FILED

APR 17 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GABINO ROMERO, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 20-55264 D.C. No. 2:18-cv-06087-AB-RAO Central District of California, Los Angeles ORDER

Before: OWENS and BENNETT, Circuit Judges.

The request for a certificate of appealability is denied because the notice of appeal was not timely filed. *See* 28 U.S.C. §§ 2107, 2253(c)(2).

The court notes that appellant filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(1) in the district court on March 6, 2020, which remains pending.

Any motions pending in this appeal are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GABINO ROMERO, Petitioner, v. RAYMOND MADDEN, Warden, Respondent.	Case No. CV 18-06087-AB (RAO) ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records and files herein, the Magistrate Judge's Report and Recommendation ("Report"), and Petitioner's objections to the Report ("Objections"). The Court has further made a *de novo* determination of those portions of the Report to which objections have been made. The Court concurs with and accepts the findings, conclusions, and recommendations of the Magistrate Judge and overrules the Objections.

The Court addresses one portion of the Objections. Petitioner raises for the first time a new ground for relief which was not asserted in the Petition. Specifically, Petitioner raises a claim of ineffective assistance of trial counsel. The new ground appears unexhausted and is likely time-barred. In an exercise of its discretion, this Court declines to consider the new ground for relief presented for the first time in the

Objections. *See United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000), cert. denied, 534 U.S. 831 (2001).

IT IS ORDERED that the Petition is denied, and Judgment shall be entered dismissing this action with prejudice.

DATED: July 22, 2019

ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GABINO ROMERO, Petitioner, v. RAYMOND MADDEN, Warden, Respondent.	Case No. CV 18-6087 AB (RAO) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I. INTRODUCTION

In 2015, a jury in the Santa Barbara County Superior Court convicted Gabino Romero ("Petitioner") of forcible rape while acting in concert, forcible rape, oral copulation by acting in concert with force, and making criminal threats.[1] (Clerk's Transcript ("CT") 708-16.) The jury also found that Petitioner used a deadly or dangerous weapon (i.e., a knife) in the commission of the forcible rape while acting

///

[1] Co-defendant Juan Carlos Herrera-Romero ("Herrera-Romero") was tried and convicted in the same proceeding, but by a separate jury. (*See* Lodg. No. 7 at 1.)

in concert and criminal threats offenses. (CT 709, 716.) The trial court sentenced him to 36 years to life in prison. (CT 758-64, 771-74.)

Petitioner appealed to the California Court of Appeal, which affirmed the judgment in a reasoned decision. (Lodg. Nos. 4-7.) Thereafter, Petitioner's petition for review in the California Supreme Court was summarily rejected. (Lodg. Nos. 8-9.)

On July 3, 2018, Petitioner, a California state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"), pursuant to 28 U.S.C. § 2254, raising a single ground for relief. (Docket No. 1.) On October 12, 2018, Respondent filed an Answer to the Petition and a supporting memorandum ("Answer"). (Docket No. 10.) Respondent also lodged the relevant state records. (*See* Docket No. 71.) On December 14, 2018, Petitioner filed a Traverse. (Docket No. 14.)

II. PETITIONER'S CLAIM

Petitioner raises a single claim for relief, arguing that there was insufficient evidence of penetration to convict him of rape in violation of his constitutional rights. (Petition at 5, 5(a)-5(e).)

III. FACTUAL SUMMARY

The Court adopts the factual summary set forth in the California Court of Appeal's opinion affirming Petitioner's conviction on appeal.[2]

> On July 16, 2014, K.R., age 62, was homeless. She was living on the beach in Santa Barbara with her boyfriend, Barry Johns, age 69. At about 2:00 a.m., two men came into their camp. The men spoke Spanish and English.

---

[2] The Court "presume[s] that the state court's findings of fact are correct unless [p]etitioner rebuts that presumption with clear and convincing evidence." *Tilcock v. Budge*, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1). Because Petitioner has not rebutted the presumption with respect to the underlying events, the Court relies on the state court's recitation of the facts. *Tilcock*, 538 F.3d at 1141. To the extent that an evaluation of Petitioner's claim depends on an examination of the trial record, the Court has done so.

[Petitioner], the shorter of the two men, pushed Johns down on his stomach and held him to the ground. When Johns began to scream, [Petitioner] brandished a folding knife and pushed Johns's face into the sand. [Petitioner] threatened to cut Johns if he did not pretend to sleep.

Herrera-Romero took off K.R.'s clothes and began to rape her. Johns could see Herrera-Romero on top of K.R. "pumping away" with his pelvis against her pelvis. K.R. was saying, "No, stop it. It hurts."

When Herrera-Romero was finished, [Petitioner] began to rape K.R. Johns could see [Petitioner] "pumping away" with his pelvis touching her pelvis. [Petitioner] took only a couple of minutes. The two men then walked away together.

It took Johns a few minutes to get up. By then K.R. had already left their camp.

At about 3:45 a.m., K.R. walked into the lobby of a nearby hotel. She was naked. She told the desk clerk she had been raped. The desk clerk gave her a bed sheet to wrap herself in and called the police.

When the police arrived, K.R. told them she had been raped by two Mexican men. One man was taller and older. The other was shorter and younger. They wore condoms. She said her vagina hurt during the rapes and still hurt at the time of the interview. The two men also forced K.R. to orally copulate them. Her right cheek and jaw had some swelling. K.R. told the police the men left in a light brown SUV.

K.R. said she was concerned about Johns. She thought the men might have broken his arm. She insisted that the police go to the camp to check on Johns.

K.R. led the police to the encampment on the beach just west of the hotel. Johns was there. The clothes K.R. had been wearing were scattered around the camp. The police found a white cell phone in the sand near K.R.'s clothing. The cell phone did not belong to K.R. or Johns.

The police obtained a search warrant for the cell phone. They traced it to Herrera-Romero. On the afternoon of July 16, 2014, Detective Brian Larson went to Herrera-Romero's job site. Herrera-Romero's gold SUV was there. In the back, there was a small locking blade knife.

Herrera-Romero did not appear surprised to see law enforcement at the job site. When Larson told Herrera-Romero that he had a search warrant to collect DNA from his genitalia, Herrera-Romero asked to use the bathroom.

When Larson said he had to accompany him, Herrera-Romero changed his mind about using the bathroom.

Herrera-Romero's Statement

Detective Andrew Hill interviewed Herrera-Romero at the police station. Herrera-Romero agreed to waive his rights and talk to Hill.

Herrera-Romero said he and [Petitioner] discussed raping a woman. They found K.R. on the beach. He admitted he raped her and forced her to orally copulate him. He wore a condom during the sex acts. He stayed with Johns while [Petitioner] was with K.R. and told Johns not to move. Herrera-Romero said he was sorry and wanted the victim to know it.

[Petitioner's] Statement

The police arrested [Petitioner] in the evening of July 16, 2014. They found a folding knife inside his car. [Petitioner] told the officers, "I know I did wrong. What happened last night was bad, but don't send me to Mexico or deport me to Mexico."

Detective Hill interviewed [Petitioner] at the police station. After being advised of his rights, [Petitioner] agreed to talk because he did something wrong. He said he and Herrera-Romero were drunk and fishing at the pier at about 2:00 a.m. They talked about having sex with some homeless girls. They went to the beach and decided to rape K.R. He gave Herrera-Romero a condom and kept one for himself. [Petitioner] grabbed Johns and told him not to scream while Herrera-Romero had sex with K.R.

[Petitioner] said he tried to have sex with K.R. But when she said it hurt, he felt bad and decided he did not want to do it. He denied he had an erection or penetrated her vagina. He said he rubbed his penis against her vagina, but did not penetrate her. He also denied he forced her to orally copulate him or that he sodomized her.

[Petitioner] said he felt bad about what happened. He wrote a letter of apology to K.R.

Forensic Evidence

Swabs from K.R.'s breast collected DNA that matched [Petitioner's] DNA profile. There was no male DNA taken from K.R.'s vaginal swabs. That is consistent with the use of condoms.

(Lodg. No. 7 at 2-5.)

IV. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). In particular, this Court may grant habeas relief only if the state court adjudication was contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court or was based upon an unreasonable determination of the facts. *Id.* at 100 (citing 28 U.S.C. § 2254(d)). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (internal citation and quotations omitted).

A state court's decision is "contrary to" clearly established federal law if: (1) the state court applies a rule that contradicts governing Supreme Court law; or (2) the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court but nevertheless arrives at a result that is different from the Supreme Court precedent. *See Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A 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." *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002).

A state court's decision is based upon an "unreasonable application" of clearly established federal law if it applies the correct governing Supreme Court law but unreasonably applies it to the facts of the prisoner's case. *Williams*, 529 U.S. at 412-13. A federal court may not grant habeas relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly

///

established federal law erroneously or incorrectly. Rather, that application must also be *unreasonable*." *Id.* at 411 (emphasis added).

In determining whether a state court decision was based on an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), such a decision is not unreasonable "merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L.Ed.2d 738 (2010). The "unreasonable determination of the facts" standard may be met where: (1) the state court's findings of fact "were not supported by substantial evidence in the state court record"; or (2) the fact-finding process was deficient in some material way. *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012) (citing *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004)).

In applying these standards, a federal habeas court looks to the "last reasoned decision" from a lower state court to determine the rationale for the state courts' denial of the claim. *See Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)). There is a presumption that a claim that has been silently denied by a state court was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and that AEDPA's deferential standard of review therefore applies, in the absence of any indication or state-law procedural principle to the contrary. *See Johnson v. Williams*, 568 U.S. 289, 298, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) (citing *Richter*, 562 U.S. at 99).

Here, Petitioner raised the sole claim in his Petition in both the California Court of Appeal and the California Supreme Court on direct appeal. (*See* Lodg. Nos. 4, 6, 8.) The California Court of Appeal rejected Petitioner's claim on the merits in a reasoned opinion, and the California Supreme Court denied it without comment or citation. (*See* Lodg. Nos. 7, 9.) Accordingly, under the "look through" doctrine, this claim is deemed to have been rejected for the reasons given in the last reasoned decision on the merits, which was the Court of Appeal's decision, and entitled to

AEDPA deference. *Ylst*, 501 U.S. at 803; *see also Wilson v. Sellers*, __ U.S. __, 138 S. Ct. 1188, 1194, 200 L.Ed.2d 530 (2018) (reaffirming *Ylst*'s "look through" doctrine).

V. DISCUSSION

In his only claim for relief, Petitioner argues that there was insufficient evidence of penetration to lawfully convict him of rape. (Petition at 5.) He asserts that there was no evidence that his "flaccid penis" ever penetrated "even the external genital organs" of the victim. (Petition at 5 & 5(b).) He argues that he may have attempted to rape the victim, but that the jury's conclusion that he completed the act was "pure speculation." (Petition at 5(d)-5(e).)

A. *Background*

At trial, the victim, K.R., did not testify.[3] (*See* CT 606.) Several of her pre-trial statements about the alleged rapes were admitted at trial, however.[4] (CT 607.) K.R. specifically told police officers immediately after the incident that she had been "raped" by two men. (Supplemental Clerk's Transcript ("SCT") 138, 154; Reporter's Transcript ("RT") 492-93.) She later complained of vaginal pain from the incident. (SCT 164; RT 699.)

K.R.'s boyfriend, Johns, also testified at trial that Petitioner "raped her." (RT 573.) He testified that, although he could not actually see if they were having sexual intercourse, Petitioner was on top of K.R. "pumping away" for "two or three minutes," while he had his pants off or "down around his ankles." (RT 594, 618-19, 622.)

Petitioner later told the police that he put a condom on and "tried" to put his penis in her vagina, but stopped because she said it was hurting her. (SCT 23-24,

---

[3] Subsequent to the night she was raped, her mental health deteriorated to the point that the trial court found she was not mentally competent to testify. (CT 603, 607.)

[4] Petitioner did not challenge the admissibility of any of the victim's statements on appeal.

36, 38, 45.) He admitted, however, to rubbing the tip of his penis against her vagina. (SCT 46.) He also expected his DNA to be found inside her vagina because he "tried to have sex with her." (SCT 45, 52.)

B. *The California Court of Appeal Opinion*

In 2017, the California Court of Appeal denied Petitioner's claim on direct appeal, finding substantial evidence of penetration as follows:

> Here, K.R. told the police she was raped by two men. Johns testified that he saw [Petitioner] on top of K.R. "pumping away" pelvis to pelvis. That alone would be sufficient to support the conviction.
>
> In addition, [Petitioner] admitted that he rubbed his penis against K.R.'s vagina. "The penetration which is required is sexual penetration and not vaginal penetration. Penetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina." (*People v. Karsai* (1982) 131 Cal.App.3d 224, 232, disapproved on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8.) If [Petitioner] rubbed his penis against K.R.'s vagina, he must have penetrated her external genital organs.

(Lodg. No. 7 at 8-9.)

C. *Federal Law and Analysis*

It is well established that sufficient evidence exists to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis included). "[I]t is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." *Cavazos v. Smith*, 565 U.S. 1, 2, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011) (per curiam). Accordingly, a federal reviewing court must not usurp the role of the finder of fact by considering how it would have resolved any conflicts in the evidence, made the inferences, or considered the evidence at trial. *See Jackson,* 443 U.S. at 318-19, 326 (holding that if the record supports conflicting inferences, a reviewing court "must

presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution"); *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) (holding that the reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict").

In applying the *Jackson* standard, the federal court must refer to the substantive elements of the criminal offense as defined by state law at the time that a petitioner committed the crime and was convicted and look to state law to determine what evidence is necessary to convict on the crime charged. *See Jackson*, 443 U.S. at 324 n.16; *see also Boyer v. Belleque*, 659 F.3d 957, 965 (9th Cir. 2011) (stating that, when assessing sufficiency of the evidence claims in a habeas petition, the court looks to state law to establish the elements of the crime, then turns to the federal question of whether the state court was objectively unreasonable in concluding that the evidence was sufficient).

Finally, under AEDPA, federal courts must "apply the standards of *Jackson* with an additional layer of deference." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). A federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees; rather, it "may do so only if the state court decision was objectively unreasonable." *Cavazos*, 565 U.S. at 2 (internal quotations omitted). Thus, where a *Jackson* claim is "subject to the strictures of AEDPA, there is a double dose of deference that can rarely be surmounted." *Boyer*, 659 F.3d at 964; *see also Coleman v. Johnson,* 566 U.S. 650, 651, 132 S.Ct. 2060, 182 L.Ed.2d 978 (2012) (per curiam) ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference.").

///

Petitioner challenges the sufficiency of evidence to convict him of raping K.R. by arguing that there was no substantial evidence that he penetrated K.R.'s vagina during his attempt to rape her. (Petition at 5b; Traverse at 4-5.) California law defines forcible rape as an act of sexual intercourse accomplished with a person not the spouse of the perpetrator against the person's will by means of, among other things, force or violence. Cal. Penal Code § 261(a) (2); *People v. Harris*, 57 Cal.4th 804, 850, 161 Cal.Rptr.3d 364, 306 P.3d 1195 (2013). "Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis." *People v. Aleksanyan*, 231 Cal.App.4th Supp.1, 6, 180 Cal.Rptr.3d 375, 379 (App. Dep't Sup. Ct. 2014). Actual penetration of the vagina is unnecessary to commit the crime of rape because penetration of the external female genitalia constitutes sexual penetration under statutory law. *See People v. Quintana*, 89 Cal.App.4th 1362, 1371, 108 Cal.Rptr.2d 235, 242 (2001) (rejecting narrower interpretation requiring actual vaginal penetration and citing cases indicating that contact "with labia minora" or "between the folds of skin over the vagina" sufficed under Cal. Penal Code § 289 as "genital penetration"); *People v. Karsai*, 131 Cal.App.3d 224, 232, 182 Cal.Rptr. 406, 411 (1982) ("Penetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina."), *overruled on other grounds by People v. Jones*, 46 Cal.3d 585, 250 Cal.Rptr. 635, 758 P.2d 1165 (1988).

In denying Petitioner's claim, the state courts relied on three key pieces of evidence: (1) K.R.'s statement to police immediately after the incident that she was raped by both Petitioner and Herrera-Romero; (2) Johns's testimony at trial that he saw Petitioner on top of K.R. "pumping away" pelvis to pelvis; and (3) Petitioner's admissions to police that he rubbed his penis against K.R.'s vagina. While none of this constituted direct evidence of sexual intercourse on its own, taken together, it strongly supported an inference of penetration as defined by California law. *See Walters*, 45 F.3d at 1358 (holding that inferences from circumstantial evidence can

sufficiently support a conviction); *People v. Strickland*, 134 Cal.App.2d 815, 818, 286 P.2d 586 (1955) (stating that the fact of penetration for rape may be established by circumstantial evidence).

Here, Petitioner was witnessed attempting to have vaginal intercourse with K.R. while he admittedly rubbed his penis against her vagina. This was sufficient for a reasonable juror to conclude that, in doing so, he at least penetrated the victim's external genitalia. *See, e.g., Peyton v. Lopez,* No. EDCV 10-1195-RGK (JPR), 2012 WL 1203484, at *30 (C.D. Cal. Feb. 22, 2012) (finding victim's testimony that defendant "rubbed the top of [the] vagina with his fingers" was sufficient to support conviction involving sexual penetration), *report and recommendation adopted by*, 2012 WL 1203566 (C.D. Cal. Apr. 9, 2012). This Court is bound by the state court's definition of sexual penetration, *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005), and, under this definition, there is little doubt that a rational juror could have found beyond a reasonable doubt that Petitioner penetrated K.R. during the sexual assault. *See Jackson*, 433 U.S. at 319.

For these reasons, the state court's rejection of Petitioner's claim of insufficient evidence was not contrary to, or an unreasonable application of, clearly established federal law and, as such, the claim fails to merit habeas relief.[5]

VI. RECOMMENDATION

For the reasons discussed above, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Report and Recommendation;

---

[5] In his Traverse, Petitioner requests that the Court conduct an evidentiary hearing to allow him to further develop his claim that his flaccid penis could not have caused any vaginal injury to the victim. (*See* Traverse at 15.) That request is denied as such a determination is not relevant to the lawfulness of his conviction. *See Sully v. Ayers*, 725 F.3d 1057, 1075 (9th Cir. 2013 ("[A]n evidentiary hearing is pointless once the district court has determined that § 2254(d) precludes habeas relief."). Moreover, under AEDPA, this Court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 180-81.

and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: April 10, 2019

Rozella A. Oliver

ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

FILED

AUG 6 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GABINO ROMERO, Petitioner-Appellant, v. RAYMOND MADDEN, Warden, Respondent-Appellee.	No. 20-55264 D.C. No. 2:18-cv-06087-AB-RAO Central District of California, Los Angeles ORDER

Before: McKEOWN and BADE, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 3) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.