APPENDIX A

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September 22, 2017

No.: 17-56449
D.C. No.: 5:16-cv-02202-R-KS
Short Title: Wyley Baird v. William Muniz

Dear Appellant

The Clerk's Office of the United States Court of Appeals for the Ninth Circuit has received a copy of your notice of appeal and/or request for a certificate of appealability.

A briefing schedule will not be set until the court determines whether a certificate of appealability should issue.

Absent an emergency, all subsequent filings in this matter will be referred to the panel assigned to consider whether or not to grant the certificate of appealability.

All subsequent letters and requests for information regarding this matter will be added to your file to be considered at the same time the cause is brought before the court.

The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 2 2018

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

WYLEY TOMAS BAIRD, Petitioner-Appellant, v. WILLIAM MUNIZ, Warden, Respondent-Appellee.	No. 17-56449 D.C. No. 5:16-cv-02202-R-KS Central District of California, Riverside ORDER

Before: CLIFTON and CHRISTEN, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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MAY 31 2018

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

WYLEY TOMAS BAIRD, Petitioner-Appellant, v. WILLIAM MUNIZ, Warden, Respondent-Appellee.	No. 17-56449 D.C. No. 5:16-cv-02202-R-KS Central District of California, Riverside ORDER

Before: W. FLETCHER and WATFORD, Circuit Judges.

The motion for reconsideration (Docket Entry No. 6) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WYLEY TOMAS BAIRD, **Petitioner,** **v.** **WILLIAM MUNIZ, Warden** **Respondent.**	**NO. EDCV 16-02202-R (KS)** **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Manual R. Real United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On October 18, 2016, Petitioner Wyley Tomas Baird ("Petitioner"), a California state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (the "Petition" or "Pet."). (Dkt. No. 1.) On December 29, 2016, Respondent filed an Answer to the Petition. (Dkt. No. 6) and on January 13, 2017, Petitioner filed a Reply to the Answer (Dkt. No. 8).

Briefing in this action is now complete and the matter is under submission to the Court for decision.

PRIOR PROCEEDINGS

On December 17, 2013, following a trial in Riverside County Superior Court, a jury convicted Petitioner of four counts of forcible sexual penetration of a child under the age of 14 years (Cal. Penal Code § 269(a)(5)); and six counts of forcible lewd and lascivious acts with force or fear to a child under the age of 14 years for sexual gratification (Cal. Pen. C. § 288(a)).[1] (Clerk's Transcript ("CT") at 113-114). The jury also found true the allegation that Petitioner committed the charged offenses against more than one victim. (Cal. Pen C. § 667.61(a), (4).) (CT at 222.) Petitioner was sentenced to a total term of imprisonment of 150 years to life. (CT 235-36.)

On September 18, 2014, Petitioner appealed his conviction and sentence in the California Court of Appeal, Fourth Appellate District, Division Two (case no. E0607510). (Lodged Document ("LD") 4.) On direct review, Petitioner raised the following grounds: (1) substantial evidence did not support the finding that Petitioner acted with the requisite force, violence, duress, menace of fear of bodily harm to support his convictions for violating section 288(b)(1); (2) substantial evidence did not establish that sexual penetration was accomplished by force, violence, duress, menace of fear of immediate and unlawful bodily injury; (3) the trial court erred by failing to instruct the jury on an essential element of aggravated sexual assault; (4) prosecutorial misconduct because the prosecutor elicited testimony of uncharged sexual abuse where evidence of such conduct was previously undisclosed; and (5)

[1] All subsequent references to sections 288, 269, or 289, unless otherwise noted, refer to California Penal Code sections.

trial court error in not staying imposition of fines imposed under Penal Code § 290.3. (LD 4.)

In a reasoned unpublished decision, the California Court of Appeal stayed the imposition of a portion of the section 290.3 fines, but affirmed the judgment. (LD8; and *see People v. Baird*, No. E060751, 2015 WL 5029559 (Cal. Ct. App. Aug. 25, 2015).) The appellate court found that the prosecutor committed misconduct and there was instructional error, but concluded that no prejudice resulted from these errors. (LD 8 at 3.)

On September 28, 2015, Petitioner filed a petition for review in the California Supreme Court (LD 9), which that court summarily denied without citation or comment on November 30, 2015 (LD 10). On May 23, 2016, Petitioner filed a petition for writ of habeas corpus in the California Supreme Court in which he presented four grounds for relief: (1) ineffective assistance of trial counsel for failing "to strike bias jurors"; (2) ineffective assistance of trial counsel for failing to obtain a medical expert; (3) ineffective assistance of trial counsel for failing to subpoena witnesses in support of the defense; and (4) ineffective assistance of counsel based on cumulative error. (LD 11.) On July 13, 2016, the California Supreme Court denied the habeas petition with citations to *People v. Duvall*, 9 Cal.4th 464, 474; and *In re Swain*, 34 Cal.2d 300, 304 (1949). (*See* LD 12.)

Petitioner timely filed this federal petition on October 18, 2016.

PETITIONER'S HABEAS CLAIMS

The Petition asserts five grounds for relief:

Ground One: Substantial evidence did not support conviction under section 288(b)(1) because "[t]here was no evidence petitioner ever threatened to shame, humiliate, restrict any privileges, or any retribution if victim revealed abuse" in violation of Petitioner's rights to a fair trial and due process, right to proof of each element of the charged offense beyond a reasonable doubt. (Pet. at 5.)

Ground Two: Substantial evidence did not support conviction on aggravated sexual assault in the absence of supporting evidence "that the acts were accomplished against the victim's will by means of force, violence, duress, or fear of immediate and unlawful bodily injury within mean of [§] 289(a)" in violation of Petitioner's right to a fair trial, due process of law, and right to be convicted beyond a reasonable doubt. (Pet. at 5-6.)

Ground Three: Instructional error in the trial court's omission of an essential element of the crime by instructing the jury with CALCRIM 1100 instead of CALCRIM 1045, thereby violating Petitioner's right to a fair trial, due process of law, and the right to have the jury determine each element of the charged offense. (Pet. at 6.)

Ground Four: The Court liberally construes Petitioner's claim in Ground Four as presenting two distinct subclaims: (a) Prosecutorial misconduct based on the prosecutor eliciting testimony at trial about sexual abuse that was not disclosed prior to trial; and (b) closing argument by the prosecutor that used such evidence to "inflame the jury." (Pet. at 6.)

Ground Five: Ineffective assistance of trial counsel ("IAC") in violation of Petitioner's Sixth Amendment right to counsel, based on five alleged errors that comprise the following subclaims that "trial counsel: [a] failed to strike bias jurors;

[b] failed to obtain medical expert or medical reports; [c] failed to subpoena witnesses in support of defense; [d] failed to object to misconduct by prosecutor; [e] failed to object to misinstruction of the jury"; and "[f] counsel's numerous deficiencies amount to cumulative prejudice." (Pet. at 6.)

SUMMARY OF THE EVIDENCE AT TRIAL

The following factual summary from the California Court of Appeal's unpublished decision on direct review is provided as background. *See* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence.)

A. PROSECUTION'S CASE

1. *JD1'S[2] TESTIMONY*

JD1 had just turned nine years old at the time of trial. In August 2012, JD1 went to stay with [Petitioner] in Moreno Valley for four days while her mother, D.W. (Mother), looked for a new place for them to live. While staying with [Petitioner], she slept with him on the couch in the living room. They slept underneath an unzipped sleeping bag. She wore pajamas with a top and bottom.

On the first night that she slept at the house, she fell asleep. She woke up because she felt [Petitioner] put her hand on his "thing." She described it as his "stick thingy," and as being "weird" and "slimy." Doe pulled her hand away. It

[2] Because the victims were minors, their names are not disclosed in the record, rather the young girls, Petitioner's daughters, are identified as "Jane Doe 1 ("JD1") and Jane Doe 2 ("JD2").

made her feel gross and afraid. [Petitioner] did not say anything and she said nothing back. [Petitioner] then touched her "private." She said that she had two private parts: the front that she used to "pee" she called "private part"; the back private area she used to "poop" she called her "butt."

[Petitioner] took JD1's pajama bottoms and underwear off. He put his finger on the front of her private part. He flicked his finger back and forth. He did this for a couple of minutes. [Petitioner] then put his finger inside where the "pee comes out." This hurt her. [Petitioner] did this only once but "for a period of time." [Petitioner] took his hands and placed them under her shirt and rubbed her chest.

After [Petitioner] did these acts, he took out his cellular telephone. He typed on the screen of the phone, "'Don't tell anybody,'" on it and showed it to JD1. JD1 was confused. He responded, "'Read it. Do what it says. Don't tell anybody.'" The message made her feel scared that he was going to do something to her if she did tell. Doe slept the rest of the night with [Petitioner] on the couch. JD1 told no one what happened after the first night.

The second night, JD1 again slept on the couch with [Petitioner]. [Petitioner] took off her pajama bottoms and put his finger into her private area like the first night. [Petitioner] also put his two fingers in and out of her vagina for a few minutes. This hurt JD1. He then put his stick thing in her private. JD1 started crying because it hurt. [Petitioner] told her to be quiet and that she would be okay. She thought that [Petitioner] stopped because she was crying. [Petitioner] also rubbed his stick thing between her butt cheeks.

The next morning, JD1 did not tell anyone what had happened because he had told her not to tell anyone and told her that something would happen to her if she did say anything. JD1 did not talk to anyone and did not call her mother.

On the third night, JD1 thought about sleeping somewhere else but believed something bad would happen to her if she did. She slept on the couch again with [Petitioner]. On that night, [Petitioner] rubbed her chest, put his finger and "stick thingy" in her private, and rubbed his "stick thingy" against her butt cheeks. It hurt again; she kept saying "ouch." [Petitioner] said nothing. This third incident lasted one hour. Again she thought he stopped because she was crying.

Sometime the third night, [Petitioner] told JD1, " 'Don't tell your mom. Don't tell anybody. Don't tell your uncle or anybody.' " JD1 was "very, very scared." [Petitioner] also told JD1 at some point, " 'I did it to [JD2] and now I'm doing it to you.' " He told her it was a "family thing." JD1 told JD2 that [Petitioner] was touching her in the wrong places. JD1 also told JD2 that [Petitioner] had said it was a family thing.

JD1 called Mother on the third night and told her she wanted to come home. JD1 told her she was hungry and had been bit by a spider. Sometime on the fourth night, Mother picked her up and took her home. At trial, she thought nothing happened the fourth night. JD1 later testified that the same things that happened the first three nights happened the fourth night. JD1 did not tell Mother what [Petitioner] had done because she was afraid if she told her, [Petitioner] would do something to her. She also testified that he orally copulated her at some point.

Petitioner Contends that Line 2 and 3 is a false recount of the testimony on record

Sometime later, JD1 told her best friend and her best friend's sister what [Petitioner] had done to her. Mother then found out about the abuse. JD1 was still afraid to tell Mother because she thought the police would get [Petitioner] and [Petitioner] would do something to her.

JD1 was interviewed by a woman from the police department.

JD1 did not initially tell the police that [Petitioner]'s stick thingy went inside her private part because she was scared to say it. She did not say that he touched her chest under her shirt or that he kissed her on her private. She was embarrassed. She did not reveal that [Petitioner] typed a message on his cell phone.

2. JD2'S TESTIMONY

JD2 was 14 years old at the time of trial. She was a half sister to JD1; they had different mothers. JD2 lived with [Petitioner] in Moreno Valley during the summer of 2012. She recalled that JD1 would visit and stay the night. JD1 slept on the couch with [Petitioner].

[Petitioner] began touching JD2 when she was either the age of "late" 11 or "early" 12 years. The incidents occurred in a house in Moreno Valley. Most of the incidents occurred while she was sleeping on the couch with [Petitioner]. The touching started without any warning. Doe thought the molestations lasted a couple of months, until she was about 12 years old. [Petitioner] also told her what he was doing was to keep the bloodline strong. The first time that [Petitioner] touched her she did not tell anyone because she was embarrassed or thought she would get in trouble. JD2 thought it was her fault that [Petitioner]

was touching her.

[Petitioner] started by touching her breasts and vagina over her clothes with his hands. He touched her vagina over her clothes about five times. This first time he stopped because she got up and moved. She also said that she told him to stop and that she pushed him away.

[Petitioner] then progressed to putting his fingers inside of her vagina. [Petitioner] put his fingers inside her vagina on five or six separate occasions. It hurt and she was shocked. He would move his two fingers in her vagina. JD2 told [Petitioner] to stop. [Petitioner] said nothing while doing this.

[Petitioner] also put his finger on top of her vagina, skin-to-skin, probably more than five times.

[Petitioner] put his penis inside her vagina between two to five times. JD2 was confused as to what was happening. This hurt and she cried. [Petitioner] told her to stop crying. [Petitioner]'s tone was angry. Doe was sad and afraid. She did not tell anyone what was going on. She did not recall that anything ever came out of his penis.

One night, [Petitioner] told JD2 he wanted to talk to her in the bathroom. Once inside, he tried to get her to touch his penis. She tried to leave but he blocked the door. He masturbated in front of her. She told him she wanted to leave but he told her to be quiet. She was disgusted. He put his penis in her vagina while they were on the couch and the time they were in the bathroom.

[Petitioner] had also performed oral sex on her. [Petitioner] also had tried to grab her butt over her clothing when she was the ages of 11 and 12. [Petitioner] had nibbled her ears while sexually abusing her.

[Petitioner] would say to her "'Don't tell.'" She threatened to tell her great-grandmother what he was doing and [Petitioner] told her, "'You better not.'" This made her scared. She was afraid he would hurt her. JD2 stated that [Petitioner] was tall and she was a little girl. Anything could have happened to her because of him being bigger than her.

When JD1 was staying at the house in August 2012, JD1 told JD2 that [Petitioner] was touching her. JD1 told her that [Petitioner] had told her that the molestation was a "family thing." [Petitioner] had said the same thing to JD2. JD2 told her not to let him do that to her.

JD2 was interviewed by police after JD1 disclosed that she was being abused by [Petitioner].

At the interview with the police she did not reveal that [Petitioner] put his penis in her vagina because she was embarrassed and confused. She also did not reveal that he kissed her vagina or that they had sex in the bathroom.

3. *OTHER EVIDENCE*

While JD1 was at [Petitioner]'s house, JD1 called Mother and told her she

wanted to come home because she had been bitten by a spider. Mother told her she needed a few more days and then she would get her. JD1 called her several more times asking to be picked up. JD1 stayed with [Petitioner] about four days. When Mother picked her up, JD1 said nothing about [Petitioner] touching her. JD1 later told her friends at school and Mother discovered it. Mother asked JD1 about the abuse. At first JD1 was scared and was crying. Mother immediately contacted the police.

Riverside County Sheriff's Detective Eric Holland was assigned to the Moreno Valley Police Department to investigate sexual assault and child abuse cases. Detective Holland set up interviews of JD1 and JD2. He observed the interviews.

[Petitioner] was interviewed by Detective Holland and the interview was played for the jury. [Petitioner] initially denied he molested JD1. He did not believe that she would make up that story. He then stated that something may have happened in his sleep because he was used to sleeping with his girlfriends. He may have been having a dream. It would never happen again because he would not sleep on the couch with her. When confronted about the allegations of JD2, he said "Oh." He said he did not know how that happened, and if it did it was accidental, but that it would not happen again. He also said that there was no reason for the girls to make up the allegations. He agreed to write them apology letters.

When Detective Holland said to him that it was not an accident and it did happen, he nodded his head yes. Also, when Detective Holland confronted him

with the accusations made by JD2, his voice reduced to a whisper. He sat with his shoulders slumped and just look down at the floor. [Petitioner] wrote letters to JD1 and JD2. He did not admit he touched them inappropriately, but was sorry if they felt that he done something wrong.

(LD 8; *Baird*, 2015 WL 5029559, **1-4.)

STANDARD OF REVIEW

I. The Antiterrorism and Effective Death Penalty Act of 1996

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless that adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

For the purposes of Section 2254(d), "clearly established Federal law" refers to the Supreme Court holdings in existence at the time of the state court decision in issue. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). "A Supreme Court precedent is not clearly established law under § 2254(d)(1) unless it 'squarely addresses the issue' in the case before the state court, or 'establishes a legal principle that "clearly extends"' to the case before the state court." *Andrews v. Davis*, 798 F.3d 759, 773 (9th Cir. 2015) (internal citations omitted); *see also Harrington v. Richter*, 562 U.S. 86, 101 (2011) (it "'is not an unreasonable application of clearly established Federal law for a

state court to decline to apply a specific legal rule that has not been squarely established by'" the Supreme Court) (citation omitted).

A state court decision is "contrary to" clearly established federal law under Section 2254(d)(1) only if there is "a direct and irreconcilable conflict with Supreme Court precedent." *Murray v. Schriro,* 745 F.3d 984, 997 (9th Cir. 2014). A state court decision is an "unreasonable application" of clearly established federal law under Section 2254(d)(1) if the state court's application of clearly established Supreme Court precedent was "objectively unreasonable, not merely wrong." *White v. Woodall,* __ U.S. __, 134 S. Ct. 1697, 1702 (2014). Specifically, the petitioner must establish that "there [can] be no 'fairminded disagreement'" that the clearly established rule at issue applies to the facts of the case. *See id.* at 1706-07 (internal citation omitted). Finally, a state court's decision is based on an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d)(2) when the federal court is "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record before the state court." *Hurles v. Ryan,* 752 F.3d 768, 778 (9th Cir.) (internal quotation marks omitted), *cert. denied,* 135 S. Ct. 710 (2014). So long as "'[r]easonable minds reviewing the record might disagree,'" however, the state court's determination of the facts is not unreasonable. *See Brumfield v. Cain,* ___ U.S. ___, 135 S. Ct. 2269, 2277 (2015).

AEDPA thus "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *White v. Wheeler,* __ U.S. __, 136 S. Ct. 456, 460 (2015) (per curiam) (internal quotation marks and citation omitted). The petitioner carries the burden of proof. *See Pinholster,* 563 U.S. at 181.

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II. Grounds One Through Four (a) Are Subject to Review Under AEDPA

The California Court of Appeal rejected Grounds One through Four (a) in a reasoned unpublished decision. (LD 8.) Petitioner then presented these same claims to the California Supreme Court (LD 9), which summarily denied relief. (LD 10.)

The Court looks through the California Supreme Court's silent denial to the last reasoned decision to determine whether the state court's adjudication is unreasonable or contrary to clearly established federal law. *See Johnson v. Williams*, 568 U.S. 289, ___, 133 S. Ct. 1088, 1094 n.1 (2013) ("Consistent with our decision in *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991), the Ninth Circuit 'look[ed] through' the California Supreme Court's summary denial . . . and examined the California Court of Appeal's opinion."); *see also, e.g., Jones v. Harrington*, 829 F.3d 1128, 1136 (9th Cir. 2016) (looking through California Supreme Court's summary denial of a petition for review to the California Court of Appeal's decision on direct review); *but see Wilson v. Warden*, 834 F.3d 1227, 1235-36 (11th Cir. 2016) (holding that *Richter* abrogated the *Ylst* look-through doctrine and therefore federal courts should not "look through" a summary denial to review a previous opinion), *cert. granted* No. 16-6855, 137 S. Ct. 1203 (Feb. 27, 2017) (*Wilson v. Sellers*).

Here, the California appellate court's decision is the relevant adjudication for review of Grounds One through Four (a) under AEDPA's deferential standard. *See Berghuis v. Thompkins*, 560 U.S. 370, 378-80 (2010).

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III. Grounds Four (b) and Five Are Reviewed *De Novo*

In Ground Four (b), Petitioner alleges prosecutorial misconduct based on allegedly inflammatory statements made by the prosecutor during closing argument. (Pet. at 6.) Petitioner did not present this argument to the state courts on direct appeal (*see* LD 4) or in his habeas petition to the California Supreme Court (LD 9). A federal habeas claim must first be presented to the highest state court. *Picard v. Connor*, 404 U.S. 270, 278 (1971). Consequently, Ground Four (b) is unexhausted.

A habeas petition that contains both exhausted and unexhausted claims is subject to dismissal as a "mixed petition." *Rose v. Lundy*, 455 U.S. 509, 522 (1982). However, the Court exercises its discretion to review this element of Ground Four *de novo*. *See* 28 U.S. C. 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005).

Ground Five, with its related subclaims, was presented to the California Supreme Court in a petition for habeas corpus (LD 11) that was denied with citations to *In re Clark* and *Duvall*. (LD 12.) Generally, a state court's denial of a state habeas petition with citations to *Swain* and *Duvall* reflects a decision that the petition was procedurally defective owing to inadequate pleading, not a decision on the merits.[3] *See, e.g., Pollard v. Madden*, No. CV 15-9487-JPR, 2016 WL 7017223, at *13 (C.D. Cal. Nov. 30, 2016); *see also Curiel v. Miller*, 830 F.3d 864, 869 (9th Cir. 2016) ("the California Supreme Court's denial of Curiel's third habeas petition with reference to

[3] On occasion, however, the citations are construed as the state court's substantive judgement on the *prima facie* lack of merit in a petitioner's claim. *See, e.g., Sanchez v. Allison*, No. CV 10-8190-JLS (CW), 2014 WL 7205015, at *3 (C.D. Cal. Dec. 16, 2014); *see also Seeboth v. Allenby*, 789 F.3d 1099, 1103 (9th Cir. 2015) ("in the particular context of this case, we hold that the California Supreme Court's citation to *Duvall* signals that it . . . reached the merits").

Swain and *Duvall* . . . means that the California Supreme Court rejected Curiel's petition as insufficiently pleaded"); *Gaston v. Palmer*, 417 F.3d 1030, 1039 (9th Cir. 2005), *as amended by order*, 447 F.3d 1165 (9th Cir. 2006) ("In light of its citations to . . . *Swain* and *Duvall*, we read the California Supreme Court's denial of Gaston's sixth habeas application as, in effect, the grant of a demurrer, *i.e.*, a holding that Gaston had not pled facts with sufficient particularity."). In such cases, the denial does not merit AEDPA deference and the federal habeas court applies *de novo* review. *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on de novo review[.]").

Thus, this Court reviews Ground Five *de novo*. *See Lambrix v. Singletary*, 520 U.S. 518, 524-35 (1997); *Flournoy v. Small*, 681 F.3d 1000, 1004 n. 1 (9th Cir. 2012) ("While we ordinarily resolve the issue of procedural bar prior to any consideration of the merits on habeas review, we are not required to do so when a petition clearly fails on the merits."); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002) ("[C]ourts are empowered to, and in some cases should, reach the merits of habeas petitions if they are . . . clearly not meritorious despite an asserted procedural bar.")

DISCUSSION

I. Ground One - Insufficient Evidence to Support Convictions For Forcible Lewd and Lascivious Acts Upon A Minor

In Ground One, Petitioner argues that substantial evidence did not support his conviction for violation of section 288, subdivision (b)(1) because, he maintains,

there was no evidence that Petitioner's sexual assault against his daughters was committed by use of force, duress, menace or fear of immediate injury. (Pet. at 5.)

In counts 5-9 of the Amended Information, Petitioner was charged with committing lewd and lascivious acts upon a child under the age of fourteen years within in the meaning of Section 288(b)(1).[4] (CT 116-118.) California Penal Code section 288(b)(1) provides that any person who willfully and lewdly commits any lewd or lascivious act upon or with the body of a child under the age of 14 years with the intent of arousing, appealing, to or gratifying sexual desire "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment for 5, 8, or 10 years." Cal. Pen. C. § 288. subd.(b) (1).

Petitioner presented this claim to the California Court of Appeal, which rejected it in a reasoned decision. (LD 8.) The California Supreme Court denied review in a summary decision without comment or citation. (LD 10.) Hence, Ground One is subject to AEDPA's deferential review. *See* 28 U.S.C. § 2254.

A. Clearly Established Federal Law

Evidence is sufficient to support a conviction if, viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord McDaniel v. Brown*, 558 U.S. 120 (2010); *see also In re Winship*, 397 U.S. 358, 364 (1970). On habeas review, the Court's inquiry into the

[4] Counts 5-9 of the Amended Information alleged violations of Penal Code section 288, subdivision (b), subsection (1) for sexual acts Petitioner committed upon JD1. (*See* CT 115-118.) Counts 10-14 alleged violations of Penal Code section 288, subdivision (a) for sexual acts committed upon JD2. (*Id.* at 118-119.)

sufficiency of evidence is limited. First, a reviewing court must conduct an independent review of the record to "consider the evidence in the light most favorable to the prosecution." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (citation omitted); *Jackson*, 443 U.S. at 317; *see also McDaniel*, 558 U.S. at 133; *Jones*, 114 F.3d at 1008. Second, the Court "must determine whether this evidence, so viewed, is adequate to allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *Nevils*, 598 F.3d at 1164 (citation and internal quotations omitted; emphasis in original). For a habeas claim to succeed based on insufficiency of evidence at trial, a jury's finding must be "so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012) (per curiam); *see also Cavazos v. Smith*, 132 S. Ct. 2 (2011).

Although sufficiency of the evidence review is grounded in the Fourteenth Amendment, a federal habeas court must refer to the substantive elements of the criminal offense as defined by state law and must look to state law to determine what evidence is necessary to convict on the crime charged. *See Jackson*, 443 U.S. at 324 n.16; *Juan H.*, 408 F.3d at 1275; *Coleman*, 132 S. Ct. at 2064. Where, as here, a California state court has issued a reasoned decision denying a habeas petitioner's sufficiency of the evidence claim, AEDPA requires this Court to "apply the standards of *Jackson* with an additional layer of deference." *Juan H.*, 408 F.3d at 1274. Therefore, the Court must ask "whether the decision of the California Court of Appeal reflected an unreasonable application of *Jackson* and *Winship* to the facts of this case." *Id.* at 1275 (internal quotation marks and citations omitted).

B. State Court Decision

After laying out the elements required for conviction under section 288, subdivision (b)(1), the California Court of Appeal noted that "duress" as used in

section 288 (b)(1) "means 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted,'" *Baird*, 2015 WL 5029559, *5 (citing, *inter alia*, *People v. Soto*, 51 Cal. 4th, 229, 246 (2011).) Further, the state appellate court observed that California courts have affirmed convictions under section 288 (b)(1) "where the victim was under 10 years old and the defendant was an older family member, even in the absence of explicit threats of violence." (*Id.*)

With respect to the evidence presented against Petitioner at trial, the Court reasoned:

> Here, JD1 was nine years old and [Petitioner], who was her biological father, was 33 years old. JD2 testified that [Petitioner] was tall and she was a little girl; JD2 was older than JD1 when [Petitioner] molested her. Further, JD1 had been entrusted to [Petitioner]'s care while Mother tried to find new housing for her and JD1. JD1 reasonably considered [Petitioner] to be an authority figure and that she must comply with his demands. . . . [Petitioner] who was JD1's father, had a position of dominance and authority over young JD1. A reasonable jury could conclude that there was duress based on the relationship between JD1 and [Petitioner].
>
> Moreover, at the end of the first night, [Petitioner] told her not to tell anyone about what he had done to her. JD1 stated that this made her feel scared and that he was going to do something to her if she told anyone about what had happened. On the second night, [Petitioner] told her not to say anything to anyone. He also told her that something would happen to her if she did say

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anything. [Petitioner] again told JD1 on the third night not to tell anyone. JD1 expressed that she was "very, very scared." "It could be reasonably inferred that [Petitioner] threatened [JD1] implicitly or explicitly, based on her fear of [Petitioner]...."

Cannot When testimony disputes

Baird, 2015 WL 5029559, *6. Further, the Court of Appeal found that although Petitioner argued there was no evidence of duress because JD1 had been asleep when Petitioner "placed her hand on his 'thingy'", JD1 testified that she was afraid when he did this and the jury could reasonably infer from their family relationship, their physical size differential, and the fact that Petitioner told JD1 not to tell anyone, that there was an implied threat. *Id.*

C. Discussion

The Court of Appeal's rejection of Petitioner's claim of insufficient evidence in Ground One is reasonable and consistent with clearly established federal law. The state appellate court accurately identified the elements necessary to establish a violation of section 288(b)(1) and correctly cited the California standard for establishing "duress" under the statute. (LD 8; *Baird*, 2015 WL 5029559, *5.) Further, the state court identified ample testimony by JD1 from which the jury could reasonably infer that Petitioner used implied threats of retribution against her.

At trial, JD1 testified that it made her feel "scared" to see her father in court. (Reporter's Transcript ("RT") 56-57.) She testified that on the first night that she stayed at Petitioner's home, she was sleeping on the couch with him when she was awakened because "My dad took my hand and put it on his thing." (RT 63.) She referred to it as a "stick thingy" and testified that Petitioner made her touch it, but she

took her hand away; it made her feel "gross" and she was afraid. (RT at 63-64.) She also testified that on that first night, Petitioner warned her not to tell anybody:

> Q. Did he say anything to you that first night? Did he ever talk to you while he was doing those things?
>
> [JD1] No. But he, like, got his phone and put "Don't tell anybody" on it and showed it to me.
>
> Q. Explain what you mean by that.
>
> [JD1] Like he got his phone, and he typed it, and then he showed it to me. And I was like, "What is that for?" He said, "Read it. Do what it says. Don't tell anybody."
>
> Q. How did that make you feel?
>
> [JD1] Scared like he was going to do something to me if I did tell.

(RT at 70.) JD1 testified that on the second night, the abuse continued, Petitioner took her clothes off and put the "stick thingy" inside her private, it hurt and she "started crying." (RT 73-74). She did not tell anyone "[b]ecause he told me not to tell anybody. If I did, something would happen to me." (RT 77.) On the third night, Petitioner again put his finger and his "stick thingy inside her private part. (RT 78.) On the third night, Petitioner again told JD1 not to tell what he'd done to her:

> Q.: Did he tell you not to tell your mom?
>
> [JD1] Yes.
>
> Q. When did he tell you that?
>
> [JD1] The third night, I think.
>
> Q. What did he say?
>
> [JD1] He said, "Don't tell you mom. Don't tell anybody. Don't tell your uncle or anybody."

Q. How did that make you feel?

[JD1] Very, very scared.

(RT 86.)

Petitioner argues that the evidence was not sufficient to support a finding that he committed the sexual acts upon JD1 by means of "duress" because, he asserts, there was "no evidence petitioner ever threatened to shame, humiliate restrict any privileges or any retribution if victim revealed abuse." (Pet. at 5.) Petitioner cites *People v. Espinoza,* 95 Cal.4th 1287 (2002) for the proposition that "psychological coercion without more does not establish duress." (*Id.*) But, the record here supports the appellate court's finding of more than mere psychological coercion. As the Court of Appeal noted, "[m]any courts have affirmed section 288 subdivision (b)(1) convictions based on duress where the victim was under 10 years old and the defendant was an older family member, even in the absence of explicit threats of violence." *Baird*, 2015 WL 5029559, *6. The state court reasonably concluded that Petitioner's "implied threat caused [JD1] to acquiesce in an act to which she otherwise would not have submitted." (*Id.*)

The appellate court also reasonably concluded that the jury could infer threats of retribution by Petitioner from JD1's testimony about Petitioner's repeated instructions not to tell anyone what he had done to her. The evidence, viewed in the light most favorable to the prosecution, was more than sufficient to allow any rational juror to find beyond a reasonable doubt that Petitioner committed lewd and lascivious acts upon JD1 by use of "duress, menace, or fear" within the meaning California Penal Code section 288(b)(1). *See Jackson* 443 U.S. at 307. Given JD1's testimony, the jury's verdict is not "so insupportable as to fall below the threshold of bare rationality." *Coleman*, 132 S. Ct. at 2065.

Accordingly, the Court of Appeal's rejection of Petitioner's insufficient evidence claim in Ground One is neither inconsistent with, nor an unreasonable application of clearly established federal law, nor an unreasonable determination of fact in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. 2254. Petitioner is not entitled to habeas relief on Ground One.

II. Ground Two - Insufficient Evidence to Support Conviction For Aggravated Sexual Assault Upon A Minor

Similar to his arguments in Ground One, in Ground Two, Petitioner contends that his conviction for aggravated assault under California Penal Code 289 subdivision (a) and section 269(a)(5) were not supported by substantial evidence because, he argues, the evidence did not establish that the Petitioner committed the acts against the victims' will by use of force, violence, duress, menace or fear of immediate and unlawful bodily harm. (Pet. at 6.)

Counts 1 through 4 of the Amended Information charged Petitioner with sexual penetration of a person under 14 years of age pursuant to sections 289(a) and 269 (a)(5) for acts committed against JD1. (CT 115- 16.) California Penal Code section 289(a) provides that "[a]ny person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison or three, six, or eight years." Cal. Pen. C. § 289 subd. (a) (1)(A). Section 269, subdivision (a)(5) penalizes aggravated sexual assault against a child, when any person commits an act of sexual penetration in violation of Section 289 (a)against a child younger than 14 years of age and seven or more years younger than the defendant. Cal. Pen. C. § 269 subd. (a)(5).

Petitioner presented this claim to the California Court of Appeal, which rejected it in a reasoned decision. (LD 8.) The California Supreme Court denied review in a summary decision without citation or comment. (LD 12.) Thus, the Court of Appeal's unpublished decision is the relevant merits adjudication for AEDPA review.

A. Clearly Established Federal Law

As noted above, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) provides the clearly established federal law for analyzing a sufficiency of the evidence claim. Thus, this Court's inquiry, after an independent review of the record and viewing the evidence in the light most favorable to the prosecution, is limited to whether the evidence, is sufficient to allow *any* rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *Nevils*, 598 F.3d at 1164 (citation and internal quotations omitted; emphasis in original). Habeas relief is not warranted unless the jury's finding is so insupportable as to falls "below the level of bare rationality." *Coleman*, 132 S. Ct. at 2065.

B. State Court Decision

The Court of Appeal outlined the elements of the relevant statutes and noted that the acts underlying this charge were based on the same conduct as that in Petitioner's Ground One. (LD 8 at 16.) The state court, for the same reasons detailed in its analysis of Ground One, concluded that "there was ample evidence of duress based on the relationship between Petitioner, his implied threats to her that she should not tell anyone or something bad would happen to her, and his position of authority." (LD 8 at 15; *Baird*, 2015 WL 5029559, *8.)

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C. Discussion

The state court's rejection of Ground Two was reasonable and consistent with clearly established federal law. During cross-examination of JD1, defense counsel asked if Petitioner had explicitly threatened to hit her or hurt her if she told someone what he had done and JD1 replied "No." (*See* RT 105; 115; 119.) But on re-direct, JD1 testified that she was afraid of him nonetheless:

Esplnoza

> Q. Okay. [Defense counsel] was asking you questions right now, if your daddy ever threatened you or said he would hit you or hurt you. And he never did those things. Is that right?
>
> [JD1] Yes.
>
> Q. He did do those things?
>
> [JD1] No.
>
> Q. But you said you were afraid of him.
>
> [JD1] Yes.
>
> Q. Why are you afraid of him?
>
> [JD1] Because, like, he said, "don't tell anybody," and I did tell somebody, so he can do something like kill me or something.
>
> Q. Is that what you thought in your head, if you told someone that would happen?
>
> [JD1] Yes.

(RT 119.) The state court reasonably found that such evidence was sufficient to permit rational jurors to find that the acts of sexual abuse against JD1 were committed with "duress" within the meaning of sections 269, subdivision (a) and section 289, subdivision(a).

Accordingly, the Court of Appeal's rejection of Petitioner's insufficient evidence claim in Ground Two is neither inconsistent with, nor an unreasonable application of clearly established federal law, nor an unreasonable determination of fact in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. 2254. Petitioner is not entitled to habeas relief on Ground Two.

III. Ground Three – Instructional Error

In Ground Three, Petitioner argues that his Constitutional rights to a fair trial, due process of law, and the right to have the jury determine each element of the charged offense were violated when the trial court failed to instruct the jury as to the sexual penetration crimes (§§ 269, subd.(a), 289, subd. (a)) that the crimes had to be accomplished against the victim's will by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury of the victim or another person. (Pet. at 6.) Petitioner presented this claim on direct review to the California Court of Appeal (LD 4) and to the California Supreme Court (LD 9), which summarily denied review (LD 10). Thus, Petitioner's Ground Three is subject to AEDPA's deferential review.

For the reasons discussed below, Petitioner is not entitled to habeas relief on his instructional error claim.

A. Clearly Established Federal Law

Challenges to state jury instructions are generally questions of state law and alleged state law errors are not cognizable in habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). To warrant federal habeas relief on a claim that the trial court erred by failing to properly instruct a jury, a petitioner must show that the trial court committed an error that "'so infected the entire trial that the resulting conviction

violates due process.'" *Id.* at 72 (internal citation omitted). The jury instruction "may not be viewed in artificial insolation, but must be considered in the context of the instructions as a whole and the trial record." *Waddington v. Sarausad*, 555 U.S. 179, 191 (2009) (internal quotations omitted).

A petitioner has an "especially heavy" burden when seeking habeas relief based on the failure to give a jury instruction. *See Hendricks v. Vasquez,* 974 F.2d 1099, 1106 (9th Cir. 1992 (as amended) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977)). Even if a petitioner can demonstrate that a constitutional violation occurred, habeas corpus relief may not be granted unless the petitioner can demonstrate that he was prejudiced by the error, *i.e.*, that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks omitted).

B. State Court Adjudication

The California Court of Appeal acknowledged the trial court's "sua sponte duty to instruct on all general principles of law that are closely and openly connected with the facts of the case" and emphasized that " in a criminal case, the general principles of the law include all the elements of the charged offense." (LD 8 at 16; *Baird*, 2015 WL 5029559, *7 (internal citations omitted).) After reviewing the instructions given as to the elements of Penal Code section 289, subdivision (a), the state appellate court noted that the jury was instructed with CALCRIM No. 1100[5], but

[5] CALCRIM 1100 as given, stated "To prove the defendant is guilty of this crime, the People must prove the following elements:[¶]One, the defendant committed sexual penetration with a foreign object on another person; [¶] And two, when the defendant acted, the other person was under the age of 14 years and was at least seven years younger than the defendant; [¶] To decide whether the defendant committed the crime of sexual penetration with a foreign object, please refer to the separate instruction that I will give you on the crime." (RT at 356; and *see Baird*, 2015 WL 5029559, *7.) The jury was also instructed: "To prove that the defendant is guilty of sexual penetration with a foreign object, the

> the trial court did not instruct the jury that they had to find within the meaning of section 289, subdivision (a) that the acts were committed through the use of force, menace, violence, duress or in fear of immediate or unlawful bodily injury.

(LD 8 at 17; *Baird*, 2015 WL 5029559, *8.) This omission, the appellate court found, was error. (*Id.*) Nonetheless, the state court found no basis for reversal, noting that, under California law, it could

> affirm the jury's verdict despite the error if it appears beyond a reasonable doubt that the error did not contribute to the jury's verdict. . . . in particular, we affirm where an omitted element is supported by uncontroverted evidence. . . . or if, at the end of an examination of the record, we can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error[.]

(LD 8 at 17-18; *Baird*, 2015 WL 5029559, *8 (internal quotation marks and citations omitted).)

The appellate court observed that counts 1 through 4 were based on the same conduct by Petitioner that gave rise to counts 6 through 9 and " the jury was instructed on counts 6 through 9 that they must find those counts were committed through the "use of force, violence, menace, duress or fear of immediate and unlawful bodily injury." (LD 8 at 18.) The Court of Appeal reasoned, "[i]t is inconceivable that the

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People must prove the following elements: [¶] One, the defendant participated in an act of sexual penetration with another person; [¶] Two, the penetration was accomplished by using a foreign object; [¶] And three, at the time of the act, the other person was under the age of 14 years and was at least ten years younger than the defendant. [¶] 'Sexual penetration' means penetration, however, slight, of the genital or anal openings of another person for the purpose of arousal or gratification." (*Id.*)

jury would have found that there was duress for counts 6 through 9, . . . but not found duress for counts 1 through 4. The jury here necessarily found duress for these counts." (*Id.*) The state appellate court also pointed to the "strong evidence of duress for counts 1 through 4" and determined that "any conceivable error in omitting the element of force, violence, menace, duress or fear of immediate and unlawful bodily injury for a violation of sections 269, subdivision (a) and 289, subdivision (a) was clearly harmless." (*Id.*)

C. Discussion

As a threshold issue, to the extent Petitioner's Ground Three claim presents a question of state law, it is not a cognizable ground for federal habeas relief because whether the trial court adequately instructed the jury on the applicable state law is not a question of federal law. *See Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) ("[I]nstructions that contain errors of state law may not form the basis for federal habeas relief."); *Dunckhurst v. Deeds*, 859 F.2d 110, 114 (9th Cir. 1988) (instructional error "does not alone raise a ground cognizable in a federal habeas corpus proceeding"). Petitioner cites no federal law in support of his claim and the Petition refers only vaguely to denial of "fair trial, due process of law, the right to a properly instructed jury, right to have jury determine each element of offense." (Pet. at 6.) Petitioner cannot transform his state law claim into a federal one merely by asserting a violation of due process. *See Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1999).

Even if Petitioner asserts a viable constitutional claim based on the instructional error, to obtain federal habeas relief Petitioner must establish that the ailing instruction "so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. 62, 72 (1991); *Clark v. Brown*, 450 F.3d 898, 904 (9th Cir. 2006). The court must evaluate the alleged instructional error in light of the overall charge to the jury

and in the context of the entire trial. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Estelle*, 502 U.S. at 72.

Here, the state court's rejection of Ground Three was reasonable and consistent with federal law. As the California Court of Appeal pointed out, the charges in counts 1 through 4 were based on the same conduct alleged in counts 5 through 9 and the jury was properly instructed as to the element of force, violence, menace, duress or fear of immediate and unlawful bodily injury with respect to counts 1 through 4. (*See* RT 356-358.) Indeed, even though the trial court did not instruct the jury that they had to find within the meaning of section 289, subdivision (a) that the acts were committed through the use of force, menace, violence, duress or in fear of immediate or unlawful bodily injury, the jury was instructed on the meaning of "duress" and "menace" in the instructions for counts 5 through 9:

> "Duress" means the use of a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to do or submit to something that he or she would not otherwise do or submit to.
>
> When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and her relationship to the defendant.
>
> "Menace" means a threat, statement, or act showing an intent to injure someone.
>
> An act is accomplished by fear if the child is actually and reasonably afraid or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it.

(RT 358.) Further, there was substantial evidence of duress based on the JD1's testimony that Petitioner warned her not to tell anyone of the abuse; that she was afraid what might happen to her if she did, and the clear size and age differential between

Petitioner and JD1. In light of the instructions as a whole and the substantial evidence of Petitioner's guilt, there is nothing to indicate that but for the instructional error, the jury verdict would have been different. Thus, the state appellate court reasonably concluded that the omission with respect to the instructions for Penal Code section 289, subdivision (a) was clearly harmless. Petitioner is not entitled to habeas relief on Ground Three.

IV. Ground Four - Prosecutorial Misconduct

In Ground Four, Petitioner argues that he was deprived of his right to a fair trial and due process because of prosecutorial misconduct during the trial. First, the prosecutor elicited evidence of uncharged acts of oral copulation by Petitioner during the victims' testimony. (Pet. at 6.) Specifically, Petitioner alleges that the prosecutor committed misconduct when he elicited testimony from JD1 that Petitioner performed oral copulation on her when this information was not disclosed during the preliminary hearing, during pretrial interviews and was never disclosed to the defense. Second, Petitioner complains that the prosecutor engaged in misconduct by presenting unduly inflammatory statements about Petitioner's conduct during closing argument.

Petitioner raised Ground Four (a) on direct review to the California of Appeal, which, in a reasoned opinion, found prosecutorial misconduct, but concluded any error was harmless. (LD 8.) The California Supreme summarily denied review without comment or citation. (LD 10.) Thus, the Court of Appeal's harmlessness determination is subject to AEDPA deferential review. *See Ylst*, 501 U.S. at 806.

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A. Clearly Established Federal Law

A prosecutor's actions constitute misconduct if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012). The *Darden* standard is a "highly generalized" assessment of the fairness of the trial, not an "elaborate, multistep test" or dependent on any particular consideration. *See Deck v. Jenkins*, 814 F.3d 954, 978 (9th Cir. 2014); *see also Parker*, 132 S. Ct. at 2155. To determine whether a prosecutor's actions rise to the level of a due process violation, the reviewing court must examine the entire proceedings. *Boyde v. California*, 494 U.S. 370, 384-85 (1990); *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."). Relevant factors may include the type and extent of the misconduct, any rebuttal by defense counsel, the specificity and timing of any curative instructions, and the weight of the evidence. *See Deck*, 814 F.3d at 979; *Hein v. Sullivan*, 601 F.3d 897, 914 (9th Cir. 2010). Additionally, even where misconduct occurs, to obtain habeas relief, the petitioner must demonstrate that the due process violation was not harmless. *See Wood*, 693 F.3d at 1113 (applying the harmlessness standard articulated in *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)).

The *Darden* standard is difficult to satisfy. In that case, the Supreme Court held that the prosecutor's statements that the petitioner was an "animal" who should be kept on a leash did not render the petitioner's trial fundamentally unfair. 477 U.S. at 180-82. "It is not enough," the Supreme Court wrote, "that the prosecutors' remarks were undesirable or even universally condemned." *Id.* at 181. Thus, prosecutors have "considerable leeway" in closing argument to strike "hard blows." *United States v.*

Wilkes, 662 F.3d 524, 538 (9th Cir. 2011) (internal citation and quotation marks omitted)).

B. Ground Four (a) – Eliciting Testimony About Oral Copulation

The Court of Appeal provided the following additional factual background regarding this claim:

> During JD1's testimony, the prosecutor asked about what had happened between her and defendant. The prosecutor asked JD1, "Did he ever kiss your private parts?" JD1 responded, "Yes." The prosecutor stated, "He did?" and she nodded her head in the affirmative. The prosecutor asked, "When did that happen?" JD1 responded, "A different time." The prosecutor inquired, "Okay. Anything else happen that night?" JD1 responded, "The different time or the first time?" The prosecutor clarified, "The first time." JD1 responded, "No."
>
> On redirect, the prosecutor asked JD1, "[w]hen did your dad kiss your private part? What day?" JD1 stated she could not remember. She was asked, "How did he kiss your private part?" She responded, "With his tongue." The following exchange occurred:
>
> "[Prosecutor:] With his tongue. Was it your front private part or your butt?
>
> [JD1:] My private part.
>
> [Prosecutor:] Did his tongue go on top of your private part?
>
> [JD1:] In.
>
> [Prosecutor:] In your private part?
>
> [JD1:] Yes."

They then discussed her body position and whether they were under covers. The prosecutor asked how defendant put his mouth on her private part. She opened her mouth and stuck out her tongue. JD1 stated that her legs were open and her pants were off. It felt weird and embarrassing.

During the direct examination of JD2, the following exchange occurred between her and the prosecutor:

"[Prosecutor:] Just that time? Did he ever put his mouth on your body?

[JD2]: Yes.

[Prosecutor:] Tell me about that.

[JD2]: It was on my vagina.

[Prosecutor:] Where did that happen?

[JD2]: In my room."

JD2 explained it happened during the night and she was "very weirded out" by it.

Detective Holland testified that JD1 and JD2 never said anything before trial that defendant had performed oral sex on them. We have reviewed the preliminary hearing transcript, and there is no mention of oral copulation. During discussion of the instructions, the trial court inquired if there should be any instruction regarding the uncharged acts of oral copulation and sexual intercourse. Defense counsel objected because the information was disclosed for the first time at trial. Further, it was distracting and misleading to ask the jury to determine whether these uncharged acts occurred.

Baird, 2015 WL 5029559, **8-9.

a. State Court Opinion

The appellate court first noted that it is "improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist." (*Id.* (citing *People v. Friend*, 47 Cal. 4th 1, 80 (2009)).) The state court also observed that "the issue is complicated by the fact that Evidence Code section 1108 requires the disclosure of other sexual acts 30 days prior to trial[6]. (*Id.* at 10.) It was undisputed that Petitioner received no such notice.

The Court of Appeal reasoned that misconduct occurred under either scenario. If the prosecutor had a good faith reason to believe that evidence existed regarding Petitioner's oral copulation with JD1 or JD2, then he had an obligation to disclose it Petitioner, which he did not do, and if the prosecutor did not have a good faith basis to believe such evidence existed, then misconduct occurred when he elicited this testimony from the witnesses. (*Id.*) Because nothing in the record showed that JD1 or JD2 volunteered the information during trial and it was undisputed that the information was never disclosed during the preliminary hearing or during either witness interviews, the Court of Appeal concluded that misconduct occurred. (*Id.*) Indeed, the state court observed that there was nothing in the record to indicate that the girls volunteered the evidence and in fact

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[6] California Evidence Code section 1108, subdivision (a) provides, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Cal. Evid. C. § 1108 (a). Subdivision (b) of the statute provides: "In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered . . . at least 30 days prior to trial." Cal. Evid. C. § 1108 (b).

> the prosecutor asked pointed questions as to whether [Petitioner] had put his mouth on them; evidence that was not provided prior to trial. Whether the prosecutor intended to introduce inadmissible testimony, or did not have a good faith belief as to the testimony to be provided by JD1 and JD2, [Petitioner] has shown there was misconduct."

(*Id.* at 10.)

Despite finding misconduct, the Court of Appeal concluded that Petitioner was not prejudiced by the prosecutor's actions. (*Id.*) Citing the standards for reversal for prosecutorial misconduct under both California and federal law, the state court concluded that "[under] either standard there was no prejudice." (*Id.*)

First, the court noted that the "evidence elicited by the prosecutor was only a small portion of the evidence." (*Id.*) Moreover, the Court of Appeal found "the evidence was certainly no more inflammatory than the evidence that [Petitioner] had sexual intercourse with his own daughter." (*Id.*) The state court pointed out that the prosecutor had advised the jurors that the "those extra things that they talked about here in court, they're not charged. You only need to focus on the touching of the vagina, the touching of the stick thingy. It's not difficult, folks, It's very straightforward." (*Id.*; and *see* RT 287.)

Finally, the state appellate court explained that the jury was specifically instructed about the uncharged offenses. (*Id.*; and *see* RT 360.) Taking together "the jury instructions given to the jury and the overwhelming evidence of [Petitioner's] guilt," the California Court of Appeal concluded that "the misconduct did not so infect [Petitioner's] trial to render it fundamentally unfair, and it is not reasonably probabl[e]

that a result more favorable to [Petitioner] would have been reached in the absence of the misconduct." (*Id.* at 11.)

b. Discussion

The Court of Appeal's finding that the prosecutorial misconduct arising from the prosecutor eliciting of testimony about the previously undisclosed (and uncharged) oral copulation did not prejudice Petitioner is neither inconsistent with, nor an unreasonable application of clearly established federal law, nor an unreasonable determination of facts based on the evidence presented at trial. *See* 28 U.S.C. § 2254.

Even where a constitutional error occurs, habeas relief is not warranted unless a petitioner can demonstrate prejudice. A federal constitutional error is not prejudicial unless it has "substantial and injurious effect or influence on the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 621 (1993). On direct appeal, the test for harmlessness requires a finding that the error is "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). However, when a federal habeas court applying AEDPA deference reviews a state court's determination of harmlessness, the federal court "may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable." *Davis v. Ayala*, 135 S.Ct. 2187, 2199 (2015) (citing *Fry*, 551 U.S. at 119) (emphasis in original). A state court's harmlessness determination is not unreasonable if 'fairminded jurists could disagree" on the correctness of the state court's decision. *Harrington,* 562 U.S. at 102 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Here, Petitioner cannot meet this exacting standard to warrant federal habeas relief. First, the state appellate court correctly cited the federal standard for assessing prejudice in instances of prosecutorial misconduct. *Baird*, 2015 WL 5029559, *10.

Second, the Court of Appeal pointed to the jury instructions that directed jurors not to consider the evidence of the uncharged offenses. (*Id.* at 11.) The record indicates the trial court's concern to ensure that the jury not be confused by the evidence of uncharged oral copulation. (RT 342.)

Out of the presence of the jury, during discussions with the parties about jury instructions, the trial court stated:

> So if I instruct on 1191, I will be telling them that certain acts were presented that were uncharged, which will tell the jurors that rape and oral copulation is not a basis of a charge for them to consider guilt or innocence. . . . I don't want the jury to come back with evidence in their mind that would be sufficient to underlie the charges when that's really not what he's charged with.

(RT 342-43.) Neither defense counsel nor the prosecutor opposed the trial court's proposal to give three additional jury instructions, including CALCRIM 1191, to make sure the jury was not confused about the basis of the charges against Petitioner or the People's burden in proving the elements of the charged offense. (*See* RT at 344.) The trial court subsequently instructed the jury as follows:

> The people presented evidence that the defendant committed the crimes of rape and oral copulation that were not charged in this case. These crimes are defined for you in these instructions. You may consider using this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. . . If the People have not met this burden of proof, you must disregard this evidence entirely . . . If you conclude that the defendant committed the

> uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any or all of the crimes charged in this case. The People must still prove each charge beyond a reasonable doubt. Do not consider this evidence for any other purpose.

(RT 360.) In light of the record evidence and the explanation for its finding, the Court of Appeal's harmlessness determination was reasonable. Reasonable minds may disagree whether the trial court's instructions were sufficient to nullify possible confusion by jurors as to how they should view the evidence of uncharged sexual offenses, but such disagreement is not sufficient to disturb the state appellate court's decision. *Harrington*, 562 U.S. at 103. Petitioner has not shown that the state court's determination was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Davis,* 135 S. Ct. at 2199 (citing *Harrington*, 562 U.S. at 103).

Accordingly, Petitioner is not entitled to habeas relief on Ground Four (a).

C. Ground Four (b) — Prosecutor's Closing Argument Was Not Adjudicated on the Merits in State Court

a. This Unexhausted Claim is Subject to *De Novo* Review

The second part of Petitioner's prosecutorial misconduct claim stems from Petitioner's allegation that the prosecution made statements during closing argument that inflamed the "passion and prejudice of jury." (Pet. at 6.) Petitioner points to the prosecutor's statement about Petitioner's conduct that: "He is so sick and disgusting and twisted that he orally copulated his own beautiful child in his dead mother's bed."

(RT 305.) Defense counsel immediately objected, "Improper argument." (*Id.*) The trial court then addressed the jury:

> Again ladies and gentlemen, you have to determine what the facts are in this case and what happened. Lawyers do have an opportunity to make their case to you. But keep in mind statements of the lawyers are not evidence. The facts came from the witness stand.

(RT 305.)

As noted, this aspect of Petitioner's Ground Four claim is unexhausted because Petitioner did not raise this argument on direct appeal or in his habeas petition to the California Supreme Court. Consequently, the Court exercises its discretion to review Ground Four (b) *de novo*.

b. Discussion

To establish prosecutorial misconduct based on a prosecutor's statements at trial, "[i]t is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden,* 477 U.S. at 181. In *Darden*, the U.S. Supreme Court held that a prosecutor's statements that the petitioner was an "animal" who should be kept on a leash did not render the petitioner's trial fundamentally unfair. *Darden*, 477 U.S. at 180-82. Thus, it is well recognized that in closing argument prosecutors have "considerable leeway" to strike "hard blows." *United States v. Wilkes*, 662 F.3d 524, 538 (9th Cir. 2011) (internal citation and quotation marks omitted)).

To determine whether the prosecutor's comments in this case rendered Petitioner's trial constitutionally unfair, the Court must consider them in the context

of the record as a whole. *See Hein*, 601 F.3d at 912-13 (citing *Darden*, 477 U.S. at 182); *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."). Relevant factors include, *inter alia*, "whether the comment misstated the evidence, whether the judge admonished the jury to disregard the comment, whether the comment was invited by defense counsel in its summation, whether defense counsel had an adequate opportunity to rebut the comment, the prominence of the comment in the context of the entire trial[,] and the weight of the evidence." *Hein*, 601 F.3d at 912-13.

Further, if a habeas petitioner establishes that a constitutional error occurred, habeas relief is warranted only if the trial error resulted in actual prejudice. *See Davis v. Ayala*, __ U.S. __, 135 S. Ct. at 2197 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)); *see also Deck v. Jenkins*, 814 F.3d 954, 985 (9th Cir. 2014) (conducting a harmless error analysis in connection with a habeas petitioner's prosecutorial misconduct claim).

During closing argument, on several occasions the prosecutor referred to Petitioner's sexual abuse of his daughters as "sick" and "twisted." At the beginning of her closing argument the prosecutor told the jury: "I told you that this case would involve the trauma and the sick pleasures of a father with his young children. And you've heard that." (RT 284.) Later, when summarizing evidence concerning letters of apology that Petitioner wrote to his daughters, the prosecutor said:

> And you know what's sick and twisted is that you can tell just from those letters the grooming, the process, right, of trying to get those girls to subject to him themselves, their bodies. Or that sick, twisted, disgusting child molester love. Not only does he say what he says in the letters, but he tells the girls, "This is

what we do in our family." Right? As though it's okay. "This is to keep our bloodline strong." Those are sick, demented, twisted words of a child molester trying to convince a child to allow them to be abused by them. Disgusting. Revolting. It's horrific what he did to these girls.

(RT 303-04.) The prosecutor reminded the jury of JD2's testimony that her father abused her in what had been her grandmother's bedroom: "[JD2] said that one of the acts of oral copulation took place in her room on her bed. He is so sick and disgusting and twisted that he orally copulated his own beautiful child in his dead mother's bed." (RT 304-05.)

Applying the factors outlined in *Hein* to the prosecutor's statements, the Court finds no prosecutorial misconduct in the prosecutor's closing argument. Looking at the record as a whole, particularly the graphic testimony by JD1 and JD2 about repeated sexual acts Petitioner committed against them, the prosecutor's description of Petitioner's behavior as "sick" or "disgusting" did not misstate the salacious nature of the evidence and did not render the trial fundamentally unfair. When defense counsel objected to the prosecutor's comments as improper argument, the trial court admonished the jury that the statements of lawyers are not evidence. (RT 320.) In addition, at the end of closing argument by both sides, the trial court properly instructed the jury that "Nothing that the attorneys say is evidence." (RT 349.) A jury is presumed to have followed the trial court's instructions. *Weeks v. Angelone,* 528 U.S. 225, 234, (2000).

Defense counsel had the opportunity to rebut the prosecutor's characterizations. Indeed, when defense counsel began his closing argument, he commented on the prosecutor's argument saying,

> I lost track of how many times we heard the words "sick," "disgusting," "horrifying," "terrifying." Those are all incredibly easy words to throw out on a case like this. We know the charges are bad. No one sugarcoated the case. No one sugarcoated the trial to you.

(RT 306.) But defense counsel went on to concede: "We know these acts, *if they're true in any case, are sick and disgusting and horrifying*." (*Id.* (emphasis added).) As to the last *Hein* factor, the overall weight of the evidence also supports that the prosecutor's statements in closing argument were not misconduct. As discussed above in connection with Petitioner's other grounds for relief, substantial evidence supported Petitioner's conviction for multiple acts of aggravated sexual assault against his minor daughters.

Even if the prosecutor's remarks in closing argument rose to the level of misconduct, Petitioner suffered no actual prejudice. On this record, given the substantial evidence of Petitioner's guilt, it is not likely that Petitioner would have achieved a more favorable outcome but for the prosecutor's comments during closing argument. Accordingly, Petitioner is not entitled to habeas relief on Ground Four (b).

V. Ground Five – Ineffective Assistance of Trial Counsel

In Petitioner's fifth ground for habeas relief, he argues that he received ineffective assistance of counsel ("IAC") based on five instances of allegedly deficient performance by trial counsel. (Pet. at 6.) Petitioner contends that his counsel was constitutionally deficient in failing to: (1) "strike bias jurors"; (2) "obtain medical expert or medical report;" (3) "subpoena witnesses in support of defense;" (4) "object to misconduct by prosecutor"; (5) "object to misinstruction of the jury; and Petitioner

contends that the "numerous deficiencies" by trial counsel amounted to "cumulative prejudice." (Pet. at 6.)

Petitioner presented his IAC claims to the California Supreme Court in a habeas petition. (LD 11; and *see* Pet., Attachment, PageID 69-80.) [7] The California high court denied relief without discussion but with citations to *People v. Duvall*, 9 Cal.4th 464, 474 (1995) and *In re Swain*, 34 Cal.2d 300, 304 (1949). (LD 12.) The citations to *Duvall* and *Swain* indicate procedural denial based on a curable pleading deficiency. *Curiel,* 830 F.3d at 870-71; and *see Cross v. Sisto*, 676 F.3d 1172, 1177-78 (9th Cir. 2012). This procedural defect does not, however, preclude a merits review of the claims by a federal habeas court. "While we ordinarily resolve the issue of procedural bar prior to any consideration of the merits on habeas review, we are not required to do so when a petition clearly fails on the merits." *Flournoy v. Small*, 681 F.3d 1000, 1004, n.1 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 880 (2013). Consequently, in the absence of an adjudication by the state courts on the merits of Petitioner's IAC claims, this Court declines to address the procedural bar question and reviews the claims in Ground Five *de novo*.

A. Legal Standard

To succeed on his ineffective assistance of counsel claim, Petitioner must demonstrate that counsel's performance was both objectively deficient and prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because both prongs of the *Strickland* test must be satisfied to establish a constitutional violation, a petitioner's failure to satisfy either prong requires denial of the ineffectiveness claim. *Strickland*, 466 U.S. at 697 (no need to address deficiency of performance if prejudice

[7] The Attachments to the form petition are not paginated, therefore, for ease of reference, the Court cites to these pages using the CM-ECF identifiers.

is examined first and found lacking); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("[f]ailure to satisfy either prong of the *Strickland* test obviates the need to consider the other").

"To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Richter*, 562 U.S. at 104 (citation omitted). However, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690; *see also Pinholster*, 563 U.S. at 196. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Richter*, 562 U.S. at 105. Notably, the failure to take a futile action or make a meritless argument can never constitute deficient performance. *See Rupe v. Wood*, 93 F.3d 1434, 1444-45 (9th Cir. 1996); *see also Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (counsel is not obligated to raise frivolous motions, and failure to do so cannot constitute ineffective assistance of counsel); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not constitute ineffective assistance.").

To establish prejudice, a habeas petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. The court must consider the totality of the evidence before the jury in determining whether a petitioner satisfied this standard. *Strickland*, 466 U.S. at 695.

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B. Discussion

Petitioner's conclusory assertions regarding trial counsel's purported deficiencies fail to rebut the strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. *See id.* at 689. Indeed, Rule 2 Governing Habeas Corpus requires that a federal habeas petition must "state the facts supporting each ground" for relief. 28 U.S.C. § 2254, Rule 2. Further, the Advisory Notes to Rule 4 Governing Section 2254 Cases in the United States District Courts emphasize that "the petition is expected to state facts that point to a 'real possibility of constitutional error.'" 28 U.S.C. § 2254, Rule 4, Advisory Committee Notes, 1976 Adoption. The Petition does not meet Rule 4's requirement in asserting the IAC claims.

a. Failure to Strike Biased Jurors

As Respondent emphasizes, in arguing that his trial counsel failed to strike biased jurors, Petitioner offers no facts to support this claim in the Petition itself. (Answer at 21.) However, Petitioner attached to the Petition as supporting facts, a copy of his habeas petition filed in the California Supreme Court where he alleged that several jurors were biased based on their personal and professional backgrounds, and associations with law enforcement. (Pet., Attachment at PageID 76 and *see* LD 11.) Petitioner argued that "at least half of [the] jury had some type of direct association with law enforcement." (*Id.*) For example, Petitioner pointed to Juror [TJ09] whose brother-in-law worked in the Riverside District Attorney's office; Juror [TJ03] who stated he was a chaplain in the Riverside County Sheriff's Department; and Juror [TJ10] had been a correctional officer for 12 years and had reported sexual crimes in his current job as a school administrator. (*Id.*)

But Petitioner acknowledges that each of the jurors "said they could be fair and impartial" and he presents no facts or evidence from the record to indicate the juror did otherwise. Petitioner's argument ultimately rests on the general assertion that "it is almost understood that there would be some amount of subconscious bias. . . . Prejudicial bias would be basic human nature." (*Id.*) Petitioner does not include any affidavit from trial counsel explaining his decision making strategy during jury selection and Petitioner's supposition that humans are inherently biased does not demonstrate that trial counsel was objectively unreasonable in failing to strike any or all of these individuals as potential jurors.

Even if trial counsel erred by not striking supposedly biased jurors, Petitioner does not demonstrate that he was prejudiced by this failure. Given the substantial and undisputed evidence of Petitioner's sexual assaults on his daughters, it is not substantially likely that, had trial counsel excluded the jurors Petitioner complains of, a differently composed jury would have reached a different verdict.

Consequently, Petitioner is not entitled to habeas relief on this ineffectiveness argument in Ground Five.

b. Failure to Obtain Medical Expert or Medical Reports

Petitioner next contends that trial counsel was ineffective for failing "to obtain medical expert or medical reports of any evidence of penetration of victim." (Pet., Attachment at PageID 77.) He argues that the "[p]rosecution had no medical evidence that such penetration occurred. Evidence was completely circumstantial." (*Id.*) While he concedes that the jury had the direct testimony of the victim about the instances of penetration, he contends that "the only plausible defense is medical reports that prove that there was no physical evidence of what was alleged." (*Id.*) Here, Petitioner seems

to second guess his defense counsel' strategy rather than establishing performance that was objectively deficient.

As Respondent points out, Petitioner fails to demonstrate that trial counsel did not conduct an investigation regarding the medical evidence and Petitioner does not assert what information further investigation or medical reports would have revealed. (Answer at 22.) Nothing in the Petition or the record suggests that trial counsel's performance was objectively deficient for failing to engage medical experts or obtain medical reports. Given the victims' testimony, defense counsel could reasonably have decided that it was strategically unhelpful to try and discredit the girls' testimony or, that trying to disprove the fact of penetration with a medical expert would have been futile. Counsel could also have concluded that any independent medical report(s) would have likely provided additional physical evidence that confirmed the girls' testimony of abuse. Counsel is not ineffective for failing to take a futile action. *See Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) ("failure to take a futile action can never be deficient performance.").

Even if trial counsel's performance was deficient for failing to engage a medical expert or obtain medical reports, Petitioner has not demonstrated prejudice. Given the totality of the evidence before the jury, Petitioner has not shown that testimony from a medical expert or information in a medical report would have created a substantial likelihood of a different result for Petitioner. *See Richter*, 562 U.S. at 112; *Strickland*, 466 U.S. at 695. The evidence showed that Petitioner repeatedly sexually molested his daughters, JD1 and JD2, that he warned both girls not to tell anyone about the abuse, and both victims felt afraid that something might happen to them if they did tell. Given this evidence, it is not substantially likely that had trial counsel hired a medical expert or obtained medical reports, the jury would have reached a different verdict.

For these reasons, Petitioner is not entitled to habeas relief on this part of his ineffectiveness argument in Ground Five.

c. Failure to Subpoena Potential Witnesses

Petitioner also complains that trial counsel was constitutionally ineffective for failing to subpoena witnesses in support of his defense. (Pet., Attachment, PageID 78.) As with Petitioner's previous two arguments about trial counsel's performance, his argument that trial counsel performance was objectively deficient because he failed to subpoena witnesses for the defense, is wholly conclusory. Petitioner gives no indication what witnesses trial counsel could or should have called, what their testimony would have been, and how any such testimony would have countered the damning evidence of the victims' testimony regarding the sexual abuse their father committed against them. Indeed, given the strong presumption that trial counsel performed adequately, it is more likely than not that trial counsel made a strategic decision that subpoenaing additional defense witnesses would not bolster Petitioner's case.

As to *Strickland's* second prong, for all the reasons discussed above, even if Petitioner had demonstrated that counsel was ineffective for failing to subpoena defense witnesses, for all the reasons detailed above, he fails to demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. a 694.

Therefore, Petitioner is not entitled to habeas relief on this ineffectiveness argument in Ground Five.

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d. Failure to Object to Misconduct By Prosecutor

In his habeas petition to the California Supreme Court, Petitioner included trial counsel's failure to object to misconduct by the prosecutor among the alleged errors by counsel that comprise his claim for cumulative error. (Pet., Attachment, PageID 80.) However, Petitioner made no argument and offered no facts in his state habeas petition to support the claim beyond the passing mention as a part of the alleged cumulative error. (*Id.*) The instant Petition is equally void of facts to support this claim. (*See* Pet. at 7.)

As noted, on direct appeal, the California Court of Appeal concluded that the prosecutor engaged in misconduct when he elicited testimony from JD1 and JD2 at trial that Petitioner performed oral copulation on them. *Baird*, 2015 WL 5029559, *10. Oral copulation was not one of the charged offenses, this evidence was not disclosed at the preliminary hearing or during any witness interviews with the victims. Despite finding misconduct, however, the state appellate court concluded there was no federal constitutional error because the error was harmless. *Id.* at **10-11. The state court reasoned that the testimony was no more inflammatory than the victims' detailed testimony that Petitioner had sexual intercourse with them; the prosecutor advised jurors that the oral copulation was not charged; and the jury was properly instructed that there had been evidence introduced of crimes that were not charged in the case. *Id.* at 11. Based on the jury instructions and the substantial evidence of Petitioner's guilt, the prosecutor's misconduct did not so infect the trial as to rend it fundamentally unfair and it was not reasonably probable that Petitioner would have achieved a more favorable result but for the misconduct. *Id.*

Even if trial counsel erred by not objecting to the testimony about oral copulation, Petitioner was not prejudiced. The trial court gave specific instructions

that the evidence of the uncharged offenses was "not sufficient by itself to prove that the defendant is guilty of any or all of the crimes charged in this case. (RT 360.) The jury was properly instructed that the prosecution had to prove each element of the charged offenses beyond a reasonable doubt. (*Id.*) In light of the overwhelming evidence of Petitioner's guilt, it is not conceivable, much less, reasonably likely, that if trial counsel had objected to the testimony about oral copulation that the jury would have reached a different verdict.

Accordingly, defense counsel's performance was not constitutionally deficient and Petitioner is not entitled to habeas relief on this argument in his ineffectiveness claim.

e. Failure to Object to Misinstruction of Jury

This subclaim was also identified as part of counsel's cumulative error in Petitioner's habeas petition to the California Supreme Court. (Pet., Attachment PageID 80.) But here, too, Petitioner offered no argument or facts in the state habeas petition to support the claim beyond the passing mention. (*Id.*)

As discussed, the Court of Appeal found that the omission of the jury instruction on "duress" as to the sexual penetration crimes (Penal Code §§ 269, subd.(a), 289, subd. (a)) was harmless because the conduct that was the basis for the section 288, subdivision (a) violations was the same conduct that gave rise to the sexual penetration counts and the duress instruction was given with respect to the section 288 counts. *Baird*, 2015 WL 5029559, *6. In addition, the state appellate court found no prejudice because the testimony of the two victims provided ample evidence to support a finding of duress. *Id.*

Similar to Petitioner's other ineffectiveness arguments, this contention also fails to establish constitutional ineffectiveness. While an objection to the misinstruction might have triggered the trial court to correct the error prior to giving the final jury instructions, the failure to object, even if error, did not result in prejudice to Petitioner. The jury was properly instructed with respect to the elements of "duress" for counts 6 through 9 and the same conduct formed the basis for counts 1 through 4. *Baird*, 2015 WL 5029559, *6. Given JD1's testimony that Petitioner forced her to put her hand on his penis, had intercourse with her that hurt her and made her cry, that Petitioner warned both JD1 and JD2 not to tell anyone about his molestation, and testimony that both victims felt afraid something would happen to them if they told about the abuse, it is not reasonably probable that if trial counsel had objected to the failure to include the duress instruction for the sexual penetration crimes, Petitioner would have obtained a more favorable verdict.

Consequently, Petitioner is not entitled to habeas relief on this ineffectiveness argument presented in Ground Five.

f. Cumulative Error

Finally, Petitioner argues that counsel's numerous errors amount to cumulative error sufficient to violate his right to due process and rendered his trial fundamentally unfair. (Pet. at 6.)

The combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair. *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973). Cumulative error does not merit habeas relief unless the errors have "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (quoting *Donnelly*,

416 U.S. at 643). Thus, "where the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process." *Parle*, 505 F.3d at 927 (quoting *Chambers*, 410 U.S. at 294, 302-03).

Here, Petitioner fails to establish any claim of ineffectiveness regarding trial counsel's performance. Without any individual errors by defense counsel, there can be no cumulative error. *See Rupe v. Wood*, 93 F.3d at 1445 (where there is no single constitutional error, nothing can accumulate to the level of a constitutional violation). Consequently, Petitioner is not entitled to habeas relief on this argument in Ground Five.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the District Judge issue an Order: (1) accepting the Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: July 12, 2017

Karen L. Stevenson

KAREN L. STEVENSON
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. 5:16-cv-02202-R-KS Date: August 1, 2017

Title *Wyley Tomas Baird v. William Muniz*

Present: The Honorable: Karen L. Stevenson, United States Magistrate Judge

Roxanne Horan-Walker	
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Petitioner:	Attorneys Present for Respondent:

Proceedings: (IN CHAMBERS) ORDER DENYING REQUEST FOR APPOINTMENT OF COUNSEL

On October 18, 2016, Petitioner Wyley Tomas Baird ("Petitioner"), a California state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (the "Petition" or "Pet."). (Dkt. No. 1.) On December 29, 2016, Respondent filed an Answer to the Petition. (Dkt. No. 6) and on January 13, 2017, Petitioner filed a Reply to the Answer (Dkt. No. 8).

On July 12, 2017 the Court issued a Report and Recommendation to dismiss the Petition, and issued a Notice that objections, if any, were due by August 2, 2017. (Dkt. Nos. 12, 13.) No objections have been filed to date, but on July 28, 2017, Petitioner filed a Request for Appointment of Counsel. (Dkt. Nos. 36, 37.) For the following reasons, the Court **DENIES the Motion for Appointment of Counsel.**

"The sixth amendment right to counsel does not apply in habeas corpus actions." *Knaubert v. Goldsmith*, 791 F.2d 722, 728 (9th Cir. 1986). "Indigent state prisoners applying for habeas corpus relief are not entitled to appointed counsel unless the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations." *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986).

A district court is authorized to appoint counsel for a habeas petitioner when it determines the interest of justice requires such appointment, 18 U.S.C. § 3006A(a)(2)(B), but "[u]nless an evidentiary hearing is required, the decision to appoint counsel is within the discretion of the district court." *Knaubert*, 791 F.2d at 728. "In deciding whether to appoint counsel in a habeas proceeding, the district court must evaluate the likelihood of success on the

merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved." *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). Appointment of counsel is required in at least two situations: (1) when the court determines that counsel is "necessary for effective discovery"; and (2) when the court determines that "an evidentiary hearing is warranted." Rules 6(a) and 8(c) of the Rules Governing 2254 Cases, 28 U.S.C. foll. § 2254; *see Weygandt*, 718 F.2d at 954.

Here, neither of these two situations is relevant. Moreover, as noted, a Report and Recommendation has been issued in this case. (Dkt. No. 13.) Although Petitioner has yet to file optional objections to the Report and Recommendation, at this stage of proceedings, it is unclear that appointment of counsel will have an impact on the resolution of this matter. Moreover, in light of the Report and Recommendation for dismissal of the Petition, Petitioner is unlikely to succeed on the merits of his case. Lastly, despite the alleged challenges stemming from lack of education, comprehension of case law, and finding assistance from other inmates, Petitioner has demonstrated no difficulty responding to court orders and filing timely and coherent legal pleadings thus far. **Accordingly, IT IS ORDERED that Petitioner's Request For Appointment Of Counsel is DENIED.**

Petitioner is also reminded that Objections, if any, are due August 2, 2017.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WYLEY TOMAS BAIRD, **Petitioner,** **v.** **WILLIAM MUNIZ, Warden,** **Respondent.**	**NO. EDCV 16-2202-R (KS)** **ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus ("Petition"), all of the records herein, the Report and Recommendation of United States Magistrate Judge ("Report"), and Petitioner's Objections to the Magistrate Judge's Report and Recommendation ("Objections"). Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a *de novo* review of those portions of the Report to which objections have been stated. Having completed its review, the Court accepts the findings and recommendations set forth in the Report.

Petitioner appears to seek an evidentiary hearing in the Objections. For the reasons stated in the Report, the Court was able to resolve the merits of Petitioner's federal habeas claims solely by reference to the state court records. *See Gandarela v. Johnson*, 286 F.3d 1080, 1087 (9th Cir. 2001) (petitioner not entitled to evidentiary hearing because he failed to

show "what more an evidentiary hearing might reveal of material import"). Further, the Court's ability to consider new evidence obtained through an evidentiary hearing is constrained by 28 U.S.C. § 2254(e)(2), and Petitioner has not satisfied this standard. 28 U.S.C. § 2254(e)(2); *see also Pinholster*, 563 U.S. at 186.

Accordingly, IT IS ORDERED that: (1) the Petition is DENIED; and (2) Judgment shall be entered dismissing this action with prejudice.

DATED: August 14, 2017

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WYLEY TOMAS BAIRD, Petitioner, v. **WILLIAM MUNIZ, Warden,** Respondent.	**NO. EDCV 16-2202-R (KS)** **JUDGMENT**

Pursuant to the Court's Order Accepting Findings and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that this action is dismissed with prejudice.

DATED: August 14, 2017

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WYLEY TOMAS BAIRD, **Petitioner,** **v.** **WILLIAM MUNIZ, Warden,** **Respondent.**	**NO. EDCV 16-2202-R (KS)** **ORDER DENYING CERTIFICATE OF APPEALABILITY**

By separate Order and Judgment filed concurrently, the Court has determined that habeas relief should be denied and this 28 U.S.C. § 2254 action should be dismissed with prejudice. Under 28 U.S.C. § 2253(c)(1)(A), an appeal may not be taken from a "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court" unless the appellant first obtains a certificate of appealability ("COA"). The Court addresses the COA question pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In *Slack v. McDaniel*, 529 U.S. 473 (2000), the Supreme Court clarified the showing required to satisfy

Section 2253(c)(2) when, as here, a habeas petition has been denied on the merits:

> To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot* [*v. Estelle*, 463 U.S. 880 (1983)], includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" (citation omitted)
>
> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

529 U.S. at 483-84. *See also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (a petitioner satisfies Section 2253(c)(2) "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further").

In her Report and Recommendation, the Magistrate Judge concluded that federal habeas relief was not warranted based on the claims alleged in the Petition. After carefully considering the record, the Court has accepted the Magistrate Judge's findings and conclusions in a concurrently-filed Order. The Court has further concluded that: reasonable jurists would not find its resolution of the Petition to be "debatable or wrong"; and the issues

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raised by Petitioner are not "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484.

Accordingly, issuance of a certificate of appealability is not warranted.

IT IS SO ORDERED.

DATED: August 14, 2017

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.