Appendix - A

PUNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 17 2021

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

VICTOR SHAWN BROWN,

Petitioner-Appellant,

v.

DEBBIE ASUNCION, Warden,

Respondent-Appellee.

No. 20-55025

D.C. No. 2:18-cv-08892-MWF-FFM
Central District of California,
Los Angeles

ORDER

Before: CANBY and LEE, Circuit Judges.

Appellant's petition for rehearing (Docket Entry No. 11) is construed as a motion for reconsideration and is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 17 2021

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

VICTOR SHAWN BROWN, Petitioner-Appellant, v. DEBBIE ASUNCION, Warden, Respondent-Appellee.	No. 20-55025 D.C. No. 2:18-cv-08892-MWF-FFM Central District of California, Los Angeles ORDER

Before: PAEZ and CALLAHAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 5, 8) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

Appendix-B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VICTOR SHAWN BROWN, Petitioner, v. WARREN DEBBIE ASUNCION, Respondent.	No. CV 18-8892 MWF (FFM) JUDGMENT

Pursuant to the Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is dismissed with prejudice.

DATED: December 19, 2019

MICHAEL W. FITZGERALD
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VICTOR SHAWN BROWN, Petitioner, v. WARDEN DEBBIE ASUNCION, Respondent.	CASE NO. CV 18-8892-MWF (FFM) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the entire record in this action, the Report and Recommendation of United States Magistrate Judge ("Report") (Docket No. 23), and the objections to the Report (Docket No. 29). Good cause appearing, the Court concurs with and accepts the findings of fact, conclusions of law, and recommendations contained in the Report after having made a *de novo* determination of the portions to which objections were directed.

The Court notes that, in his Objections, Petitioner presents new evidence and new claims to support his ineffective assistance of counsel grounds for relief. "A district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation," but it "must actually exercise its discretion, rather than summarily accepting or denying the motion." *United States v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000).

Here, the Court, in its discretion, elects not to address the new evidence and claims that Petitioner has raised in his Objections. As an initial matter, the evidence on which Petitioner relies -- his own declaration -- in pertinent part, consists of inadmissible hearsay evidence, as it sets forth out-of-court statements allegedly made by his initial counsel for the truth of the matter asserted. Moreover, Petitioner has had ample time and opportunity to state the nature of his claims and any evidence supporting those claims. Indeed, he filed an amended petition in which could have set forth any evidence or legal theories supporting his many grounds for relief. That he elected do so in his Objections, as opposed to in his amended petition or in any request to file another amended petition, does not warrant consideration of his evidence and legal theories at this late stage.

Regardless, even if the Court were to consider the claims and evidence that Petitioner has asserted for the first time in his Objections, those claims would fail. The new evidence and theories advanced by Petitioner in his Objections pertain to his ineffective assistance of counsel ground for relief. But the allegations of attorney error that he alleges in his Objections (and the evidence supporting them) fail, either because they are not supported by competent evidence or because Petitioner suffered no prejudice in light of the overwhelming evidence of his guilt that is detailed in the magistrate judge's Report. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694

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104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (explaining that counsel's error warrants habeas relief only if reasonable probability exists that, but for error, result would have been different).

IT IS THEREFORE ORDERED that judgment be entered dismissing the First Amended Petition on the merits with prejudice.

DATED: December 19, 2019

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VICTOR SHAWN BROWN, Petitioner, v. WARDEN DEBBIE ASUNCION, Respondent.	No. CV 18-8892-MWF (FFM) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Michael W. Fitzgerald, 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. For the reasons discussed below, it is recommended that the First Amended Petition be denied and the action be dismissed with prejudice.

I. PROCEEDINGS

Petitioner, Victor Shawn Brown, a state prisoner in the custody of the California Department of Corrections, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 on October 15, 2018. He filed a First Amended Petition ("FAP") on November 5, 2018. Thereafter, on

February 28, 2019, Respondent filed an answer to the FAP. On April 8, 2019, Petitioner filed a traverse.

The matter, thus, stands submitted and ready for decision.

II. PROCEDURAL HISTORY

A Los Angeles County Superior Court jury convicted Petitioner of assault with a deadly weapon and false imprisonment by violence. He was then sentenced to state prison for sixteen years.

Petitioner appealed his conviction. On August 7, 2017, the California Court of Appeal filed an unpublished opinion in which it affirmed the judgment. Petitioner then filed a petition for review in the California Supreme Court, which denied the petition on October 11, 2017. Thereafter, he filed a series of unsuccessful state collateral attacks to his conviction, the last of which was denied on September 19, 2018.

This action followed.

III. FACTUAL BACKGROUND

The following facts were taken verbatim from the California Court of Appeal's opinion affirming Petitioner's conviction:

In the early morning hours of January 28, 2015, three deputies from the Los Angeles County Sheriff's Department responded to a 911 call which led them to [Petitioner's] home. After one of the deputies, Mike Reynolds, heard a man yelling and a woman crying inside, the deputies forced open the front door and entered [Petitioner's] home. Reynolds, who had his service weapon drawn as he entered, saw [Petitioner] and the victim laying on their backs on the floor near the front door. [Petitioner] had his left arm wrapped around the victim's chest and held a knife with an 8-inch blade to her throat. The victim was screaming.

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Reynolds pointed his gun at [Petitioner], who eventually threw the knife to the floor and released the victim.

[Petitioner] testified in his own defense at trial. He explained that he had known the victim for many years and she spent the night at his house prior to the incident. [Petitioner] said that he had been up all night using drugs and, in the morning, was paranoid and afraid. He became convinced other people were in his house and grabbed a knife from the kitchen while he walked through the house looking for the intruders. During this time, he and the victim called 911 for assistance. The victim, who was trying to leave [Petitioner's] home to go to work, suggested they sit together on the floor by the front door until help arrived. [Petitioner] recalled he had his arm around the victim and had the knife in his right hand when the deputies burst through the front door. Reynolds immediately told [Petitioner] to put his hands up and throw down the knife, which he did. According to [Petitioner], Reynolds instructed him to lay on the floor on his stomach and then Reynolds hit him on the side of the head with his gun and threatened to shoot him in the head. Reynolds later recovered a small bag of methamphetamine from defendant's front shirt pocket. [Petitioner] denied holding the knife to the victim's throat.

(Docket No. 6 at 3-4.)[1]

IV. PETITIONER'S CLAIMS

1. The trial court violated Petitioner's right to due process by allowing him to represent himself because he lacked the mental capacity to exercise his right to waive his right to counsel.

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[1] Any reference in this Report to page numbers of the parties' filings corresponds to the sequential page number of the electronic copy that was filed in this Court.

2. Petitioner was deprived of his right to due process because his trial was conducted by a superior court commissioner, rather than by a judge.

3. The trial court abused its discretion by committing the following evidentiary errors:

a. allowing two sheriff's deputies to testify to the facts regarding Petitioner's arrest, despite the fact that neither deputy authored a police report concerning the arrest;

b. prohibiting Petitioner from introducing testimony relating to his mental health issues; and

c. prohibiting Petitioner from introducing testimony relating to the sheriff's department's policies pertaining to the excessive use of force by its deputies.

4. The trial court abused its discretion by refusing to disclose information contained in the personal records of one of the sheriff's deputies who arrested Petitioner.[2]

5. The prosecutor deprived Petitioner of his right to due process and a fair trial by committing the following acts of misconduct:

a. expressing negative opinions about Petitioner's credibility and that of several other witnesses;

b. misstating the evidence at trial and urging the jury to draw inferences based on those misstatements; and

c. vouching for the credibility of the sheriff's deputies who testified for the prosecution.

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[2] Petitioner asserts this claim of error in his third ground for relief. However, because the analysis of this claim is distinct from the analysis of the other claims that Petitioner asserts in Ground Three, the undersigned addresses this claim as if it were an independent ground for relief.

6. Trial counsel deprived Petitioner of his Sixth Amendment right to effective assistance of counsel by committing the following errors:

a. stipulating to having a court commissioner, rather than a judge, preside over the trial;

b. failing to object to the testimony of the sheriff's deputies who testified for the prosecution based on the fact that the testifying deputies did not write a police report concerning the crime underlying Petitioner's conviction;

c. failing to properly investigate, and present testimony during the guilt phase of the trial relating to, Petitioner's mental health history;

d. failing to object to the prosecutor's numerous acts of misconduct;

e. failing to elicit testimony concerning the fact that the victim filed "a number of complaints" against one of the arresting sheriff's deputies and the prosecutor;

f. failing to conduct an adequate investigation into the facts underlying the *Pitchess* motion that counsel filed on Petitioner's behalf; and

g. sleeping during an "important part" of the trial.

7. Petitioner was deprived of his Sixth Amendment right to trial counsel because trial counsel was laboring under an actual conflict of interest that prevented him from adequately defending Petitioner.

8. The trial court erred in excluding evidence regarding Petitioner's voluntary intoxication when he committed the charged crime.

9. Appellate counsel denied Petitioner his constitutional right to effective assistance of counsel on appeal by failing to assert each of the foregoing claims of error on appeal.

V. STANDARD OF REVIEW

The standard of review applicable to Petitioner's claims herein is set forth in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") (Pub. L. No. 104-132, 110 Stat. 1214 (1996)). *See* 28 U.S.C. § 2254(d); *see also Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). Under AEDPA, a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that adjudication "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 "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."[3] 28 U.S.C. § 2254(d); *see Williams v. Taylor*, 529 U.S. 362, 402, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

The phrase "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."[4] *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). However, a state court need not cite the controlling Supreme Court cases in its own decision, "so long as neither the reasoning nor the result of the state-court decision contradicts" relevant Supreme Court precedent

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[3] In addition, under 28 U.S.C. § 2254(e)(1), factual determinations by a state court "shall be presumed to be correct" unless the petitioner rebuts the presumption "by clear and convincing evidence."

[4] Under AEDPA, the only definitive source of clearly established federal law is set forth in a holding (as opposed to dicta) of the Supreme Court. *See Williams*, 529 U.S. at 412; *see also Yarborough v. Alvarado*, 541 U.S. 652, 660-61, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). Thus, while circuit law may be "persuasive authority" in analyzing whether a state court decision was an unreasonable application of Supreme Court law, "only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

which may pertain to a particular claim for relief. *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (*per curiam*).

A state court decision is "contrary to" clearly established federal law if the decision applies a rule that contradicts the governing Supreme Court law or reaches a result that differs from a result the Supreme Court reached on "materially indistinguishable" facts. *Williams*, 529 U.S. at 405-06. A decision involves an "unreasonable application" of federal law if "the state court identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. A federal habeas court may not overrule a state court decision based on the federal court's independent determination that the state court's application of governing law was incorrect, erroneous, or even "clear error." *Lockyer*, 538 U.S. at 75. Rather, a decision may be rejected only if the state court's application of Supreme Court law was "objectively unreasonable." *Id.*

The standard of unreasonableness that applies in determining the "unreasonable application" of federal law under Section 2254(d)(1) also applies in determining the "unreasonable determination of facts in light of the evidence" under Section 2254(d)(2). *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). Accordingly, "a federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable." *Id.*

Where more than one state court has adjudicated the petitioner's claims, the federal habeas court analyzes the last reasoned decision. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991) for presumption that later unexplained orders, upholding judgment or rejecting same claim, rest upon same ground as the prior order). Thus, a federal habeas court looks through ambiguous or unexplained state court decisions to the last reasoned decision in order to

determine whether that decision was contrary to or an unreasonable application of clearly established federal law. *Bailey v. Rae*, 339 F.3d 1107, 1112-13 (9th Cir. 2003).

VI. DISCUSSION

A. Petitioner's Waiver of His Right to Counsel

In his first ground for relief, Petitioner contends that the trial court violated his right to due process, and presumably his right to counsel, by allowing him to represent himself without first conducting a mental competency hearing. Had the trial court conducted such a hearing, according to Petitioner, the court would have discovered that Petitioner had been diagnosed with schizophrenia, post-traumatic stress disorder, depression, and paranoia, all of which rendered him incompetent to waive his right to counsel.

Petitioner raised this claim before the Los Angeles County Superior Court. The superior court rejected the claim, stating, "The mere fact that [P]etitioner suffered from schizophrenia is not a valid basis to assume that [he] was incompetent at the time of the proceedings." (Lodged Doc. No. 10.) As explained below, the superior court did not commit constitutional error in rejecting Petitioner's claim.

1. Factual Background

During Petitioner's preliminary hearing on March 10, 2015, one of the sheriff's deputies testified that he had heard Petitioner was schizophrenic. Meanwhile, a probation officer submitted a pre-conviction report, observing that, in connection with a prior criminal case filed in 2008, Petitioner had reported diagnoses and medications for bipolar disorder and paranoid schizophrenia.

Petitioner appeared in court six times over the next two months. During those appearances, he routinely spoke to the court. For example, he corrected a mistake regarding his birth date, he argued that his case should be dismissed

because one of the deputies was involved in multiple internal investigations, he described his compliance with drunk-driving classes for an unrelated misdemeanor case, he explained his reasons for rejecting a thirteen-year plea-bargain sentence, and he complained that he was "not being helped by [his] attorney" to the "full potential." When confronted about the possibly threatening nature of a phone call he made from jail, Petitioner promised that he would not become angry during trial and that he was "way more mature" than when he previously argued with a different judge in a prior case. Neither defense counsel nor the court raised a doubt as to Petitioner's competency throughout these proceedings.

On June 16, 2015, Petitioner requested that he be allowed to represent himself. Accordingly, he completed a written waiver, in which he indicated that he understood and wished to waive his right to an attorney. Again, defense counsel did not declare a doubt as to Petitioner's competency. The trial court advised Petitioner of the dangers of self-representation and reminded him that he was entitled to an appointed attorney. Petitioner, however, stated that he still wanted to represent himself. After conducting a brief colloquy, the trial court found that Petitioner had "expressly, knowingly, understandingly, and intelligently waived his right to an attorney." Consequently, the trial court granted Petitioner's request to represent himself and, therefore, relieved defense counsel.

Less than two weeks later, on July 29, 2015, after repeatedly interrupting the court, Petitioner's *pro se* status was revoked. The trial court then appointed Wayne Redmond to serve as defense counsel. Trial began approximately six months later, on January 13, 2016.

2. Federal Legal Standard and Analysis

The mental competency standard for a criminal defendant waiving the right to counsel is the same standard applicable for a criminal defendant's competency

to stand trial and plead guilty. *Moran v. Godinez*, 509 U.S. 389, 399, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). For each, the standard for competence is whether a defendant has a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him. *Id.*

Determining whether a criminal defendant is competent to waive his right to counsel does not require inquiry into the defendant's "technical legal knowledge." *Id.* Rather, as the Supreme Court has recognized, "the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." *Id.*

Here, as the state superior court alluded to in rejecting this claim, there is no evidence in the record to suggest that Petitioner was mentally incompetent to waive his right to counsel. On the contrary, the only mental health history regarding Petitioner's competency to waive his right to counsel in 2015 is limited to Petitioner's own reporting in 2008 that he suffered from bipolar disorder and paranoid schizophrenia and the reporting of his girlfriend, the victim, that he was schizophrenic. However, "[n]ot all people who have a mental problem are rendered by it legally incompetent." *Bouchillon v. Collins*, 907 F.2d 589, 593 (5th Cir. 1990) ("We venture to guess that if every accused were to be adjudged incompetent who was rendered depressed or apathetic at finding himself incarcerated and indicted on felony charges, few would ever be tried.") Moreover, Petitioner's 2008 self-diagnosis fails to show that he was experiencing any particular symptoms approximately seven years later. The statements of the victim, likewise, do not suggest that Petitioner was experiencing any schizophrenic symptoms and, more importantly, the victim was not qualified to make a medical diagnosis. The undersigned further notes that nothing in the Reporter's Transcript indicates that Petitioner was experiencing any symptoms with regards to his 2008 diagnosis when (or before) he was permitted to represent himself. Rather, Petitioner repeatedly addressed the trial court, made arguments,

and gave explanations as to his decisions. In short, nothing in the record suggests that Petitioner's decision to waive his right to counsel was anything but knowing and voluntary.

Regardless, even if the trial court erred in allowing Petitioner to waive his right to counsel, Petitioner is not entitled to habeas relief because he suffered no prejudice as a result. Petitioner was permitted to represent himself for less than two weeks during the pre-trial process. During that time, no critical stage of the pre-trial proceedings occurred. *See Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 2085, 173 L. Ed. 2d 955 (2009) (stating that, once adversary judicial process has been initiated, Sixth Amendment guarantees defendant right to have counsel present at all "critical stages" of criminal proceedings). Instead, Petitioner represented himself only during two pretrial appearances, which were limited to questions concerning pretrial discovery, including the appointment of experts and investigators. Assuming that Petitioner was deprived of counsel during these two proceedings, he has not even attempted to show how he was prejudiced by the purported lack of counsel.

Moreover, after representing himself for less than two weeks, Petitioner was appointed counsel. Importantly, counsel had adequate time to familiarize himself with the relevant facts and law pertaining to Petitioner's case, as counsel was appointed to represent Petitioner nearly six months before trial. Although Petitioner complains that he would have preferred his original counsel to the one who was appointed after his *pro se* privileges were revoked, Petitioner had no constitutional right to the counsel of his choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); *Caplin & Drysdale v. United States*, 491 U.S. 617, 624, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989) (explaining that "those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts"); *Morris v. Slappy*,

461 U.S. 1, 14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) (rejecting premise that "the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel").

For the foregoing reasons, the state courts' rejection of this claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court. The undersigned also notes that, even under a *de novo* standard of review, Petitioner's claim would fail because, as discussed above, he has provided no evidence to show that he was mentally incompetent to waive his right to counsel. Accordingly, he is not entitled to habeas relief with respect to this claim.

B. Court Commissioner

In his second ground for relief, Petitioner contends that he was deprived of his right to due process because his trial was presided over by a superior court commissioner, rather than by a judge. Although Petitioner acknowledges that his trial counsel stipulated to have the commissioner conduct the trial, he nevertheless maintains that he, himself, never made any such stipulation and that, in fact, he objected to the commissioner during trial.

Petitioner raised this claim before the Los Angeles County Superior Court. The superior court rejected the claim, stating, "The court records do not suppor[t] [P]etitioner's claim." (Lodged Doc. No. 10.) As explained below, the superior court did not commit constitutional error in rejecting Petitioner's claim.

1. Factual Background

On January 12, 2016, the case was assigned to Commissioner Lisa Strassner for trial. At that time, Petitioner was represented by defense counsel Wayne, and the minute order from that date indicates that "both sides stipulate[d] to the commissioner." (CT at 247.)

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Commissioner Strassner conducted voir dire and ruled on pretrial motions the following day. She empaneled the jury on January 15, 2015, and heard opening statements and witness testimony on January 20, 2015. Petitioner was present during each of these proceedings, but never objected to Commissioner Strassner's authority to hear the case.

The next day, Commissioner Strassner denied Petitioner's request for daily transcripts of proceedings. In response, Petitioner moved pursuant to California Code of Civil Procedure 170.6(a)(1) to disqualify Commissioner Strassner. Commissioner Strassner denied the motion as untimely.[5] Commissioner Strassner then heard additional witness testimony.

The next day, on January 22, 2015, Petitioner, for the first time, complained that he had not personally stipulated to having his case heard by a commissioner rather than a judge. Defense counsel indicated that the option "was given to me whether or not to accept this court for trial" on January 12, 2015 "and I accepted it on behalf of [Petitioner] and myself." Commissioner Strassner asked whether defense counsel was "asking [for] anything," such as a withdrawal of his stipulation, and defense counsel indicated that he was not.

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[5] Pursuant to California law, motions to disqualify brought under section 170.6 are untimely if brought after the drawing of the first juror. *See* Cal. Code Civ. Pro. § 170.6(a)(2) ("In no event shall a judge, court commissioner, or referee entertain the motion if it is made after the drawing of the name of the first juror. . . ."). In a separate claim, Petitioner maintains that the trial court erred in denying his section 170.6 motion without considering the relevant factors. This claim is meritless because, as set forth above, the motion was untimely. Moreover, Petitioner has identified no prejudice on the trial court's part that would justify disqualification, assuming that the disqualification request was based on actual prejudice.

2. Federal Legal Standard and Analysis

Petitioner's challenge to Commissioner Strassner fails for two reasons. First, Petitioner is bound by his counsel's decision to stipulate to have the case tried before a court commissioner. *See New York v. Hill*, 528 U.S. 110, 114-115, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000) (holding that defendant is bound by counsel's decisions relating to conduct of trial).[6]

Second, Petitioner effectively stipulated to having Commissioner Strassner preside over the case by making regular appearances before her without objecting or complaining. The Ninth Circuit has held that, even in the absence of a formal stipulation, "a valid stipulation for purposes of California's constitutional provision may arise as a result of the conduct of the parties." *Horton v. Mayle*, 408 F.3d 570, 577 (9th Cir. 2005). Thus, in *Horton*, the Ninth Circuit held that there was a valid stipulation to the court commissioner presiding over the petitioner's case where the petitioner never objected to the court commissioner. *Id.*

Here, like the petitioner in *Horton*, Petitioner repeatedly appeared before Commissioner Strassner without objection. Indeed, over the course of a week,

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[6] In a separate claim, Petitioner asserts that counsel was ineffective in stipulating to having a court commissioner, rather than a judge, preside over the trial. This argument is meritless, as counsel made a tactical decision to stipulate to the court commissioner-- one that he declined to abandon even when given the option to do so. *Silva v. Woodford*, 279 F.3d 825, 844 (9th Cir. 2002) (noting United States Supreme Court precedent dictates that counsel commits no error when he or she makes an informed strategic decision) (citing Burger v. Kemp, 483 U.S. 776, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)). What is more, there is no reason to believe that, but for counsel's stipulation, a reasonable probability exists that Petitioner would have obtained a more favorable outcome than the one he actually received. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (explaining that counsel's error warrants habeas relief only if reasonable probability exists that, but for error, result would have been different).

Commissioner Strassner empaneled the jury, heard opening statements, and permitted counsel to call witnesses to testify. It was not until Commissioner Strassner denied Petitioner's request for daily transcripts of proceedings that Petitioner expressed any issue with Commissioner Strassner. What is more, when he moved to disqualify Commissioner Strassner, Petitioner did not do so on the grounds that the trial was being presided over by a court commissioner. Rather, he moved to disqualify Commissioner Strassner because he believed she was prejudiced against him. Although, the next day, he finally complained that he had not personally stipulated to having his case heard by a commissioner rather than by a judge, his complaint was not timely because, by that time, he already had tacitly stipulated to having Commissioner Strassner preside over his trial.

For the foregoing reasons, the state courts' rejection of this claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

C. Evidentiary Errors

In his third ground for relief, Petitioner contends that the trial court abused its discretion in making several evidentiary decisions. For example, he maintains that the trial court erred in allowing two sheriff's deputies to testify because neither deputy authored a police report concerning the crime underlying Petitioner's conviction.

Petitioner, likewise, maintains that the trial court abused its discretion in prohibiting evidence relating to his mental state. Specifically, he faults the trial court for prohibiting an expert to testify about the fact that Petitioner was schizophrenic.[7] Similarly, Petitioner maintains that the trial court erred in

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[7] Petitioner also faults the trial court for prohibiting the victim from describing (continued...)

disallowing evidence regarding Petitioner's voluntary intoxication and how that may have exacerbated his existing schizophrenia.[8]

Petitioner also faults the trial court from prohibiting him from calling a sergeant in the Los Angeles County Sheriff's Department to testify as an expert. Based on Petitioner's allegations, the topics about which the sergeant would have testified, had he been allowed to do so, is unclear. However, according to the Reporter's Transcript, Petitioner attempted to call a sheriff's sergeant to testify generally about the department's policies for 'excessive force and also requirements that they're supposed to follow if, in fact, a prisoner or a suspect claims . . . he's suffering from certain injuries . . . .'" (RT 2104.)

Petitioner raised these claims before the Los Angeles County Superior Court. The superior court rejected the claims on their respective merits. As to Petitioner's challenge to the deputies' testimony, the superior court stated, "[A]llowing witnesses to testify even though they have not written a report is not an abuse of discretion." (Lodged Doc. No. 10.) In rejecting Petitioner's claim pertaining to his schizophrenia, the superior court explained, "[E]xcluding a mental defense in a case where general intent crimes are charged is not an abuse of discretion." (*Id.*) As explained below, the superior court did not commit constitutional error in rejecting Petitioner's claims.

As an initial matter, each of Petitioner's evidentiary claims fails because each claim involves only alleged errors in state law. "In conducting habeas

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[7](...continued)
Petitioner as schizophrenic and from using the word schizophrenic all together.

[8] Petitioner asserts his challenge to the trial court's decision excluding voluntary intoxication evidence in a separate ground for relief. However, the undersigned elects to address that claim and Petitioner's challenge to the trial court's decision excluding evidence of Petitioner's schizophrenia together, as the same analysis applies to both claims.

review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *see also* 28 U.S.C. § 2254(a). Habeas relief is not available for an alleged error in the interpretation or application of state law. *Estelle*, 502 U.S. at 68. Here, Petitioner has alleged only state evidentiary errors, as he faults the trial court only for abusing its discretion. Accordingly, none of Petitioner's evidentiary claims are cognizable on federal habeas review.

Moreover, as explained below, even giving Petitioner the benefit of the doubt that he intended to assert cognizable due process or Confrontation Clause claims, his claims nevertheless would fail.

1. Admission of Evidence

A federal habeas petitioner may not transform a state-law issue into a federal one merely by making a general appeal to a constitutional guarantee, such as the right to due process. *See Gray v. Netherland*, 518 U.S. 152, 163, 116 S. Ct. 2074, 2081, 135 L. Ed. 2d 457 (1996). For this reason, the Ninth Circuit has repeatedly held that a habeas petitioner's mere reference to the Due Process Clause is insufficient to render his claims viable under the Fourteenth Amendment. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994); *Miller v. Stagner*, 757 F.2d 988, 993-94 (9th Cir. 1985).

Regardless, even assuming that Petitioner has asserted a cognizable challenge to the trial court's decision to admit the deputies' testimony, that challenge would not entitle him to habeas relief. To be sure, the Supreme Court has suggested that the admission of evidence can provide a basis for habeas relief if the evidence rendered the trial fundamentally unfair. *Estelle*, 502 U.S. at 68. Notwithstanding this statement, the Supreme Court has not made a clear ruling "that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley v.*

Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009). Thus, the superior court's rejection of Petitioner's evidentiary claim cannot be said to be contrary to, or an unreasonable application of, federal law as decided by the Supreme Court. *See Carey v. Musladin*, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (where Supreme Court precedent gives no clear answer to question presented, "it cannot be said that the state court 'unreasonab[ly] appli[ed] clearly established Federal law'").

Finally, there is no merit to the premise of Petitioner's claim -- namely, that the deputies should not have been permitted to testify because they did not author police reports regarding the crime underlying Petitioner's conviction. Both of the deputies were percipient witnesses to Petitioner holding the victim at knife point. Accordingly, both deputies offered relevant testimony. As such, their testimony did not violate Petitioner's right to due process. *See Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991); *see Estelle*, 502 U.S. at 70 (testimony does not violate due process if it is relevant).[9]

2. Exclusion of Evidence

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting *California v. Trombetta*,

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[9] In a separate ground for relief, Petitioner maintains that trial counsel erred in failing to object to the deputies' testimony based on the fact that the deputies did not write a police report concerning the crime underlying Petitioner's conviction. This claim fails for the reasons stated above. Petitioner also claims that counsel erred in failing to object to purported hearsay statements that the deputies related to the jury. That claim, likewise, fails because, as explained below, any supposed error in failing to object could not have prejudiced Petitioner in light of the overwhelming evidence of his guilt. (*See infra.*)

467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)) (citations omitted); *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense." *DePetris v. Kuykendall*, 239 F.3d 1057, 1062 (9th Cir. 2001) (citations omitted).

The right to present relevant evidence, however, is subject to reasonable restrictions, such as state evidentiary rules. *Moses v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009); *see also LaJoie v. Thompson*, 217 F.3d 663, 668 (9th Cir. 2000) (observing that right to present evidence in criminal case "'may, in appropriate circumstances, bow to accommodate other legitimate interests in the criminal trial process'") (quoting *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991)). Indeed, "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' *or* 'disproportionate to the purposes they are designed to serve.'" *Green v. Lambert*, 288 F.3d 1081, 1090 (9th Cir. 2002) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)) (emphasis in original). Thus, a criminal defendant "does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). Rather, "any number of familiar and unquestionably constitutional evidentiary rules authorize the exclusion of relevant evidence." *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (plurality opinion).

In evaluating a claim of inability to present a complete defense based on the exclusion of evidence, reviewing courts must be mindful that state evidentiary

rulings are not cognizable in a federal habeas proceeding unless constitutional rights are affected. *See Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); *Gordon v. Duran*, 895 F.2d 610, 613 (9th Cir. 1990). Consequently, a state court's exclusion of certain evidence will not justify habeas relief unless the exclusion was so prejudicial as to jeopardize the petitioner's due process rights. *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990). In other words, in order to prevail, the petitioner must show that the court's ruling was so prejudicial that it rendered his trial fundamentally unfair. *See Estelle*, 502 U.S. at 68; *Jammal v. Van de Kamp*, 926 F.2d 918, 920 (9th Cir. 1991).

Here, Petitioner's challenge to the trial court's decision to exclude evidence of Petitioner's purported schizophrenia, or how his voluntary intoxication exacerbated his schizophrenia, does not warrant habeas relief. The United States Supreme Court has not squarely addressed the issue of whether an evidentiary rule "requiring a trial court to balance factors and exercise its discretion" violates a defendant's due process right to present a defense. *Moses*, 555 F.3d at 758. Rather, as the Ninth Circuit has observed, "[t]he Supreme Court has found a violation of the right to present a complete defense [only] in cases where a state evidentiary rule, *on its face*, 'significantly undermined fundamental elements of the defendant's defense,' but did little or nothing to promote a legitimate state interest." *United States v. Pineda-Doval*, 614 F.3d 1019, 1033 n.7 (9th Cir. 2010) (*emphasis added*). Specifically, the Supreme Court has struck down rules that "preclude[] a defendant from testifying, exclude[] testimony from key percipient witnesses, or exclude[] the introduction of all evidence relating to a crucial defense." *Moses*, 555 F.3d at 758.

Here, the trial court ruled that evidence regarding Petitioner's schizophrenia and his voluntary intoxication was not relevant. That ruling necessarily involved an individualized analysis of whether the challenged evidence tended to prove or disprove a material fact. In other words, the trial

court's decision to exclude the challenged evidence as irrelevant involved the exercise of discretion. Because no Supreme Court case has squarely held that the exclusion of such evidence violates a criminal defendant's right to present a defense, the state court's holding that it did not was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court. *See Carey v. Musladin*, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006) (where Supreme Court precedent gives no clear answer to question presented, "it cannot be said that the state court 'unreasonab[ly] appli[ed] clearly established Federal law'").[10]

Moreover, the trial court's decision was correct under state law. Petitioner was charged with a general intent crime. Under California law, neither a defendant's mental heath issue nor his voluntary intoxication is a defense to general intent crimes. *See People v. Gutierrez*, 180 Cal. App. 3d 1076, 1082, 225 Cal. Rptr. 885 (1986) ("[E]vidence of mental illness may be offered to show the absence of specific intent *but not to prove the absence of general intent.*") (*emphasis added*); *see also People v. Berg*, 23 Cal. App. 5th 959, 965-66, 233 Cal. Rptr. 3d 629 (2018) (stating that "voluntary intoxication evidence is admissible only when a defendant is charged with a specific intent crime"). Furthermore, Petitioner did not plead not guilty by reason of insanity. *Compare id.* ("A defendant who pleads and proves insanity is totally absolved of criminal

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[10] This precedent also forecloses habeas relief as to Petitioner's claim the trial court erred in prohibiting him from calling a sergeant in the Los Angeles County Sheriff's Department to testify. In refusing to allow the sergeant's testimony, the trial court ruled that his proposed testimony -- which evidently would have involved the sheriff's department's policies and practices on excessive force -- was irrelevant to the question of Petitioner's guilt. (*See* RT 2106.) The superior court's opinion was silent as to this claim. However, even under *de novo* review, the claim fails because any supposed use of excessive force was not relevant to Petitioner's guilt or innocence.

responsibility although subject to civil confinement.") Accordingly, the trial court properly excluded the evidence pertaining to Petitioner's purported schizophrenia and his voluntary intoxication.[11]

Regardless, assuming error, Petitioner could not establish prejudice. The evidence against Petitioner was overwhelming. Indeed, no less than three sheriff's deputies witnessed Petitioner pinning the victim down and holding a knife to her throat. What is more, the recording of the 911 call leading to Petitioner's arrest contained statements that were damning to Petitioner's defense. Indeed, on the recording, the victim is heard screaming that Petitioner was hurting her. Moreover, during the call, she exclaimed, "Don't stab me." (CT 264.)

Petitioner's actions after his arrest further evidenced his guilt. For example, in a covertly recorded phone call, Petitioner coached the victim about what to say in order to absolve him of any criminal liability. A review of the transcript of the phone call leaves little doubt that Petitioner was attempting to persuade the victim into perjuring herself at trial.

Moreover, the fact that the victim testified at trial that Petitioner committed no wrongdoing does not undercut the overwhelming weight of the evidence against Petitioner. As an initial matter, the victim's credibility at trial was open to wide-ranging credibility attacks because of her thirty-year relationship with Petitioner. *See House v. Bell*, 547 U.S. 518, 554-55, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (eyewitness testimony given by disinterested witness with no motive to lie "has more probative value" than "testimony from inmates, suspects, or friends or relations of the accused"); *see also Romero v. Tansy*, 46 F.3d 1024,

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[11] For the same reasons, Petitioner's corresponding claim that trial counsel erred in failing to properly investigate, and present testimony relating to, Petitioner's mental health history during the guilt phase of the trial fails. *See Strickland*, 466 U.S. at 687-88 (explaining that counsel's error warrants habeas relief only if reasonable probability exists that, but for error, result would have been different).

1030 (10th Cir. 1995) (testimony by defendant's family members is of "significantly less exculpatory value than the testimony of an objective witness"). Indeed, she not only testified that she loved him and that they currently were in a romantic relationship, she also testified that she planned on marrying him. For these reasons alone, her testimony, which conflicted with that of three sheriff's deputies, would undoubtedly be viewed with a skeptical eye.

Putting that aside, her testimony was inherently unbelievable. For example, she testified that none of the sheriff's deputies interviewed her after arresting Petitioner. And, although she attempted to explain away certain portions of the 911 call, those explanations are implausible in light of the 911 phone call transcript. Moreover, she had no answer to why she was heard on the call pleading with Petitioner not to stab her. In short, there is every reason to believe that the jury concluded that the victim was not a credible witness.

Accordingly, Petitioner is not entitled to habeas relief on this claim.

D. *Pitchess* Motion

In his next claim for relief, Petitioner contends that the trial court abused its discretion by refusing to disclose certain information contained in the personal records of Mike Reynolds, one of the sheriff's deputies who arrested Petitioner. According to Petitioner, the requested discovery was relevant to the Deputy Reynolds's credibility.

The California Court of Appeal held that the trial court committed no error in limiting its disclosure of Deputy Reynolds's file. As explained below, the court of appeal did not commit constitutional error in rejecting Petitioner's claim.

Under California law, "a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting law enforcement officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge." *People v. Mooc*, 26 Cal. 4th 1216, 1219, 114 Cal. Rptr. 2d 482,

36 P.3d 21 (2001). A motion to obtain discovery of an officer's personnel file is known as a *Pitchess* motion. *See Pitchess v. Superior Court*, 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305 (1974). The defendant must first describe the information sought and must show good cause for disclosure. If the trial court finds good cause, it screens the requested records *in camera* for relevance to the issue. *California Highway Patrol v. Superior Court*, 84 Cal. App. 4th 1010, 1019-20, 101 Cal. Rptr. 2d 379 (2000). A showing of "good cause" requires the defendant "to demonstrate the relevance of the requested information by providing a 'specific factual scenario' which establishes a 'plausible factual foundation' for the allegations of officer misconduct committed in connection with defendant." *Id.* at 1020 (quoting *City of Santa Cruz v. Municipal Court*, 49 Cal. 3d 74, 85-86, 260 Cal. Rptr. 520, 776 P.2d 222 (1989)).

Although a *Pitchess* motion is a creature of state law, it may implicate a prisoner's due process right to receive material exculpatory and impeachment evidence. *See Harrison v. Lockyer*, 316 F.3d 1063, 1065-66 (9th Cir. 2003) (finding on federal habeas review that California procedure for *Pitchess* discovery requests, including requirement for preliminary showing of materiality, "faithfully followed" *Brady v. Maryland*, 373 U.S. 83, 86, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), *as modified by Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)).

The Due Process Clause requires the government to produce to criminal defendants favorable evidence material to their guilt or punishment. *Brady*, 373 U.S. at 87. To establish a *Brady* violation, the petitioner must show three things: that the evidence was favorable to him, either because it is exculpatory, or because it is impeaching; that the evidence must have been suppressed by the prosecution either willfully or inadvertently; and that petitioner was prejudiced by the nondisclosure. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

Evidence is material for *Brady* purposes "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). A defendant may not require disclosure of information in a requested file "without first establishing a basis for his claim that it contains material evidence." *Ritchie*, 480 U.S. at 58 n.15; *Harrison*, 316 F.3d at 1066. This requirement of a threshold showing of materiality also applies in California to *Pitchess* requests. *Harrison*, 316 F.3d at 1066 (noting that *Pitchess* process operates in parallel to procedure in *Brady* and *Ritchie* but that state standard is "both a broader and lower threshold for disclosure" than *Brady* standard) (citing *City of Los Angeles v. Superior Court*, 29 Cal. 4th 1, 14-15, 124 Cal. Rptr. 2d 202, 52 P.3d 129 (2002)).

Here, Petitioner cannot establish a due process violation under the *Brady/Ritchie* standards. Indeed, Petitioner's entire argument regarding the discovery of Deputy Reynolds's file is premised solely on the possibility that the undisclosed portion of the file might contain information that undermined Deputy Reynolds's credibility. Petitioner's claim, however, is not supported by any evidence or knowledge of actual incidents contained in the undisclosed portion of that file. He does not, for example, cite any past instance of which he is aware where Deputy Reynolds committed some act of misconduct that would have undermined his trial testimony. Instead, Petitioner relies only on speculation and hope that the undisclosed portion of the file might have yielded information helpful to Petitioner's defense. But neither speculation nor hope suffices to show that the personnel files contained complaints material to his defense. *See Gutierrez v. Yates*, 2008 WL 4217865 at *7 (C.D. Cal. Apr. 8, 2008) (observing that absence of proof that exculpatory evidence would be found in police personnel records "is fatal to petitioner's due process claim"); *Gomez v.*

Alameida, 2007 WL 949425 at *15 (N.D. Cal. Mar. 27, 2007) (same); *Page v. Runnels*, 2006 WL 2925690 at *8 (N.D. Cal. Oct. 12, 2006) (same).[12]

E. Prosecutorial Misconduct

In his next ground for relief, Petitioner maintains that the prosecutor committed several acts of misconduct that effectively deprived Petitioner of his right to due process and a fair trial. First, Petitioner faults the prosecutor for expressing personal opinions about Petitioner's credibility and that of several other witnesses. Although Petitioner cites numerous examples of this purported misconduct, each example shares the same alleged misconduct -- namely, that the prosecutor either misstated the witnesses' testimony or that he argued that the witnesses were not credible. Second, Petitioner contends that the prosecutor impermissibly vouched for the credibility of the sheriff's deputies who testified for the prosecution. In particular, Petitioner faults the prosecutor for arguing that the deputies had no motive to lie about what they witnessed.

Petitioner raised his prosecutorial misconduct claims before the Los Angeles County Superior Court. The superior court rejected those claims, stating, "Prosecutors have a great deal of leeway to make arguments which are supported by evidence admitted during trial. Pointing out discrepancies and calling into question credibility based upon those discrepancies is not prosecutorial misconduct." (Lodged Doc. No. 10.) As explained below, the superior court did

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[12] Moreover, even assuming error in regards to the *Pitchess* motion, Petitioner could not establish prejudice in light of the overwhelming evidence of guilt. (*See supra*.) What is more, even if Petitioner, somehow, could have attempted to tarnish Deputy Reynolds's credibility, the fact remains that two other sheriff's deputies witnessed Petitioner pinning the victim to the floor while holding a knife to her neck.

not commit constitutional error in rejecting Petitioner's prosecutorial misconduct claims.

Allegations of prosecutorial misconduct are governed by the standard set forth by the Supreme Court in *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *see Parker v. Matthews*, 567 U.S. 37, 45, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012) (*per curiam*) (identifying *Darden* as "[t]he 'clearly established Federal law'" relevant to claims of prosecutorial misconduct arising from prosecutor's closing arguments). In *Darden*, the Supreme Court explained that prosecutorial misconduct does not rise to the level of a constitutional violation unless it "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)); *Comer v. Schriro*, 480 F.3d 960, 988 (9th Cir. 2007).

To determine whether a prosecutor's comments amount to a due process violation, the reviewing court must examine the entire proceedings so that the prosecutor's remarks may be placed in their proper context. *Boyde v. California*, 494 U.S. 370, 384-85, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). Assuming, however, that a petitioner can establish that the prosecutor engaged in misconduct, habeas relief nevertheless is unwarranted unless the petitioner can show that the misconduct had a substantial and injurious impact on the jury's verdict. *Karis v. Calderon*, 283 F.3d 1117, 1128 (9th Cir. 2002) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).

1. Attacking Witnesses' Credibility

A prosecutor does not commit misconduct by asking the jury in closing arguments to make reasonable inferences from the evidence at trial, even if the defendant disputes those inferences. *See United States v. Cabrera*, 201 F.3d 1243, 1250 (9th Cir. 2000); *United States v. Patel*, 762 F.2d 784, 795 (9th Cir. 1985) ("When a prosecutor's remarks . . . constitute reasonable inferences from

the evidence, no prosecutorial misconduct can be demonstrated."). Indeed, "[c]ounsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." *Ceja v. Stewart*, 97 F.3d 1246, 1253-54 (9th Cir. 1996). This latitude does not, however, extend to arguments calculated to arouse the passions or prejudices of the jury. *Viereck v. United States*, 318 U.S. 236, 247-48, 63 S. Ct. 561, 566, 87 L. Ed. 734 (1943); *United States v. Leon-Reyes*, 177 F.3d 816, 822 (9th Cir. 1999).

To be sure, the Ninth Circuit has recognized that "[a] personal attack on defense counsel's integrity [can] constitute misconduct." *United States v. Santiago*, 46 F.3d 885, 892 (9th Cir. 1995). By contrast, "[c]riticism of defense theories and tactics is a proper subject of closing argument." *United States v. Sayetsitty*, 107 F.3d 1405, 1409 (9th Cir. 1997). Indeed, "[a] lawyer is entitled to characterize an argument with an epithet as well as a rebuttal." *Williams v. Borg*, 139 F.3d 737, 745 (9th Cir. 1998); *see Turner v. Marshall*, 63 F.3d 807, 818 (9th Cir. 1995) (stating that prosecutor is permitted to go so far as to "label a witness's testimony as lies or fabrication"), *overruled on other grounds by Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999) (*en banc*).

Here, the prosecutor did not overstep the wide latitude afforded to him. At bottom, the prosecutor pointed out that several of the witnesses had reason to lie. For example, the prosecutor urged the jury to find that the victim lacked credibility because, among other reasons, she testified that she had not been interviewed by the sheriff's deputies, even though she was the victim of the crime and the person heard on the 911 call. Her testimony on that point contradicted that of sheriff's deputies and defied common sense, as she was the victim of the crime. Accordingly, the prosecutor was free to urge the jury to reject the victim's credibility on that basis. The same is true in regards to the prosecutor's arguments regarding the credibility of Petitioner's neighbor. In his testimony, the

neighbor stated that he was concerned that, at the time of the arrest, the deputies might shoot Petitioner because he was a black man with a knife. Based on that testimony, the prosecutor acted well within the discretion afforded to him by arguing that the neighbor displayed through his attitude that he had a problem with police.[13]

Regardless, the prosecutor's comments, even if improper, did not approximate the type of statements that have been found insufficient to establish a due process violation based on prosecutorial misconduct. *See Darden*, 477 U.S. at 180 n.10-12 (prosecutor did not deprive defendant of right to fair trial where prosecutor urged jury to impose death penalty by arguing that "as far as I am concerned, . . . [the defendant is] an animal," and "I wish [the decedent] had a shotgun in his hand . . . and blown [the defendant's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun"); *Comer v. Schriro*, 480 F.3d 960, 988 (9th Cir. 2007) (prosecutor did not deprive defendant of right to fair trial despite labeling petitioner "monster," "filth," and "reincarnation of the devil"). Accordingly, even if the prosecutor erred in his attempts to attack the credibility of some of the witnesses, that error did not deprive Petitioner of his right to a fair trial.

2. Vouching

A prosecutor may not vouch for the credibility of a prosecution witness. *See, e.g., United States v. Young*, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985); *United States v. Jackson*, 84 F.3d 1154, 1158 (9th Cir. 1996). "Vouching may occur in two ways: the prosecution may place the prestige of the

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[13] Petitioner also takes issue with a number of the inferences that the prosecutor drew from the evidence at trial. A review of the Reporter's Transcript, however, shows that the prosecutor did nothing more than urge the jury to draw reasonable inferences from the evidence adduced at trial. Accordingly, he committed no misconduct in doing so.

government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) (citing *Lawn v. United States*, 335 U.S. 339, 359-60 n.15, 78 S.Ct. 311, 2 L. Ed. 2d 321 (1958); *United States v. Lamerson*, 457 F.2d 371 (5th Cir. 1972)); *United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005).

An example of the first of these two forms of impermissible vouching occurs when the prosecutor asserts that a prosecution witness is honest. *See Hein v. Sullivan*, 601 F.3d 897, 913 (9th Cir. 2010) (holding that prosecutor improperly vouched for witness's credibility where prosecutor argued, among other things, that witness "was painfully honest" and that witness's testimony incriminating petitioner was "honest" despite that witness revealed embarrassing things about himself); *United States v. Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005) (prosecutor improperly vouched for testifying officers by arguing that they had no reason to lie and that, if they lied, they would risk being prosecuted for perjury).

Here, the prosecutor's comments about the deputies' credibility did not constitute improper vouching. Although the prosecutor noted that the deputies had no motive to lie, that argument was proper in light of the theory of Petitioner's case -- namely, that the deputies were either lying or mistaken about what they saw when they entered Petitioner's home. Given this theory of defense, the prosecutor could not have deprived Petitioner of a fair trial by noting the absence of any evidence suggesting a motive to lie on the deputies' part. And, in fact, the jury instructions required the jury to consider whether a given witness had any motive to lie in determining whether the given witness was credible. (*See* CT 339 (instructing jurors that, in determining "the believability of a witness," consider, among other things, "the existence or nonexistence of a bias, interest, or other motive").)

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Finally, the prosecutor's comments could not have deprived Petitioner of a fair trial in light of the evidence presented against Petitioner. *See Hein*, 601 F.3d at 916 (denying habeas relief despite prosecutor's improper vouching for witness, in part, because evidence against petitioner was strong). As explained above, the evidence against Petitioner was overwhelming. That evidence included, among things, the testimony of three sheriff's deputies who witnessed Petitioner pinning the victim down and holding a knife to her throat. The evidence also included a recording of a 911 call in which, among other things, the victim pleaded with Petitioner not to stab her. Given this evidence, there is little reason to believe that the prosecutor's statements regarding the credibility of the deputies had any cognizable impact on the jury's verdict.[14]

F. Trial Counsel's Performance

In his next ground for relief, Petitioner contends that trial counsel committed several errors that, either alone or in combination, deprived Petitioner of his Sixth Amendment right to effective assistance of counsel. First, Petitioner faults trial counsel for failing to elicit testimony concerning the fact that the victim filed "a number of complaints" against Deputy Reynolds and the

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[14] In a separate ground for relief, Petitioner contends that trial counsel erred in failing to object to the prosecutor's purportedly improper remarks. But, as explained above, the prosecutor committed no misconduct; thus, counsel could not have performed unreasonably in declining to object to those remarks. *See Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) (counsel's failure to raise meritless argument does not constitute ineffective assistance). Moreover, as explained above, the evidence against Petitioner was overwhelming; consequently, Petitioner did not suffer any cognizable prejudice form any purported error on counsel's part in failing to object to the prosecutor's comments. *See Strickland*, 466 U.S. at 687-88 (explaining that counsel's error warrants habeas relief only if reasonable probability exists that, but for error, result would have been different).

prosecutor. (Docket No. 10-1 at 21.) Second, Petitioner contends that counsel failed to conduct an adequate investigation into the facts underlying the *Pitchess* motion that counsel filed on Petitioner's behalf. Rather than conducting an adequate investigation, counsel, according to Petitioner, improperly relied on "[i]ncomplete work of the public defender's investigator." (*Id.*) Finally, Petitioner maintains that counsel slept during an "important part" of the trial.[15] (*Id.* at 22.)

Petitioner raised his claims of attorney error before the Los Angeles County Superior Court. The superior court rejected those claims, stating, "None of the assertions amounts to a prima facie case for relief." (Lodged Doc. No. 10.) As explained below, the superior court did not commit constitutional error in rejecting Petitioner's allegations of attorney error.

Each of Petitioner's allegations of attorney error is governed by the two-prong test set forth in in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the first prong of that test, a petitioner must prove that trial counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. To establish deficient performance, the petitioner must show his counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687; *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). In reviewing trial counsel's performance, however, courts "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690;

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[15] Petitioner has asserted several other allegations of attorney error that correspond to independent claims of error that Petitioner has asserted in his FAP. The undersigned, therefore, has addressed those claims of attorney error in connection with the analysis regarding Petitioner's independent claims of error. (*See supra.*)

Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). Only if counsel's acts and omissions, examined within the context of all the surrounding circumstances, were outside the "wide range" of professionally competent assistance, will petitioner meet this initial burden. *Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Strickland*, 466 U.S. at 690.

Under the second part of *Strickland*'s two-prong test, the petitioner must show that he was prejudiced by demonstrating a reasonable probability that, but for his counsel's errors, the result would have been different. 466 U.S. at 694. The errors must not merely undermine confidence in the outcome of the trial or the appeal, but must result in a proceeding that was fundamentally unfair. *Williams*, 529 U.S. at 393 n.17; *Lockhart*, 506 U.S. at 369. The petitioner must prove both deficient performance and prejudice. A court need not, however, determine whether counsel's performance was deficient before determining whether the petitioner suffered prejudice as the result of the alleged deficiencies. *Strickland*, 466 U.S. at 697.

Here, none of Petitioner's allegations of attorney error warrants habeas relief. First, assuming that counsel erred in failing to elicit testimony concerning the "number of complaints" that the victim filed against Deputy Reynolds and the prosecutor, Petitioner suffered no cognizable prejudice. As explained above, the victim's credibility was open to attacks on multiple fronts. Indeed, she had a longstanding, romantic relationship with Petitioner and planned to marry him after the trial. What is more, Petitioner coached the victim on what to say in order to absolve him of criminal liability. And, the victim's testimony that she was never interviewed in connection with Petitioner's arrest was inherently implausible. Furthermore, as explained above, the evidence of Petitioner's guilt was overwhelming. (*See supra.*) Given these facts, there is no reason to conclude that, but for counsel's failure to explore the topic of the victim's

complaints, the jury would have reached an outcome more favorable to Petitioner than the one it actually reached.

Second, there is no merit to Petitioner's claim that counsel failed to conduct an adequate investigation into the facts underlying the *Pitchess* motion that counsel filed on Petitioner's behalf. Although Petitioner conclusorily alleges that counsel's investigation (or that of the public defender's investigator) was deficient, Petitioner alleges no facts or information that counsel failed to uncover. Such unsupported allegations do not warrant habeas relief. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."); *Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) (habeas relief not warranted where claims for relief are unsupported by facts). Moreover, in light of the overwhelming evidence against Petitioner, there is no reason to believe that, but for any error in counsel's investigation into the *Pitchess* motion, the jury would have reached an outcome more favorable to Petitioner than the one it actually reached.

Finally, Petitioner has submitted no evidence to support his assertion that counsel slept during "important parts" of Petitioner's trial or that Petitioner suffered any prejudice as a result. Although Petitioner provides citations to the Reporter's Transcripts to support his assertion, nothing in the transcript that corresponds to Petitioner's citations suggests that counsel was sleeping. On the contrary, they reflect that counsel engaged in discussions with the trial court. The absence of any evidence in support of Petitioner's assertion provides a reasonable basis to reject his argument. *See Womack v. Del Papa*, 497 F.3d 998, 1004 (9th Cir. 2007) (finding petitioner's own self-serving statements insufficient to support ineffective assistance of counsel claim without corroborating evidence). Moreover, assuming that trial counsel did fall asleep at some time during the trial, that fact would not have resulted in *per se* prejudice to Petitioner. Indeed, no Supreme Court authority clearly establishes that sleeping at trial is *per se*

ineffective assistance. And, under Ninth Circuit precedent, a trial counsel's sleeping at trial is prejudicial to a criminal defendant *per se* only if counsel "sleeps through a substantial portion of the trial." *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984). Where counsel was not "sleeping or dozing during a substantial portion [of the trial], and may not have been sleeping at all," the petitioner has the burden of showing prejudice. *United States v. Peterson*, 777 F.2d 482, 484 (9th Cir. 1985).

Here, Petitioner has submitted no evidence to suggest that counsel was sleeping for a substantial portion of the trial or that he was sleeping at all, for that matter. Petitioner also has failed to submit any evidence tending to suggest that counsel's alleged sleeping during trial, if it took place, resulted in any prejudice.

For the foregoing reasons, the state courts' rejection of Petitioner's challenges to his trial counsel's performance was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

G. Conflict of Interest

Petitioner contends that he was deprived of his Sixth Amendment right to counsel because trial counsel had an actual conflict of interest with Petitioner. Although the precise nature of the conflict is not quite clear, it appears that Petitioner believes the conflict first arose in connection with a prior criminal case in which counsel represented Petitioner.[16] In connection with that case, Petitioner, in 2009, filed a complaint with the state bar against trial counsel.[17]

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[16] The prior case or cases in which counsel represented Petitioner had nothing to do with Petitioner's current conviction.

[17] Specifically, Petitioner complained that defense counsel had not provided

(continued...)

Presumably, Petitioner believes that the alleged conflict from that case was exacerbated when, in 2016, he filed another complaint with the state bar against counsel -- this time, because counsel had stipulated to having the trial heard by a court commissioner and because counsel did not object to an allegedly altered audio recording that was played at trial. In any event, according to Petitioner, an irreconcilable conflict arose between him and trial counsel.

Petitioner raised his conflict of interest claim before the Los Angeles County Superior Court. The superior court rejected that claim, stating, "A complaint against an attorney to the state bar does not create a conflict of interest." (Lodged Doc. No. 10.) As explained below, the superior court did not commit constitutional error in rejecting Petitioner's conflict of interest claim.

The Sixth Amendment right to counsel includes the right to assistance by a conflict-free attorney. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). Where a petitioner raises a Sixth Amendment challenge based on a conflict of interest, he must demonstrate that his attorney's performance was "adversely affected" by the conflict of interest. *Mickens v. Taylor*, 535 U.S. 162, 174, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

As a general rule, a habeas petitioner alleging a conflict of interest also must demonstrate prejudice by establishing "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens*, 535 U.S. at 166 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). An exception to the prejudice requirement may occur in a case of joint representation leading to a

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[17](...continued)
Petitioner with certain files necessary to file a direct appeal in connection with Petitioner's prior criminal case.

conflict of interest. *Mickens*, 535 U.S. at 166-67; *Cuyler*, 446 U.S. at 349-50. There is, however, no clearly established Supreme Court precedent applying the exception outside the context of joint representation. *Mickens*, 535 U.S. at 175-76. What is more, the Supreme Court has cautioned against extending this exception beyond cases involving joint representation. *Id.* (expressing disapproval of the "holdings of Courts of Appeals, which have applied [Supreme Court's Sixth Amendment conflict precedent] unblinkingly to all kinds of alleged attorney ethical conflicts," including conflicts involving counsel's personal or financial interests); *see also Earp v. Ornoski*, 431 F.3d 1158, 1184-85 (9th Cir. 2005). For this reason, courts reviewing habeas challenges arising from conflicts other than those involving joint representation require the petitioner to satisfy the two-part test set forth in *Strickland*. *See, e.g.*, *United States v. Bernard*, 762 F.3d 467, 476 (5th Cir. 2014); *Hughes v. Singh*, 2013 WL 2423128, *11 (C.D. Cal. June 4, 2013); *Arenas v. Adams*, 2011 WL 7164453. *12 (C.D. Cal. Nov. 30, 2011); *Bouldon v. Chrones*, 2009 WL 2058164, *4 (C.D. Cal. July 9, 2009).

Here, Petitioner cannot show that counsel was laboring under a conflict of interest or that, if a conflict existed, the conflict adversely impacted counsel's performance. As an initial matter, there is no authority -- let alone clearly established Supreme Court authority -- supporting the proposition that a conflict of interest arises whenever a criminal defendant files a state bar complaint against his trial counsel. On the contrary, courts routinely reject that argument. *See, e.g.*, *Grady v. Biter*, 2014 WL 12684213, *42 ("The trial judge's finding that Petitioner failed to show an actual conflict with counsel by simply writing a letter to the state bar association complaining about his trial counsel was correct, because Petitioner failed to demonstrate any adverse effect on his representation by the alleged conflict."); *Harris v. Adams*, 2009 WL 2705835, *5 (E.D. Cal. Aug. 25, 2009) (holding that petitioner's complaint to state bar and threat to sue counsel did not, in and of itself, give rise to conflict of interest).

Moreover, the substance of Petitioner's state bar complaint did not give rise to a conflict of interest. As the Ninth Circuit has recognized, "[d]isagreements over strategical or tactical decisions do not rise to [the] level of a complete breakdown in communication." *Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007); *Schell v. Witek*, 218 F.3d 1017, 1026 (9th Cir. 2000) (noting that "decisions that are committed to the judgment of the attorney and not the client" do not deprive criminal defendant of Sixth Amendment right to conflict-free counsel); *see also Brookhart v. Janis*, 384 U.S. 1, 8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966) ("[A] lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval."). This precedent forecloses Petitioner's claim that a conflict arose from counsel's tactical decision to stipulate to a court commissioner presiding over the trial.

Petitioner's complaint about a purportedly "altered" audio recording, likewise, is insufficient to establish a conflict of interest. Putting aside the fact that there is no evidence to substantiate Petitioner's claim that any audio recording was, in fact, altered, there is no reason to believe that counsel's failure to object to the supposedly altered recording stemmed from any purported conflict that he had with Petitioner.[18]

Regardless, even assuming that some hypothetical conflict of interest existed between Petitioner and counsel, the alleged conflict did not prejudice Petitioner. Petitioner fails to demonstrate any prejudice from any specific action that counsel allegedly took or failed to take because of the supposed conflict. Moreover, as explained above, the evidence against Petitioner was overwhelming.

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[18] Petitioner's corresponding claim that trial counsel erred in failing to object to the supposedly "altered" recording also fails. *See Strickland*, 466 U.S. at 687-88 (explaining that counsel's error warrants habeas relief only if reasonable probability exists that, but for error, result would have been different).

See Schell, 218 F.3d at 1026 (conflict will not give rise to habeas relief unless either it resulted in total denial of counsel or unless petitioner can show prejudice from conflict).

For the foregoing reasons, the state courts' rejection of Petitioner's conflict of interest claim was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

H. Appellate Counsel's Performance

In his final ground for relief, Petitioner contends that his appellate counsel deprived Petitioner of his right to effective assistance of counsel on appeal. Specifically, Petitioner maintains that appellate counsel erred in failing to assert each of the claims that Petitioner has asserted in this Petition.

Petitioner raised this claim before the Los Angeles County Superior Court. The superior court rejected that claim, stating, "Petitioner fails to establish a prima facie case for relief." (Lodged Doc. No. 10.) As explained below, the superior court did not commit constitutional error in rejecting Petitioner's challenge to appellate counsel's performance.

The Due Process Clause guarantees a criminal defendant effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 391-405, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). The standard for assessing the performance of trial and appellate counsel is the same. *Id.* at 395-99; *Cockett v. Ray*, 333 F.3d 938, 944 (9th Cir. 2003). Accordingly, to succeed on his challenge to appellate counsel's performance, Petitioner must show that counsel's performance fell below an objective standard of reasonableness and that Petitioner suffered prejudice as a result. *See Strickland,* 466 U.S. at 687-88, 690, 694.

Here, Petitioner can show neither. As explained above, each of the grounds that Petitioner has raised in this action is meritless. Accordingly, counsel

could not have performed unreasonably in declining to assert those grounds on appeal. *See Kimmelman*, 477 U.S. at 375; *Boag*, 769 F.2d at 1344 (*supra*).

Moreover, some of those claims, such as Petitioner's numerous challenges to his trial counsel's performance, were not appropriate for direct review. Under California law, ineffective assistance of counsel claims are not proper on direct appeal unless the record illuminates all the facts necessary to resolve the claim, including the basis for counsel's challenged decision or shortcoming. *See People v. Mendoza Tello*, 15 Cal. 4th 264, 266-67, 62 Cal. Rptr. 2d 437, 933 P.2d 1134 (1997). Thus, appellate counsel cannot be faulted for declining to assert Petitioner's numerous allegations of error on trial counsel's part, even if some of those allegations had merit. And, as discussed above, none of those allegations has merit.

Accordingly, the state courts' denial of this ground for relief was neither an unreasonable application of, nor contrary to, clearly established federal law as determined by the Supreme Court.

VII. RECOMMENDATION

The Magistrate Judge therefore recommends that the Court issue an order: (1) approving and adopting this Report and Recommendation; and (2) directing that judgment be entered denying the First Amended Petition on the merits with prejudice.

DATED: April 12, 2019

/S/ FREDERICK F. MUMM
FREDERICK F. MUMM
United States Magistrate Judge

NOTICE

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

Appendix-C

S248605

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re VICTOR SHAWN BROWN on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

Appendix-D

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re VICTOR SHAWN BROWN on Habeas Corpus.	B288232 (Los Angeles County Super. Ct. No. MA065245) ORDER

THE COURT:

We have read and considered the petition for writ of habeas corpus filed on February 21, 2018. The petition is denied.

Edmon Lavin Currey

EDMON, P. J. LAVIN, J. CURREY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.