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In pro se

IN THE SUPREME COURT OF THE UNITED STATES

ANTOINE REED, Petitioner, v. NEIL McDOWELL, Respondent	Case No.

APPENDICES

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTOINE D. REED, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. LACV 15-5636-CAS (LAL) **ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, the Magistrate Judge's Report and Recommendation, Petitioner's Objections and the remaining record, and has made a *de novo* determination.

Petitioner's Objections lack merit for the reasons stated in the Report and Recommendation.

Accordingly, IT IS ORDERED THAT:

1. The Report and Recommendation is approved and accepted;

2. Judgment be entered denying the First Amended Petition and dismissing this action with prejudice; and

3. The Clerk serve copies of this Order on the parties.

DATED: February 14, 2019

Christina A. Snyder

HONORABLE CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTOINE D. REED, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. LACV 15-5636-CAS (LAL) **JUDGMENT**

Pursuant to the Order Accepting Report and Recommendation of United States Magistrate Judge,

IT IS ADJUDGED that the First Amended Petition is denied and this action is dismissed with prejudice.

DATED: February 14, 2019

Christina A. Snyder

HONORABLE CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTOINE D. REED, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. LACV 15-5636-CAS (LAL) **ORDER DENYING CERTIFICATE OF APPEALABILITY**

For the reasons stated in the Report and Recommendation, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right.[1] Thus, the Court declines to issue a certificate of appealability.

DATED: February 14, 2019

HONORABLE CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

[1] See 28 U.S.C. § 2253; Fed. R. App. P. 22(b); Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTOINE D. REED, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. LACV 15-5636-CAS (LAL) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Christina A. Snyder, United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On July 24, 2015, Antoine D. Reed ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). On November 5, 2015, the then assigned magistrate judge granted Petitioner's motion to stay the proceedings in order to exhaust unexhausted claims in state court. On April 15, 2016, Petitioner filed a First Amended Petition ("FAP"). On August 1, 2016, Respondent filed a Motion to Dismiss the First Amended Petition. On February 6, 2017, the then assigned magistrate judge issued a Report and

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Recommendation that the Motion to Dismiss be granted and Petitioner be directed that if he chose to proceed on Claims One through Four of his Petition he would be required to withdraw Claim Five. On June 5, 2017, the district court granted Petitioner's motion to withdraw Claim Five and ordered Respondent to file an Answer to Claims One through Four of the First Amended Petition. On October 19, 2017, Respondent filed an Answer. On February 21, 2018, Petitioner filed a Reply. Thus, this matter is ready for decision.

II.

PROCEDURAL HISTORY

A. Conviction and Sentence

On December 5, 2007, Petitioner was convicted after a jury trial in the Los Angeles County Superior Court of one count of forcible rape,[1] one count of oral copulation of a person under 16 years old,[2] and two counts of lewd act upon a child.[3] (Volume 2 Clerk's Transcript ("CT") at 398-408, 449.) On January 31, 2008, the trial court sentenced Petitioner to a state prison term of 110 years to life. (2 CT at 445-49.)

B. Direct Appeal

Petitioner appealed his conviction and sentence to the California Court of Appeal. (Lodgments 48-50.) On March 4, 2009, the Court of Appeal conditionally reversed the judgment, finding that the trial court erroneously prevented Petitioner from calling the victim's mother as a defense witness at trial. The appellate court remanded the matter to the trial court to allow Petitioner the opportunity to present the witness's testimony for the trial court's determination of whether the testimony warranted a new trial. (Lodgment 1 at 2.) Petitioner then filed a Petition for Review to the California Supreme Court, which summarily denied review on June 10, 2009. (Lodgments 2, 3.)

Following remand proceedings, Petitioner filed an appeal from the reinstated judgment and a "Request for Peremptory Writ" in the California Court of Appeal. (Lodgments 12, 51-53.) On December 15, 2010, the Court of Appeal considered both the appeal and the writ, which it

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[1] Cal. Penal Code § 261(a)(2).
[2] Cal. Penal Code § 288a(b)(2).
[3] Cal. Penal Code § 288(c)(1).

construed as a habeas petition. (Lodgment 4.) The Court of Appeal again reversed the judgment and again remanded the matter to the trial court, finding that the trial court had prevented Petitioner from eliciting relevant evidence from the victim's mother during the hearing on remand. The California Court of Appeal further dismissed Petitioner's habeas petition without prejudice as moot. (Lodgment 4 at 2.)

Following the second remand proceedings, Petitioner filed a third appeal from his conviction. (Lodgments 54-56.) On February 6, 2014, the California Court of Appeal affirmed the judgment. (Lodgment 5.) Petitioner then filed a Petition for Review to the California Supreme Court. (Lodgment 6.) The Supreme Court summarily denied review on April 23, 2014. (Lodgment 7.)

C. Collateral Review

Meanwhile, on June 22, 2010, Petitioner filed a second habeas petition in the California Court of Appeal. (Lodgment 8.) On July 8, 2010, the Court of Appeal denied the petition without prejudice because Petitioner had not first sought relief in the Superior Court. (Lodgment 9.)

On June 18, 2010, Petitioner filed a third habeas petition in the California Court of Appeal, which the appellate court denied on June 23, 2010. (Lodgments 33, 34.)

On July 20, 2010, Petitioner filed a fourth habeas petition in the California Court of Appeal. (Lodgment 10.) On August 20, 2010, the California Court of Appeal denied the petition. (Lodgment 11.)

On January 18, 2011, petitioner filed a Petition for Review in the California Supreme Court, which denied the petition on March 2, 2011. (Lodgments 13, 14.)

On September 29, 2011, Petitioner filed a Petition for Writ of Mandate in the California Court of Appeal. (http://appellatecases.courtinfo.ca.gov.) The Court of Appeal denied the petition on October 5, 2011. (http://appellatecases.courtinfo.ca.gov.)

On March 22, 2013, Petitioner filed a fifth habeas petition in the California Court of Appeal. (Lodgment 15.) On April 4, 2013, the Court of Appeal denied the petition because Petitioner had not first sought relief in the Superior Court. (Lodgment 16.)

On April 23, 2013, Petitioner filed a habeas petition in the Los Angeles Superior Court, which the Superior Court denied on June 18, 2013. (Lodgment 35.)

On June 9, 2014, Petitioner filed a second habeas petition in the Los Angeles Superior Court, which the Superior Court denied on June 27, 2014. (Lodgment 19.)

On August 8, 2014, Petitioner filed a third habeas corpus petition in Los Angeles County Superior Court. (Lodgment 20.) The Superior Court denied the petition on September 29, 2014. (Lodgment 21.)

On August 18, 2014, Petitioner filed a petition for writ of mandate in the California Court of Appeal seeking the return of seized property. (Lodgment 22.) On January 6, 2015, the Court of Appeal remanded the case to the Superior Court for further proceedings regarding the evidence. (Lodgment 23.)

On November 24, 2014, Petitioner filed a sixth habeas petition in the California Court of Appeal. (Lodgment 17.) On December 11, 2014, the California Court of Appeal denied the petition because Petitioner had not first sought relief in the Superior Court. (Lodgment 18.)

Next, on January 28, 2015, Petitioner constructively filed a fourth habeas petition in the Los Angeles Superior Court. (Lodgment 24.)[4] The Los Angeles County Superior Court denied the petition on April 14, 2015. (Lodgment 25.)

On April 22, 2015, Petitioner filed a fifth habeas petition in the Los Angeles Superior Court, which the Superior Court denied on June 18, 2015. (Lodgment No. 26.)

On July 23, 2015, Petitioner filed a sixth habeas petition in the Los Angeles Superior Court. (Lodgment 27.) On July 24, 2015, the Superior Court denied the petition. (Lodgment 28.)

On August 21, 2015, Petitioner filed a sixth habeas petition in the California Court of Appeal. (Lodgment 29.) The appellate court denied the petition on September 11, 2015. (Lodgment 30.)

[4] The copy of the petition lodged by Respondent is not file stamped. Thus, this Court refers to the date on which Petitioner signed the Petition.

On November 16, 2015, Petitioner filed a habeas petition in the California Supreme Court. (Lodgment 31.) On March 9, 2016, the California Supreme Court denied the petition. (http://appellatecases.courtinfo.ca.gov.)[5]

On March 13, 2017, Petitioner filed a petition for writ of mandate in the California Court of Appeal, which the court denied on March 22, 2017. (Lodgment 58.)

Finally, on May 30, 2017, Petitioner filed a second habeas petition in the California Supreme Court. (Lodgment 59.) The Supreme Court denied relief on August 9, 2017. (Lodgment 60.)

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

This Court has independently reviewed the state court record. Based on this review, this Court adopts the factual discussion of the California Court of Appeal's February 6, 2014 opinion in this case as a fair and accurate summary of the evidence presented at trial:[6]

> The prosecution's evidence showed that Reed approached 15-year-old S. between 7:00 and 8:00 in the morning of August 2, 2006, as she waited at a bus stop to go to school. Reed told S. that he was a "modeling agent" and asked her to walk over to his car to look at photographs and his camera. S. agreed. At the car, Reed showed S. a document that he said was his "modeling agent" license, his camera and an album of photographs of young women. Reed told S. that he would pay her $200 if she would go with him to model for some photographs. Believing that she was going to earn $200 for modeling, S. agreed to go with Reed. During the drive to the Botanic Garden in Palos Verdes, S. told Reed that she was 15 years old and Reed told her that he had daughters close to her age.

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[5] Respondent cites to Lodgment 32 as the California Supreme Court's denial of this petition. (Answer at 4.) However, Lodgment 32 is missing from this Court's record.

[6] "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary . . ." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Thus, Ninth Circuit cases have presumed correct the factual summary set forth in an opinion of the state appellate court under 28 U.S.C. §2254(e)(1). See, e.g., Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted).

In a secluded area of the Botanic Garden, Reed raped S., placed his penis in her mouth and forced her to masturbate him. Afterward Reed dropped S. off at her high school. As he drove away, S. wrote down the license number of his car.

Initially S. told police that Reed had "picked her up" and "thrown her into the car." Later she told police that Reed had threatened to "use a knife on her" if she did not get into his car. Still later, S. admitted to police that these versions were untrue and at trial she testified to the version of events described above. On cross-examination she admitted that she had initially lied to the police.

Reed testified in his own defense. He stated that S. approached him and expressed interest in being a model. She agreed to go to the Botanic Garden with him to pose for pictures in return for $20 and a copy of the prints to use in her modeling portfolio. S. told Reed that she was 19 years old and he believed her. At the Garden, Reed photographed S. as agreed. After the photo session ended, they argued over the amount Reed had agreed to pay S. for her modeling; Reed claiming it was $20 and S. claiming it was $200. In the course of their argument Reed remarked that S. would "have to do a little bit more than that for $200" and S. replied "let it do what it do." Taking that reply as a consent to engage in sex, and believing S. to be 19, Reed found a "nice spot," engaged in vaginal intercourse with her and ejaculated on her face and neck. Reed denied forcing S. to touch his penis and denied putting his penis in her mouth or putting his mouth on her breast.

Reed proposed calling S.'s mother as a defense witness to testify whether the police had "manipulate[ed]" S.'s testimony. Although he conceded that he did not know what the mother would say and was not able to make an offer of proof of her testimony because she had refused to talk to his investigator, he did explain: "She had a[n] inclination to not allow Detective Montenegro to talk to her daughter because she felt like they were manipulating her daughter." The court, however, refused Reed's request to call the mother as a witness stating "this

isn't the time for depositions" and that Reed's "hope that she's going to be able to provide relevant information" was not enough of a showing to allow her testimony.

(Lodgment 5 at 3-4.)

IV.

PETITIONER'S CLAIMS

Petitioner raises the following claims for habeas corpus relief:

(1) The California Court of Appeal misapplied federal authority on compulsory process by failing to unconditionally reverse Petitioner's conviction on appeal after finding the trial court erred by preventing Petitioner from calling the victim's mother as a defense witness;

(2) The state courts incorrectly applied the materiality analysis in considering the testimony of the victim's mother as it related to Petitioner's compulsory process claim;

(3) The trial court improperly denied Petitioner's request for self-representation; and

(4) The trial court erred by refusing to conduct a hearing on Petitioner's request to substitute counsel.

V.

STANDARD OF REVIEW

A. 28 U.S.C. § 2254

The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

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

28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be. As the United States Supreme Court stated in Harrington v. Richter,[7] while the AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings[,]" habeas relief may be granted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with United States Supreme Court precedent. Further, a state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.[8]

B. Sources of "Clearly Established Federal Law"

According to Williams v. Taylor,[9] the law that controls federal habeas review of state court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." To determine what, if any, "clearly established" United States Supreme Court law exists, a federal habeas court also may examine decisions other than those of the United States Supreme Court.[10] Ninth Circuit cases "may be persuasive."[11] A state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, if no Supreme Court decision has provided a clear holding relating to the legal issue the habeas petitioner raised in state court.[12]

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[7] 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).
[8] 28 U.S.C. § 2254(e)(1).
[9] 529 U.S. 362, 412, 120 S. Ct. 1495, 146, L. Ed. 2d 389 (2000).
[10] LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).
[11] Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).
[12] Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S. Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators' courtroom conduct, the state court's decision could not have been contrary to or an unreasonable application of clearly established federal law).

Although a particular state court decision may be both "contrary to" and an "unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings under Williams.

A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts.[13] If a state court decision denying a claim is "contrary to" controlling Supreme Court precedent, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)."[14] However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them."[15]

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'"[16] Accordingly, this Court may reject a state court decision that correctly identified the applicable federal rule but unreasonably applied the rule to the facts of a particular case.[17] However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable" under Woodford v. Visciotti.[18] An "unreasonable application" is different from merely an incorrect one.[19]

Where the California Supreme Court denied claims without comment, the state high court's "silent" denial is considered to be "on the merits" and to rest on the last reasoned decision on the claims. In the case of Claims Three and Four, this Court looks to the grounds the California Court of Appeal stated in its March 4, 2009 decision on direct appeal.[20]

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13 Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06).
14 Williams, 529 U.S. at 406.
15 Early, 537 U.S. at 8.
16 Id. at 11 (citing 28 U.S.C. § 2254(d)).
17 See Williams, 529 U.S. at 406-10, 413.
18 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).
19 Williams, 529 U.S. at 409-10.
20 See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).

Where, as here with respect to Claims One and Two, the state courts have supplied no reasoned decision for denying the petitioner's claims on the merits,[21] this Court must perform an "'independent review of the record' to ascertain whether the state court decision was objectively unreasonable."[22]

VI.

DISCUSSION

A. Remedy on Appeal

1. Background

In Claim One, Petitioner argues the California Court of Appeal misapplied United States Supreme Court precedent when it found the trial court abused its discretion by disallowing testimony from the victim's mother but then determined the appropriate remedy was a remand for further proceedings rather than an unconditional reversal. (FAP at 5; Supplemental FAP at 1-5.) The California Court of Appeal fairly summarized the trial court proceedings underlying Petitioner's claim in its March 4, 2009 decision on direct review:

> At a time when [Petitioner] was still representing himself, the court asked him to identify the witnesses he intended to call.
>
> When [Petitioner] named S.'s mother the court assumed [Petitioner] wanted to question her about whether S. had claimed to be the victim of sexual molestation in the past. The court stated it was not inclined to permit that

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[21] Respondent suggests the California Court of Appeal's March 4, 2009 decision on direct appeal is the last reasoned opinion on Claim One (Answer at 14), and the California Court of Appeal's February 6, 2014 decision on direct appeal is the last reasoned opinion on Claim Two (Answer at 14). Although in its 2009 decision the Court of Appeal addressed Petitioner's argument that the trial court erred by preventing Petitioner from calling the victim's mother, the state appellate court did not address Petitioner's argument that the appellate court misapplied federal precedent in forming a remedy. Rather, Petitioner presented his current claim to the California Supreme Court in his Petition for Review from the Court of Appeal's 2009 decision. (Lodgment 2 at 4-11.) The California Supreme Court denied the Petition for Review without comment. (Lodgment 3.) In addition, although the California Court of Appeal cited federal precedent in its consideration of Claim One, its ultimate decision was based on an issue of state law. (Lodgment 1 at 17-21.) The state appellate court did not address the merits of the federal issue. Moreover, although Petitioner presented Claim Two as a federal claim to the California Court of Appeal in Petitioner's third round of direct review (Lodgment 54 at 7-20), the state appellate court addressed it as a state law claim only (Lodgment 5 at 8-10). Thus, the state appellate court did not offer a reasoned analysis as to Petitioner's federal constitutional claim.

[22] Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (citing Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000)).

question but before making a final ruling on that issue it would review the cases under Evidence Code section 782.

[Petitioner] then asked the court whether he could question S.'s mother "concerning everything other than [S.'s prior sexual conduct] until final ruling is made on the 782?" This question led to the following colloquy between the court and [Petitioner].

"The court: What would she be able to testify to that she would have direct knowledge of?

"The defendant: She had a[n] inclination to not allow Detective Montenegro to talk to her daughter because she felt like they were manipulating her daughter. So I'm wondering what brought her to that point where she felt like they were manipulating her daughter.

"The court: Under [section] 352, I don't find that particularly probative, and that's the conclusion of this person, maybe. But I don't think that it's relevant as it relates to the facts before the jury. Her feelings about law enforcement or their investigation aren't relevant.

"The defendant: What if she actually knew what they actually said or did to her daughter?

"The court: What's your offer of proof?

"The defendant: That was just it. I don't know the whole reason as to why she didn't want Montenegro to talk to her daughter alone.

"The court: This isn't the time for depositions. I'm not going to allow you to call the witness on the hopes that she's going to be able to provide information to make it relevant. What else do you have? Who else do you want?

"The defendant: Based on your rulings concerning [section] 352, that may be all that I want to offer right now."

(Lodgment 1 at 15-17.)

The California Court of Appeal then found the trial court abused its discretion under California Evidence Code section 352 when it prevented Petitioner from calling the victim's mother as a defense witness. (Lodgment 1 at 17-20.) Specifically, the appellate court found the trial court held Petitioner to too high a burden in proffering the relevance of the witness's proposed testimony because the witness had refused to speak with members of the defense team. (Lodgment 1 at 18-19 (citing United States v. Valenzuela-Bernal[23] for the proposition that "when the defendant has not had the opportunity for a pretrial interview with the witness" "'the defendant cannot be expected to render a detailed description of [the] lost testimony.'")). Next, the court proceeded to a harmless error analysis but determined it could not make a finding as to prejudice without additional evidence. (Lodgment 1 at 20.) Accordingly, the appellate court concluded it could not, based on the record before it, reverse Petitioner's conviction outright. Rather, the appellate court remanded the matter to the trial court to conduct a hearing at which Petitioner would be allowed to call the victim's mother as a witness in an attempt to show the exclusion of the evidence resulted in prejudice at trial. (Lodgment 1 at 20-21.)

2. Analysis

To the extent Petitioner argues the California Court of Appeal merely erred in its application of state law when it opted to remand the matter to the trial court under California Penal Code section 1260, he fails to state a claim cognizable on federal habeas review. Federal habeas relief is not available for errors of state law only.[24]

Petitioner's claim also fails to the extent he argues the California Court of Appeal misapplied the United States Supreme Court's decision in Valenzuela-Bernal when it remanded the action rather than ordering an unconditional reversal of Petitioner's conviction. (See Supplemental FAP at 2-5; Reply at 3-6.) Although the California Court of Appeal cited Valenzuela-Bernal in its decision, it did so to articulate the burden to be imposed upon a defendant in proffering the relevancy of proposed witness testimony, a burden the appellate court

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[23] 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 1193 (1982).

[24] See 28 U.S.C. § 2254(a); see also Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

was considering within the context of the trial court's decision to exclude the proposed testimony under California Evidence Code section 352. (Lodgment 1 at 19.) To this end, the California Court of Appeal's ultimate finding of trial court error was not premised on a violation of the federal constitutional right to compulsory process, as articulated in Valenzuela-Bernal. In fact, the state court never reached the federal constitutional issue. Instead, the appellate court premised its decision on a finding that the trial court abused its discretion under California Evidence Code section 352 by holding Petitioner to too high a burden with respect to proffering the relevancy of the proposed testimony. (Lodgment 1 at 17-20.)

Petitioner's claim still fails even if he could show the California Court of Appeal relied upon Valenzuela-Bernal in addressing Petitioner's federal constitutional claim. In Valenzuela-Bernal,[25] the Supreme Court considered a scenario where a criminal defendant was deprived of witness testimony after the witnesses at issue were deported by the government. The Court explained the absence of the witnesses would violate the defendant's right to compulsory process only if the defendant could "at least make some plausible showing of how [the witnesses'] testimony would have been both material and favorable to his defense."[26] The Court went on to remark that "[b]ecause prompt deportation deprives the defendant of an opportunity to interview the witnesses to determine precisely what favorable evidence they possess, [] the defendant cannot be expected to render a detailed description of their lost testimony."[27] The Court cautioned, however, that "this does not . . . relieve the defendant of the duty to make some showing of materiality."[28] Thus, the Court concluded, "sanctions will be warranted for [a violation of the right to compulsory process] only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact."[29] Ultimately, in Valenzuela-Bernal, because the defendant did not make the showing of materiality, the Supreme Court found he had not made a showing of a violation of his right to compulsory process.[30]

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[25] 458 U.S at 860-61.
[26] Id. at 867.
[27] Id. at 873.
[28] Id.
[29] Id. at 873-74.
[30] Id. at 874.

Petitioner is mistaken in suggesting Valenzuela-Bernal mandated an unconditional reversal in his case. In analyzing Petitioner's state law claim, the California Court of Appeal concluded it needed additional evidence to assess whether the exclusion of the testimony at issue resulted in prejudice at trial. It follows that the evidence before the appellate court was insufficient to determine the materiality of the proposed testimony, thereby preventing an ultimate finding on the issue of compulsory process under the authority of Valenzuela-Bernal. (See Lodgment 1 at 19-20 (noting "[t]he record supports the *possibility* that mother could give material testimony" but remanding to take the witness's testimony because "we do not know, and have no way of determining from the record, what [the witness] would have testified to had she been called" at trial) (emphasis added). Because the record before the appellate court was insufficient on its face to prove materiality, the court could have relied on Valenzuela-Bernal to deny Petitioner's compulsory process claim outright.[31] However, at that stage, the appellate court did not foreclose Petitioner's opportunity for obtaining relief. Instead, it allowed Petitioner an additional opportunity to gather evidence that could help him prove the materiality component of a compulsory process claim.

Finally, Petitioner's claim fails to the extent he argues the California Court of Appeal applied an incorrect harmless error standard. (Reply at 3, 5-13.) The appellate court did not conduct a harmless error analysis. In fact, the court's reasoning for sending the case to the trial court for further proceedings was that the appellate court had insufficient evidence upon which to conduct a harmless error analysis. (Lodgment 1 at 20-21.)

Accordingly, the state courts' rejection of Petitioner's claim was not contrary to, or an unreasonable application of, federal law. Habeas relief is not warranted on Claim One.

B. Materiality

1. Background

In Claim Two, Petitioner argues, as an alternative to Claim One, that following remand the state courts misapplied the materiality standard in adjudicating Petitioner's claim regarding

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[31] Id. at 874 (defendant did not show violation of right to compulsory process because he did not prove the witnesses' testimony was material).

the exclusion of the mother's testimony. (FAP at 5; Supplemental FAP at 5-20; Reply at 13-18.)[32]

The California Court of Appeal fairly summarized the procedural and factual background underlying Petitioner's claim in its February 6, 2014 decision on direct appeal:

> [] **Evidence At The First Remand**
>
> Upon Reed's appeal from the judgment we held that the court abused its discretion in excluding the mother's testimony because the record supported the likelihood that the mother could give material testimony and the court's requirement that Reed demonstrate how the mother would testify "imposed an insurmountable burden on the defense." Because we could not determine whether the exclusion of the mother's testimony was prejudicial, we conditionally reversed the judgment and remanded the case to the trial court to hear the mother's testimony and determine whether it required granting Reed a new trial. We specifically directed the trial court not to limit the mother's testimony to the "manipulation" issue but to "hear all relevant testimony mother has to offer." We further directed that after the court heard all of the mother's relevant testimony it "shall evaluate the materiality of this new evidence in light of the whole record and determine whether to grant Reed a new trial."
>
> Upon remand, the court held a hearing at which S.'s mother was questioned by Reed, again appearing in pro per, and the prosecutor.
>
> The mother testified that she received telephone calls from S.'s grandmother and the police informing her that S. had been raped and was at the police station. When she arrived at the station she saw S. and hugged her. The

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[32] Petitioner argues this Court must review his claim de novo because the state courts applied the wrong materiality standard. (FAP at 5; Supplemental FAP at 5; Reply at 13-18.) This Court does not agree. However, this Court notes that even under a de novo review Petitioner's claim fails for the reasons discussed below. In addition, Respondent argues Petitioner's claim is unexhausted to the extent he argues the state courts misapplied the materiality standard. (Answer at 25.) To the extent Respondent is correct that Petitioner failed to exhaust any portion of his claim, this Court denies the claim on the merits notwithstanding the exhaustion issue. See Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir.2005) (the court may deny on the merits an unexhausted claim which is not "colorable"); see also 28 U.S.C. § 2254(b)(2)).

police did not allow her to be present when they interviewed S. The mother stated that she was angry at being excluded from the interview and came away with the impression that female officers at the police station had been rough, mean and rude toward S. That was why, she explained, she was initially reluctant to allow Detective Montenegro to come to the house to speak further with S. Once she realized that Montenegro was not one of the officers who had behaved in a manner she disapproved, she allowed Montenegro to come and interview S. The mother testified that in the days following the alleged rape, S. told her, in bits and pieces, a version of what happened that was fairly close to her testimony at trial.

The mother further testified that she did not believe S. was a liar, S. had never been in trouble for ditching classes, she was a "model student" who received "straight A's" and that S. had never had any problems in school.

Following the hearing the court denied Reed's motion for a new trial and reinstated the judgment.

[] Evidence At The Second Remand

We again reversed the judgment because the court prevented Reed from seeking evidence from S.'s mother on relevant topics. The court would not allow Reed to question the mother about the kinds of discipline she inflicted on S. prior to the incident in order to show S. lied about the incident out of fear of her mother's retribution. The court would not allow Reed to question the mother about where S. got the money to pay for her cell phone in order to show that S. needed money for the phone. Finally, the court would not allow Reed to question the mother about whether she fed S. every day. The relevancy of this last inquiry arose from the testimony of one of S.'s teachers that he frequently gave S. food money because she was having a "hard time at school." Reed reasoned that if S's mother fed her at home, her asking for food money at school showed she would "trick adults out of their money."

On the second remand, S.'s mother gave the following testimony.

The mother stated that when she testified at the evidentiary hearing after the first remand she did not testify falsely to protect S. nor did she ever lie to any law enforcement officials to protect S. Her mother testified that S. has lied to her in the past but Reed did not ask, and her mother did not give details of what S. lied about. She did say that she could tell whether or not S. is lying but she was not asked if she believed S. was telling the truth in stating that Reed raped her.

If S. misbehaved, her mother punished her by depriving her of privileges such as taking away her computer. She never used physical discipline on S.

On the issue of where S. got the money for her cell phone and food, her mother testified that S. performed chores around the house, and as a reward she received allowances and privileges, such as owning her own cell phone. The mother bought time on S.'s phone for her and could not recall any times when S.'s phone time ran out and she needed more money. Her mother tried "to keep her phone bill paid." At the time of the incident, the mother received Social Security and public financial assistance; however, she did not acquire money "in other ways" to "make ends meet." Her children's father worked. Between his income, upon which the mother "didn't rely," her Social Security income and public assistance she was able to pay her rent. She did not describe her "economical situation" as "hard times." Instead, she said things were "all right," and that "up until the point of the rape . . . it wasn't that bad." When S. needed clothing and other items, her mother, along with S.'s father, grandmothers, and aunt, would contribute money.

The mother testified that when she arrived at the police station, she saw S. and gave her a hug. At that point, two officers called S. into another room. The police told the mother that she could not join her daughter. S. told her mother that she wanted to speak with her, but she never said that she wanted to speak with her mother privately, and she never asked to leave the station. The mother saw that S. was "sad" and that "[s]omething was wrong." While she was at the station, the

mother did not recall seeing the officers provide S. with any food or drink, and she did not recall seeing S. use the bathroom in the seven to nine hours she was being questioned by the police. Her mother later clarified on cross-examination that she did not know whether S. used the bathroom before she got there, only that when she arrived, S. needed to use the bathroom. When S. left the room she was "upset" and she told her mother "how they were speaking to her." The mother admitted that she had previously accused the police of "badgering" her daughter during the interview.

When asked if she allowed S. to "hang out" alone with her boyfriend, her mother answered, "No." (This conflicted with S.'s testimony at trial that she did not have a boyfriend.)

After hearing the mother's testimony the court permitted Reed to call certain "'impeachment' witnesses" to counter her testimony.

Vince Carbino, the principal of S.'s school, testified that he prepared an incident report concerning the alleged attack on S. and that he obtained the information he used in the report from Alan Tuazon, a clinical social worker employed by the school district. Tuazon obtained his information by sitting in on a meeting between the school nurse, the police and S. The incident report describes the incident as a "possible rape" and the suspect as a "Black Male Teenager or Early Adult." It also states: "During police questioning, student changed story to she had been with her boyfriend from Dorsey High School all day." It is undisputed that her mother was never involved in these conversations and that she did not receive a copy of the incident report.

The court also heard testimony that nearly four years after the alleged sexual assault S.'s mother was arrested for violating Penal Code section 244, assault with a caustic chemical (bleach). The alleged victim was a 5-year-old child. The case was ultimately rejected for filing by the District Attorney and the Los Angeles City Attorney.

> Reed attempted to subpoena S.'s school records for the period 2003-2007 including her report cards, attendance records, disciplinary reports and all reports prepared by school officials regarding the alleged sexual assault. The attorney representing S. at the hearing moved to quash the subpoena and the court granted the motion on the grounds the records were outside the scope of our remand, Reed failed to establish good cause for the production of the records and this collateral attempt to impeach the mother violated S.'s right to privacy and to be free from harassment.
>
> After hearing the testimony described above the court denied Reed's motion for a new trial. The court found that Reed failed "to establish any reasonable probability that a more favorable outcome would have occurred even if the jury had heard the testimony of S.'s mother and the additional "'impeachment' witnesses." In accordance with our instructions, the court reinstated the judgment.

(Lodgment 5 at 4-8 (footnote omitted).)

The California Court of Appeal then denied Petitioner's claim, finding the trial court did not abuse its discretion when it denied Petitioner's new trial motion under state law because it was not reasonably probable the result of Petitioner's trial would have been different had Petitioner presented the mother's testimony. (Lodgment 5 at 8-10.)

2. Legal Standard

The Sixth Amendment provides that the defendant has "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary."[33] Though fundamental, the Sixth Amendment right to compulsory process does not afford "[t]he accused . . . an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly."[34] Rather, "[i]n the exercise of [the right to present

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[33] Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Taylor v. Illinois, 484 U.S. 400, 408-09, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

[34] Taylor, 484 U.S. at 410.

witnesses], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."[35] Moreover, "[t]he Supreme Court has held that the Sixth Amendment's guarantee of compulsory process only is violated when the criminal defendant is arbitrarily deprived of 'testimony [that] would have been relevant and material, and . . . vital to the defense.'"[36]

The Sixth Amendment right to compulsory process requires the same "showing of materiality" as the Fifth Amendment Due Process Clause.[37] "Materiality" is "a reasonable probability that . . . the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[38] Stated differently, evidence is material "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact."[39] Thus, "more than the mere absence of testimony is necessary to establish a violation of the right [to compulsory process]."[40]

"Materiality requires that 'the omission . . . be evaluated in the context of the entire record.'"[41] A plausible showing must be made illustrating that the witness's testimony would not have been merely cumulative to the testimony of available witnesses.[42]

"However, violations of the right to compulsory process are subject to harmless error review."[43] "The standard governing harmless error review on federal habeas petitions is stated in Brecht v. Abrahamson[44]: whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'"[45]

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35 Taylor, 484 U.S. at 411 n.15 (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).
36 Selam v. Warm Springs Tribal Correctional Facility, 134 F.3d 948, 952 (9th Cir.1998) (quoting Washington, 388 U.S. at 16).
37 United States v. Bianchi, 594 F.Supp.2d 532, 544-45 (E.D. Pa. 2009).
38 United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).
39 Valenzuela-Bernal, 458 U.S. at 874.
40 Id. at 867.
41 Howard v. Walker, 406 F.3d 114, 131 (2d Cir. 2005) (citation omitted).
42 Valenzuela–Bernal, 458 U.S. at 873.
43 Williams v. Stewart, 441 F.3d 1030, 1055 (9th Cir. 2006).
44 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).
45 Rogers v. McDaniel, 793 F.3d 1036, 1042 (9th Cir. 2015).

4. **Analysis**

On its face, Petitioner's claim is that the state courts applied an incorrect standard of materiality in adjudicating his compulsory process claim. Petitioner is mistaken. As explained, the compulsory process precedent applies a "reasonable probability" standard of materiality. This is the materiality standard the state courts applied in addressing Petitioner's claim under state law, although the trial court also suggested Petitioner's claim still failed under an alternate standard. (Lodgment 5 at 8; Lodgment 41 at 54-55; Lodgment 44 at 72-74; Lodgment 46 at 3902, 4202.)

Moreover, even if Petitioner's challenge is to the correctness of the state courts' unreasoned denials of his federal compulsory process claim, his argument fails. Petitioner's case has been the subject of extensive litigation. Throughout this litigation Petitioner has asserted that the trial court violated Petitioner's right to compulsory process by preventing him from calling the victim's mother as a witness at trial. For the sake of clarity and finality, this Court has carefully considered all of Petitioner's arguments in this regard, made both here and in state court, and finds that, even if this Court could give weight to Petitioner's claims of error and assumed the victim's mother would have testified at trial as she did at the two hearings before the trial court, any error in preventing the witness's testimony was harmless.[46] In other words, any alleged error did not have a substantial and injurious effect or influence in determining the jury's verdict.

The victim gave detailed, compelling, and credible testimony about how Petitioner coaxed her into his car under false pretenses, took her to an isolated location, and sexually assaulted her. (5 RT at 1509-16 (Petitioner convinced the victim to get in his car after he claimed to be a modeling agent and said he would pay the victim $200 to take some photographs), 1534-38 (Petitioner put his hands and mouth on the victim's breasts), 1548-51 (Petitioner raped the victim), 1552 (Petitioner forced the victim to orally copulate him), 1554-56 (Petitioner forced the victim to masturbate him).) Supporting the victim's credibility was

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[46] This Court has carefully considered all of the evidence presented throughout all of Petitioner's litigation in this case. This Court discusses below only the evidence it finds to be relevant to the consideration of the issues raised by Petitioner's claim.

testimony that, when Petitioner dropped the victim off after the assault, she wrote down Petitioner's license plate number, as well as the color and make of his car. She also tried to draw a picture of him. (6 RT at 1567-69.) The victim went directly to her computer class where her teacher noticed she was "ashen" and "seemed extremely upset." (5 RT at 1264; 6 RT at 1569.) After class, the victim cried and asked her teacher to help her look up Petitioner's license plate number on the computer. (5 RT at 1265; 6 RT at 1569.)

Petitioner attempted to rebut this evidence with testimony at trial and on remand before the trial court. However, Petitioner presented little more than inconsistencies and insinuations painting a picture of a typical human life, particularly for a teenage child. (Lodgment 46 at 2736-37 (the victim had lied to her mother in the past), Lodgment 46 at 2740, 2742 (the victim's mother disciplined her for misbehaving but was never violent, thereby undermining Petitioner's theory that the victim might have falsified the story because she was afraid of telling her mother she had consensual sex with Petitioner for money); Lodgment 46 at 2747-50; 5 RT at 1263) (the victim's teacher gave her money to buy food even though her family was providing for her sufficiently). None of these attempts at impeachment would have had a substantial affect or influence on the jury, particularly when the jury had already heard evidence that the victim lied to police but nevertheless credited her testimony by convicting Petitioner. (6 RT at 1590-91 (the victim initially lied to police about how she got in Petitioner's car.)

To the extent Petitioner strongly pushed a theory that the police coerced the victim into claiming Petitioner assaulted her, he has not presented proof that would have had a substantial influence on the jury. Petitioner presented evidence that the victim's mother was skeptical about the way the police treated the victim. (Lodgment 46 at 2773, 2776, 2779, 3091 (mother did not like the way police treated the victim and believed they badgered her and were mean and rude).) However, the mother testified that she was never in the room with the victim when she was speaking with police and, thus, she could not offer any proof of how the police may or may not have influenced the victim's statements. (Lodgment 42 at 57-58, 67, 92, 104-05; Lodgment 46 at 2756-57, 2761, 2774, 2780, 2807, 2860.) The mother further clarified that when she expressed concern about the police being rude to the victim, she really meant the police were

rude to the mother because they would not allow her in the room with the victim during questioning. (Lodgment 46 at 2779-80.) Moreover, despite Petitioner's theory that the mother thought police were badgering the victim, the mother ultimately signed a document authorizing the police to question the victim further. (Lodgment 42 at 54; Lodgment 46 at 2868-70) Finally, while Petitioner attempted to show through the mother's testimony that the police did not provide the victim with food or drink and did not allow her to use the bathroom, the mother admitted she did not know whether the victim had been able to use the bathroom while at the police station (Lodgment 46 at 2772-73, 2801, 2860)

The strong evidence of Petitioner guilt was contrasted at trial by Petitioner's changing accounts of the events and an unlikely story that he was the victim of a sophisticated plot by a teenage girl to exchange sex for money and then accuse him of a serious crime. (7 RT at 2442-43, 2445, 2482, 2487-88, 2518.)

Ultimately, Petitioner has not shown that any of the alleged errors by the trial courts resulted in the exclusion of evidence that might have had a substantial affect or influence on the jury's verdict. Accordingly, the state courts' rejection of Petitioner's claim was not contrary to, or an unreasonable application of, federal law. Habeas relief is not warranted on Claim Two.

C. Faretta

1. Background

In Claim Three, Petitioner argues the trial court violated his right to self-representation under Faretta v. California[47] when it denied Petitioner's mid-trial motion to represent himself. (FAP at 9; Supplemental FAP at 21-22; Reply at 18-25.)[48] The California Court of Appeal fairly summarized the factual background underlying Petitioner's claim in its March 4, 2009 decision on direct review:

> Reed represented himself throughout most of the pretrial proceedings and the trial of the People's case. Just before the prosecution called Detective Montenegro, its last witness, Reed asked to give up his self-representation and

[47] 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[48] To the extent Petitioner's claim is really one of ineffective assistance of counsel, this Court has considered Petitioner's arguments and finds any such claim lacks merit.

requested that his stand-by counsel be appointed to represent him. The court told Reed that it was willing to grant his request with the understanding "that once I make the determination on that request, that's it. I'm not going to -- I'm not even going to listen to a request for you to represent yourself again during the course of this trial. . . . Do you understand?" Reed responded, "Yes, your Honor." The court next asked Reed: "Do you now waive and give up your right to pro per privileges and request counsel be appointed to represent you?" Reed responded, "Yes, I do." The court then granted Reed's request, terminated his pro. per. privileges and appointed his stand-by attorney as attorney of record.

Reed's counsel represented him through the remainder of the prosecution's case and examined Reed's DNA expert witness. The following day, Reed informed the court that he wanted to revert to self-representation because he was dissatisfied with his counsel's representation. The court asked Reed if he was making a *Marsden* motion and Reed stated that he was. In a closed hearing Reed explained his dissatisfaction with counsel's cross-examination of Detective Montenegro and examination of his DNA expert and counsel explained the reasons and tactics for his actions. After hearing Reed and his counsel, the court denied Reed's *Marsden* motion finding counsel's performance did not fall below the standard of a reasonably competent lawyer. The court added that it was denying Reed's request to represent himself as "untimely" and "dilatory." (Lodgment 1 at 13-14.)

2. State Court Opinion

The California Court of Appeal held that the trial court did not abuse its discretion when it denied Petitioner's Faretta motion because Petitioner's motion was untimely and he was engaged in dilatory tactics. (Lodgment 1 at 14.)

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3. Legal Standard

The right to counsel has been interpreted to encompass "an independent constitutional right" of the accused to represent himself at trial, and thus waive the right to counsel.[49] This right, however, is neither automatic nor without qualification. To properly invoke his rights under Faretta, a defendant's request must be timely, not for purposes of delay, unequivocal, and knowing and intelligent.[50] The Supreme Court has not articulated when a Faretta motion will be considered "untimely," but has found that a motion made "weeks before trial" is properly presented.[51] Faretta otherwise provides no guidance as to what constitutes a timely request for self-representation.[52]

4. Analysis

Petitioner cites no United States Supreme Court authority for the proposition that his mid-trial request to represent himself was timely and should have been granted. A state court's decision cannot be contrary to clearly established Federal law if there is a "lack of holdings from" the Supreme Court on a particular issue.[53] Moreover, notwithstanding the lack of clearly established Supreme Court precedent, it was not unreasonable for the state courts to conclude Petitioner's motion, made well into trial, was untimely.[54]

Accordingly, the state courts' rejection of Petitioner's Faretta claim was not contrary to, or an unreasonable application of, federal law. Habeas relief is not warranted on Claim Three.

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[49] Faretta, 422 U.S. at 806.

[50] United States v. Maness, 566 F.3d 894, 896 (9th Cir. 2009) (*per curiam*).

[51] See Faretta, 422 U.S. at 835.

[52] Stenson v. Lambert, 504 F.3d 873, 884-85 (9th Cir. 2007) (Faretta "indicates only that a motion for self-representation made 'weeks before trial' is timely").

[53] Carey v. Musladin, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Marshall v. Taylor, 395 F.3d 1058, 1061 (9th Cir. 2005) ("Because the Supreme Court has not clearly established when a Faretta request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request 'weeks before trial' is timely.") (footnote omitted).

[54] Marshall, 395 F.3d at 1061 (state courts reasonably concluded request made on the first day of trial was untimely); Rogers v. Giurbino, 619 F.Supp.2d 1006, 1013 (S.D. Cal. 2007) (federal habeas relief not warranted where state court found Faretta motion was untimely because it "was made on the first (or possibly second) day of trial").

D. Marsden

1. Background

In Claim Four, Petitioner argues the trial court erred by refusing to conduct a hearing on Petitioner's motion to replace his appointed counsel under People v. Marsden.[55] (FAP at 9; Supplemental FAP at 22-25; Reply at 25-34.) The California Court of Appeal fairly summarized the factual background underlying Petitioner's claim in its March 4, 2009 decision on direct review:

> After the court pronounced sentence it advised Reed of his appeal rights and then addressed his counsel, asking: "Mr. Kim, will you be filing a notice of appeal on [Reed's] behalf?" Counsel responded: "Your Honor, I will. But -- *I've just been told by Mr. Reed* that he wants to request a *Marsden* hearing." The court responded: "It's a little untimely at this point. The request for a *Marsden* hearing is denied." (Italics added.)

(Lodgment 1 at 15.)

2. State Court Opinion

The California Court of Appeal rejected Petitioner's claim, explaining no purpose would have been served by appointing new counsel after the pronouncement of sentence. (Lodgment 1 at 15.)

3. Legal Standard

The denial of a motion to substitute counsel implicates a defendant's Sixth Amendment right to counsel and is properly considered in federal habeas.[56] The Ninth Circuit has held that when a defendant voices a seemingly substantial complaint about counsel, the trial judge should make a thorough inquiry into the reasons for the defendant's dissatisfaction.[57] However, the inquiry need only be as comprehensive as the circumstances reasonably would permit.[58] If a

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[55] 2 Cal.3d 118 (1970).

[56] Bland v. California Dep't of Corrections, 20 F.3d 1469, 1475 (9th Cir.1994), overruled on other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir.2000).

[57] Id. at 1475-76; Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir.1982).

[58] King v. Rowland, 977 F.2d 1354, 1357 (9th Cir.1992) (record may demonstrate that extensive inquiry was not necessary).

state court denies a motion to substitute counsel, the ultimate inquiry in a federal habeas proceeding is whether the petitioner's Sixth Amendment right to counsel was violated.[59]

4. Analysis

Petitioner did not move to substitute trial counsel until his proceedings had concluded. The only step left for Petitioner was the filing of his notice of appeal. Petitioner has not alleged he received ineffective assistance of counsel in relation to the filing of that notice of appeal. Accordingly, Petitioner cannot show the trial court's denial of his motion to substitute counsel resulted in the denial of Petitioner's right to effective trial counsel.[60]

Accordingly, the state courts' rejection of Petitioner's Marsden claim was not contrary to, or an unreasonable application of, federal law. Habeas relief is not warranted on Claims Four.

E. Cumulative Error

To the extent Petitioner presents a claim of cumulative error (Reply at 41-42), he is not entitled to relief. Cumulative error applies where, "although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant."[61] However, where no error lies with each alleged claim taken separately, there also rests no cumulative error.[62] Similarly, where no prejudice lies with each alleged claim taken separately, there also rests no cumulative prejudice.[63]

Here, this Court finds that none of the alleged claims individually constituted prejudicial error. Accordingly, the Court finds that Petitioner did not suffer any cumulative prejudice that deprived him of due process.

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[59] Schell, 218 F.3d at 1024-25.

[60] To the extent Petitioner argues he had wanted to lodge a motion to substitute counsel before his sentence was imposed, (see Reply at 33), his allegation is not supported by anything more than his own self-serving statements offered in hindsight. See Womack v. Del Papa, 497 F.3d 998, 1004 (9th Cir. 2007) (rejecting ineffective assistance of counsel claim when "[o]ther than Womack's own self-serving statement, there is no evidence" to support the claim); Turner v. Calderon, 281 F.3d 851, 881 (9th Cir. 2002) ("'[S]elf-serving statements by a defendant that his conviction was constitutionally infirm are insufficient to overcome the presumption of regularity accorded state convictions.'" (citation omitted)).

[61] Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002) (internal quotation marks and citation omitted).

[62] See Mancuso, 292 F.3d at 957 ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation.").

[63] Thompson v. Calderon, 109 F.3d 1358, 1369 (9th Cir. 1997, as amended Mar. 6, 1997), rev'd on other grounds, 523 U.S. 538, 566, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) ("Finding no prejudice from the errors taken separately, we also find no cumulative prejudice."); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) (same).

F. **Evidentiary Hearing**

Petitioner seeks an evidentiary hearing in this matter. (Reply at 9, 23-24, 28, 37-38, 41-42.) An evidentiary hearing is not warranted where, as here, "the record refutes the applicant's factual allegations or otherwise precludes habeas relief."[64] As such, Petitioner's request for an evidentiary hearing should be denied.

VII.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: December 17, 2018

HONORABLE LOUISE A. LA MOTHE
United States Magistrate Judge

[64] Schrirro v. Landrigan, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 6 2020

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

ANTOINE D. REED, Petitioner-Appellant, v. DANIEL PARAMO, Warden, Respondent-Appellee.	No. 19-55301 D.C. No. 2:15-cv-05636-CAS-LAL Central District of California, Los Angeles ORDER

Before: CANBY and CHRISTEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) 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.