

ORIGINAL

Ninth Circuit U.S. Court of Appeals Order (s)

1. Most Recent, March 15, 2019, Denying Reconsideration and/or Reconsideration en banc, to Grant Certificate Of Appealability.
2. Order of January 10, 2019, Granting motion for extension of time until February 11, 2019. To file Motion for Reconsideration, and to file an Amended application for (COA), on other errors not initially submitted to the Court. In conjunction with the Court's Order of December 3, 2018.
Another Motion for further extension to file the Amended application with other errors for (COA), was never ruled on.
3. Order of December 3, 2018, by Panel, denying (COA).

ORIGINAL

APPENDIX - A

A.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 15 2019

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

JAMES M. WILLIAMS, AKA James
Michael Williams,

Petitioner-Appellant,

v.

DANIEL PARAMO, Warden; KAMALA D.
HARRIS, Attorney General,

Respondents-Appellees.

No. 18-55723

D.C. No. 3:15-cv-02576-AJB-WVG
Southern District of California,
San Diego

ORDER

Before: CANBY and WARDLAW, Circuit Judges.

Appellant's motion for reconsideration and/or rehearing en banc (Docket Entry Nos. 12 & 13) is construed as a combined motion for reconsideration and motion for reconsideration en banc.

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

Any other pending motions are denied as moot.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 10 2019

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

JAMES M. WILLIAMS, AKA James
Michael Williams,

Petitioner-Appellant,

v.

DANIEL PARAMO, Warden and
KAMALA D. HARRIS, Attorney General,

Respondents-Appellees.

No. 18-55723

D.C. No. 3:15-cv-02576-AJB-WVG
Southern District of California,
San Diego

ORDER

Before: SCHROEDER and CHRISTEN, Circuit Judges.

The motion for extension of time (Docket Entry No. 9) is granted. Any motion for reconsideration is due by February 11, 2019.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 3 2018

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

JAMES M. WILLIAMS, AKA James
Michael Williams,

Petitioner-Appellant,

v.

DANIEL PARAMO, Warden and
KAMALA D. HARRIS, Attorney General,

Respondents-Appellees.

No. 18-55723

D.C. No. 3:15-cv-02576-AJB-WVG
Southern District of California,
San Diego

ORDER

Before: CALLAHAN and MURGUIA, Circuit Judges.

Appellant's motion to amend his certificate of appealability (Docket Entry No. 7) is granted.

The court has considered appellant's request for a certificate of appealability, including the filing in this court (Docket Entry No. 2). 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.

ORIGINAL

United States District Court Southern District of California

1. Report and Recommendation Of U.S. Magistrate Judge Gallo,
Dated August 18, 2017.

2. District Court Judge Battaglia, Adopting the Report and
Recommendation, Order Dated March 28, 2018.

ORIGINAL

APPENDIX - B

B.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES MICHAEL WILLIAMS.

Petitioner,

V.

DANIEL PARAMO, Warden *et al.*

Respondents.

Case No.: 15-CV-2576-AJB(WVG)

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
JUDGE RE: GRANTING LEAVE TO
AMEND AND DENYING PETITION
FOR A WRIT OF HABEAS CORPUS**

James Michael Williams (hereinafter “Petitioner”) is a state prisoner proceeding *pro se* and *in forma pauperis* with a Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. (ECF No. 1.) He challenges his San Diego Superior Court convictions for one count of forcible rape and two counts of forcible oral copulation, and his sentence of 150 years-to-life plus 18 years in state prison, enhanced due to a prior rape conviction. (Pet. at 1-2.)¹ He claims his federal constitutional rights were violated by the admission at trial of evidence of the prior conviction (claim one), withholding of exculpatory and impeachment evidence by the prosecution (claim two), because the evidence is insufficient

¹ All pleading citations are to page numbers as assigned by the Electronic Case Filing (“ECF”) system.

1 to support the convictions (claim three), and due to ineffective assistance of trial counsel
2 (claim four) and appellate counsel (claim five). (*Id.* at 6-10.)

3 Respondent has filed an Answer and lodged portions of the state court record. (ECF
4 Nos. 28-29, 44.) Respondent argues that the state court adjudication of the claims in the
5 Petition is neither contrary to, nor involves an unreasonable application of, clearly
6 established federal law, and is not based on an unreasonable determination of the facts.
7 (Memo. of P&A in Supp. of Answer [“Ans. Mem.”] at 11-25.) Respondent argues that
8 even if Petitioner could make such a showing, any errors are harmless because he had a
9 fair trial, and that an evidentiary hearing is unnecessary because habeas relief is unavailable
10 even assuming his allegations are true. (*Id.*; Answer at 3-4.)

11 Petitioner has filed a Traverse, supported by his declaration. (ECF No. 39.) He
12 argues that the state court adjudication of the claims in the Petition is contrary to federal
13 law, that the errors are not harmless, and that he is entitled to an evidentiary hearing.
14 (Traverse at 1-10.) He has also filed a Proposed Amendment to the Petition. (ECF No.
15 43.) He claims that the use of the documents introduced at the bifurcated bench trial to
16 prove his prior conviction violated federal principles of due process, confrontation, and
17 double jeopardy, because (1) they are incomplete, improperly authenticated, and contain
18 false statements; (2) they were not presented at his first trial, which ended with a hung jury;
19 (3) he was not permitted to confront the person who certified the documents; and (4) they
20 provide insufficient evidentiary support. (*Id.* at 31-63.)

21 Respondent has filed a Supplemental Answer to the Proposed Amendment to the
22 Petition, and has lodged additional portions of the state court record. (ECF Nos. 50-51.)
23 Respondent answers that the new claims are timely and exhausted, and Respondent does
24 not object to amendment of the Petition to include them. (Suppl. Answer at 2-4.)
25 Respondent argues that (1) the confrontation claim is procedurally defaulted due to
26 Petitioner’s failure to properly present it to the state court, and it can be denied because it
27 is without merit; (2) the state court adjudication of the remaining claims is neither contrary
28 to, nor involves an unreasonable application of, clearly established federal law; and (3) any

1 errors are harmless because Petitioner received a fair trial. (*Id.* at 2-3; Memo. of P&A in
2 Supp. of Suppl. Answer [“Suppl. Ans. Mem.”] at 10-26.)

3 Petitioner has filed a Supplemental Traverse. (ECF No. 55.) He argues that the state
4 court adjudication of the claims presented in the Proposed Amendment is contrary to
5 federal law, that the errors are not harmless, his confrontation claim is not defaulted, and
6 he is entitled to an evidentiary hearing. (Suppl. Traverse at 1-30.)

7 The Court recommends allowing Petitioner to amend his Petition to include the
8 claims presented in the Proposed Amendment to the Petition, but finds that federal habeas
9 relief is unavailable as to any claim presented in this action because the state court
10 adjudication is neither contrary to, nor involves an unreasonable application of, clearly
11 established federal law, and is not based on an unreasonable determination of the facts.
12 The Court alternately finds that even if Petitioner could satisfy that provision as to the
13 claims presented in the Proposed Amendment to the Petition, any federal constitutional
14 errors are harmless. The Court also finds that an evidentiary hearing is neither necessary
15 nor warranted. The Court therefore recommends that leave to amend be granted and the
16 Petition be denied.

17 I. PROCEDURAL BACKGROUND

18 In a five-count amended information filed in the San Diego County Superior Court
19 on January 16, 2013, Petitioner was charged with forcible rape in violation of California
20 Penal Code § 162(a)(2) (count one), two counts of forcible oral copulation in violation of
21 Penal Code § 288a(c)(2)(A) (counts two and three), rape by a foreign object with the use
22 of force in violation of Penal Code § 289(a) (count four), and false imprisonment by
23 violence, menace, fraud or deceit in violation of Penal Code §§ 236 and 237(a) (count five).
24 (Lodgment No. 2, Clerk’s Transcript [“CT”] at 174-79 [ECF No. 29-6 at 45-50].) The
25 amended information alleged, as to all counts, that Petitioner used a deadly weapon (a
26 knife) within the meaning of Penal Code § 12022.3(a), and, as to counts one through four,
27 that he used a deadly weapon or a firearm in violation of Penal Code §§ 12022, 12022.3,
28 12022.5 or 12022.53 within the meaning of Penal Code § 667.61(b)(c)(e). (*Id.*) It was also

1 alleged that he had been previously convicted of kidnapping and rape in Oklahoma in 1984
2 which qualified him as a habitual sexual offender within the meaning of Penal Code
3 § 667.71(a), and that the prior Oklahoma conviction qualified as a prison prior, a serious
4 felony prior, and a strike prior within the meaning of Penal Code §§ 667(a)(1) and (b),
5 667.5(b), 668, 1192.7(c) and 1170.12. (*Id.*)

6 Petitioner's first trial ended on March 2, 2012, with the jury deadlocked on all
7 counts. (CT 321 [ECF No. 29-8 at 69].) On January 16, 2013, following a retrial, he was
8 found guilty on counts one through three, with the jury returning a not true finding on the
9 knife use allegation. (CT 248-50 [ECF No. 29-7 at 50-52].) A mistrial was declared as to
10 counts four and five after the jury was unable to reach a verdict, and those counts were
11 dismissed. (CT 331.01 [ECF No. 29-8 at 80].) In a bifurcated bench trial, the trial judge
12 found the prior conviction allegations true, and found that the prior Oklahoma convictions
13 constituted two strikes within the meaning of California's Three Strikes law.² (CT 344
14 [ECF No. 29-8 at 99].) On April 5, 2013, Petitioner was sentenced to consecutive terms
15 of 25 years-to-life on each count, tripled as a result of the two strikes, consecutive terms of
16 five years on each count for the habitual sexual offender finding, and consecutive one-year
17 terms on each count for the prison prior, for a total term of 225 years-to-life plus 18 years.
18 (CT 354 [ECF No. 29-8 at 103].)

19 Petitioner appealed, raising claim one presented here. (Lodgment Nos. 3-5.) On
20 September 30, 2014, the appellate court affirmed in all respects except as to sentencing,
21 finding that although the Oklahoma rape conviction constituted a strike, the Oklahoma
22 kidnapping conviction did not because it was missing the asportation element required for
23 kidnapping under California law, and remanded for resentencing. (Lodgment No. 6,
24

25

26 ² The information was amended, over a defense objection, after the jury announced they
27 had reached a verdict but before the verdicts were returned, to allege that the Oklahoma
28 convictions for rape and kidnapping for rape, which arose from the same series of events,
constituted two strikes rather than one as originally charged. (Lodgment No. 1, Reporter's
Tr. ["RT"] at 981-85.)

1 *People v. Williams*, No. D063742, slip op. at 22 (Cal. Ct. App. Sept. 30, 2014).) Petitioner
2 filed a petition for review in the state supreme court presenting claim one, which was
3 summarily denied on December 10, 2014. (Lodgment Nos. 7-8.)

4 Petitioner was re-sentenced to 150 years-to-life plus 18 years, consisting of the same
5 sentence with the exception that the three consecutive 25 years-to-life terms were doubled
6 as a result of one strike rather than tripled as a result of two. (See Lodgment No. 9 at 2
7 [ECF No. 29-15 at 5].) Following resentencing, Petitioner’s appointed appellate counsel
8 filed an appellate brief pursuant to *People v. Wende*, 25 Cal. 3d 436 (1979) and *Anders v.*
9 *California*, 386 U.S. 738 (1967), asking the court to independently review the record for
10 arguable issues, and pointing out as potential claims (none of which are raised here) that
11 the trial court abused its discretion in failing to disregard the strike, erred in imposing
12 consecutive rather than concurrent sentences, erred in denying Petitioner a copy of his
13 transcripts, and erred in imposing the 18-year enhancement. (*Id.* at 3-4 [ECF No. 29-15 at
14 6-7].) On July 30, 2015, Petitioner filed a *pro se* brief in support of the appeal after
15 resentencing, in which he raised the claims he presents in his Proposed Amendment to the
16 Petition here, which challenge the authentication and admission of the documentary
17 evidence of his prior Oklahoma conviction. (Lodgment No. 16.) On October 5, 2015, the
18 appellate court affirmed the new sentence in all respects. As to the claims raised by
19 Petitioner in his *pro se* brief, the appellate court noted that they “were fully litigated” in his
20 first appeal and “are not now properly before us.” (Lodgment No. 10, *People v. Williams*,
21 No. D067567, slip op. at 9 (Cal. Ct. App. Oct. 5, 2015).) On November 2, 2015, Petitioner
22 presented the same claims in a *pro se* petition for review in the state supreme court.
23 (Lodgment No. 17.) That petition was summarily denied on December 9, 2015.
24 (Lodgment No. 11.)

25 On November 5, 2015, Petitioner filed a habeas petition in the state supreme court
26 presenting claims two through five raised here. (Lodgment No. 12.) The petition was
27 summarily denied on March 9, 2016. (Lodgment No. 13.)

28

II. UNDERLYING FACTS

2 Laurel B. testified that she grew up in the Ocean Beach area of San Diego where she
3 attended high school, then moved to the San Francisco area where she received a Bachelor
4 of Arts degree from San Francisco State University, and remained there after graduation
5 working at a record store and living with her best friend and high school classmate, Stacy
6 Antonel. (RT 540-41.) Laurel and Stacy eventually moved back to Ocean Beach, and on
7 March 8, 2011, they walked from their home to the Sunshine Company bar about 10:00
8 p.m., where they joined a co-worker of Laurel and her friends. (RT 541-43.) Laurel was
9 celebrating because it was Mardi Gras and because she had been working two jobs for
10 some time and had just quit her second job as a restaurant hostess. (RT 577.)

11 Laurel testified that she drank three beers and Stacy had two, when, at about closing
12 time, they were approached by Petitioner who offered to buy them a drink. (RT 544.)
13 Laurel, who was 26 years old, remarked about Petitioner, who was 62: "I didn't think he
14 was hitting on me. He's too old to think that." (RT 545; CT 254-55 [ECF No. 29-8 at 2-
15 3].) She said Petitioner "was offering a business proposal. He wanted me to model for a
16 line of clothing that he told me he had." (RT 545.) He showed Laurel "a wad of cash" and
17 said it was from his recent sale of a motorcycle jacket. (*Id.*) Petitioner bought her a drink
18 of whiskey, at which point Laurel felt a little intoxicated but not drunk. (*Id.*)

When the bar closed at 2:00 a.m., not long after they met Petitioner, Laurel stood outside smoking a cigarette talking with Stacy and Petitioner. (RT 546.) Petitioner, who was dressed "like a biker guy," continued talking to Laurel about modeling for his motorcycle clothing business. (RT 546-47.) He invited them to his RV, parked half a block away at the beach parking lot, and although Laurel said she did not feel alarmed or uncomfortable, she said she would not have gone without Stacy. (RT 547-48.) The three of them sat inside the RV where they drank whiskey, chatted, and discussed Petitioner's clothing line and the possibility of both women modeling for him. (RT 548.) He showed them a photograph of a UFO he had taken, which did not seem odd to Laurel because growing up in Ocean Beach she was used to encountering interesting people with unusual

1 beliefs. (RT 583.) About 3:30 or 4:00 a.m., Stacy announced that she wanted to go home,
2 and Petitioner said he wanted to talk to Laurel alone. (RT 550-51.) Laurel said that she
3 and Stacy were both comfortable leaving Laurel alone with Petitioner because they had
4 come to trust him, and although he had told them that he had been in prison for kidnapping,
5 Laurel believed him when he said he was innocent. (*Id.*)

6 Laurel testified that she continued to drink whiskey after Stacy left, while Petitioner
7 discussed the possibility of Laurel going on the road with him and taking care of the
8 financial end of his business as she had done at the record store after college. (RT 551.)
9 Up to this point Laurel said there had been no sexual element to their encounter, but then
10 Petitioner kissed her, and she “consented for a second and then stopped the kiss” because
11 she “didn’t want to be kissing him.” (RT 551-53.) She said she had not flirted with him
12 or touched him, and she was not attracted to him. (RT 553.) Petitioner offered to take her
13 anywhere in the world, and she thought he was wealthy. (RT 553-56.)

14 They left in the RV to get breakfast, and Petitioner stopped after a couple of blocks
15 at a gas station where he went in to buy cigarettes while Laurel stayed in the RV. (RT 554-
16 55.) Rather than continue to a restaurant for breakfast, however, Petitioner drove back to
17 the parking lot, at which point Laurel started to feel worried. (RT 555.) Laurel said that
18 when they returned to the parking lot, Petitioner told her “he would give me \$10,000 to
19 lick my pussy.” (RT 558.) She told him she was not interested in the offer, told him she
20 wanted to go home, and began gathering her things, but he was standing between her and
21 the door. (*Id.*) Petitioner told her she was not going home and he became aggressive for
22 the first time, pushing her and preventing her from leaving. (RT 559.) He pulled something
23 from a drawer which she thought was a knife, held it to her throat, and told her she was not
24 leaving (count five-false imprisonment by violence, menace, fraud or deceit). (*Id.*) She
25 was scared and thought he would hurt or kill her if she tried to leave. (RT 559-60.)

26 Petitioner put the knife away and offered to allow her to leave, and she thought he
27 had a change of heart, but when she started to leave he “punched my face with his fist . . .
28 a few times.” (RT 561.) He then told her to take off her clothes, and she undressed because

1 she thought he would hurt her if she refused. (RT 561-62.) He told her they could do it
2 the easy way, which is to do as he says, or the hard way, where he would give her drugs to
3 force her to comply, and she said "fine, give me whatever you want. I don't want to feel
4 this." (RT 564.) He took out his penis and told her to put it in her mouth (count two-forced
5 oral copulation), which she did only because she thought he would hurt her if she refused.
6 (RT 562.) He repeatedly said he would allow her to leave if she wanted to, "hounding" her
7 with the offer, but she believed it was the same trick he had used earlier and that he would
8 hurt her if she tried to leave. (RT 569.) When she eventually relented and said she wanted
9 to go home and started to go, he did not allow her to leave. (*Id.*)

10 Petitioner then told her he was friendly with the Hell's Angels, and the first thing
11 they were going to do in the morning is go to the Hell's Angels' headquarters where they
12 would copy her driver's license so they would know her address. (RT 563-64.) He told
13 her that everything they had discussed earlier was going to happen, that she "was going to
14 be his girl, and we were going to go on the road together." (RT 564.) When she said she
15 would have to call her parents and Stacy, he told her exactly what to say to them, that she
16 was taking a leave of absence from work because she had a great opportunity to model for
17 Petitioner and they were not to worry. (*Id.*) She said she believed his threats about the
18 Hell's Angels, but was not sure about the drugs as he never produced any, and said he made
19 her drink the remaining whiskey, about half a cup. (RT 564-65.)

20 Laurel said Petitioner then climbed in bed with her and asked what kind of sex she
21 preferred, and she responded by saying she wanted to give him oral sex, explaining at trial
22 that she felt it would be the least intrusive. (RT 567.) She performed oral sex on him
23 (count three-forced oral copulation) while he penetrated her vagina with his fingers (count
24 four-forced penetration with a foreign object), although she said she did not remember that
25 last part very well. (RT 567-68.) She submitted not because she wanted to, but because,
26 as with all the sex acts that night, she was afraid she would be hurt or killed if she refused.
27 (*Id.*) Petitioner said he had a gun between the front seats of the RV, and that if she ever
28 went to the police or looked at an officer funny while they were on the road he would slit

1 her throat, and she believed him. (*Id.*) Petitioner then inserted his penis in her vagina
2 (count one-forcible rape), which she allowed because she was afraid of him. (RT 568.)

3 Laurel said that when Petitioner fell asleep she got up to leave but was naked and
4 could not find her clothes. (RT 570-71.) She put on his pants, her jacket and shoes, took
5 her purse, and grabbed the wad of cash Petitioner had been flashing all night off a table as
6 she left. (RT 571-72.) She explained at trial that it was a stupid decision to take the money,
7 but at the time she was not thinking clearly and thought she “should get something out of
8 this horrible experience.” (RT 572.) She denied that the entire night had been a plan to
9 steal Petitioner’s money or that it was payment for prostitution. (*Id.*)

10 Laurel ran home where Stacy called 911, and when the police did not arrive right
11 away Laurel called 911 herself because she was afraid Petitioner would get away. (*Id.*)
12 The police took Laurel and Stacy to Petitioner’s RV where they identified Petitioner and
13 he was arrested. (RT 573.) Laurel said she realized at that point that she should tell the
14 police about the money she had taken, and they returned home where the money was turned
15 over to the police, with the exception of three dollars she turned over later. (RT 573-74.)
16 Laurel then submitted to a physical examination and said Petitioner never ejaculated and
17 had difficulty maintaining an erection. (*Id.*) On cross-examination she clarified that she
18 told the police about the money only after they asked her about it. (RT 586.)

19 Stacy Antonel testified that she grew up in Ocean Beach and went to high school
20 with Laurel B. (RT 594.) They lived together while Laurel attended San Francisco State
21 University at the same time Stacy attended the University of California, Berkeley, where
22 she obtained a degree in cultural anthropology. (RT 594-95.) Stacy testified that on the
23 evening of May 8, 2011, she and Laurel were living together in Ocean Beach and walked
24 to the Sunshine Company bar, arriving at 11:15 or 11:30 p.m., where they ran into Laurel’s
25 co-workers, and where Stacy had two beers and Laurel three. (RT 595-96.) Petitioner
26 approached them near closing time wearing a leather jacket and black pants, holding a wad
27 of money with hundred dollar bills on the outside, and offered to buy them a drink. (RT
28 597.) Stacy declined but Laurel allowed Petitioner to buy her a drink. (*Id.*) Stacy said she

1 was not “weirded out or freaked out” by Petitioner because he seemed to fit in with the
2 eclectic type of people she was accustomed to seeing in Ocean Beach. (RT 598.)

3 When the bar closed, Petitioner invited them to his RV, which was parked nearby,
4 and he told them he was interested in having Laurel model for his leather goods company.
5 (RT 598.) Stacy said she did not want to go, but Laurel was intrigued by the opportunity
6 to model and wanted to earn money, so Stacy went along in order to make sure Laurel was
7 safe and to ensure Petitioner talked about that opportunity. (RT 599.) At the RV he poured
8 them whiskey and told them about his family and his leather goods business, saying that
9 there was a lack of fresh-faced youthful innocence in models these days, which is why he
10 liked Laurel’s look. (RT 600-02.) Stacy took one sip of whiskey and did not see Laurel
11 drink any. (RT 601.) Petitioner seemed very knowledgeable about the business and
12 genuinely interested in Laurel as a model, although Stacy thought the amount of money he
13 claimed to make seemed exaggerated. (RT 602-03.) Petitioner told them that he had been
14 involved in a robbery and had been caught, which alarmed Stacy, but she said she was not
15 scared because he remained jovial, friendly and talkative, and there had been no flirting or
16 sexual advances of any kind by anyone. (RT 603-04.) Stacy left about 4:00 a.m. because
17 she was tired, and although she admitted it now “sounds ridiculous,” she did not think there
18 was any risk in leaving Laurel alone with Petitioner. (RT 604-05.)

19 Stacy went home and slept until about 6:30 a.m., at which point she became alarmed
20 when Laurel did not answer her phone or return her texts. (RT 604-05.) Laurel came home
21 about 7:30 a.m., “really riled up,” and told Stacy that Petitioner had raped her and that she
22 was lucky to have gotten away when he fell asleep. (RT 606.) Laurel was out of breath
23 and very agitated, unlike her normal demeanor as a calm, collected person, and Laurel
24 removed money from the pocket of the pants she was wearing and placed it in a drawer.
25 (RT 607-09.) Stacy called the police, who took them to the RV where they identified
26 Petitioner. (RT 607-08.) Stacy said the issue of money came up only after they identified
27 Petitioner, and Stacy then retrieved it from the drawer at their house and gave it to the
28

1 police. (RT 609-10.) Stacy denied that there was ever any plan to rob Petitioner or hide
2 the money, or that she or Laurel had ever engaged in prostitution. (RT 610-11.)

3 San Diego Police Officer Joshua Gustafson testified that he answered a radio
4 dispatch at 8:08 a.m. on March 9, 2011, at the residence of Laurel B. and Stacy Antonel in
5 Ocean Beach. (RT 627.) He took a statement from Laurel while another officer took a
6 statement from Stacy, and the two officers then compared the stories and found no
7 discrepancies. (RT 629.) Laurel and Stacy were taken to a parking lot where they
8 identified Petitioner and his RV. (RT 630-31.) Officer Gustafson then took Laurel for a
9 medical examination, stopping at her house on the way to pick up \$1,699 in cash, some of
10 which she had taken off a table as she left the RV, and some she found in the pocket of
11 Petitioner's pants she put on when she could not find her dress. (RT 631-34.) Officer
12 Gustafson said Laurel did not mention the money in the initial interview at her house and
13 that it came up about an hour and a half later when she was asked if there was anything in
14 the pockets of Petitioner's pants when she took them. (RT 640-45.) She told Officer
15 Gustafson that she took the money because she felt she deserved it after what Petitioner
16 had done to her. (RT 635.) Officer Gustafson said Laurel complained that her jaw was
17 sore where Petitioner had punched her, but she declined immediate medical attention. (RT
18 636.)

19 San Diego Police Officer Justin Montoya testified that he and three other officers
20 arrived at Petitioner's RV on the morning of March 9, 2011, in response to a sexual assault
21 complaint. (RT 653-55.) Petitioner took his time opening the door of the RV in response
22 to numerous knocks by the officers, and he backed into the RV when commanded to exit.
23 (RT 655-56.) Because the victim had reported the presence of a knife and possibly a gun,
24 the officers forced entry into the RV and took Petitioner into custody. (RT 656.) Petitioner
25 was identified by the victim and did not appear intoxicated. (RT 657, 662.) Without being
26 questioned, Petitioner spontaneously told the officers that he had met two women, one of
27 whom agreed to model for him in a western clothing catalog for \$150, and the three of
28 them went to his RV. (RT 658.) He said that after one of the women left, another male

1 came to the RV with alcohol and they all began drinking. (*Id.*) The next thing he
2 remembered was being pushed onto the bed and having his pants taken off. (*Id.*) Petitioner
3 told the officers that he had several thousand dollars lying on a table in the RV, but Officer
4 Montoya did not see any money in the RV. (RT 660-61.)

5 Patti Rankle, a nurse specializing in sexual assault examinations, testified that she
6 examined Petitioner at 7:10 p.m. on March 9, 2011, and found abrasions on the right side
7 of his head, under his left armpit, on one arm, and in the middle of his back, and a hernia
8 in his left groin. (RT 663-70.) She collected swabs from his fingernails, penis and scrotum,
9 as well as hair from his head and pubic area. (RT 670.) Madeline Marini, a sexual assault
10 nurse, testified that on March 9, 2011, she examined Laurel B., who cried during the
11 examination and complained of soreness in her jaw where she said Petitioner had punched
12 her. (RT 682-88.) Marini observed a possible suction injury on Laurel's left breast, and a
13 one-inch linear abrasion on her right jaw which could have been a scratch. (*Id.*) A pelvic
14 examination revealed a red and tender area near the clitoris with a possible abrasion, and a
15 red and tender hymenal area with an abrasion directly below. (RT 689.) Marini collected
16 swabs from Laurel's mouth, breast and vagina, and said although it was not possible to
17 confirm she was raped, her observations were consistent with Laurel's story. (RT 690-93.)

18 Mary Beth Sciarretta, a Criminalist with the San Diego Police Department, testified
19 that she processed the sexual assault examination kits. (RT 705.) She did not find any
20 sperm cells or semen, but Laurel B.'s left breast swab contained Petitioner's DNA, and
21 Petitioner's penile swab contained Laurel's DNA. (RT 705-13.) She did not submit the
22 vaginal swabs for DNA testing because she did not observe any sperm cells, and therefore
23 "the probability of obtaining any DNA foreign to the victim automatically decreases." (RT
24 706-07.) She said only Petitioner's penile and scrotum swabs were tested for DNA, and
25 not his fingernail swabs or hair, because judicious use of her laboratory's resources require
26 that she typically will "choose the most probative evidence." (RT 708-09.)

27 San Diego Police Detective Jamal Pasha testified that he searched Petitioner's RV
28 with his consent after it had been impounded. (RT 724.) He found a knife in a kitchen

1 drawer, a clear plastic cup and a liquor bottle in the sink, and Laurel's panties in the bed.
2 (RT 726-30.) There was no money, but Laurel's dress and bra were recovered. (RT 743-
3 44.) Detective Pasha said Laurel called him on March 10, 2011, and said she remembered
4 accepting \$13 from Petitioner to buy cigarettes, but did not spend it that night because he
5 bought the cigarettes, that she had since spent \$10 of it before she realized it was his, and
6 returned the remaining \$3. (RT 731-32.) Laurel told Detective Pasha she laughed as she
7 ran from the RV because she did not think she was going to get away. (RT 746-48.)

8 Lawrence Morris testified that he was currently in custody, that he had been
9 convicted of felony theft in 2008, and that he had convictions for possession of stolen
10 property and a history of drug use. (RT 790-91.) He said he had not been promised
11 anything from the prosecutor for his testimony, but hoped for assistance in getting into a
12 drug rehabilitation program. (*Id.*) He testified that he was in custody with Petitioner in the
13 summer of 2012, and when Petitioner became aware Morris was about to be released, he
14 gave Morris verbal and written instructions to offer a reward to any woman who would
15 testify she had gone out with Petitioner and had enjoyed her stay in his RV where they had
16 nonviolent sex. (RT 791-95.) Petitioner told Morris he would pay \$10,000 to anyone
17 willing to testify, pursuant to a written script provided by Petitioner, that they were at the
18 Ocean Beach parking lot on the night of the incident and saw a woman leave his RV with
19 no sign of violence, who was immediately asked by a woman waiting outside the RV if
20 "she got the money," that the woman who came from the RV replied no, went back inside,
21 and replied yes when she came back out and was asked the same thing by the woman
22 waiting outside, who then said "let's get the hell out of here." (RT 792-800.) Petitioner
23 said he would pay Morris \$5,000 for that service when the charges against him were
24 dropped. (RT 797.)

25 An investigator with the San Diego County District Attorney's Office testified that
26 he obtained handwriting exemplars from Petitioner and Morris. (RT 815-18.) A Forensic
27 Document Examiner with the San Diego Police Department Crime Lab testified that he
28

1 conducted a handwriting comparison analyses and opined there was a high probability
2 Petitioner wrote the letters turned in by Morris. (RT 753-54.)

3 At the first trial, the prosecutor introduced only documentary evidence of
4 Petitioner's prior Oklahoma conviction, but the victim of that crime testified at the retrial
5 over a defense objection. (RT 253-74.) Cheryl B. testified that in the summer of 1984 she
6 was 20 years old, a newlywed married for eight months, and was working the graveyard
7 shift at a convenience store in Oklahoma. (RT 824-25.) Petitioner came to the store one
8 evening as she began her shift, while her co-worker was still there, and wanted to purchase
9 beer, but state law prevented the sale of beer at that time. (RT 825-26.) Petitioner returned
10 several hours later when she was working alone, asked if he could park his motorcycle in
11 the parking lot overnight, and asked her to come outside and show him where to park. (RT
12 826-27.) She went outside with him and pointed to a place by her own car where she would
13 be able to keep an eye on his motorcycle, at which point he came up behind her and held
14 an eight-inch buck knife to her throat. (RT 827.) He told her if she did not get on his
15 motorcycle and leave with him he would kill her. (*Id.*) She told him that although she was
16 not allowed to sell him beer she would give him some, along with cash from the register,
17 gasoline and food, but he told her the only thing he wanted was her and repeated his threat
18 to kill her if she did not go with him. (*Id.*)

19 They left on his motorcycle, and as they drove through town he pulled up to a stop
20 sign in front of the police station, where he told her if she tried to jump off or scream he
21 would kill her. (RT 828.) They drove for about 30 to 45 minutes down a small country
22 road where he stopped and forced her to have oral sex. (RT 828-29.) He placed his penis
23 in her mouth and told her: "If I didn't swallow everything that he was going to kill me,"
24 and ejaculated. (RT 829.) She burned her arm on a motorcycle pipe and began crying, and
25 he told her if she did not stop crying he would kill her. (*Id.*) He put both of his arms around
26 her throat and choked her until she lost consciousness and fell down. (*Id.*) He was standing
27 over her when she regained consciousness, and told her to get on the motorcycle or he
28 would kill her. (RT 829-30.) He drove them for a distance and stopped in a vacant lot in

1 a small country town where he told her to take off all her clothes and lie down. (RT 830.)
2 He then raped her against her will, placing his penis in her vagina. (*Id.*) They got dressed
3 and Petitioner drove them to the next town, about 40 miles from where she was abducted,
4 where they were stopped by the police because an all-points bulletin had been issued for
5 them. (RT 831-32.) She said her husband had noticed her missing from the store with her
6 car still there and the cash register unlocked, and had obtained Petitioner's description from
7 her co-worker. (*Id.*) Cheryl said she went to court to face Petitioner, which she was not
8 required to do, and after attending a hearing without a jury, she was called into the judge's
9 chambers and was told he had pleaded guilty. (RT 833.) She then sat in court while
10 Petitioner entered his guilty plea. (*Id.*)

11 The parties stipulated that on August 8, 1984, Petitioner pled guilty to kidnapping
12 Cheryl B. with the intent to rape her and to first degree rape. (RT 835.) The People rested.
13 (RT 836.) The defense rested without presenting evidence, although Petitioner had
14 testified at his first trial. (RT 848.)

15 After deliberating for one and one-half days, during which the jury requested
16 clarification on the use of a deadly weapon allegation and had the testimony of the
17 prosecution DNA expert Mary Beth Sciarretta read back, they found Petitioner guilty of
18 one count of forcible rape and two counts of forcible oral copulation, but returned a not
19 true finding on the allegation that he personally used a knife during those offenses. (RT
20 993-94; CT 341-44.) The jury was unable to reach a verdict as to count four, rape by a
21 foreign object, and count five, false imprisonment by violence, menace, fraud or deceit,
22 and a mistrial was declared on those counts. (RT 995-96.) After the jury informed the
23 court they had reached a verdict, but before the verdicts were accepted, the prosecutor was
24 allowed to amend the information to charge two strikes arising from the Oklahoma
25 conviction rather than one, over a defense objection that the amendment was untimely and
26 violated double jeopardy having come after the previous mistrial. (RT 981-85.)

27 In a bifurcated bench trial on the prior conviction allegations, Lori Adams, a San
28 Diego Police Detective with the sex crimes unit, testified that she interviewed Petitioner

1 and he told her that the 1984 Oklahoma conviction involved a misunderstanding between
2 him and the victim. (RT 1004-05.) Petitioner told her he was passing through town and
3 met the victim, who told him she wanted to leave town and leave her husband, and asked
4 for a ride on his motorcycle. (RT 1005-06.) They took a short ride, and when he returned
5 her to the store she saw her husband and asked Petitioner to drive her away. (RT 1006.)
6 Petitioner told Detective Adams that he had served 25 years in prison as a result of the
7 conviction arising from those events. (*Id.*) The prosecutor offered into evidence certified
8 documents of the Oklahoma conviction, and asked the court to take judicial notice of
9 Cheryl B.'s trial testimony. (RT 1006-09.) Defense counsel objected to the use of the
10 Oklahoma conviction documents on the basis they were not properly authenticated and to
11 the use of Cheryl B.'s trial testimony on the basis she was not available for cross-
12 examination at the bifurcated bench trial. (RT 1006-12.) Both objections were overruled.
13 (*Id.*)

14 Petitioner then testified at the bench trial on his priors that the sheriff who arrested
15 him in Oklahoma used coercion and torture to obtain his guilty plea, including shooting
16 him during his arrest without need. (RT 1014-17.) He said that while he was in jail the
17 sheriff and his deputies pistol whipped him, hit him in the groin with a cattle prod, choked
18 him to unconsciousness, threw water on him in the middle of the night, and threatened to
19 kill him. (*Id.*) He said Cheryl B. wanted to go with him to get away from her abusive
20 husband and that she had concocted the rape and kidnapping story in order to avoid being
21 beaten by her husband when he saw them together. (RT 1017.) He said that his appointed
22 lawyer was an "informant" who falsely told him he would get 12 years if he pled guilty to
23 kidnapping for extortion, but he ended up serving 25 years. (RT 1018-19.) He said he
24 never pled guilty to rape, and that the rape charge was later surreptitiously added to the
25 conviction documents which he only discovered after he had served 21 years. (RT 1021-
26 22.) The trial judge found the prior Oklahoma conviction allegation true, found that it
27 qualified Petitioner as a habitual sexual offender, and found that it qualified as a prison
28

1 prior, a serious felony prior, and two strike priors; he was sentenced to 225 years-to-life
2 plus 18 years, later reduced to 150 years-to-life plus 18 years. (RT 1024-27, 1061-62.)

3 **III. DISCUSSION**

4 Petitioner claims that his federal constitutional rights were violated (1) by the
5 testimony of the victim of his prior Oklahoma conviction because it was inadmissible under
6 the state evidence code and violated the federal due process prohibition against the use of
7 propensity evidence (claim one); (2) by the withholding of exculpatory and impeachment
8 evidence by the prosecution in failing to perform DNA testing of the vaginal swabs
9 collected from Laurel and the fingernail swabs and hairs collected from him (claim two);
10 (3) because there is insufficient evidence to support the forcible rape and forcible oral
11 copulation convictions since the jury found the knife use allegation to be not true, the sex
12 acts occurred after the violent acts, and because Laurel's trial testimony was not credible
13 in that it diverged in minor ways from her testimony at the first trial, the preliminary
14 hearing, and her statements to the police and the examining nurse (claim three); (4) by
15 ineffective assistance of counsel because trial counsel (a) refused to obtain Petitioner's cell
16 phone records, which would have shown that Laurel programmed her number into
17 Petitioner's phone, which could have been used to challenge the prosecution's closing
18 argument that because Petitioner did not know how to find Stacy and Laurel they had no
19 motive to falsely accuse him, (b) failed to obtain surveillance video from the Ocean Beach
20 gas station or businesses around the parking lot, or interview employees of those
21 businesses, in order to challenge the veracity of Laurel's timeline testimony, (c) failed to
22 raise a vindictive prosecution defense on the basis that the prosecutor believed Laurel had
23 been raped rather than believe Petitioner had been robbed simply because he had a prior
24 rape conviction, (d) sought to call as character witnesses women Petitioner had dated or
25 had sex with, who could not be found without his cell phone records, and refused to find
26 and call as character witnesses women Petitioner had helped and had not taken advantage
27 of when they were vulnerable, (e) failed to challenge the prosecution's failure to test all of
28 the biological evidence, and (f) failed to file a motion to dismiss based on the jury's not

1 true finding on the knife use allegation (claim four); and (5) by ineffective assistance of
2 appellate counsel for failing to raise the claims presented in the Petition, and failing to
3 challenge the late amendment of the information (claim five). (Pet. at 6-10, 29-76.)

4 Respondent answers that (1) the state court adjudication of those claims is neither
5 contrary to, nor involves an unreasonable application of, clearly established federal law;
6 (2) even assuming federal errors occurred, they are harmless because Petitioner received a
7 fair trial; (3) the state court factual findings are entitled to deference; and (4) Petitioner is
8 not entitled to an evidentiary hearing. (Ans. Mem. at 3, 11-25.) Petitioner replies that the
9 state court adjudication of the those claims is contrary to federal law, that the errors are not
10 harmless, that the state court factual findings are not entitled to deference, and that he is
11 entitled to an evidentiary hearing. (Traverse at 1-10.)

12 Petitioner raises additional claims in his Proposed Amendment to the Petition,
13 claiming that the use of the documentary evidence of his prior Oklahoma conviction to
14 enhance his sentence violated his federal rights to due process, to confront witnesses, and
15 to be free from being twice placed in jeopardy, because: (a) the documents introduced at
16 the bench trial were incomplete, improperly authenticated, and contained false statements;
17 (b) many of the documents introduced at his second trial was not presented at his first trial;
18 (c) he was not permitted to confront the person who certified the documents; and (d) the
19 evidence is insufficient to qualify him for an enhanced sentence under the Three Strikes
20 law. (ECF No. 43 at 31-63.)

21 Respondent answers that habeas relief is unavailable as to these claims because the
22 confrontation claim is procedurally defaulted and without merit, the state court
23 adjudication of the remaining claims is neither contrary to, nor involves an unreasonable
24 application of, clearly established federal law, and any alleged errors are harmless. (Suppl.
25 Ans. Mem. at 10-26.) Petitioner replies that his confrontation claim is not defaulted, that
26 his claims all merit habeas relief, that any errors are not harmless, that he has rebutted the
27 presumption of correctness of the state court factual findings, and that he is entitled to an
28 evidentiary hearing. (Suppl. Traverse at 2-30.)

1 **A. Standard of Review**

2 In order to obtain federal habeas relief with respect to a claim that was adjudicated
3 on the merits in state court, a federal habeas petitioner must demonstrate that the state court
4 adjudication of the claim “(1) resulted in a decision that was contrary to, or involved an
5 unreasonable application of, clearly established Federal law, as determined by the Supreme
6 Court of the United States; or (2) resulted in a decision that was based on an unreasonable
7 determination of the facts in light of the evidence presented in the State court proceeding.”

8 28 U.S.C. § 2254(d). Even if § 2254(d) is satisfied, a petitioner must show a federal
9 constitutional violation occurred in order to obtain relief. *Fry v. Pliler*, 551 U.S. 112, 119-
10 22 (2007); *Frantz v. Hazey*, 533 F.3d 724, 735-36 (9th Cir. 2008) (en banc). Furthermore,
11 a petitioner must also show that any constitutional error is not harmless, unless it is of the
12 type included on the Supreme Court’s “short, purposely limited roster of structural errors.”
13 *Gautt v. Lewis*, 489 F.3d 993, 1015 (9th Cir. 2007), citing *Arizona v. Fulminante*, 499 U.S.
14 279, 306 (1991) (recognizing “most constitutional errors can be harmless.”)

15 A state court’s decision may be “contrary to” clearly established Supreme Court
16 precedent (1) “if the state court applies a rule that contradicts the governing law set forth
17 in [the Supreme Court’s] cases” or (2) “if the state court confronts a set of facts that are
18 materially indistinguishable from a decision of [the] Court and nevertheless arrives at a
19 result different from [the Court’s] precedent.” *Williams v. Taylor*, 529 U.S. 362, 405-06
20 (2000). A state court decision may involve an “unreasonable application” of clearly
21 established federal law, “if the state court identifies the correct governing legal rule from
22 this Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s
23 case.” *Id.* at 407. Relief under the “unreasonable application” clause of § 2254(d) is
24 available “if, and only if, it is so obvious that a clearly established rule applies to a given
25 set of facts that there could be no ‘fairminded disagreement’ on the question.” *White v.*
26 *Woodall*, 572 U.S. ___, 134 S. Ct. 1697, 1706-07 (2014), quoting *Harrington v. Richter*,
27 562 U.S. 86, 103 (2011). In order to satisfy § 2254(d)(2), the petitioner must show that the
28

1 factual findings upon which the state court's adjudication of his claims rest are objectively
2 unreasonable. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

3 **B. Claim One**

4 Petitioner alleges in claim one that the introduction of the testimony by the victim
5 of his prior Oklahoma conviction at the guilt phase of his trial violated his federal due
6 process rights, because the jury was instructed it could consider the evidence to show he
7 had a propensity to commit similar sexual offenses and in deciding whether he acted with
8 the required intent rather than under a mistaken belief in consent. (Pet. at 6, 29-41.) He
9 first argues that the evidence was improperly admitted under the California Evidence Code
10 because (1) it was not probative to show his intent or the victim's consent, as there was no
11 middle ground on the issue of consent because either the victim consented or Petitioner
12 held a knife to her throat; (2) even if it was probative it was cumulative to Laurel B.'s
13 testimony; and (3) any probative value was outweighed by prejudice, as his prior
14 conviction is dissimilar to and more inflammatory than the charged offenses, is remote in
15 time, and confused the jury in that they were unaware he had served 25 years in prison for
16 it and may have wanted to punish him for that offense. (Pet. at 30-38.) He next argues that
17 the admission of that evidence violated federal due process because the United States
18 Supreme Court, in reserving ruling on whether the introduction of propensity evidence in
19 a state trial violates federal due process in *Estelle v. McGuire*, 502 U.S. 62, 70-73 (1991),
20 recognized that the admission of propensity evidence can rise to the level of a federal due
21 process violation, and he argues that this is one of those instances. (*Id.* at 30-38; Traverse
22 at 6.) He claims that the admission of the evidence was prejudicial because this was a close
23 case, turning on the credibility of the victim, as shown by the fact that (1) the first jury
24 could not reach a verdict on any count, and on retrial the jury could not reach a verdict on
25 two of the five counts and found the weapon use allegation untrue; and (2) the first jury
26 only heard bare facts about the Oklahoma conviction, whereas the second jury heard victim
27 testimony, suggesting that the additional, inflammatory details tipped the scales from a
28 mistrial to a conviction. (Pet. at 38-41.)

1 Respondent answers that there is no clearly established United States Supreme Court
2 precedent which has held that the admission of propensity evidence is unconstitutional, and
3 the denial of the claim by the state court therefore could not be contrary to, or involve an
4 unreasonable application of, clearly established federal law. (Ans. Mem. at 12-15.)
5 Respondent also argues that the state court correctly found the evidence was admissible
6 under state law, and therefore its decision does not involve an unreasonable determination
7 of the facts in light of the evidence presented in the state court proceedings. (*Id.*) Petitioner
8 replies that the testimony of the victim of his prior conviction resulted in a fundamentally
9 unfair trial. (Traverse at 5-6.)

10 Petitioner presented this claim to the state supreme court in his first petition for
11 review. (Lodgment No. 7 at 7-14 [ECF No. 29-13 at 11-18].) That petition was denied
12 with an order which stated: “The petition for review is denied.” (Lodgment No. 8.) The
13 same claim was presented to the state appellate court on direct appeal (Lodgment No. 3 at
14 6-13 [ECF No. 29-9 at 12-19]), and denied in a written opinion. (Lodgment No. 6.)

15 There is a presumption that “[w]here there has been one reasoned state judgment
16 rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the
17 same claim rest upon the same ground.” *Ylst v. Nunnemaker*, 501 U.S. 797, 803-06 (1991).
18 Therefore, with respect to claim one, the Court will look through the silent denial of this
19 claim by the state supreme court on direct appeal to the last reasoned state court opinion
20 addressing the claim, the appellate court opinion on direct appeal, which stated:

21 Evidence of other crimes committed by the defendant is generally
22 inadmissible to prove the defendant has a propensity to commit crimes.
23 (*People v. Catlin* (2001) 26 Cal.4th 81, 145.) However, Evidence Code
24 section 1108 (section 1108) sets forth an exception to the general rule against
25 the use of propensity evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903,
26 911.) When a defendant is charged with a sex offense, section 1108 allows
27 admission of evidence of other sex offenses to prove the defendant’s
28 disposition to commit sex offenses, subject to the trial court’s discretion to
exclude the evidence under Evidence Code section 352 (section 352).
 (§ 1108, subd. (a); *Falsetta*, at p. 911; *People v. Lewis* (2009) 46 Cal.4th 1255,
 1286.) In *Falsetta*, the California Supreme Court ruled that section 1108 was
 constitutional. (*Falsetta*, at pp. 910–922.) The *Falsetta* court reasoned that

1 sex offense propensity evidence was critical in sex offense cases given the
2 serious and secretive nature of sex crimes. (*Id.* at p. 918.) Further, a
3 defendant's constitutional right to a fair trial is properly safeguarded by
4 requiring the trial court to engage in a careful weighing process under section
5 352 to determine whether probative value is substantially outweighed by the
6 danger of undue prejudice, confusion, or time consumption. (*Falsetta*, at pp.
7 916–917). Based on section 1108, “the presumption (is) in favor of
8 admissibility” of uncharged sex offense evidence. (*People v. Loy* (2011) 52
9 Cal.4th 46, 62.)

10 Evidence of the defendant's other crimes is also admissible under
11 section 1101, subdivision (b) (section 1101(b)) for the limited purpose of
12 proving such matters as intent or lack of mistake. (*People v. Catlin, supra*, 26
13 Cal.4th at p. 145.) Admission under section 1101(b) is also subject to the trial
14 court's discretion to exclude the evidence under section 352 if the potential
15 for prejudice outweighs the probative value. (*People v. Balcom* (1994) 7
16 Cal.4th 414, 426.)

17 The decision whether to apply section 352 to exclude otherwise
18 admissible evidence “is entrusted to the sound discretion of the trial judge
19 who is in the best position to evaluate the evidence.”” (*People v. Falsetta, supra*, 21
20 Cal.4th at pp. 917–918.) On appeal we will not disturb the trial
21 court's ruling unless the court exercised its discretion in an arbitrary,
22 capricious, or patently absurd manner that resulted in a miscarriage of justice.
23 (*People v. Lewis, supra*, 46 Cal.4th at p. 1286.)

24 Defendant argues the evidence of his Oklahoma sex offense should
25 have been excluded because (1) section 1108 violates his right to due process
26 under the federal Constitution, and (2) the court abused its discretion under
27 section 352. The constitutional challenge is unavailing. As defendant
28 recognizes, the California Supreme Court has found section 1108 to be
constitutional. (*People v. Falsetta, supra*, 21 Cal.4th 903.) We are bound to
follow our high court's ruling. (*Auto Equity Sales, Inc. v. Superior Court*
(1962) 57 Cal.2d 450, 455; see *People v. Loy, supra*, 52 Cal.4th at pp. 60–61
(declining to reconsider *Falsetta*)).

29 To support his claim the court abused its discretion in admitting the
30 evidence, defendant argues the prior and current incidents were dissimilar, the
31 prior offense was remote and more inflammatory, and there was a risk the jury
32 would convict to punish him for the prior offense.

1 Although the similarity between the prior and current sex offenses is a
2 relevant factor to consider when conducting the weighing process under
3 section 352 (*People v. Lewis, supra*, 46 Cal.4th at p. 1285), there is no strict
4 similarity requirement for admission of the evidence. (See *People v. Loy, supra*, 52 Cal.4th at p. 63; *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.) Here, in both the Oklahoma and current offenses, defendant lured a
5 woman late at night to a location where she was more vulnerable, used force
6 and threats to compel her to comply with his sexual demands, and engaged in
7 oral copulation and sexual intercourse with her. Although there were some
8 factual differences between the two offenses (for example, the current offense,
9 unlike the prior offense, involved drinking and socializing prior to the
10 assaultive behavior), they were not so dissimilar as to significantly diminish
11 the high probative value of the prior offense. Nor was the prior offense unduly
12 inflammatory as compared to the current offense; both offenses involved
13 threats of serious injury or death that caused the victims to comply with
14 defendant's sexual demands, and sexual activity of a comparable
15 invasiveness. Remoteness was of minimal significance; although the 1984
16 Oklahoma offense occurred many years prior to the current offense, the record
17 shows defendant was in prison until September 2009 and he committed the
18 current offense in March 2011, which was *less than two years* after his release
19 from prison. (See *People v. Loy, supra*, 52 Cal.4th at p. 62.)

20 Defendant argues the jurors may have improperly wanted to punish him
21 for the prior offense because they may have inferred he did not serve a lengthy
22 prison term given his talk about his successful business during the charged
23 incident. Defendant has not shown an abuse of discretion based on this claim.
24 The jurors knew from L.B.'s testimony that defendant had been in prison, and
25 the jurors could have just as easily inferred that defendant's talk about his
26 business was a fabricated story to keep L.B. interested rather than an
27 indication that he had not spent much time in prison. [Footnote: L.B. testified
28 defendant disclosed he had been in prison before.] Further, the court explicitly
 instructed the jurors that uncharged offense evidence was not sufficient by
 itself to prove the charged crimes, and the prosecution had to prove each
 charge beyond a reasonable doubt. (See CALCRIM Nos. 1191, 375.) The
 fact that the jurors acquitted defendant of the personal weapon use allegation
 reflected they were aware of their duty to carefully evaluate the evidence and
 they knew they could not convict merely because he had engaged in criminal
 conduct in the past. (See *People v. Robertson, supra*, 208 Cal.App.4th at p.
 994.)

29 Finally, defendant contends the court should not have admitted the
30 evidence under section 1101(b) on the issues of intent or belief in consent

1 because the evidence was cumulative on these issues. In support, he cites
2 *People v. Balcom, supra*, 7 Cal.4th 414, where the court held prior offense
3 evidence was merely cumulative (and hence more prejudicial than probative)
4 because the victim's testimony, if believed, that the defendant held a gun to
5 her head provided compelling evidence of the defendant's intent during sexual
6 intercourse. (*Id.* at pp. 422–423.) Defendant posits that, likewise here, the
7 victim's testimony, if believed, provided compelling evidence of his intent
8 and absence of belief in consent so as to substantially diminish the probative
9 value of the prior sex offense evidence. We are not persuaded.

10 Unlike the circumstances in *Balcom*, L.B.'s testimony did not so
11 definitively establish defendant's state of mind as to require the court to
12 disallow consideration of the prior offense evidence on the issues of intent and
13 belief in consent. Although L.B. described numerous facts supporting that
14 defendant engaged in forcible sexual conduct, she also described several
15 factors relevant to a contrary conclusion concerning defendant's state of mind,
16 including her voluntary decision to go with defendant to his RV, her initial
17 allowance of his kissing her, her statement to defendant that she would stay
18 when he told her she could leave, and her decision to take defendant's money.
19 The court was not required to find the nature of the victim's testimony was so
20 clear cut that, if credited, it rendered the prior offense evidence merely
21 cumulative as to defendant's state of mind.

22 (Lodgment No. 6, *People v. Williams*, No. D063742, slip op. at 7-12 [ECF No. 29-12 at 7-
23 12].)

24 Petitioner first contends that the evidence of his prior Oklahoma conviction was
25 erroneously admitted under California Evidence Code § 1108. He argues it was not
26 relevant to Laurel's consent or to his intent and was cumulative to Laurel's testimony. Also
27 it was erroneously admitted under California Evidence Code § 352 because its probative
28 value was outweighed by its prejudice as it is dissimilar to and more inflammatory than the
charged offenses, is remote in time, and had the potential to confuse the jury since they
were not told that he had served 25 years in prison as a result of the conviction and they
may have wanted to punish him for that offense. (Pet. at 33-38.) As quoted above, the
appellate court rejected this argument as a matter of state law. The United States Supreme
Court has held that an inquiry into whether evidence was "incorrectly admitted pursuant to
California law . . . is no part of a federal court's habeas review of a state conviction."

1 *McGuire*, 502 U.S. at 67. The state court rejection of this aspect of claim one is therefore
2 neither contrary to, nor involves an unreasonable application of, clearly established federal
3 law. *Richter*, 562 U.S. at 102; *Lockyer*, 538 U.S. at 75-76; *Williams*, 529 U.S. at 405-07;
4 *McGuire*, 502 U.S. at 67.

5 Petitioner next contends that “[t]he admission of propensity evidence, in
6 contravention of longstanding traditions of Anglo-American jurisprudence, deprived [him]
7 of due process.” (Pet. at 31-33, citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997)
8 (noting that prejudice results from introduction of evidence used to “lure the factfinder into
9 declaring guilt on a ground different from proof specific to the offense charged,” because
10 it risks the jury convicting a defendant because he is “a bad person, or one portrayed as
11 bad, [who] deserves punishment.”)) As Petitioner correctly observes (*id.* at 32) however,
12 the Supreme Court in *Old Chief* was relying on its supervisory role regarding *federal* trials,
13 but in *McGuire* it left open the issue as to “whether a *state law* would violate the Due
14 Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to
15 commit a charged crime.” *McGuire*, 502 U.S. at 75 n.5 (emphasis added).

16 The Ninth Circuit has read *McGuire* as providing that there are circumstances under
17 which a federal habeas petitioner can establish a federal due process violation by showing
18 that the admission of evidence was so prejudicial that it rendered the trial fundamentally
19 unfair. *See Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995) (“The admission of
20 evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally
21 unfair in violation of due process.”) (citing *McGuire*, 502 U.S. at 67-69; *Jammal v. Van de
22 Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991) (“The issue for us, always, is whether the state
23 proceedings satisfied due process; the presence or absence of a state law violation is largely
24 beside the point.”)). Petitioner argues that this is one of those situations envisioned by the
25 Supreme Court in *McGuire* where the introduction of evidence of his prior sex offense to
26 show he has a propensity to commit such crimes resulted in a fundamentally unfair trial
27 and a violation of due process.

28

1 However, in *Alberni v. McDaniel*, 458 F.3d 860 (9th Cir. 2006), the Ninth Circuit
2 held that because the Supreme Court in *McGuire* specifically reserved ruling on the issue
3 regarding whether introduction of propensity evidence can give rise to a federal due process
4 violation, and has denied certiorari at least four times on that issue since *McGuire* was
5 decided, the right “has not been clearly established by the Supreme Court, as required by
6 AEDPA.” *Id.* at 866-67; *see Wright v. Van Patten*, 552 U.S. 120, 125-26 (2008) (holding
7 that the state court could not have unreasonably applied federal law if no clear Supreme
8 Court precedent exists); *see also Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir.
9 2009) (granting habeas relief under AEDPA based on state court’s limitation on cross-
10 examination and refusal to admit impeachment evidence, but observing that even though
11 the petitioner received a fundamentally unfair trial as a result of the introduction of
12 prejudicially irrelevant evidence, a federal habeas court applying AEDPA could not grant
13 the writ on that basis because the Supreme Court “has not yet made a clear ruling that
14 admission of irrelevant or overtly prejudicial evidence constitutes a due process violation
15 sufficient to warrant issuance of the writ.”)

16 Accordingly, with respect to the aspect of claim one alleging that the introduction of
17 Cheryl B.’s testimony regarding his prior sex offense amounted to a violation of federal
18 due process because it unfairly permitted the jury to infer that he had a propensity to
19 commit crimes similar to the ones with which he was charged, or was so prejudicial as to
20 render his trial fundamentally unfair, the state court adjudication is neither contrary to, nor
21 involved an unreasonable application of, clearly established federal law. *Richter*, 562 U.S.
22 at 102; *Wright*, 552 U.S. at 125-26; *Lockyer*, 538 U.S. at 75-76; *Williams*, 529 U.S. at 405-
23 07; *Holley*, 568 F.3d at 1101; *Alberni*, 458 F.3d at 867.

24 In addition, there is no basis to find that the state court adjudication of claim one is
25 based on an unreasonable determination of the facts in light of the evidence presented in
26 the state court proceedings. Petitioner challenges Cheryl B.’s trial testimony, contending
27 that her version of the events is inconsistent with his own version of the events as set forth
28 in his declaration. (See Decl. of Pet. attached to Traverse at 20-24 [ECF No. 39-1 at 20-

1 24].) However, in order to satisfy this provision, Petitioner must show that the factual
2 findings upon which the state court's adjudication of his claims rest are objectively
3 unreasonable. *Miller-El*, 537 U.S. at 340. In order to do so, he must show "there was an
4 unreasonable determination of the facts *in light of the evidence presented in the State court*
5 *proceeding.*" 28 U.S.C. § 2254(d)(2) (emphasis added). His reliance on his own post-
6 conviction declaration to challenge the trial testimony of the victim of his Oklahoma
7 conviction is insufficient to attack the factual basis on which the state court relied to reject
8 this claim. *Id.* In any case, a federal habeas petition is not a proper vehicle for challenging
9 the credibility of a state trial witness. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979)
10 (federal habeas courts must respect the "factfinder's province to determine witness
11 credibility."); *see also Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("[U]nder *Jackson*, the
12 assessment of the credibility of witnesses is generally beyond the scope of review.")

13 Accordingly, the Court finds that habeas relief is not available as to claim one
14 because the state court adjudication of the claim is neither contrary to, nor involves an
15 unreasonable application of, clearly established federal law, and is not based on an
16 unreasonable determination of the facts. Before addressing the remaining claims in the
17 Petition, the Court will address the claims raised in the Proposed Amendment, which, as
18 with claim one, challenges evidence of his prior conviction.

19 **C. Proposed Amendment**

20 In his Proposed Amendment, Petitioner claims that (1) the documentary evidence
21 introduced at the bench trial to establish the truth of the prior Oklahoma conviction is
22 incomplete, improperly authenticated, and contains false statements in the narrative of the
23 crimes; (2) the trial court erred in allowing a late amendment of the information to allege
24 that his Oklahoma conviction constituted two strikes rather than one; (3) he was denied his
25 right to confront the person who certified the accuracy of the Oklahoma conviction
26 documents within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004); and (4) the
27 evidence was insufficient to enhance his sentence under the Three Strikes law. (ECF No.
28 43 at 31-63.)

1 Respondent answers that (1) the confrontation claim is procedurally defaulted
2 because it is now too late for him to return to the state court with that previously
3 unexhausted claim, but—in any event—the claim can be denied because it is entirely
4 without merit; (2) the state court adjudication of the remaining claims is neither contrary
5 to, nor involves an unreasonable application of, clearly established federal law; and (3) any
6 errors are harmless because Petitioner received a fair trial. (Suppl. Answer at 2; Suppl.
7 Ans. Mem. at 10-26.)

8 Petitioner replies that the evidence is insufficient to support the finding that he had
9 suffered the prior conviction, and that he has rebutted the presumption of correctness of
10 the state court factual findings as to that claim because “the factual record dictates a
11 contrary conclusion as a matter of law.” (Suppl. Traverse at 2-27.) He contends his
12 confrontation clause claim is not defaulted because he properly presented it to the state
13 appellate court which then impermissibly evaded review of the claim, and that his double
14 jeopardy claim has merit because he has been punished twice for the same prior conviction.
15 (*Id.* at 27-30.)

16 These claims were raised in the *pro se* petition for review Petitioner filed in the state
17 supreme court following the appeal of his resentencing, which was summarily denied.
18 (Lodgment Nos. 11, 17.) He presented the same claims in a *pro se* supplemental brief filed
19 in the appellate court on appeal of his resentencing. (Lodgment No. 16.) The appellate
20 court denied relief, stating:

21 As noted, defendant also raised a series of contentions in his
22 supplemental brief, including that: (1) the trial court erred in admitting
23 evidence of his 1984 Oklahoma conviction because the evidence as
24 insufficient and/or inadmissible to support that conviction and because in any
25 event, the admission of such evidence violated his constitutional rights; and
26 (2) the trial court abused its discretion in imposing consecutive as opposed to
concurrent sentences on each of the three counts.

27 As to defendant’s first contention, these issues were fully litigated in
28 defendant’s first appeal and were the subject of extensive discussion in our
previous opinion in this case. As such, those issues are not now properly

1 before us in this, defendant's second appeal, which as noted merely involved
2 his resentencing.

3 (Lodgment No. 10, *People v. Williams*, No. D067567, slip op. at 9 (Cal. Ct. App. Oct. 5,
4 2015).)

5 Because the second appellate court opinion rested its decision on the first appellate
6 court opinion, the Court will look through the silent denial by the state supreme court to
7 the first state appellate court opinion. *See Ylst*, 501 U.S. at 804 n.3 ("Since a later state
8 decision based upon ineligibility for further state review neither rests upon procedural
9 default nor lifts a pre-existing procedural default, its effect upon the availability of federal
10 habeas is nil"); *see also Barker v. Fleming*, 423 F.3d 1085, 1091-92 (9th Cir. 2005)
11 ("Before we can apply [the] standards [of § 2254(d)], we must identify the state court
12 decision that is appropriate for our review. When more than one state court has adjudicated
13 a claim, we analyze the last reasoned decision.") To the extent the first state appellate court
14 did not address the claims, the Court will treat the silent denial of the state supreme court
15 as a denial on the merits. *See Johnson v. Williams*, 568 U.S. 289 ___, 133 S. Ct. 1088,
16 1096 (2012) (when a state court issues a reasoned decision but appears to ignore a federal
17 claim, there is a rebuttable presumption the claim was denied on the merits).

18 Petitioner first claims that the introduction of evidence of his prior Oklahoma
19 conviction to enhance his sentence violated his federal due process rights because the
20 documentary evidence introduced at the bench trial to establish the truth of that conviction
21 is incomplete, improperly authenticated, and contains false statements in the narrative of
22 the crime. (ECF No. 43 at 31-37.) He challenged the authentication of those documents
23 and the use of the crime narrative at trial. (RT 976-78.) The trial judge found: "It looks to
24 me as though these documents substantially comply with business records and official
25 records. And on that basis the *Crawford* Sixth Amendment objection is overruled." (RT
26 978.) His appointed appellate attorney on direct appeal challenged the use of the prior
27 conviction as unfairly prejudicial and as providing insufficient evidence of an asportation
28 element necessary for it to be used to support a strike for kidnapping, but did not challenge

1 the authenticity of the documentation. (Lodgment No. 3.) As set forth above in the
2 discussion of claim one, the appellate court found that evidence of the prior Oklahoma rape
3 conviction was properly admitted at trial. (Lodgment No. 6, *People v. Williams*, No.
4 D063742, slip op. at 7-12.) The appellate court then stated:

5 Defendant does not dispute that his Oklahoma *rape* conviction qualifies
6 as a prior serious felony, but he contends it cannot be used for this
7 enhancement because it was not properly pled in the information. For the
8 habitual sex offender, prior serious felony, and prior prison term allegations,
9 the information identified the Oklahoma case by the term "Kidnapping." For
10 the two prior strike allegations, the information initially pled one strike prior
11 allegation, denominated "Kidnapping," and at trial the prosecution added the
12 second strike prior allegation, denominated "Rape." Under the circumstances
13 of this case, we find no pleading barrier to the use of the Oklahoma rape
14 conviction to support the prior serious felony enhancement.

15 As a matter of due process, a defendant has a right "to fair notice of the
16 specific enhancement allegations that will be invoked to increase punishment
17 for his crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747.) Here, the
18 serious felony prior conviction alleged in the information described the
19 "Charge" as "Kidnapping," and provided the date of the conviction, the court
20 case number, and the county and state where the conviction was incurred.
21 From this allegation, defendant knew the prosecution was seeking to impose
22 the five-year serious felony enhancement based on his Oklahoma case. Also,
23 prior to trial the defense was provided with copies of the Oklahoma court
24 documents, which reflect that the Oklahoma case involved two convictions,
25 i.e., the kidnapping count and the rape count. Although the information in the
26 current California case referred to the Oklahoma conviction merely as
27 "Kidnapping," the Oklahoma court documents apprised defendant of the
28 specific nature of the charges, including kidnapping for extortion (defined as
seizing, kidnapping, and confining with intent to commit rape) and first degree
rape.

29 On appeal, defendant does not claim that he was not on notice that his
30 Oklahoma case included a rape conviction, and the record supports that he
knew in a timely fashion that the rape conviction was a component of the
Oklahoma case. For example, during trial (for purposes of the prior sex
offense evidence) the parties stipulated to the two convictions underlying the
Oklahoma case. Thereafter, while the jury was in deliberations, the prosecutor
successfully moved to amend the information to allege rape as a second strike
arising from the Oklahoma case. Although defense counsel objected to the

1 amendment as untimely, he did *not* argue that defendant was prejudicially
2 deprived of notice of the rape conviction even though the court invited him to
3 address the point. Later, at sentencing, the trial court stated the “Oklahoma
4 prior, particularly the rape” qualified defendant as a habitual sex offender.
5 Defense counsel did not object to the trial court’s reliance on the rape
6 conviction even though the habitual sex offender allegation in the information,
7 like the prior serious felony allegation, referred only to the Oklahoma case as
8 “Kidnapping.” Finally, defense counsel did not object when the trial court
9 stated at sentencing that it was imposing sentences for both the serious felony
and prison term enhancements because there were two Oklahoma convictions.
It is clear from the record that the manner in which the case was pleaded did
not mislead defendant to think his Oklahoma case involved only a kidnapping
conviction.

10 Further, the circumstances here are not comparable to those in
11 *Mancebo*, where the Supreme Court found a due process violation in
12 circumstances where the prosecutor alleged a special circumstance based on
13 gun use, and at sentencing the trial court imposed sentence based on an
14 uncharged special circumstance of multiple victims. (*People v. Mancebo*,
15 *supra*, 27 Cal.4th at pp. 738-739, 753.) In *Mancebo* the alleged fact of gun
16 use could not be characterized as expressly or impliedly incorporating the fact
17 of multiple victims. In contrast here, defendant knew from the information
18 that the prosecution was seeking to impose a serious felony enhancement
19 based on the Oklahoma case, and he knew that the Oklahoma case
20 *incorporated both the rape and kidnapping convictions*. Because there is no
showing of a due process/notice concern here, it is reasonable to construe the
information’s characterization of the Oklahoma charge as “Kidnapping” as a
shorthand reference to the kidnapping for extortion with intent to rape
convictions, as well as the rape conviction.

21 (Lodgment No. 6, *People v. Williams*, No. D06374, slip op. at 19-21.)

22 “As a matter of due process, an offender may not be sentenced on the basis of
23 mistaken facts or unfounded assumptions.” *Roberts v. United States*, 445 U.S. 552, 563
24 (1980). Petitioner stipulated at trial that he had been convicted in Oklahoma of kidnapping
25 for rape and first degree rape. (RT 835.) The victim of those crimes testified at Petitioner’s
26 trial, subject to cross-examination, to the facts of those offenses, and testified that she was
27 in the courtroom when he entered a guilty plea. (RT 833.) A detective with the sex crimes
28 unit testified that Petitioner told her that he served 25 years in prison as a result of the

1 conviction arising from those events. (RT 1006.) Even assuming the truth of Petitioner’s
2 allegation that the Oklahoma conviction documents were incomplete or improperly
3 authenticated, his failure to allege he was sentenced based on false facts regarding the prior
4 conviction, as opposed to merely identifying incidental errors in the authentication of the
5 documentation of his prior conviction, does not even allege a federal due process violation.
6 *Roberts*, 445 U.S. at 563. Although it is unclear whether the state appellate court was
7 correct to deny this claim on the basis that it had been adjudicated in the prior appellate
8 court opinion, even to the extent the state appellate court ignored the claim, for the same
9 reasons just discussed, Petitioner is unable to show the state court denial is contrary to, or
10 an unreasonable application of, clearly established federal law. *Id.*; *see also Johnson*, 133
11 S. Ct. at 1096 (holding that when a state court issues a reasoned decision but appears to
12 ignore a federal claim, there is a rebuttable presumption the claim was denied on the
13 merits); *Richter*, 562 U.S. at 102 (holding that when faced with such a presumption, a
14 federal habeas court “must determine what arguments or theories . . . could have supported
15 the state court’s decision; and then it must ask whether it is possible fairminded jurists
16 could disagree that those arguments or theories are inconsistent with the holding in a prior
17 decision of” the Supreme Court).

18 Furthermore, even if Petitioner could satisfy the provisions of 28 U.S.C. § 2254(d)
19 with respect to this claim, and assuming a federal constitutional violation occurred as a
20 result of the reliance by the trial judge on improperly authenticated documents, any such
21 error is subject to harmless error analysis. *See United States v. Weiland*, 420 F.3d 1062,
22 1078 (9th Cir. 2005) (applying harmless error to erroneous admission of prior conviction
23 documents); *Gautt*, 489 F.3d at 1015 (noting that harmless error review applies unless the
24 constitutional error is of the type included on the Supreme Court’s “short, purposely limited
25 roster of structural errors.”) (citing *Fulminante*, 499 U.S. at 306 (recognizing that “most
26 constitutional errors can be harmless.”)). Habeas relief is not available “unless the error
27 resulted in ‘substantial and injurious effect or influence in determining the jury’s verdict,’
28 . . . or unless the judge ‘is in grave doubt’ about the harmlessness of the error.” *Medina v.*

1 *Hornung*, 386 F.3d 872, 877 (9th Cir. 2004) (quoting *O'Neal v. McAninch*, 513 U.S. 432,
2 436 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

3 Assuming the truth of the allegation that the Oklahoma conviction documents were
4 not properly authenticated, were technically deficient, or contained false statements in the
5 narrative of the crimes, the Court is not in grave doubt whether the outcome of the
6 sentencing proceeding was affected in any way. Petitioner stipulated at trial that he had
7 been convicted of kidnapping for rape and first degree rape, the victim of those crimes
8 testified at his trial to the facts of those offenses and testified that she was in the courtroom
9 when he entered a guilty plea, and a sex unit detective testified that Petitioner admitted he
10 had served 25 years in prison as a result of that conviction. Although Petitioner contends
11 that the victim of his Oklahoma conviction did not witness his plea (Suppl. Traverse at 12),
12 as set forth above, her testimony was presented to the trier of fact, and federal habeas is not
13 a proper avenue to challenge her credibility. Because there is no factual dispute that
14 Petitioner was convicted of rape in Oklahoma, it is clear that any error arising from a failure
15 to properly authenticate the conviction documents is harmless. Thus, the Court is not “in
16 grave doubt” whether a federal constitutional error arising from the use of improperly
17 authenticated Oklahoma conviction documents resulted in a “substantial and injurious
18 effect or influence” on the trial judge’s finding that the prior conviction allegation was true.
19 *Brecht*, 507 U.S. at 637; *O'Neal*, 513 U.S. at 436.

20 Petitioner next contends that the introduction at his second trial of evidence of the
21 Oklahoma conviction which had not been presented at his first trial, including the
22 testimony of the Oklahoma victim and the certified copies of the prior conviction
23 documents (a fax copy of those documents were used at the first trial), violates federal
24 double jeopardy principles and supports a finding of vindictive prosecution. (ECF No. 43
25 at 34-49.) Respondent answers that double jeopardy principles are not implicated in a
26 retrial of a prior conviction allegation, but does not address the vindictive prosecution
27 aspect of the claim. (Suppl. Ans. Mem. at 13.)

28

1 Although Petitioner presented these claims to the state appellate and supreme courts,
2 neither court expressly addressed the claims when denying the petitions in which they were
3 raised. Accordingly, this Court must presume the silent denial by the state supreme court
4 was a decision on the merits of the ineffective assistance of appellate counsel claim.
5 *Richter*, 562 U.S. at 102; *Johnson*, 133 S. Ct. at 1096. The Court “must determine what
6 arguments or theories . . . could have supported the state court’s decision; and then it must
7 ask whether it is possible fairminded jurists could disagree that those arguments or theories
8 are inconsistent with the holding in a prior decision of” the Supreme Court. *Richter*, 562
9 U.S. at 102.

10 “The Double Jeopardy Clause ‘protects against a second prosecution for the same
11 offense after acquittal. It protects against a second prosecution for the same offense after
12 conviction. And it protects against multiple punishments for the same offense.’” *Brown*
13 *v. Ohio*, 432 U.S. 161, 165 (1977) (quoting *N.C. v. Pearce*, 395 U.S. 711, 717 (1969)
14 (footnotes omitted), *overruled on other grounds by Ala. v. Smith*, 490 U.S. 794, 802
15 (1989)). Petitioner was neither acquitted nor convicted at his first trial, as the jury was
16 unable to reach a verdict at the guilt phase and no trial on the prior conviction enhancement
17 was held. The state supreme court could have reasonably denied this claim on the basis
18 that his second trial did not violate double jeopardy. *Or. v. Kennedy*, 456 U.S. 667, 672
19 (1982) (finding that it has been long-settled that double jeopardy does not preclude retrial
20 after a jury was unable to reach a verdict in the first trial); *Monge v. Cal.*, 524 U.S. 721,
21 728 (1998) (“Historically, we have found double jeopardy protections inapplicable to
22 sentencing proceedings because the determinations at issue do not place a defendant in
23 jeopardy for an offense.”) (citation and internal quote marks omitted).

24 With respect to the vindictive prosecution claim, federal due process forbids
25 “enhanced sentences or charges . . . motivated by actual vindictiveness toward the
26 defendant for having exercised guaranteed rights.” *Bono v. Benov*, 197 F.3d 409, 416 (9th
27 Cir. 1999) (quoting *Wasman v. United States*, 468 U.S. 559, 568 (1984) (holding that the
28 Due Process Clause of the Fourteenth Amendment prevents increased sentences actually

1 motivated by vindictive retaliation by the judge)). This claim is apparently based on
2 Petitioner's contention that he was only prosecuted because the prosecutor believed
3 Laurel's story of forcible rape rather than his story that he was a victim of robbery simply
4 because he had previously been convicted of rape and despite the fact that the first jury was
5 unable to reach a verdict at the first trial. (See Pet. at 67-70.) The state supreme court
6 could have reasonably denied this claim on the basis that Petitioner has identified no
7 constitutional right he exercised which caused the prosecutor to charge him with rape rather
8 than charge Laurel with robbery, nor has he alleged any basis for the decision to bring the
9 charges against him other than a proper exercise of prosecutorial discretion. *Nunes v.*
10 *Ramirez-Palmer*, 485 F.3d 432, 441 (9th Cir. 2007) (denying habeas relief where state
11 prisoner failed to set forth "exceptionally clear proof" necessary to overcome the
12 presumption that the prosecutor's discretion was lawful) (quoting *McCleskey v. Kemp*, 481
13 U.S. 279, 297 (1987)); *see also United States v. Goodwin*, 457 U.S. 368, 380 (1982)
14 (holding that a defendant must demonstrate that the charges were brought "solely to
15 penalize the defendant and could not be justified as a proper exercise of prosecutorial
16 discretion.")

17 Petitioner next claims that the trial court violated his rights to due process and to be
18 free from double jeopardy by allowing the information to be amended to allege two strikes
19 arising from the Oklahoma conviction rather than one after the case was submitted to the
20 jury in the second trial. (ECF No. 43 at 34-49.) Respondent answers that this claim is
21 without merit because the state court correctly found that Petitioner had ample notice that
22 the Oklahoma conviction constituted two strikes, and that adding new counts on a retrial
23 does not violate double jeopardy principles. (Suppl. Ans. Mem. at 17-19.)

24 Petitioner objected at trial that the amendment was untimely and on the basis that
25 jeopardy attached at the first trial. (RT 983.) The trial judge found that the defense was in
26 possession of the prior conviction documents prior to the first trial (although at the first
27 trial the prosecutor used a sanitized fax copy in his case in chief), obtained an admission
28 from the defense that there was no particularized prejudice arising from the amendment,

1 and permitted the amendment based on California Penal Code § 969 which provides a
2 prosecutor with discretion to amend an information to add a prior conviction enhancement
3 before a jury is excused. (RT 983-85.) As quoted above, the state appellate court on direct
4 appeal found there was no due process violation arising from the amendment because
5 Petitioner was on notice that the Oklahoma conviction constituted two offenses,
6 kidnapping and rape. (Lodgment No. 6, *People v. Williams*, No. D06374, slip op. at 19-
7 21.)

8 Thus, the state court found that the amendment was permissible under state law, and
9 that Petitioner had fair and timely notice that the prosecutor intended to use his prior rape
10 conviction to enhance his sentence. The United States Supreme Court has “repeatedly held
11 that a state court’s interpretation of state law, including one announced on direct appeal of
12 the challenged conviction, binds a federal court sitting in habeas corpus.” *Bradshaw v.*
13 *Richey*, 546 U.S. 74, 76 (2005) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)); *see also*
14 *People v. Alvarado*, 207 Cal. App. 3d 464, 478 (1989) (noting that trial courts have
15 discretion to permit amendment to a complaint to allege a prior felony conviction under
16 Penal Code § 969). The state court adjudication of this claim on the basis that amendment
17 was permissible under state law and that Petitioner had adequate notice is neither contrary
18 to, nor involves an unreasonable application of, clearly established federal law, and it is
19 not based on an unreasonable determination of the facts.

20 Petitioner next contends that his rights under the Confrontation Clause of the Sixth
21 Amendment and the Due Process Clause of the Fifth Amendment were violated by the
22 introduction of the evidence of his Oklahoma conviction because the narrative of the crime
23 contained false statements and because he was not permitted to confront the person who
24 certified the documentary evidence of the conviction. (ECF No. 43 at 50-53.) As set forth
25 above, the state appellate court addressed a claim on the first direct appeal challenging the
26 use of the narrative of the crime, stating: “Because we conclude the prosecution’s narrative
27 was not part of the record of conviction, we need not address defendant’s argument that
28 admission of the report violated his constitutional right to confront witnesses.” (Lodgment

1 No. 6, *People v. Williams*, No. D063742, slip op. at 18 n.6.) The claim alleging an inability
2 to cross-examine the person who authenticated the prior conviction documents was raised
3 in Petitioner's *pro se* briefs in the appellate and supreme courts in his second appeal.
4 Respondent contends that the denial of the claim by the state appellate court in the second
5 appeal (on the basis that the issues raised in the *pro se* supplemental brief were fully
6 litigated in the first appeal and are therefore "not now properly before us in this, defendant's
7 second appeal"), means the claim was never properly presented to the state court. (Suppl.
8 Ans. Mem. at 21.) Respondent argues that the claim is technically exhausted because
9 Petitioner no longer has state court remedies available, and it is therefore procedurally
10 defaulted. (*Id.*) Petitioner replies that no default occurred because the state court was
11 properly presented with but evaded review of the claim. (Suppl. Traverse at 27-28.)

12 The Confrontation Clause does not apply to non-testimonial evidence. *Davis v.*
13 *Washington*, 547 U.S. 813, 821 (2006). Documents regarding the fact of Petitioner's prior
14 conviction are non-testimonial. *Melendez-Diaz v. Mass.*, 557 U.S. 305, 321 (2005); *United*
15 *States v. Weiland*, 420 F.3d 1062, 1077 (9th Cir. 2005) (holding that the Confrontation
16 Clause does not preclude admission of records of prior convictions because they are "not
17 testimonial in nature.") Thus, even if the claim was properly raised in the state court, the
18 state supreme court's silent denial of the claim is objectively reasonable because that court
19 could have denied this claim on the basis that the records of the prior conviction were not
20 testimonial. To the extent the claim was not properly presented to the state court, this Court
21 can deny it because it does not raise even a colorable claim. *See* 28 U.S.C. § 2254(b)(2)
22 ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding
23 the failure of the applicant to exhaust the remedies available in the courts of the State.");
24 *see also Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005) (holding "that a federal
25 court may deny an unexhausted petition on the merits only when it is perfectly clear that
26 the applicant does not raise even a colorable federal claim.")

27 Furthermore, even if the admission of the documents violated the Confrontation
28 Clause because Petitioner was unable to confront the person who certified the records, any

1 error is clearly harmless for the same reason discussed above why any error in ensuring the
2 documents were properly authenticated is harmless. In light of Petitioner's stipulation at
3 trial that he had been convicted of those crimes, the victim's testimony that the crimes
4 occurred and that she witnessed Petitioner enter a guilty plea, and the sex crimes unit
5 detective's testimony that Petitioner admitted he had served 25 years in prison as a result
6 of his guilty plea, it is clear that any error in admitting the documents without requiring the
7 person who certified them to testify and submit to cross-examination did not have a
8 substantial or injurious effect on the sentencing proceeding. *Brecht*, 507 U.S. at 637-38.

9 Finally, Petitioner contends the evidence was insufficient to enhance his sentence
10 under the Three Strikes law, and that using the evidence to double his sentence violated
11 federal due process and double jeopardy principles. (ECF No. 43 at 54-63.) As set forth
12 above, Petitioner has failed to allege a federal due process violation arising from the failure
13 to properly plead and prove his prior conviction, and any such violation would amount to
14 harmless error. In addition, the Supreme Court has repeatedly rejected double jeopardy
15 challenges to recidivist sentencing schemes. *See Witte v. United States*, 515 U.S. 389, 400
16 (1995) ("In repeatedly upholding such recidivism statutes, we have rejected double
17 jeopardy challenges because the enhanced punishment imposed for the later offense is not
18 to be viewed as either a new jeopardy or additional penalty for the earlier crimes, but
19 instead as a stiffened penalty for the latest crime, which is considered to be an aggravated
20 offense because a repetitive one.") (citations and internal quote marks omitted).

21 In sum, the Court finds that (1) Petitioner should be granted leave to amend the
22 Petition to include the claims raised in the Proposed Amendment; (2) the state court
23 adjudication of those claims is neither contrary to, nor involves an unreasonable application
24 of, clearly established federal law, and is not based on an unreasonable determination of
25 the facts in light of the evidence presented in the state court proceedings; and (3) any errors
26 are harmless. Accordingly, the Court recommends granting Petitioner leave to amend the
27 Petition to include these claims and recommends denying habeas relief as to the claims.

28

1 **D. Claim Two**

2 Petitioner contends in claim two that the prosecution withheld exculpatory and
3 impeachment evidence by failing to perform DNA testing of the vaginal swabs collected
4 from Laurel and the fingernail swabs and pubic hairs collected from him, in violation of
5 *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that “the suppression by the prosecution
6 of evidence favorable to an accused upon request violates due process where the evidence
7 is material either to guilt or to punishment.”) (Pet. at 7, 27-38.) Respondent answers that
8 the claim is without merit because there was no suppression, destruction, or failure to
9 preserve evidence, all of which was available to the defense for testing, and the silent denial
10 by the state supreme court is therefore neither contrary to, nor involves an unreasonable
11 application of, clearly established federal law. (Ans. Mem. at 15-17.) Petitioner replies
12 that the prosecutor violated *Brady* by failing to test the evidence. (Traverse at 7.)

13 Petitioner presented this claim to the state supreme court in a habeas petition.
14 (Lodgment No. 12 at 8-22 [ECF No. 19-18 at 10-23].) That court denied the petition in an
15 order which stated: “Petition for writ of habeas corpus denied. Kruger, J., was absent and
16 did not participate.” (Lodgment No. 13, *In re Williams*, No. S230518, order at 1 (Mar. 9,
17 2016).) Petitioner did not present this claim to any lower state court. This Court therefore
18 must treat the silent denial by the state supreme court as an adjudication on the merits of
19 the claim. *Richter*, 562 U.S. at 102. The Court “must determine what arguments or theories
20 . . . could have supported the state court’s decision; and then it must ask whether it is
21 possible fairminded jurists could disagree that those arguments or theories are inconsistent
22 with the holding in a prior decision of” the Supreme Court. *Id.*

23 Mary Beth Sciarretta, a Criminalist with the San Diego Police Department, testified
24 that Petitioner’s DNA was found on Laurel B.’s left breast swab, and Laurel’s DNA was
25 found on Petitioner’s penile swab. (RT 705-13.) She testified that she did not submit
26 Laurel’s vaginal swabs for DNA testing because she did not observe any sperm cells and
27 therefore “the probability of obtaining any DNA foreign to the victim automatically
28 decreases.” (RT 706-07.) She testified that only the penile and scrotum swabs from

1 Petitioner were tested for DNA because judicious use of her laboratory's resources require
2 that she typically will "choose the most probative evidence," which was the penile and
3 scrotum swabs, and the other evidence was not as probative. (RT 708-09.) On cross-
4 examination defense counsel asked Sciarretta why she did not test the other contents of the
5 sexual examination kits, and she answered that the decision was "based on a variety of
6 issues. If we are able to obtain results – we have to choose certain pieces of evidence to
7 test. We can't just test everything. So we choose what we think is the most probative to
8 the case." (RT 717.) She testified that the fingernail swabs and hair samples from
9 Petitioner were less probative than the penile and vaginal swabs, particularly because no
10 semen or sperm cells had been found. (RT 706, 717-18.)

11 The failure to test evidence by itself does not support a claim for habeas relief. *See*
12 *Villafuerte v. Stewart*, 111 F.3d 616, 625-26 (9th Cir. 1997) (finding no due process
13 violation arising from the failure to test a semen sample absent a showing of bad faith).
14 Furthermore, Petitioner can demonstrate materiality under *Brady* only if the suppression of
15 the evidence deprived him of a fair trial. *United States v. Bagley*, 473 U.S. 667, 678 (1985);
16 *see Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (holding that prejudice under *Brady* is
17 shown when "there is a reasonable probability of a different result" as to guilt or penalty).

18 Petitioner has made no showing that the failure to test all the biological evidence
19 affected his trial in any way whatsoever. He contends that the jury questioned the absence
20 of the results because they asked for a read back of Sciarretta's testimony, and speculates
21 that it is impossible to know what evidence might have resulted from the testing. (Traverse
22 at 7.) However, the jury was unable to reach a verdict on count four, rape by a foreign
23 object based on Laurel's testimony that Petitioner placed his finger in her vagina. If his
24 fingernail swab had been tested and revealed Laurel's DNA, the jury might have convicted
25 him of that offense. In fact, defense counsel argued to the jury in closing that the
26 prosecution's failure to test Petitioner's fingernail swab when it could have corroborated
27 Laurel's story constituted a lack of proof. (RT 945-46.) The state supreme court could
28 have reasonably denied this claim on the basis that there is no showing of a reasonable

1 probability of a more favorable result had Petitioner's fingernail swab or hair been tested.
2 *Richter*, 562 U.S. at 102; *Whitley*, 514 U.S. at 434; *Bagley*, 473 U.S. at 678. Nor is there
3 any basis to find that the state court adjudication of the claim is based on an unreasonable
4 determination of the facts. *Miller-El*, 537 U.S. at 340. Accordingly, the Court finds that
5 the state court adjudication of claim two is neither contrary to, nor involves an unreasonable
6 application of, clearly established federal law, and recommends denial of this claim.

7 **E. Claim Three**

8 Petitioner contends in claim three that insufficient evidence exists to support his
9 convictions for forcible rape and forcible oral copulation because the jury found the knife
10 use allegation not true, because the sex acts occurred after any physical violence took place,
11 and because Laurel's trial testimony diverged somewhat from her statements to the police,
12 the examining nurse, and her testimony at the first trial and the preliminary hearing. (Pet.
13 at 8, 56-64; Traverse at 2-10.) Respondent answers that there was other evidence which
14 supported the jury's finding that Petitioner committed the offenses with the use of force
15 other than with the use of a knife, and that a challenge to Laurel's credibility is not
16 cognizable on federal habeas. (Ans. Mem. at 18-20.)

17 Petitioner presented this claim to the state supreme court in a habeas petition.
18 (Lodgment No. 12 at 23-35 [ECF No. 19-18 at 25-37].) That court denied the petition in
19 an order which stated: "Petition for writ of habeas corpus denied. Kruger, J., was absent
20 and did not participate." (Lodgment No. 13, *In re Williams*, No. S230518 order at 1.)
21 Because Petitioner did not present this claim to any lower state court, this Court must treat
22 the silent denial by the state supreme court as an adjudication on the merits of the claim,
23 and "must determine what arguments or theories . . . could have supported the state court's
24 decision; and then it must ask whether it is possible fairminded jurists could disagree that
25 those arguments or theories are inconsistent with the holding in a prior decision of" the
26 Supreme Court. *Richter*, 562 U.S. at 102.

27 "[T]he Due Process Clause protects the accused against conviction except upon
28 proof beyond a reasonable doubt of every fact necessary to constitute the crime with which

1 he is charged.” *In re Winship*, 397 U.S. 358, 364 (1970). The Fourteenth Amendment’s
2 Due Process Clause is violated, and an applicant is entitled to federal habeas corpus relief,
3 “if it is found that upon the record evidence adduced at the trial no rational trier of fact
4 could have found proof of guilt beyond a reasonable doubt.” *Jackson*, 443 U.S. at 324.
5 The Court must apply an additional layer of deference in applying the *Jackson* standard.
6 *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). Federal habeas relief functions as
7 a “guard against extreme malfunctions in the state criminal justice systems,” not as a means
8 of error correction. *Richter*, 562 U.S. at 103 (quoting *Jackson*, 443 U.S. at 332 n.5).

9 There is no merit to Petitioner’s contention that insufficient evidence was presented
10 at trial to support the jury’s verdicts simply because the jury returned a not true finding on
11 the knife use allegation, or because all of the physical violence testified to by Laurel
12 occurred prior to the sexual assault. Rather, Laurel’s testimony provided sufficient
13 evidence that Petitioner used force or fear to make her submit to the sex acts for which he
14 was convicted. She testified that immediately after she declined his offer to pay to perform
15 oral sex on her, she gathered her things and told him she was leaving, but “he turned really
16 aggressive” and “push[ed] me and kept me from getting to the door.” (RT 559.) When
17 asked what he did to prevent her from leaving, she testified: “He reached into a drawer and
18 pulled out something I think was a knife. My memory is kind of blurry. But he held
19 something to my throat and – and told me I wasn’t leaving, and I started to realize I was
20 trapped.” (*Id.*) She testified that Petitioner put the thing that she thought was a knife away,
21 and then offered her the option of leaving, “but when I said I wanted to leave he hit me
22 He punched my face with his fist . . . a few times.” (RT 561.) She testified that she
23 thereafter submitted to his requests to orally copulate him and to place his penis and fingers
24 in her vagina because she believed had she refused he would carry through on his threats
25 to hurt or kill her and to tell the Hell’s Angels where she lived. (RT 564-68.)

26 The jury was instructed that in order to find Petitioner guilty of forcible rape or
27 forcible oral copulation, they were required to find that Petitioner had sexual intercourse
28 or oral copulation with Laurel, that Laurel did not consent, and that he accomplished the

1 oral copulation or intercourse by force, violence, duress, menace or fear of immediate and
2 unlawful bodily injury. (RT 885; CT 72-75 [ECF No. 29-5 at 78-81].) The jury was
3 instructed that intercourse or oral copulation “is accomplished by force if a person uses
4 enough physical force to overcome the other person’s will,” and “is accomplished by fear
5 if the woman is actually and reasonably afraid, or she is actually but unreasonably afraid
6 and the defendant knows of her fear and takes advantage of it.” (RT 886; CT 73-75 [ECF
7 No. 29-5 at 79-81].) Laurel’s testimony that she submitted to the sex acts due to the force
8 Petitioner used and his threats which she took seriously adequately established each of the
9 elements of forcible rape and forcible oral copulation as those elements are defined by state
10 law. *See Jackson*, 443 U.S. at 324 n. 16 (holding that federal habeas courts must analyze
11 *Jackson* claims “with explicit reference to the substantive elements of the criminal offense
12 as defined by state law.”) Petitioner’s allegation that the force element was not satisfied
13 because the jury returned a not true finding on the knife use allegation, or because the sex
14 acts occurred after he held a knife to Laurel’s throat and punched her in the face, ignores
15 the evidence of his ongoing threats and the atmosphere of fear Laurel testified they created.
16 *See Coleman v. Johnson*, 566 U.S. 650 ___, 132 S. Ct. 2060, 2065 (2012) (“The jury in
17 this case was convinced, and the only question under *Jackson* is whether that finding was
18 so insupportable as to fall below the threshold of bare rationality.”)

19 Petitioner is not entitled to relief based on his argument that Laurel was not a credible
20 witness because her trial testimony diverged in minor ways with her prior testimony and
21 her statements to the police and the nurse. (Pet. at 57-59; Traverse at 8.) An examination
22 of Laurel’s credibility is not an appropriate inquiry under *Jackson*. *See Jackson*, 443 U.S.
23 at 319 (federal habeas courts must respect the “factfinder’s province to determine witness
24 credibility, resolve evidentiary conflicts, and draw reasonable inferences from proven
25 facts” by assuming “the trier of fact resolved all such conflicts in favor of the prosecution.”)

26 In light of the additional layer of deference required under the *Jackson* standard, *see*
27 *Juan H.*, 408 F.3d at 1274, and the admonition that federal habeas relief functions as a
28 “guard against extreme malfunctions in the state criminal justice systems,” and not simply

1 as a means of error correction, *Richter*, 562 U.S. at 103, it is clear that the state supreme
2 court could have reasonably denied claim three on the basis that sufficient evidence was
3 presented at trial to support Petitioner's convictions. The Court finds that the state court
4 adjudication of claim three is neither contrary to, nor involves an unreasonable application
5 of, clearly established federal law. *Richter*, 562 U.S. at 102; *Jackson*, 443 U.S. at 324; *In*
6 *re Winship*, 397 U.S. at 364; *Juan H.*, 408 F.3d at 1274. Nor is there any basis to find that
7 the state court adjudication is based on an unreasonable determination of the facts. *Miller-*
8 *El*, 537 U.S. at 340. This Court recommends denial of this claim.

9 **F. Claim Four**

10 Petitioner contends in claim four that he received ineffective assistance of counsel
11 because his trial counsel (1) failed to obtain Petitioner's cell phone records, surveillance
12 video from the gas station or other businesses near the parking lot, or interview employees
13 of those businesses; (2) failed to raise a vindictive prosecution defense; (3) wished to call
14 as character witnesses only women Petitioner had dated and had consensual sex with rather
15 than women he had helped when they were vulnerable and did not take advantage of; (4)
16 failed to challenge the prosecution's failure to test all of the biological evidence as alleged
17 in claim two; and (5) failed to seek dismissal based on the jury's not true finding on the
18 knife use allegation as alleged in claim three. (Pet. at 66-72.)

19 Respondent answers that this claim is without merit because defense counsel was
20 not deficient in any of those respects and because Petitioner was not prejudiced by any of
21 counsel's alleged failures. (Ans. Mem. at 20-24.) Respondent contends that the silent
22 denial of this claim by the state supreme court is therefore neither contrary to, nor involves
23 and unreasonable application of, clearly established federal law. (*Id.*)

24 Petitioner presented this claim to the state supreme court in a habeas petition.
25 (Lodgment No. 12 at 36-45 [ECF No. 19-18 at 39-48].) The petition was summarily
26 denied. (Lodgment No. 13, *In re Williams*, No. S230518 order at 1.) Because this claim
27 was not presented to any lower state court, this Court must treat the silent denial by the
28 state supreme court as an adjudication on the merits of the claim, and "must determine

1 what arguments or theories . . . could have supported the state court's decision; and then it
2 must ask whether it is possible fairminded jurists could disagree that those arguments or
3 theories are inconsistent with the holding in a prior decision of" the Supreme Court.
4 *Richter*, 562 U.S. at 102.

5 The clearly established United States Supreme Court law governing ineffective
6 assistance of counsel claims is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).
7 See *Baylor v. Estelle*, 94 F.3d 1321, 1323 (9th Cir. 1996) (stating that *Strickland* "has long
8 been clearly established federal law determined by the Supreme Court of the United
9 States"). For ineffective assistance of counsel to provide a basis for habeas relief,
10 Petitioner must show that counsel's performance was deficient. *Strickland*, 466 U.S. at
11 687. "This requires showing that counsel made errors so serious that counsel was not
12 functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*
13 Petitioner must also show that counsel's deficient performance prejudiced the defense,
14 which requires showing that "counsel's errors were so serious as to deprive [Petitioner] of
15 a fair trial, a trial whose result is reliable." *Id.* To show prejudice, Petitioner need only
16 demonstrate a reasonable probability that the result of the proceeding would have been
17 different absent the error. *Id.* at 694. A reasonable probability is "a probability sufficient
18 to undermine confidence in the outcome." *Id.* Petitioner must establish both deficient
19 performance and prejudice to establish ineffective assistance of counsel. *Id.* at 687.

20 "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Ky.*, 559 U.S.
21 356, 371 (2010). "The standards created by *Strickland* and section 2254(d) are both highly
22 deferential and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S.
23 at 105 (citations omitted). These standards are "difficult to meet" and "demands that state
24 court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181
25 (2011). "Representation is constitutionally ineffective only if it 'so undermined the proper
26 functioning of the adversarial process' that the defendant was denied a fair trial." *Richter*,
27 562 U.S. at 110 (quoting *Strickland*, 466 U.S. at 686).

1 Petitioner first contends that his appointed counsel did not conduct an adequate pre-
2 trial investigation because counsel refused to obtain the surveillance video from the Ocean
3 Beach gas station or any of the businesses near the parking lot, or obtain statements from
4 employees of those businesses. (Pet. at 68-69.) He contends those records could have
5 shown that the RV left for the gas station and returned to the parking lot between 3:45 and
6 4:00 a.m. (*Id.*) Petitioner contends that this evidence could have been used to refute
7 Laurel's testimony that she escaped from the RV about 7:00 a.m. with \$1,699 of his money,
8 when (according to Petitioner) she in fact left between 4:30 and 5:00 a.m. with \$2,430 of
9 his money, which gave Laurel two hours to confer with Stacy and decide what to do to
10 avoid being charged with robbery. (*Id.*; Traverse at 11-15.)

11 Assuming the truth of Petitioner's allegation, that he drove the RV to the gas station
12 for cigarettes and returned to the parking lot about 3:45 and 4:00 a.m., there is no showing
13 that video surveillance evidence or eyewitnesses to those acts would have challenged
14 Laurel's timeline testimony. Laurel testified that Stacy left the RV "maybe" about 3:30 or
15 4:00 a.m., but said she did not "know for sure." (RT 551.) Stacy testified that she (Stacy)
16 left the RV about 4:00 a.m., and that Laurel came home about "7:30-ish." (RT 604-06.)
17 Laurel testified that when the police did not arrive right away after Stacy called them,
18 Laurel called 911 herself because she was afraid Petitioner would get away. (RT 572.)
19 Officer Gustafson testified that he was dispatched to Laurel and Stacy's house at 8:08 a.m.
20 (RT 627.) Petitioner has not demonstrated how video or eyewitness evidence proving that
21 the RV went to the gas station and returned to the parking lot between 3:45 and 4:00 a.m.
22 would have impeached Laurel's trial testimony. His speculation that video surveillance
23 tapes from, or employees of, nearby businesses, assuming they existed and assuming the
24 employees of those businesses were at work, could support his contention that Laurel left
25 the RV between 4:30 and 5:00 a.m. rather than around 7:00 a.m., does not provide a basis
26 to grant habeas relief. Speculative and conclusory allegations are insufficient to prove that
27 counsel provided ineffective assistance. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977);
28 *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994).

1 Petitioner next claims that counsel should have obtained his cell phone records in
2 order to show that Laurel programmed his number into her cell phone and then called his
3 phone to confirm. (Pet. at 69.) He contends this evidence could have been used to argue
4 to the jury that Petitioner had a way of finding Laurel and thereby refute the prosecutor's
5 closing argument to the jury where "the prosecutor continuously inferred that the Petitioner
6 had no way to find Laurel or Stacy, so why would they have to get the Petitioner arrested
7 and out of the way?" (*Id.*; Traverse at 11.)

8 The state supreme court could have reasonably rejected this claim on the basis that
9 Petitioner failed to show his trial counsel was deficient in failing to obtain the cell phone
10 records. Assuming Petitioner informed counsel that his phone records would have shown
11 Laurel programmed his number into her phone, counsel could have asked that of Laurel at
12 trial, rather than rely on phone records, if counsel thought the jury should be informed that
13 Petitioner had a way of finding Laurel. In light of Laurel's testimony that Petitioner said
14 he was going to tell the Hell's Angels how to find her in order to scare her into staying with
15 him and submitting to sex, it could be considered reasonable trial strategy for defense
16 counsel to forgo pointing out to the jury that Petitioner could track Laurel down with her
17 phone number, which he had in any case obtained through the same ruse he had used to get
18 her into his RV to rape her. *See Strickland*, 466 U.S. at 689 ("There are countless ways to
19 provide effective assistance in any given case. Even the best criminal defense attorneys
20 would not defend a particular client in the same way."); *Matylinsky v. Budge*, 577 F.3d
21 1083, 1091 (9th Cir. 2009) (holding that a petitioner must overcome a "heavy burden of
22 proving that counsel's assistance was neither reasonable nor the result of sound trial
23 strategy.")

24 The state supreme court could also have reasonably rejected this claim on the basis
25 that Petitioner had failed to demonstrate prejudice. *See Strickland*, 466 U.S. at 687 (both
26 prejudice and deficient performance must be shown in order to establish constitutionally
27 ineffective assistance of counsel). Defense counsel argued to the jury that if Petitioner had
28 awoke and called the police to report a robbery before Laurel had called the police to report

1 a rape, she would have been the one arrested, and that it was unfair to convict Petitioner
2 simply because he overslept that morning. (RT 947.) The jury was able to draw a
3 reasonable inference that Laurel intended to keep the money she took from Petitioner, even
4 after accusing him of rape, in that she did not mention the money to the police until she
5 was asked by the police an hour and a half after they first contacted her if there was
6 anything in Petitioner's pants she took from the RV. (RT 640-45.) Petitioner has not
7 shown a reasonable probability that the result of the proceeding would have been different
8 had counsel brought out at trial that Petitioner knew how to find Laurel through her phone
9 number and therefore Laurel had a motive to be the first to call the police in order to protect
10 herself from being accused of robbery. *Strickland*, 466 U.S. at 694; *Richter*, 562 U.S. at
11 112 ("The likelihood of a different result must be substantial, not just conceivable.")

12 Petitioner next claims that counsel was deficient in failing to raise a claim of
13 prosecutorial vindictiveness based on the prosecution's assumption that Petitioner was
14 guilty of rape rather than a victim of robbery simply because he had been previously
15 convicted of rape in Oklahoma. (Pet. at 70.) As set forth above, a vindictive prosecution
16 claim is without merit because Petitioner has identified no constitutional right he exercised
17 which caused the prosecutor to charge him with rape rather than charge Laurel with
18 robbery, nor any other basis for the decision to bring the charges against him other than a
19 proper exercise of prosecutorial discretion. *Nunes*, 485 F.3d at 441 (denying habeas relief
20 where state prisoner failed to set forth "exceptionally clear proof" necessary to overcome
21 the presumption that the prosecutor's discretion was lawful) (quoting *McCleskey*, 481 U.S.
22 at 297); *Goodwin*, 457 U.S. at 380 (holding that a defendant must demonstrate that the
23 charges were brought "solely to penalize the defendant and could not be justified as a
24 proper exercise of prosecutorial discretion.") The state supreme court could have
25 reasonably denied this claim on the basis that Petitioner had demonstrated neither deficient
26 performance nor prejudice.

27 Petitioner next claims counsel was deficient in failing to find and call as character
28 witnesses women he had helped and did not take advantage of when they were vulnerable.

1 (Pet. at 70.) He identifies those witnesses as two “women in need of shelter and food,” and
2 a “woman who assisted me in helping the other two women,” all while he was assisting a
3 local church in handing out water and sack lunches to the homeless. (Traverse at 26.)
4 Petitioner contends defense counsel only wanted to call women whom Petitioner had dated
5 or had sex with as character witnesses, despite the fact that Petitioner only knew of two
6 such women, who could in any case only be located through his cell phone records which
7 counsel had failed to obtain because their contact information had been deleted from his
8 phone. (Pet. at 68-70; Traverse at 26.)

9 Even assuming the three women identified by Petitioner could have been located,
10 either with his phone records or otherwise, and assuming the trial judge would have
11 allowed such witnesses to testify, at best it constituted evidence that Petitioner did not rape
12 every woman he met, and at worst it would have opened the door to the prosecution to
13 challenge Petitioner’s character. Petitioner has not overcome the strong presumption that
14 the decision by trial counsel not to find and call those witnesses, assuming they could be
15 found, was sound trial strategy. *See Strickland*, 466 U.S. at 680 (“[T]he defendant must
16 overcome the presumption that, under the circumstances, the challenged action might be
17 considered sound trial strategy.”) Neither has he shown prejudice arising from counsel’s
18 failure to find those women and have them testify at trial, or the failure to find and have
19 testify the two women with whom Petitioner indicates he had engaged in non-violent sex.
20 *Id.* at 694. The state supreme court could have reasonably denied this claim on the basis
21 that, in light of the testimony of the two women Petitioner was convicted of raping, there
22 is no reasonable probability that testimony from women who had non-forcible sex with
23 Petitioner in his RV, or testimony from women who Petitioner handed out water and sack
24 lunches without raping them, would have affected the jury verdict.

25 Finally, Petitioner alleges defense counsel failed to challenge the prosecutor’s failure
26 to test the biological evidence as alleged in claim two and failed to file a post-verdict
27 motion to dismiss based on the jury’s not true finding on the knife use allegations as alleged
28 in claim three. (Pet. at 71-72.) As set forth above, those underlying claims are without

1 merit. The state supreme court could therefore have reasonably denied this aspect of claim
2 four on the basis that Petitioner had failed to demonstrate deficient performance or
3 prejudice as a result of trial counsel's actions in this regard.

4 In sum, the Court finds that the state supreme court could have reasonably denied
5 claim four on the basis that Petitioner had failed to allege facts which, if true, demonstrated
6 deficient performance of trial counsel or prejudice as a result. *See Richter*, 562 U.S. at 110
7 ("Representation is constitutionally ineffective only if it 'so undermined the proper
8 functioning of the adversarial process' that the defendant was denied a fair trial.") (quoting
9 *Strickland*, 466 U.S. at 686). Accordingly, the Court finds that the state court adjudication
10 of claim four is neither contrary to, nor involves an unreasonable application of, clearly
11 established federal law, and thus recommends denial of this claim.

12 **G. Claim Five**

13 Petitioner contends in his final claim that he received ineffective assistance of
14 appellate counsel for not raising the claims presented here, other than claim one, and for
15 failing to raise a claim based on trial counsel's failure to object to the untimely amendment
16 of the information to allege that the Oklahoma rape conviction constituted a second strike.
17 (Pet. at 10, 74-76.) Respondent answers that Petitioner has shown neither deficient
18 performance by appellate counsel nor prejudice as a result of failing to raise claims that so
19 obviously lack merit, and that the silent denial of the claim by the state supreme court is
20 neither contrary to, nor involves an unreasonable application of, clearly established federal
21 law. (Ans. Mem. at 24-25.)

22 Petitioner presented this claim to the state supreme court in a habeas petition.
23 (Lodgment No. 12 at 46-49 [ECF No. 19-18 at 50-53].) That court denied the petition in
24 an order which stated: "Petition for writ of habeas corpus denied. Kruger, J., was absent
25 and did not participate." (Lodgment No. 13, *In re Williams*, No. S230518 order at 1.)
26 Because Petitioner did not present this claim to any lower state court, this Court must treat
27 the silent denial by the state supreme court as an adjudication on the merits of the claim,
28 and "must determine what arguments or theories . . . could have supported the state court's

1 decision; and then it must ask whether it is possible fairminded jurists could disagree that
2 those arguments or theories are inconsistent with the holding in a prior decision of" the
3 Supreme Court. *Richter*, 562 U.S. at 102.

4 Appellate counsel's failure to raise claims on appeal which, for the reasons discussed
5 throughout this Report, lack merit and was neither deficient nor prejudicial. *See Turner v.*
6 *Calderon*, 281 F.3d 851, 872 (9th Cir. 2002) (explaining that the *Strickland* standard
7 applies to claims of ineffective assistance of appellate counsel); *Baumann v. United States*,
8 692 F.2d 565, 572 (9th Cir. 1982) (stating that an attorney's failure to raise a meritless legal
9 argument does not constitute ineffective assistance); *Gustave v. United States*, 627 F.2d
10 901, 906 (9th Cir. 1980) ("There is no requirement that an attorney appeal issues that are
11 clearly untenable.")

12 With respect to Petitioner's claim that appellate counsel was deficient in failing to
13 raise a claim alleging trial counsel failed to object to amendment of the information to
14 charge two strikes arising from the Oklahoma conviction rather than one, trial counsel did
15 in fact object to the amendment on the basis that it was untimely and that it violated double
16 jeopardy coming after the previous mistrial. (RT 981-85.) The prosecutor argued that
17 because there had been a mistrial at the guilt phase of the first trial, and the prior conviction
18 allegations had been bifurcated in the first trial, there had never been a trial on the prior
19 convictions. (RT 983-84.) Because a ruling on the issue was unnecessary unless the jury
20 found Petitioner guilty, the trial judge tabled the issue until the jury sent a note indicating
21 they had reached a verdict, at which point, before the verdicts were taken, the judge
22 overruled the defense objections on the basis that California Penal Code § 969 allowed the
23 prosecutor to amend the information to add a prior conviction enhancement at any time
24 before a jury is excused. (RT 985.) The state supreme court could have reasonably denied
25 this aspect of claim five on the basis that appellate counsel was not deficient in failing to
26 raise a claim that trial counsel failed to object to the amendment because trial counsel did
27 in fact object. The state court could have also reasonably denied the claim on the basis that
28 Petitioner was not prejudiced by appellate counsel's failure to raise the claim because the

1 objection was properly overruled. *See Alvarado*, 207 Cal. App. 3d at 478 (noting that trial
2 courts have discretion to permit amendment to allege a prior felony conviction before the
3 jury announces a verdict).

4 In sum, the state supreme court could have reasonably denied claim five on the basis
5 that Petitioner had failed to allege facts which, if true, demonstrate deficient performance
6 of appellate counsel or prejudice as a result. Accordingly, the Court finds that the state
7 court adjudication of claim five is neither contrary to, nor involves an unreasonable
8 application of, clearly established federal law, and thus recommends denial of this claim.

9 **H. Evidentiary Hearing**

10 The Court recommends denying Petitioner's request for an evidentiary hearing
11 because, as discussed above, even assuming Petitioner's allegations are true, the state court
12 record provides an adequate basis to adjudicate his claims. *See Campbell v. Wood*, 18 F.3d
13 662, 679 (9th Cir. 1994) (holding that an evidentiary hearing is not necessary where the
14 federal claim can be denied on the basis of the state court record, and where the petitioner's
15 allegations, even if true, do not provide a basis for habeas relief).

16 **IV. CONCLUSION**

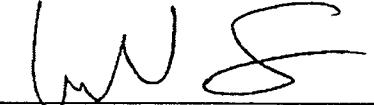
17 For all of the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the Court
18 issue an Order: (1) approving and adopting this Report and Recommendation, (2) granting
19 Petitioner leave to amend the Petition to include the claims presented in the Proposed
20 Amendment to the Petition [ECF No. 43], and (3) directing that Judgment be entered
21 denying the Petition.

22 **IT IS ORDERED** that no later than October 6, 2017, any party to this action may
23 file written objections with the Court and serve a copy on all parties. The document should
24 be captioned "Objections to Report and Recommendation."

25 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
26 the Court and served on all parties no later than November 3, 2017. The parties are advised
27 that failure to file objections with the specified time may waive the right to raise those
28

1 objections on appeal of the Court's order. *See Turner v. Duncan*, 158 F.3d 449, 455 (9th
2 Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

3 DATED: August 18, 2017

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7 Hon. William V. Gallo
8 United States Magistrate Judge
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

James Michael Williams,
Petitioner
v.
Daniel Paramo, Warden, et al.,
Respondents

Case No.: 15-cv-2576-AJB-WVG

ORDER:

- (1) GRANTING PETITIONER'S REQUEST TO AMEND HIS PETITION (Doc. No. 43);**
- (2) ADOPTING THE REPORT AND RECOMMENDATION (Doc. No. 56);**
- (3) DISMISSING BOTH PETITIONER'S HABEAS PETITIONS (Doc. Nos. 1, 43); and**
- (4) DENYING MOTION FOR CERTIFICATE OF APPEALABILITY (Doc. No. 60).**

Before the Court is Petitioner's habeas petition, (Doc. No. 1), motion for proposed amendment to the habeas petition, (Doc. No. 43), the Magistrate Judge's report and recommendation to deny Petitioner's habeas petition, (Doc. No. 56), Petitioner's objections and supplemental objections (Doc. Nos. 56, 62), and Petitioner's motion for certificate of

1 appealability, (Doc. No. 60).

2 For the reasons stated herein, the Court **ADOPTS** the Magistrate Judge's R&R.
3 (Doc. No. 56.) The Court also **GRANTS** Petitioner's proposed amendment, (Doc. No. 43),
4 but **DISMISSES** the claims raised in both his original habeas petition, (Doc. No. 1), and
5 the amended petition, (Doc. No. 43). Finally, the Court **DENIES** Petitioner's request for a
6 certificate of appealability. (Doc. No. 60.)

7 I. BACKGROUND

8 The Court incorporates the procedural background and underlying facts as laid out
9 in the report and recommendation, and will briefly reiterate the points pertinent to this
10 order. (Doc. No. 56 at 3-17.)

11 Petitioner was convicted for one count of forcible rape and two counts of forcible
12 oral copulation. The victim testified she ended up with Petitioner in his RV after a night
13 out with her friend. The two talked for a while in the RV and agreed to get breakfast
14 together. Petitioner attempted to kiss the victim, 'but she rebuffed his advances.' On the way
15 to the restaurant, Petitioner stopped at a convenience store to buy cigarettes. After,
16 Petitioner drove the RV back to a parking lot, instead of to the restaurant, causing the victim
17 to begin to worry. Once in the parking lot, Petitioner propositioned the victim to perform a
18 sexual act on her in exchange for money. She refused. Petitioner then became aggressive,
19 punching her, pushing her, and blocking her from exiting. She testified that Petitioner
20 pulled a knife out of a drawer and held it to her throat while threatening her life. After
21 putting the knife away, he "allowed" her to leave, but when she tried to, he punched her
22 again and threatened to drug her. Petitioner then forced the victim to orally copulate him
23 and used various threats against her until she complied with staying; ultimately raping her.
24 Eventually, the victim managed to escape and reported him to police.

25 Several events at trial form the basis of petitioner's habeas arguments. First, the jury
26 "returned a not true finding on the allegation that [Petitioner] personally used a knife during
27 those offenses." (Doc. No. 56 at 15.) The jury also could not reach a verdict regarding
28 count four, rape by a foreign object, and count five, false imprisonment through violence,

menace, fraud, or deceit. After the verdicts were reached, but before the verdicts were accepted, the prosecutor amended the information “to charge two strikes arising from the Oklahoma conviction rather than one, over a defense objection that the amendment was untimely and violated double jeopardy having come after the previous mistrial.” (*Id.*) In a bifurcated bench trial on the prior Oklahoma convictions, the court took judicial notice of that victim’s—Cheryl B.’s—testimony over defense counsel’s objections.

II. LEGAL STANDARDS

“The court shall make a de novo determination of those portions of the [report and recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1). The “statute makes it clear that the district judge must review the magistrate judge’s findings and recommendations de novo if objection is made, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1225–26 & n.5 (D. Ariz. 2003) (applying *Reyna-Tapia* to habeas review).

III. DISCUSSION

In Petitioner's first 37-page objection, he makes repetitive arguments, contesting the same points as his petition and traverse. (Doc. No. 59.) Some of his arguments fail to reach the merits of the R&R's analysis, and simply reiterate general assertions that the R&R's analysis is incorrect (by restating his original arguments). The cornerstone of his objections rest on his belief that the victim's testimony was not credible and failed to provide the basis for the jury's finding of force on the forcible rape charge. Petitioner doubles-down on this argument, stating that because the jury found her knife allegations not true, there was no force used to support the rape conviction. However, because those arguments fail, the majority of his petition also crumbles. The Court discusses his various objections in turn.

1. California Supreme Court's Failure to Adjudicate on the Merits

Petitioner argues that “[t]he California Supreme Court’s silent denial of Petitioner’s habeas corpus petition, does-not [sic] constitute an adjudication on the merits.” (Doc. No. 59 at 3–4 (extraneous quotation marks omitted).) This argument fails to address

1 the merits of the R&R's analysis of his first claim, but rather, takes issue with the procedure
2 itself. In the R&R, the Court took the state Supreme Court's "silent denial" as affirmation
3 of the lower court's reasoning. (Doc. No. 56 at 21.) The R&R states "[t]here is a
4 presumption that '[w]here there has been one reasoned state judgment rejecting a federal
5 claim, later unexplained orders upholding that judgment or rejecting the same claim rest
6 upon the same ground.'" (*Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803–06 (1991)).)
7 Thus, the R&R "look[ed] through the silent denial of this claim by the state supreme court
8 on direct appeal to the last reasoned state court opinion addressing the claim" (*Id.*)
9 The R&R then went on to discuss the appellate court's opinion on Petitioner's first claim,
10 and found the appellate court's opinion was not contrary to, or an unreasonable application
11 of, clearly established federal law. (*Id.* at 26.)

12 Petitioner is incorrect that a silent denial is not an adjudication on the merits. He
13 posits that California Rule of Court 4.551 on habeas petitions requires a "brief statement
14 of the reasons for the denial." (Doc. No. 59 at 4 (citing Cal. Rules of Court 4.551(g)).) Rule
15 4.551(g) does state "[a]n order only declaring the petition to be 'denied'"—without a brief
16 statement of reasons—"is insufficient." Cal. Rules of Court 4.551(g). However, Rule 4.551
17 and its subsections do not apply to California Supreme Court decisions, only to habeas
18 petitions filed in California Superior Court. *See* Cal. Rules of Court 4.550(a) ("This chapter
19 applies to habeas corpus proceedings in the superior court . . ."). The California Supreme
20 Court may issue summary denials like the one here. Thus, the Court holds this objection is
21 without merit.

22 **2. The Victim's Credibility**

23 Petitioner's next few objections can be summarized as him re-litigating the jury's
24 findings and the victim's credibility at trial. He argues the jury should not have found that
25 force was used against the victim because they found no knife was used, (Doc. No. 59 at 7);
26 that the victim's testimony fails to support a finding of force, (*Id.*); that the victim's
27 testimony is not credible, (*Id.* at 8); and that the threats the victim testified to were unproven
28 and false, (*Id.* at 9). Petitioner made the same arguments in his traverse and merely

1 reiterates them here.

2 Despite Petitioner's strong conviction regarding the victim's credibility, "a federal
3 habeas petition is not a proper vehicle for challenging the credibility of a state trial
4 witness." *Foley v. Kernan*, No.: 16cv0408-JLS (BGS), 2017 WL 3840343, at *2 (S.D. Cal.
5 Sep. 1, 2017); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (finding a court adjudicating
6 a habeas petition must respect the "factfinder's province to determine witness credibility,
7 resolve evidentiary conflicts, and draw reasonable inferences from proven facts" by
8 assuming "the trier of fact resolved all such conflicts in favor of the prosecution.").

9 Here, nearly all of Petitioner's arguments rest on his belief that the victim's
10 testimony regarding threats made and force used was false and not credible. Stemming
11 from his attack on the victim's credibility, he argues that the prosecution failed to meet the
12 required elements beyond a reasonable doubt; that the judge improperly rejected his
13 directed verdict motion; and that the trial court committed plain error. However, these
14 arguments fail as a matter of law and are not appropriate for a federal habeas petition since
15 the assertions cannot demonstrate the state court's opinion was contrary to, or an
16 unreasonable application of, clearly established federal law. Thus, the Court rejects
17 Petitioner's objections and affirms the R&R's conclusions on these matters.

18 **3. Claim Three**

19 Petitioner's third claim asserts the evidence is insufficient to support his convictions.
20 Petitioner argues the R&R improperly concluded that the California Supreme Court
21 reasonably denied claim three, finding there was sufficient evidence presented at trial to
22 support his conviction. (Doc. No. 59 at 13.) Specifically, Petitioner continues to argue that
23 because the jury found the force-by-knife allegations not true, there could not have been
24 any force used in his case, thus disproving a required element of the crime. (*Id.* at 14.)
25 However, the R&R states,

26 Petitioner's allegation that the force element was not satisfied because the jury
27 returned a not true finding on the knife use allegation, or because the sex acts
28 occurred after he held a knife to [the victim's] throat and punched her in the
face, ignores the evidence of his ongoing threats and the atmosphere of fear

1 [the victim] testified they created.

2 (Doc. No. 56 at 43.)

3 “A habeas petitioner challenging the sufficiency of the evidence to support his state
4 criminal conviction may obtain relief only if ‘it is found that upon the record evidence
5 adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable
6 doubt.’” *O’Neill v. Sherman*, No. 15cv2912 H (PCL), 2016 WL 3199330, at *5 (S.D. Cal.
7 May 10, 2016) (citing *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)). The Court must
8 review the evidence in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 319.

9 Based on the Court’s de novo review of the record and the victim’s testimony,
10 (Doc. No. 29-2 at 109–56), the Court agrees with the R&R’s analysis and conclusion. The
11 victim testified that even after Petitioner put away the knife, he punched her and continued
12 to threaten her with violence. According to her testimony, he told her he would take her to
13 the “Hell’s Angel headquarters” to “copy [her] drivers [sic] license so that they [the Hell’s
14 Angels] knew [her] address.” (Doc. No. 29-2 at 133–34.) He told her she was going to be
15 “his girl” and that they were going to “go on the road together.” (*Id.* at 134.) He demanded
16 she notify her friends and family of this by telling her exactly what to say—and making
17 her repeat it. (*Id.*) He then gave her the option of “do[ing] this [intercourse]” the “easy way
18 or the hard way,” and specified the hard way meant him drugging her. (*Id.* at 134–35.) In
19 between various sexual acts, Petitioner also told the victim he had a gun in the front
20 compartment. (*Id.* at 137.) She testified he told her that if she ever reported him to the
21 police, he would “slit my throat.” (*Id.* at 138.) Finally, she testified that she was scared of
22 him and believed his threats. (*Id.*) Based on these facts, the Court finds the R&R’s
23 conclusion that Petitioner’s actions created an “atmosphere of fear” is appropriate.
24 Petitioner failed to prove that no rational trier of fact could have found he used force against
25 the victim, despite the not true knife allegation. Because the Court finds the R&R’s analysis
26 and conclusion well-reasoned, the Court rejects this objection.

27 **4. Claim Two**

28 Claim two concerns Petitioner’s argument that the government’s failure to test

1 certain swabs for DNA was a *Brady* violation. (Doc. No. 56 at 39; *Brady v. Maryland*, 373
2 U.S. 83 (1963).) The R&R states “[t]he failure to test evidence by itself does not support a
3 claim for habeas relief.” (*Id.* at 40 (referencing *Villafuerte v. Stewart*, 111 F.3d 616, 625–
4 26 (9th Cir. 1997) (finding no due process violation arising from the failure to test a semen
5 sample absent a showing of bad faith)).) The R&R also concludes Petitioner failed to allege
6 materiality under *Brady* because the evidence did not deprive him of a fair trial, and could
7 have actually led to his conviction on a count the jury hung on (count four, rape by a foreign
8 object). (*Id.* at 40–41.)

9 Regarding the untested evidence, Petitioner argues “[t]he test analysis, of the
10 external area’s [sic] of the vagina were relevant and critical to Count Three, as originally
11 charged to Petitioner . . . that Petitioner had orally copulated [the victim].”
12 (Doc. No. 59 at 27.) He also states that “the swabs taken from Petitioner’s hands and
13 fingers, were relevant to Count Four.” (*Id.* at 29 (emphasis in original).) Petitioner
14 generally complains that the criminalist choosing to test some evidence, and not others,
15 “[c]reates a situation, where the development of evidence is one-sided.” (*Id.* at 31.)

16 The Court disagrees with Petitioner. As Respondent argues, and the R&R notes, the
17 prosecutor did not act in bad faith because there was no suppression, destruction, or failure
18 to preserve this evidence, and it was available for defense to test. (Doc. No. 56 at 39.) But,
19 moreover, the R&R is correct that Petitioner fails to establish materiality. Materiality is
20 found under *Brady* if suppression deprived him of a fair trial. *United States v. Bagley*, 473
21 U.S. 667, 678 (1985); *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (holding that
22 prejudice under *Brady* is shown when “there is a reasonable probability of a different
23 result” as to guilt or penalty). Here, the jury could not reach a decision on count four, rape
24 by a foreign object, although the victim testified as such. (*Id.* at 40.) Petitioner’s fingernail
25 swab was never tested, but had it been, the evidence could have corroborated the victim’s
26 testimony, leading to a guilty verdict on count four. (*Id.* at 40–41.) Thus, the Court agrees
27 with the R&R’s conclusion that “the state supreme court could have reasonably denied this
28 claim on the basis that there is no showing of a reasonable probability of a more favorable

1 result had Petitioner’s fingernail swab or hair been tested.” (*Id.*) There was simply no *Brady*
2 violation or non-disclosure of material evidence here. The Court rejects this objection.

3 **5. Ineffective Assistance of Counsel**

4 Petitioner argued in claims four and five that his trial and appellate counsel were
5 ineffective in various ways. (Doc. No. 56 at 44, 50.) His supplemental objection raises the
6 same arguments the R&R addressed. (Doc. No. 62 at 9–13.) After reviewing the R&R’s
7 analysis on Petitioner’s claims of ineffective assistance of counsel, the Court finds its
8 conclusions well-reasoned. The Court does not find any errors in the Magistrate Judge’s
9 recommendation, and Petitioner’s objections do not provide a basis to modify the R&R.

10 **6. Evidentiary Hearing**

11 The R&R recommended denying Petitioner’s request for an evidentiary hearing.
12 (Doc. No. 56 at 52.) Petitioner objects, and demands a hearing because he “presented a
13 clear *prima facie* case for habeas relief on this claim . . .” (Doc. No. 59 at 21.) However,
14 the Court agrees with the R&R that a hearing is unwarranted when a federal claim can be
15 denied on the basis of the state court record, as is the case here. *See Campbell v. Wood*, 18
16 F.3d 662, 679 (9th Cir. 1994) (holding an evidentiary hearing is unnecessary when the
17 court can deny a federal claim based on the state court record). Thus, the Court rejects
18 Petitioner’s objection and denies his evidentiary hearing request.

19 **7. Proposed Amendment Claims**

20 As to Petitioner’s proposed amended claims, the R&R recommends granting
21 amendment, but denying relief. (Doc. No. 56 at 27–38.) In his proposed amendment, he
22 argues the documents, which were introduced at the bifurcated bench trial, violated federal
23 due process, the Confrontation Clause, and double jeopardy because: “(1) they are
24 incomplete, improperly authenticated, and contain false statements; (2) they were not
25 presented at his first trial, which ended with a hung jury; (3) he was not permitted to
26 confront the person who certified the documents; and (4) they provide insufficient
27 evidentiary support.” (*Id.* at 2.)

28 Petitioner filed one objection pertaining to count one and the admission of prior

1 propensity evidence. (Doc. No. 62 at 13–14.) He argues that allowing Cheryl B. to testify
2 regarding his Oklahoma conviction was prejudicial to his trial and the jurors. (*Id.* at 14.)

3 The R&R ultimately concluded that this testimony did not prejudice Petitioner’s trial
4 because: (1) whether evidence is incorrectly submitted is not within the jurisdiction of a
5 federal habeas petition, (Doc. No. 56 at 24–25); (2) the Supreme Court has reserved ruling
6 on whether introducing propensity evidence can give rise to a federal due process violation,
7 and since the Supreme Court has denied granting cert on this issue four times, the right has
8 not been clearly established and a violation as such is not contrary to clearly established
9 federal law, (*Id.* at 25–26); (3) “there is no basis to find that the state court adjudication of
10 claim one is based on an unreasonable determination of the facts in light of the evidence
11 presented in the state court proceedings,” (*Id.* at 26); and finally, (4) a federal habeas
12 petition is, again, not the proper vehicle to challenge a witness’s credibility, (*Id.* at 27). As
13 to these points specifically, Petitioner fails to make a contrary argument, but generally
14 argues prejudice, and accuses the witness’s testimony as being “a one-sided version of
15 events that were extremely embellished by the Oklahoma Prosecutor.” (Doc. No. 62 at 14.)

16 However, without any specific argument contravening the R&R’s legal analysis, or
17 without proof of collusion between the witness and the Oklahoma prosecutor, the Court
18 finds the R&R’s analysis judicious. Thus, the Court **ADOPTS** the R&R’s recommendation
19 to **GRANT** the proposed amendment, (Doc. No. 43), but also **DENIES** relief based on
20 those claims.

21 8. Certificate of Appealability

22 When a district court enters a final order adverse to the applicant in a habeas corpus
23 proceeding, it must either issue or deny a certificate of appealability, which is required to
24 appeal a final order in a habeas corpus proceeding. 28 U.S.C. § 2253(c)(1)(A). A certificate
25 of appealability is appropriate only where the petitioner makes “a substantial showing of
26 the denial of a constitutional right.” *Miller-El v. Cockrell*, 537 U.S. 322, 330 (2003)
27 (quoting 28 U.S.C. § 2253(c)(2)). Under this standard, the petitioner must demonstrate that
28 “reasonable jurists could debate whether [] the petition should have been resolved in a

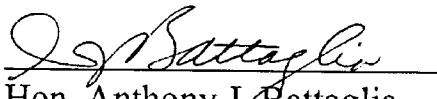
1 different manner or that the issues presented were adequate to deserve encouragement to
2 proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (citation and internal
3 quotation marks omitted). Here, the Court finds that reasonable jurists could not debate the
4 Court's conclusion to dismiss with prejudice Petitioner's claims and therefore **DECLINES**
5 to issue a certificate of appealability.

6 **IV. CONCLUSION**

7 The Court finds the R&R well-reasoned and contains no error. The Court, thus,
8 **ADOPTS** the R&R in its entirety. (Doc. No. 56.) The Court also **GRANTS** Petitioner's
9 proposed amendment, (Doc. No. 43), but denies relief as to those claims, as well as to the
10 claims in his original petition, (Doc. No. 1). Finally, the Court **DENIES** Petitioner's
11 request for a certificate of appealability. (Doc. No. 60.)

12 **IT IS SO ORDERED.**

13 Dated: March 28, 2018


14 Hon. Anthony J. Battaglia
15 United States District Judge

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