would be  
26 a stretch to construe Petitioner's nodding as an admission of guilt, despite the  
27 prosecutor's argument in this regard. At the very least, a fariminded jurist could conclude

1 that Petitioner "was acknowledging what the detective was saying, not agreeing with the  
2 statements."

3 Based on the foregoing, Petitioner is not entitled to relief on this claim.

4 **B. Claim Two: Conflicting Instructions on Intent**

5 Petitioner claims that the jury was given conflicting instructions on the intent  
6 required to find Petitioner guilty of the offense of continuous sexual abuse of a child.

7 **1. State Court Decision**

8 The Fifth District Court of Appeal rejected Petitioner's claim as follows:

9 Provencio was charged with continuous sexual abuse of a  
10 child, in violation of section 288.5, subdivision (a). The trial  
11 court instructed the jury on this count pursuant to CALCRIM  
12 No. 1120. This instruction informed the jury that to convict  
13 Provencio of this offense, the jury must find (1) Provencio  
14 lived with Victim, (2) he engaged in three or more acts of  
15 substantial sexual conduct or lewd and lascivious conduct  
16 with Victim, (3) three or more months passed between the  
17 first and last acts, and (4) Victim was under the age of 14 at  
18 the time of the acts. The instruction also defined "substantial  
19 sexual conduct" and "lewd and lascivious conduct" for the  
jury.

20 Provencio's argument focuses on the element of intent  
21 required to commit a lewd and lascivious act. CALCRIM No.  
22 1120 informed the jury that "Lewd or lascivious conduct is  
23 any willful touching of a child accomplished with the intent to  
24 sexually arouse the perpetrator or the child." (Italics added.)

25 The trial court also instructed the jury with CALCRIM No. 252.  
26 The relevant portion of this instruction informed the jury that  
27 continuous sexual abuse of a child required a general  
28 criminal intent and also informed the jury that to find  
Provencio guilty of this crime, he "must not only commit the  
prohibited act, but must do so with wrongful intent. A person  
acts with wrongful intent when he or she intentionally does a  
prohibited act; however, it is not required that he or she  
intend to break the law. The act required is explained in the  
instruction for that crime." Provencio asserts these two  
instructions conflict on the issue of intent. We disagree.

The error in Provencio's argument is that he confuses the intent required to violate section 288.5 with the intent required for one of the elements the jury must find exists to convict a

1 defendant of violating section 288.5. To violate section 288.5,  
2 a defendant must commit each of the elements as explained  
3 in CALCRIM No. 1120: (1) the defendant must live in the  
4 same home as the victim, (2) the defendant must engage in  
5 three or more acts of substantial sexual conduct with the  
6 victim or lewd and lascivious acts with the victim, (3) the  
7 length of time between the first act and the last act must be  
8 three or more months, and (4) the victim must be under the  
9 age of 14 when the acts occur. The intent required to violate  
10 each of these elements is referred to as general intent, i.e.,  
11 the intent to commit the acts without any further intent  
12 required.

13 The second element of the crime required the jury to find  
14 Provencio committed three or more lewd and lascivious acts  
15 with Victim or three or more acts of substantial sexual  
16 conduct with Victim. If the jury focused on whether Provencio  
17 committed three or more lewd and lascivious acts with Victim,  
18 the jury would have to find that those acts were committed  
19 with the specific intent to arouse either Provencio or Victim  
sexually. (People v. Whitham (1995) 38 Cal.App.4th 1282,  
20 1293.) On the other hand, if the jury focused on substantial  
21 sexual conduct when considering the second element of the  
22 crime, there was no requirement that the conduct be  
23 committed with the specific intent to arouse either Provencio  
24 or Victim sexually. The mere act of oral copulation, sodomy,  
25 insertion of an object in the vagina of either the perpetrator or  
26 the victim, or masturbation of either the victim or the  
27 perpetrator constitutes substantial sexual conduct within the  
28 meaning of section 288.5. (Whitham, at p. 1293.) The  
instructions provided to the jury adequately explained these  
concepts. There was no error.

20 People v. Provencio, No. F065755, 2014 WL 1327984, at \*7 (Cal. Ct. App. Apr. 3, 2014)

21 **3. Analysis**

22 The California Court of Appeal found that the trial court properly instructed the jury  
23 on the elements of the offense, and that Petitioner's argument was based on an  
24 incorrect understanding of the underlying law. This determination is a matter of state  
25 substantive law that does not provide a basis for federal habeas relief. Estelle v.  
26 McGuire, 502 U.S. 62, 71-72 (1991) (holding that a challenge to a jury instruction solely  
27 as an error under state law does not state a claim cognizable in federal habeas corpus

1 proceedings); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (alleged error in  
2 interpretation or application of state law not a basis for federal habeas relief).

3 Instead, a federal court's inquiry on habeas review is limited to whether the  
4 challenged jury instruction "violated some right which was guaranteed to the defendant  
5 by the Fourteenth Amendment." Cupp v. Naughten, 414 U.S. 141, 146 (1973). "[N]ot  
6 every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a  
7 due process violation." Id. On federal review, the pertinent question is whether the  
8 challenged instruction "so infused the trial with unfairness as to deny due process of  
9 law." Estelle, 502 U.S. at 75. Relevant to this inquiry is "whether there is a reasonable  
10 likelihood that the jury has applied the challenged instruction in a way' that violates the  
11 Constitution." Id. (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

12 Here, the state court determined that the instructions properly instructed the jury  
13 on the substantive elements of state criminal law. There is no basis to conclude that the  
14 jury applied the instructions in a way that violated the constitution. Petitioner is not  
15 entitled to relief on this claim.

16 **C. Claim Three: Insufficient Evidence**

17 Petitioner styles this claim as a challenge to the sufficiency of the evidence  
18 regarding the bodily harm enhancement. However, upon closer inspection, the petition  
19 appears to ask that the Court define the degree of injury required to constitute "bodily  
20 harm" under California law, or to interpret "bodily harm" more favorably than did the  
21 Court of Appeal.

22 **1. State Court Decision**

23 The Fifth District Court of Appeal rejected this claim as follows:

24 **Standard of Review**

25 To assess the evidence's sufficiency, we review the whole  
26 record to determine whether any rational trier of fact could  
27 have found the essential elements of the crime or special  
28 circumstances beyond a reasonable doubt. (People v. Maury  
(2003) 30 Cal.4th 342, 403.) The record must disclose

1 substantial evidence to support the verdict, i.e., evidence that  
2 is reasonable, credible, and of solid value, such that a  
3 reasonable trier of fact could find the defendant guilty beyond  
4 a reasonable doubt. (*Id.* at p. 396.) In applying this test, we  
5 review the evidence in the light most favorable to the  
6 prosecution and presume in support of the judgment the  
7 existence of every fact the jury reasonably could have  
8 deduced from the evidence. (People v. Boyer (2006) 38  
9 Cal.4th 412, 480.) "Conflicts and even testimony [that] is  
10 subject to justifiable suspicion do not justify the reversal of a  
11 judgment, for it is the exclusive province of the trial judge or  
12 jury to determine the credibility of a witness and the truth or  
13 falsity of the facts upon which a determination depends.  
[Citation.] We resolve neither credibility issues nor evidentiary  
14 conflicts; we look for substantial evidence. [Citation.]" (Maury,  
15 at p. 403.) A reversal for insufficient evidence "is unwarranted  
16 unless it appears 'that upon no hypothesis whatever is there  
17 sufficient substantial evidence to support' " the jury's verdict.  
18 (People v. Bolin (1998) 18 Cal.4th 297, 331.)

19 ***Bodily Harm Enhancement***

20 The jury found true an allegation that Provencio personally  
21 inflicted bodily harm on Victim within the meaning of section  
22 667.61. This section provides that a defendant who commits  
23 a sex offense that is listed in subdivision (c) of the section will  
24 be subject to a sentence of 25 years to life if specific  
25 circumstances listed in subdivisions (d) and (e) are found to  
26 be true. Subdivision (a) of the section provides that for the  
27 enhanced sentence to apply, the jury must find true either  
28 one or more of the circumstances listed in subdivision (d) or  
29 two or more of the circumstances listed in subdivision (e).  
30 Continuous sexual abuse of a child is one of the listed sex  
31 offenses (§ 667.61, subd. (c)(9)), and personal infliction of  
32 bodily harm on a victim under 14 years of age is one of the  
33 circumstances listed in subdivision (d) (§ 667.61, subd.  
34 (d)(7)).

35 "Bodily harm" is defined in subdivision (k) of section 667.61  
36 as "any substantial physical injury resulting from the use of  
37 force that is more than the force necessary to commit an  
38 offense specified in subdivision (c)." Provencio argues the  
39 jury's finding that he inflicted bodily harm on Victim was not  
40 supported by substantial evidence, and thus the enhanced  
41 sentence must be vacated and he must be sentenced  
42 pursuant to the provisions of section 288.5.

1 The testimony related to the injuries sustained by Victim was  
2 limited to that of Victim and Sager, the nurse who conducted  
3 the forensic examination. Victim testified that when Provencio  
4 sodomized her, it was painful. She had pain when she walked  
5 for a few days, and there was some bleeding after the event.  
6 She also testified that on one occasion she attempted to  
7 escape Provencio when he was molesting her, but he  
8 grabbed her by the arms and threw her to the bed. This event  
9 left bruises on her arms.  
10

11 Sager testified she found some bruising on Victim during her  
12 examination, but she could not determine if it was related to  
13 an assault or not. She also noted tenderness and a laceration  
14 in the vaginal area that could be related to a sexual assault.  
15 Similarly, she noted redness and tenderness in the anal area  
16 that could be related to a sexual assault. Finally, she  
17 observed scarring to the perineum, indicating some type of  
18 trauma that could be related to a sexual assault.  
19

20 While this testimony was not overwhelming, we conclude it  
21 was sufficient to support the jury's finding that Provencio  
22 inflicted substantial physical injury on Victim. While there are  
23 no cases directly on point, we find guidance in section  
24 12022.7. This section, in part, enhances a sentence if the  
25 defendant "inflicts great bodily injury on any person other  
26 than an accomplice" during the commission of a felony. (*Id.*,  
27 subd. (a).) The term "great bodily injury" is defined by the  
28 statute as "a significant or substantial physical injury." (*Id.*,  
subd. (f).) Thus, the Legislature had defined "great bodily  
injury" in section 12022.7 using essentially the same term as  
it used to define "bodily harm" in section 667.61. Accordingly,  
we find instructive those cases that have interpreted the term  
"great bodily injury" as used in section 12022.7.

20 In People v. Washington (2012) 210 Cal.App.4th 1042, 1047,  
21 the court noted that a finding of great bodily injury will be  
22 sustained when there is "some physical pain or damage,  
23 such as lacerations, bruises, or abrasions." The Washington  
24 court cited People v. Jaramillo (1979) 98 Cal.App.3d 830,  
836–837 (Jaramillo) and People v. Sanchez (1982) 131  
Cal.App.3d 718, 733 (Sanchez) to support its statement.

25 In Jaramillo the defendant struck her young daughters with a  
26 wooden stick 18 to 20 inches long and about one inch in  
27 diameter. One daughter "suffered multiple contusions over  
28 various portions of her body and the injuries caused swelling  
and left severe discoloration on parts of her body. The  
injuries were visible the day after infliction to at least two lay

1 persons.... Further, there was evidence that [the daughter]  
2 suffered pain as a result of her injuries because a day later  
3 she had a 'look of anguish' on her face and she flinched or  
4 turned away from a simple guiding touch on the shoulder ...  
5 and [the daughter stated] 'it hurt' as [she] walked to the  
6 nurse's office." (Jaramillo, *supra*, 98 Cal.App.3d at p. 836.)  
7 Concluding the issue "might be close," the appellate court  
8 concluded there were sufficient facts to support the finding.  
9 (Ibid.)

10 In Sanchez, this court described the victim's injuries as  
11 "multiple abrasions and lacerations. She had one long  
12 scratch diagonally across her back and numerous bruises  
13 and small lacerations on her neck. She had a serious  
14 swelling and bruising of her right eye and a markedly swollen  
15 left cheek." (Sanchez, *supra*, 131 Cal.App.3d at p. 733.)  
16 Relying primarily on Jaramillo, we held this evidence was  
17 sufficient to support a great bodily injury enhancement.

18 Additional guidance is found in two Supreme Court cases. In  
19 People v. Escobar (1992) 3 Cal.4th 740, the defendant raped  
20 the victim, causing her to suffer "multiple abrasions to her  
21 thighs, knees, hips and elbows. Several photographs  
22 introduced at trial revealed raw and bloody asphalt burns and  
23 bruises over various parts of her body. [The victim] testified  
24 that her neck hurt so badly after the attack that she could not  
25 move it. Vaginal pain prevented her from walking without  
26 impairment for more than a week. A police employee testified  
27 that when [the victim] reported for an interview six days after  
28 the assault, she appeared injured, walked with a very heavy  
limp, and required the assistance of two friends, one on each  
side, to help her." (Id. at p. 744.) The Supreme Court, in  
overruling one of its earlier cases,[FN4] held the evidence of  
"extensive bruises and abrasions over the victim's legs,  
knees and elbows, injury to her neck and soreness in her  
vaginal area of such severity that it significantly impaired her  
ability to walk" was sufficient evidence to sustain the great  
bodily injury finding. (Escobar, at p. 750.)

29 [FN4: People v. Caudillo (1978) 21 Cal.3d 562.]

30 In People v. Cross (2008) 45 Cal.4th 58, the defendant had  
31 repeated sexual intercourse with his stepdaughter, resulting  
32 in her becoming pregnant. The defendant encouraged the  
33 victim to get an abortion, which she did with the defendant's  
34 assistance. The Supreme Court explained that "Proof that a  
35 victim's bodily injury is 'great'—that is, significant or  
36 substantial within the meaning of section 12022.7—is

commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury. [Citations.] Thus, when victims of unlawful sexual conduct experience physical injury and accompanying pain beyond that 'ordinarily experienced' by victims of like crimes [citation], such additional, 'gratuitous injury' will support a finding of great bodily injury [citation]."  
(*Id.* at p. 66.) The Supreme Court held the evidence that the 13-year-old victim became pregnant was sufficient evidence to support the great bodily injury finding. (*Ibid.*)

These cases convince us that Victim suffered bodily harm within the meaning of section 667.61. Victim testified she suffered bruises on her arms as a result of Provencio forcing her to the bed so he could sodomize her. She also described rectal bleeding and pain that lasted for a few days as a result of Provencio sodomizing her. While the description of these injuries was sparse, the bleeding and excessive pain described by Victim is comparable to the injuries suffered by the victim in Escobar. When combined with the bruising suffered by Victim, we conclude there was a bare minimum of evidence sufficient to support the jury's verdict.

Provencio, 2014 WL 1327984, at \*8-10.

## 2. Analysis

To the extent Petitioner disputes the Court of Appeal's interpretation of "substantial physical injury," his claim presents a question of state law that is not subject to federal review. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (per curiam) ("[I]t is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts."); Estelle v. McGuire, 502 U.S. 62, 71-72 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); Middleton, 768 F.2d at 1085 (alleged error in interpretation or application of state law not a basis for federal habeas relief).

To the extent Petitioner argues that the evidence was insufficient even under the standard articulated by the Court of Appeal, his claim is reviewable. The Due Process Clause “protects the accused against conviction except upon proof beyond a reasonable

1 doubt of every fact necessary to constitute the crime with which he is charged." In re  
2 Winship, 397 U.S. 358, 364 (1970). There is sufficient evidence to support a conviction  
3 if, "after viewing the evidence in the light most favorable to the prosecution, any rational  
4 trier of fact could have found the essential elements of the crime beyond a reasonable  
5 doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). "[T]he dispositive question under  
6 Jackson is 'whether the record evidence could reasonably support a finding of guilt  
7 beyond a reasonable doubt.'" Chein v. Shumsky, 373 F.3d 978, 982 (9th Cir. 2004)  
8 (quoting Jackson, 443 U.S. at 318). Put another way, "a reviewing court may set aside  
9 the jury's verdict on the ground of insufficient evidence only if no rational trier of fact  
10 could have agreed with the jury." Cavazos v. Smith, 565 U.S. 1 (2011).

11 In conducting federal habeas review of a claim of insufficient evidence, "all  
12 evidence must be considered in the light most favorable to the prosecution." Ngo v.  
13 Giurbino, 651 F.3d 1112, 1115 (9th Cir. 2011). "Jackson leaves juries broad discretion in  
14 deciding what inferences to draw from the evidence presented at trial," and it requires  
15 only that they draw "reasonable inferences from basic facts to ultimate facts." Coleman  
16 v. Johnson, 132 S.Ct. 2060, 2064 (2012) (citation omitted). "Circumstantial evidence  
17 and inferences drawn from it may be sufficient to sustain a conviction." Walters v.  
18 Maass, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted).

19 "A petitioner for a federal writ of habeas corpus faces a heavy burden when  
20 challenging the sufficiency of the evidence used to obtain a state conviction on federal  
21 due process grounds." Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). In order to  
22 grant relief, the federal habeas court must find that the decision of the state court  
23 rejecting an insufficiency of the evidence claim reflected an objectively unreasonable  
24 application of Jackson and Winship to the facts of the case. Ngo, 651 F.3d at 1115; Juan  
25 H., 408 F.3d at 1275 & n.13. Thus, when a federal habeas court assesses a sufficiency  
26 of the evidence challenge to a state court conviction under AEDPA, "there is a double  
27 dose of deference that can rarely be surmounted." Boyer v. Belleque, 659 F.3d 957, 964  
28

1 (9th Cir. 2011). The federal habeas court determines sufficiency of the evidence in  
2 reference to the substantive elements of the criminal offense as defined by state law.  
3 Jackson, 443 U.S. at 324 n.16; Chein, 373 F.3d at 983.

4 Here, the state court determined that “bodily harm” requires “some physical pain  
5 or damage, such as lacerations, bruises, or abrasions.” Provencio, 2014 WL 1327984, at  
6 \*9. The complainant testified that she suffered pain for several days, bleeding, and  
7 bruising as a result of the abuse. This evidence is sufficient to support a finding of guilt  
8 beyond a reasonable doubt. Therefore, the state court’s rejection of the claim was not  
9 objectively unreasonable. Petitioner is not entitled to relief on this claim.

10 **VI. Conclusion and Recommendation**

11 Based on the foregoing, it is HEREBY RECOMMENDED that the petition for writ  
12 of habeas corpus be DENIED.

13 The findings and recommendation are submitted to the United States District  
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
15 **thirty** (30) days after being served with the findings and recommendation, any party may  
16 file written objections with the Court and serve a copy on all parties. Such a document  
17 should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.”  
18 Any reply to the objections shall be served and filed within fourteen (14) days after  
19 service of the objections. The parties are advised that failure to file objections within the  
20 specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772  
21 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir.  
22 1991)).

23 IT IS SO ORDERED.  
24

25 Dated: October 31, 2017

26 /s/ Michael J. Seng  
27 UNITED STATES MAGISTRATE JUDGE  
28