UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRADLEY DAVID JOHNSON, Petitioner-Appellant, v. STUART SHERMAN, Warden, Respondent-Appellee.	No. 20-55931 D.C. No. 5:17-cv-01860-ODW-ADS Central District of California, Riverside ORDER

Before: GRABER and TALLMAN, Circuit Judges.

Appellant's request to file an oversized request for a certificate of appealability (Docket Entry No. 7) is granted.

The request for a certificate of appealability (Docket Entry No. 8) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRADLEY DAVID JOHNSON, Petitioner, v. STU SHERMAN, Respondent.	Case No. 5:17-01860 ODW (ADS) ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND DISMISSING CASE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, Respondent's Answer, Petitioner's Reply, and all related filings, along with the Report and Recommendation of the assigned United States Magistrate Judge dated May 14, 2020 [Dkt. No. 59], and Petitioner's Objections to Report and Recommendation [Dkt. No. 68]. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made.

Accordingly, IT IS HEREBY ORDERED:

1. The United States Magistrate Judge's Report and Recommendation [Dkt.

No. 59] is accepted;

2. The Petition is dismissed with prejudice; and

3. Judgment is to be entered accordingly.

DATED: August 21, 2020

THE HONORABLE OTIS D. WRIGHT, II
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRADLEY DAVID JOHNSON, Petitioner, v. STU SHERMAN, Warden, Respondent.	Case No. 5:17-01860 ODW (ADS) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Otis D. Wright, II, 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, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be denied and the action dismissed with prejudice.

I. INTRODUCTION

On September 12, 2017, Bradley David Johnson ("Petitioner"), a prisoner in state custody, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"), alleging six broad claims and numerous subclaims challenging his

convictions for assault and false imprisonment. [Dkt. No. 1]. On June 12, 2018, Warden Stu Sherman ("Respondent") filed an Answer. [Dkt. No. 19]. On June 15, 2018, this case was transferred to the undersigned Magistrate Judge. [Dkt. No. 21]. On October 12, 2018, Petitioner filed a reply to the Answer, and on January 11, 2019, he filed further points and authorities in support of his reply. [Dkt. No. 35, 37].

On February 14, 2019, following Petitioner's request to add a claim to the Petition and additional briefing from the parties [Dkt. Nos. 26, 30-31], the undersigned granted Petitioner leave to amend the Petition to include a seventh ground for relief: ineffective assistance of appellate counsel. [Dkt. No. 39]. On March 12, 2019, Respondent filed a Supplemental Answer addressing the additional claim and related subclaims. [Dkt. No. 41]. On April 15, 2019, Petitioner filed a Supplemental Reply denying the allegations in the Supplemental Answer. [Dkt. No. 48]. On June 7, 2019, Petitioner filed additional points and authorities in support of his Supplemental Reply. [Dkt. No. 53]. The matter is ready for decision.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

After an independent review of the record, the Court adopts and restates here the factual background from the California Court of Appeal's ("Court of Appeal") opinion.[1] [Dkt. No. 20-1, Lodged Document ("LD") 1].

[1] See Crittenden v. Chappell, 804 F.3d 998, 1011 (9th Cir. 2015) (finding that a state court's factual findings are presumed correct unless "overcome . . . by clear and convincing evidence"); 28 U.S.C. § 2254(e)(1).

A. *Prosecution Evidence*

1. Doe's Testimony

Doe and [Petitioner] began a dating and sexual relationship in February 2012. Their relationship soured in September 2012, after Doe discovered that [Petitioner] had been seeing other women, but they continued to see each other. They never lived together during their relationship. Doe lived in San Bernardino and [Petitioner] lived in Highland with his grandmother, Theresa Reyes.

On August 24, 2013, [Petitioner] spent the night at Doe's apartment, and on August 25 he and Doe spent several hours together at the beach in Oceanside. At the beach, they had a disagreement about having sex at the beach: [Petitioner] wanted to, but Doe did not. [Petitioner] purchased a package of cigarettes for Doe, but hid them from her, she believed, because he wanted to have sex and she did not.

After they left the beach, [Petitioner] drove Doe to her sister's house on Mountain View in San Bernardino. By the time they arrived, they were arguing. Doe retrieved her things, went into her sister's house, came back outside, and gave [Petitioner] money for the cigarettes he had purchased for her. [Petitioner] said he did not want the money; he wanted Doe to come with him and for the two of them to return to Doe's apartment.

After Doe told [Petitioner] she was not going with him, he picked her up and put her into his car. When Doe tried to get out of the car, [Petitioner] pulled Doe's hair and drove away. Doe did not try to get out of the car because she was unable to run. [Petitioner] then drove Doe to her apartment, four miles from Doe's sister's house. They were unable to get inside Doe's apartment because Doe had left her keys at her sister's house.

Doe got back into the car with [Petitioner], thinking he was going to take her back to her sister's house. Instead of taking Doe back to her sister's house, [Petitioner] drove Doe into the local mountains, while telling her he did not believe she was going to get her apartment keys and that he was going to drop her off where her family would have to pick her up. He took Doe to a small park in San Bernardino or Redlands, and told her to get out of his car. Doe got out and [Petitioner] began driving away, but [Petitioner] backed up his car, picked up Doe again, put her back into his car, and drove her to Reyes's house in Highland, where he lived.

When they arrived at Reyes's house, Doe began honking [Petitioner]'s car horn to get Reyes's attention. After Reyes did not respond, Doe ran to the front door and knocked, and Reyes let [Petitioner] and Doe inside. Reyes was trying to calm [Petitioner] down and agreed to give Doe a ride back to her apartment. Doe got into the passenger side of Reyes's car

while Reyes stood on the driver's side with [Petitioner]. [Petitioner] was upset, and Reyes was telling him to go back inside the house. [Petitioner] was not listening to Reyes, and Reyes began to cry.

At that point, [Petitioner] "just went crazy." He leaned into the car from behind the driver's seat, pulled Doe's hair, and began striking her. When Doe opened the passenger side door to get out, he ran around the car, "yanked [Doe] down by [her] legs," and pulled her out of the car and onto the ground. He got on top of Doe and repeatedly hit her head for what seemed to Doe "like[ ] 40 hits." He finally stopped beating Doe, and Doe feigned unconsciousness.

As she lay in the grass outside Reyes's house, Doe overheard [Petitioner] trying to convince Reyes to bring Doe inside the house and "clean her up," but Reyes told [Petitioner] she was going to call the police. [Petitioner] left after Reyes told him to leave, and Reyes eventually called 911. Reyes did not testify,[2] but her recorded 911 call was played to the jury. Reyes immediately told the 911 dispatcher, "my grandson beat up this girl and . . . we're at my house." The police and an ambulance arrived, and Doe was taken to the hospital. As a result of the assault, Doe suffered a mild concussion, two black eyes, a one-inch cut above her left eye, a swollen face, and bruised arms.

2. Additional Prosecution Evidence

At the hospital, San Bernardino Police Officer Chase Smith took a statement from Doe, and forensic specialist, Anna Quiroz, took photographs of her injuries. Officer Smith did not record Doe's statement, but wrote a report summarizing it. Later that night, Doe was released from the hospital. A few days later, she met with a Detective Ernesto Antillon, who took additional photographs of her injuries.

Later that night, Officer Smith attempted to contact Reyes[] at her house, but there was no answer when he knocked on the door. Officer Smith noticed an eight-inch by eight-inch pool of blood on the grass where Doe said the assault had occurred. Around midnight, Officer Imran Ahmed transported [Petitioner] to the police station and saw that [Petitioner] had what appeared to be blood on his sandals.

Following the assault, [Petitioner], his mother, and a woman claiming to be [Petitioner]'s "aunt Alexis" and "Lynn" contacted Doe and tried to dissuade her from testifying. [Petitioner] contacted Doe on three or

[2] Reyes appeared to have avoided service of process to attend court.

four occasions, and his mother contacted Doe on five or six occasions. The woman claiming to be "aunt Alexis" and "Lynn" last contacted Doe only one or two days before trial.

B. *Defense Case*

[Petitioner] did not testify in his own defense, but called several law enforcement officers who were involved in investigating the incident.

1. Detective Ernesto Antillon

[Petitioner] elicited from San Bernardino Police Detective Antillon that the detective conducted a "[f]ollow up" interview with Doe three days after the incident and observed that she had two black eyes, the whites of her eyes were red, her arms were bruised, and she complained of pain. Doe denied having any fractures or concussions.

The court sustained on hearsay grounds the prosecutor's objections when [Petitioner] asked Detective Antillon (1) what Doe told the detective her doctors told her about her injuries, (2) what Doe told the detective about the incident, and (3) what the detective wrote in his report about what Doe told him about the incident. In each instance, [Petitioner] did not establish that Doe's hearsay statements to the detective were inconsistent with her trial testimony. ([Cal. Evid. Code § 1235].) The court also sustained the prosecutor's objection when [Petitioner] asked the detective whether Doe's injuries constituted "great bodily injuries," on the ground the question called for a legal opinion.

The court stopped [Petitioner]'s direct examination of Detective Antillon after [Petitioner] repeatedly asked the detective what he had written in his report, even though the court admonished [Petitioner], several times, that his questions called for hearsay and constituted improper impeachment because there was no showing that the report contained statements inconsistent with the detective's testimony. [Petitioner] was unable to present a videotaped recording of the detective's interview with Doe, because the court stopped his examination of the detective and because he was unprepared and failed to lay a proper foundation with the detective to play the videotape.

2. Officer Chase Smith

In the People's case-in-chief, Officer Smith testified he went to St. Bernardine Medical Center around 11:00 p.m. on August 25, 2013, in response to a call that a woman had been physically assaulted and kidnapped. At the hospital, he spoke to Doe, took an unrecorded statement from her in which she identified [Petitioner] as her attacker, and wrote a report summarizing her statement. He observed that Doe was injured: her

face was swollen and she had a cut above her left eye. Quiroz took photographs of Doe's injuries. Later that night, Officer Smith went to Reyes's house and tried to contact her, but there was no answer when he knocked on the door. He noticed an eight-inch by eight-inch pool of blood on the grass near the driveway in front of the home.

[Petitioner] called Officer Smith in his defense case and questioned him about what Doe told him at the hospital. Officer Smith did not record Doe's statement, even though he had a tape recorder with him. Doe told the officer (1) she believed the park [Petitioner] took her to was in Redlands but she was not sure, (2) at the park, [Petitioner] grabbed her by her arms and forced her back into his car, (3) she pretended to be unconscious while [Petitioner] was assaulting her outside Reyes's house, and (4) in assaulting her, [Petitioner] punched her 10 to 13 times in the face.

Officer Smith did not take a photograph of the pool of blood he saw outside Reyes's house because he did not have a camera. He explained that the police department had a limited number of cameras; the cameras are first allotted to forensic specialists and sergeants; as a patrol officer, he was not allotted one; and none was available when he went to Reyes's house. [Petitioner] later called Quiroz, who corroborated Officer Smith's testimony concerning the unavailability of cameras in the San Bernardino Police Department.

3. Sergeant Eddie Gonzalez

[Petitioner] also called Sergeant Gonzalez of the San Bernardino County Sheriff's Department's Highland station. Sergeant Gonzalez went to Reyes's house on the night of the incident and was the first law enforcement officer at the scene. He found Doe lying face down in a pool of blood, unresponsive. He did not attempt to verify Doe's identify by referring to her driver's license. He briefly spoke with Doe and Reyes, but did not interview them or write a report documenting the conversations, because the San Bernardino Police Department was contacted and investigated the incident. Reyes told Sergeant Gonzalez that Doe and [Petitioner] came to her house together; Doe and [Petitioner] got into a fight; Reyes sent [Petitioner] "to his house in the mountains"; and Reyes did not wish to be involved.

4. Deputy Donald Zehms

San Bernardino County Sheriff's Deputy Zehms arrived at Reyes's house as Doe was being put in an ambulance. He did not write a report. Doe told Deputy Zehms that she was at a house in San Bernardino with [Petitioner] when he forced her into a car, drove her around San Bernardino, and assaulted her while driving around. Doe did not provide many details, but once he determined that Doe had initially been taken from

a house in San Bernardino, he called for the San Bernardino Police Department to meet Doe at the hospital.

5. Theresa Lynn DeAvila

DeAvila testified she was [Petitioner]'s girlfriend, and went to Reyes's house around 9:30 to 10:00 p.m. on the night of the incident to see [Petitioner]. In the driveway, Doe was sitting in [Petitioner]'s car, and she told Doe she was [Petitioner]'s girlfriend. The women began arguing; DeAvila claimed Doe struck her in the mouth and she fought back in self-defense. DeAvila said she hit Doe in her nose and mouth, and both she and Doe were bleeding. The fight ended after DeAvila "took off running," and [Petitioner] left after he was unable to break up the fight. Doe was lying in the driveway when DeAvila left.

The prosecutor impeached DeAvila with the transcript of a recorded telephone conversation between DeAvila and [Petitioner], while [Petitioner] was in custody, in which [Petitioner] told DeAvila that "two girls" beat up Doe and asked DeAvila to contact the women to see whether one of the girls would testify.

C. *Rebuttal*

District Attorney Investigator Steven Shumway attempted, unsuccessfully, to serve Reyes with a subpoena at her house in Highland and at another house in Lake Arrowhead. Investigator Shumway listened to [Petitioner]'s recorded telephone calls made from the county jail. In at least one call, [Petitioner] spoke with DeAvila and asked her to contact at least one of two females to have them testify on his behalf, and he would post bail for the women. [Petitioner] also told DeAvila he had mailed a letter to Reyes's house, that "all the information, would be in that letter," and to visit him and "go over the details" after she read the letter.

[Dkt. No. 20-1, LD 1, pp. 3-11].

Petitioner represented himself at trial before a jury. [Dkt. No. 20-24, LD 18, pp. 34-36]. The jury convicted him of assault by means of force likely to produce great bodily injury and found he personally inflicted great bodily injury in violation of California Penal Code Sections 245(a)(4) and 12022.7(a). [Dkt No. 20-25, LD 18, pp. 78-79]. He was acquitted of kidnapping but convicted of the lesser-included offense of false imprisonment by menace or violence in violation of California Penal Code

Section 236. [Id., pp. 80, 85]. The jury found true the allegation that Petitioner had a prior strike conviction for criminal threats. [Id., p. 81; Dkt. No. 20-22, LD 16, p. 76].

The court sentenced Petitioner to prison for 17 years, four months. [Dkt. No. 20-25, LD 18, pp. 114-15; Dkt. No. 20-22, LD 16, pp. 88-90]. The court ordered Petitioner's driver's license permanently revoked. [Dkt. No. 20-22, LD 16, pp. 88-89].

Petitioner appealed to the California Court of Appeal. [Dkt. No. 20-26, LD 19; Dkt. No. 20-28, LD 21]. On November 20, 2015, the appellate court remanded with directions for the trial court to prepare a supplemental sentencing order clarifying that Petitioner's driver's license could be revoked for one year, but not for life. [Dkt. No. 20-1, LD 1, pp. 3, 31]. The appellate court affirmed judgment in all other respects. [Id.]. Petitioner petitioned the California Supreme Court for review. [Dkt. No. 20-3, LD 3]. On February 24, 2016, that court summarily denied the review. [Dkt. No. 20-4, LD 4].

Petitioner then engaged in a chaotic state habeas filing spree. On May 12, 2016, he filed a habeas petition in the San Bernardino County Superior Court. [Dkt. No. 20-5, LD 5]. Four days later, on May 16, he filed a petition in the California Supreme Court. [Dkt. No. 20-6, LD 6.] On July 5, 2016, the superior court denied the petition because some of the claims were raised and rejected on direct appeal, and the remaining claims could have been, but were not, raised on appeal. [Dkt. No. 20-7, LD 7]. Petitioner then filed supplements to the state superior court and supreme court petitions. [Dkt. No. 20-8, LD 8; Dkt. No. 20-9, LD 9]. On August 24, 2016, the state supreme court summarily denied habeas relief. [Dkt. No. 20-10, LD 10]. On October 26, 2016, the superior court denied Petitioner's supplement because it was a serial petition that did not allege new facts. [Dkt. No. 20-11, LD 11].

Meanwhile, on August 25, 2016, Petitioner filed an extensive habeas petition in the California Court of Appeal. [Dkt. No. 20-12 to 20-16, LD 12]. On September 2, 2016, the state appellate court summarily denied relief. [Dkt. No. 20-17, LD 13].

Finally, on February 15, 2017, Petitioner filed a second habeas petition in the California Supreme Court. [Dkt. No. 20-18, LD 14]. On August 9, 2017, that court denied the petition as successive. [Dkt. No. 20-19, LD 15]. It also denied individual claims, "as applicable," for various other procedural reasons, including because they did not include reasonably available documentary evidence; claims could have been, but were not, raised on appeal; and because the petition did not allege sufficient facts with particularity. [Id.].

III. PETITIONER'S GROUNDS FOR RELIEF

The Petition[3] raises the following grounds for relief[4]:

1. The trial court erred by (a) limiting Petitioner's voir dire time; (b) denying challenges for cause; (c) terminating Petitioner's cross-examination of a police officer; (d) controlling his examination of a detective and a sergeant; (e) ending his closing argument; (f) precluding Petitioner from impeaching the victim about immunity; (g) showing bias against Petitioner; and (h) accumulating errors;

---

[3] The Petition is not paginated sequentially. Accordingly, the Court refers to the page numbers assigned by CM/ECF to the Petition and to all electronic filings.

[4] Petitioner presents his claims in a disorganized, jumbled fashion. For consistency, the Court tracks Respondent's outline of the claims in the table of contents of the Answer. [Dkt. No. 19-1, pp. 2-3]. The Court notes that ground 1(f) (preclusion of Petitioner from impeaching about immunity) does not appear in the Introduction of the Answer. [Id., p. 10]. However, the claim is in the table of contents and briefed. [Id., p. 2, 35-37].

2. (a) The prosecutor committed misconduct by hand-picking the trial court judge; (b) the trial court violated Petitioner's constitutional rights by limiting him to two changes of clothes per week during trial; (c) and the prosecutor committed misconduct by suppressing a video of a police interview with the victim;

3. The great bodily injury finding is supported by insufficient evidence;

4. The trial court erred by granting the prosecution's motion under Batson v. Kentucky, 476 U.S. 78, 97 (1986);

5. The prosecutor violated Batson; and

6. The trial court violated the Confrontation Clause rights by admitting Petitioner's grandmother's 911 call.

[Dkt. No. 1, pp. 5-7, 11-49].

The Supplemental Petition raised the following grounds for relief:

7. Appellate counsel provided ineffective assistance by failing to allege: (1) the trial court erred by denying Petitioner's challenges for cause; (2) judicial bias; (3) prosecutorial misconduct by hand-picking the trial court judge; (4) the great bodily injury finding is supported by insufficient evidence; (5) the admission of his Petitioner's grandmother's 911 call violated the Confrontation Clause; and (6) the trial court erred in imposing an upper-term sentence and the maximum restitution fine.

[Dkt. No. 26, pp. 1-7; Dkt. No. 53].

IV. STANDARD OF REVIEW

The Court applies AEDPA in its review of this action because this Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320, 336 (1997) (holding that amendments to AEDPA apply only to cases filed after AEDPA became effective). Under AEDPA, a

federal court may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). Overall, AEDPA presents "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, 571 U.S. 12, 19 (2013). AEDPA imposes 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 (2011) (internal citations omitted).

The petitioner bears the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). In other words, "a state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness" of that ruling. Id. at 101 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). Federal habeas corpus review therefore serves as a "guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Richter, 562 U.S. at 102-03 (internal quotations omitted).

In applying the foregoing AEDPA standards, federal courts look to the last reasoned state court decision and evaluate it based upon an independent review of the relevant portions of the state court record. Nasby v. McDaniel, 853 F.3d 1049 (9th Cir.

2017). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)).

Here, subclaims (a), (c), (d), (e), and (f) of Ground One, and Ground Four were denied on the merits by the California Court of Appeal in a reasoned opinion on direct appeal. [Dkt. No. 15-4, LD 1]. The California Supreme Court summarily denied review. [Dkt. No. 20-4, LD 4]. Therefore, the Court looks through the silent denial and applies the AEDPA standard to the Court of Appeal's decision as to those claims and subclaims. See Ylst, 501 U.S at 804.

Ground Seven was denied on habeas review by California Supreme Court, and then the California Court of Appeal, without comment from either court. [Dkt. No. 20-10, LD 10; Dkt. No. 20-17, LD 13]. The claim is therefore exhausted, and the Court presumes that the state courts reached and rejected the merits of Petitioner's constitutional claim. Richter, 562 U.S. at 99; Johnson v. Williams, 568 U.S. 289, 301 (2013) (federal court ordinarily "must presume that [a prisoner's] federal claim was adjudicated on the merits"). AEDPA requires the Court to perform an "independent review of the record" to determine "whether the state court's decision was objectively unreasonable." Richter, 562 U.S. at 98. When the state court does not explain the basis for its rejection of a prisoner's claim, a federal habeas court "must determine what arguments or theories [ ] could have supported the state court's decision" in evaluating its reasonableness. Id. at 102 (emphasis added); Rowland v. Chappell, 876 F.3d 1174, 1181 (9th Cir. 2017) ("Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable.") (quotation omitted).

Finally, Respondent argues that the remaining claims in the Petition are procedurally barred, or unexhausted. [Dkt. 19-1, p. 10]. However, despite unexhaustion, a federal court may consider and deny an unexhausted claim when "it is perfectly clear that the applicant does not raise even a colorable federal claim." Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005) (citing 28 U.S.C. § 2254(b)(2)); Quezada v. Scribner, 604 F. App'x 550, 551 (9th Cir. 2015) (same). When employing this procedure, the federal habeas court reviews the unexhausted claim de novo, rather than applying AEDPA's deferential standard of review. Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004).

Similarly, the principles of judicial economy weigh in favor of reaching the substance of claims that are "clearly not meritorious despite an asserted procedural bar." Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002); Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (habeas court may consider merits of procedurally defaulted claim to conserve judicial resources). This is particularly true where a state court order, such as the California Supreme Court's August 2017 order, cited numerous procedural bars but did not specifying which bars applied to which claims. [Dkt. No. 20-19, LD 15]; see Koerner v. Grigas, 328 F.3d 1039, 1052 (9th Cir. 2003) (when a state court order invokes multiple procedural bars without specifying which bars are applied to which claims, and the federal court is unable to resolve the ambiguity, the state order will not support a procedural default); Washington v. Cambra, 208 F.3d 832, 833-34 (9th Cir. 2000) (reversing dismissal of habeas petition where California Supreme Court invoked two state procedural bars without specifying which rule applied to which claim and one of the two bars was not an independent and adequate state bar).

Accordingly, because subclaims (b), (g), and (h) of Ground One, and Grounds

Two, Three, Five, and Six clearly lack merit, and in an abundance of caution, the Court addresses the claims despite unexhaustion or any procedural bars.

V. DISCUSSION

A. Voir dire time limit (Ground 1(a))

In Ground 1(a), Petitioner contends he trial court erred by limiting his time to voir dire. [Dkt. No. 1, pp. 12-13].

1. Background and state court decision

Before voir dire, the trial judge informed the parties, "I do most of the voir dire myself." [Dkt. No. 20-5, LD 5, p. 117]. Therefore, the court allowed each party a total of 30 minutes of voir dire to spend as they saw fit. [Id., p. 118].

After the trial judge's extensive voir dire [Dkt. No. 20-23, LD 17, pp. 22-60], Petitioner questioned the first group of prospective jurors for forty minutes [Id., pp. 60-77]. During a break, and outside the presence of the jurors, the court informed Petitioner that he had exhausted his allotted time. [Id., p. 77].

Petitioner challenged the time limitation on direct appeal. After summarizing relevant state law, the California Court of Appeal rejected Petitioner's claim as follows:

> In our view, the court's 30 minute time limit on each party's right to question the prospective jurors was too restrictive, even though the case was not especially complex and involved only two charges. Generally speaking, the court should have allowed each party at least an hour to question prospective jurors, in order to probe them for potential biases and determine whether they could competently serve. Still, the 30-minute time limit did not adversely affect [Petitioner]'s right to a fair and impartial jury. As it said it would do, the court conducted "most of the voir dire" and thoroughly questioned all of the prospective jurors regarding their backgrounds, potential biases, and knowledge of the case, the parties, and the witnesses before allowing the parties to question the prospective jurors.
>
> In view of the court's voir dire, the 30-minute time limit did not prevent [Petitioner] from making reasonable inquiries into the fitness of prospective jurors to serve. [People v. Carter, 36 Cal. 4th 1215, 1251 (2005).]

> "The right to voir dire, like the right to peremptorily change [citation], is not a constitutional right but a means to achieve the end of an impartial jury. [Citation.]" [People v. Wright, 52 Cal. 3d 367, 419 (1990).] "'[C]ounsel's right is only to a reasonable examination of prospective jurors—reasonable in length, in method, in purpose, and in content.' [Citation.]" [Id.]
>
> Additionally, the court ended up allowing [Petitioner] to question prospective jurors for 40 minutes, not 30, and [Petitioner] did not use his time wisely. As the court pointed out after it terminated [Petitioner]'s voir dire, most of [Petitioner]'s questions, "either tr[ied] to pre-instruct the jury on the law or [were] questions [Petitioner] already knew the answer to, such as whether people had served on the jury before, whether they can be fair and impartial." The court also noted there was a lot of "dead air," around 20 to 30 seconds, between many of [Petitioner]'s questions. It thus appears that [Petitioner] did not need more than 40 minutes to question the prospective jurors, and had he been allowed more time he would not have used it effectively.

[Dkt. No. 20-1, LD 1, pp. 18-19].

2. Analysis

Petitioner fails to direct the court to, and the court is unaware of, any United States Supreme Court case holding that a restriction of voir dire to 30 minutes violates the Constitution. Where no decision of the Supreme Court "squarely addresses" an issue or provides a "categorical answer" to the question before the state court, AEDPA bars relief; the state court's adjudication of the issue cannot be contrary to, or an unreasonable application of, Supreme Court law. Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (per curiam). Petitioner's failure to identify governing Supreme Court law is fatal to his claim. Id.; Carey v. Musladin, 549 U.S. 70, 77 (2006); Morales v. Lewis, 2015 WL 847385, at *3 (C.D. Cal. Feb. 26, 2015) ("Petitioner cites no authority indicating that a fifteen-minute limit on voir dire violates a defendant's Sixth Amendment rights, and the Court, for its part, finds none."); Briggs v. Adams, 2009 WL 2007121, at *8 (C.D. Cal. July 9, 2009) (no right to "unrestricted time on voir dire under clearly established [f]ederal law[ ] . . . .").

Indeed, the state appellate court decided the issue solely under state law, and it recognized that voir dire is not based on a "constitutional right." [Dkt. No. 20-1, LD 1, p. 18]. And, even though the state court found that "in [its] view" the time limit was "too restrictive" under state law [id.], that is not a basis for federal relief. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (noting that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (noting that the United States Supreme Court has repeatedly held that "federal habeas corpus relief does not lie for errors of state law").

Finally, even if Petitioner could establish a cognizable claim and governing Supreme Court law, he has failed to show that the state appellate court unreasonably determined that the trial court's extensive voir dire of the jurors was sufficient to identify any bias. Petitioner ignores this aspect of the appellate court's decision and fails to show any prejudice because of the voir dire time limit. [Dkt. No. 1, pp. 12-13]; Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977) ("the petition is expected to state facts that point to a real possibility of constitutional error"); Greenway v. Schiro, 653 F.3d 790, 804 (9th Cir. 2011) (rejecting habeas claim as "cursory and vague").

Petitioner is not entitled to federal habeas relief on this ground.

B. Cross-examination of Officer Smith (Ground 1(c))

In Ground 1(c), Petitioner contends the trial court erred by terminating his cross-examination of Officer Smith. [Dkt. No. 1, pp. 15-16].

1. Background and state court decision

At trial, the trial court repeatedly ordered Petitioner to address the victim as Jane

Doe. [Dkt. No. 20-20, LD 16, pp. 119, 121-22]. Petitioner violated the order during his cross-examination of Doe. [Id., p. 223]. He also repeatedly violated this order during his cross-examination of Officer Smith. [Id.]. After Petitioner's fourth violation, the court warned him that if he continued to use the victim's name, it would deem his cross-examination complete. [Dkt. No. 20-21, LD 16, p. 28]. When Petitioner used Doe's name a fifth time, the court terminated his cross examination of Officer Smith. [Id., p. 30]. Petitioner later called Officer Smith as a witness, and examined him until he ran out of questions, even though Petitioner again used Doe's real name. [Id., pp. 72-82, 89-94].

Petitioner challenged the termination of cross-examination on direct appeal. The California Court of Appeal determined that the trial court had no authority to order that the victim be referred to as Jane Doe because she was not the victim of an enumerated sex offense under state statutory law. [Dkt. 20-1, LD 1, pp. 20-21]. Nonetheless, the state appellate court concluded Petitioner was not prejudiced. Specifically, the appellate court ruled:

> After the court terminated [Petitioner]'s cross-examination of Officer Smith for referring to Jane Doe by her true name, [Petitioner] called Officer Smith to testify in his defense case and was allowed to question the officer until he ran out of questions—despite [Petitioner]'s long pauses and repetitive and otherwise objectionable questions. [Petitioner] points to no relevant evidence that he was unable to elicit from the officer. Thus, no prejudice appears.

[Dkt. No. 20-1, LD 1, pp. 18-19].

2. Federal law and analysis

The Confrontation Clause of the Sixth Amendment guarantees a defendant in a criminal case an opportunity for effective cross-examination of the witnesses against him. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). However, trial judges "retain

wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination." Id. at 679. The exclusion of specific lines of cross-examination is not error if there is "no substantial likelihood" that "the jury's impression of [the witness's] credibility" would have been changed. Sully v. Ayers, 725 F.3d 1057, 1075 (9th Cir. 2013) (witness subjected to "extensive cross-examination that tested her biases, motivations to lie, and consistency"; excluded cross-examination topic was on "peripheral" issue).

"[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to . . . harmless-error analysis." Van Arsdall, 475 U.S. at 684. An error cannot lead to habeas relief "unless it results in 'actual prejudice'" that had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Ocampo v. Vail, 649 F.3d 1098, 1114 (9th Cir. 2011) (Brecht applies to Confrontation Clause violations).

Here, Petitioner has wholly failed to show prejudice. As the state appellate court explained, Petitioner called Officer Smith as a witness in his own case and was permitted to examine him until he ran out of questions. [Dkt. No. 20-21, LD 16, pp. 72-82, 89-94]. During that examination, Petitioner questioned Smith about Doe's statement to him, established that Smith did not record the statement even though he had a tape recorder with him, and that no one photographed the pool of blood that Smith observed outside of Reyes's house. [Id., pp. 21, 73, 78-81]. Considering Petitioner's admission that he did not have any other questions [Id., p. 92], he fails to demonstrate what would have changed the jury's impression of Smith's credibility, and thus has failed to show prejudice. See Brecht, 507 U.S. at 637; Sully, 725 F.3d at 1075.

Petitioner is not entitled to federal habeas relief on this ground.

C. Control of direct-examination (Ground 1(d))

In Ground 1(d), Petitioner contends the trial court prejudicially erred in "cutting off" his direct examination of Detective Antillon and "rudely" interrupting his direct examination of Sergeant Gonzalez. [Dkt. No. 1, pp. 16-17].

1. Background and state court decision

During Petitioner's direct examination of Antillon and Gonzalez, Petitioner repeatedly violated court rules and engaged in improper questioning, resulting admonitions and restrictions by the trial court. Petitioner challenged the trial court's management of his examinations on direct appeal. The California Court of Appeal discussed governing state law and the relevant instances, and ruled as follows:

> The trial court has "'inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice.'" [People v. Gonzalez, 38 Cal. 4th 932, 951 (2006); Cal. Pen. Code § 1044; Cal. Evid. Code § 765.] [California] Evidence Code section 765 affords the trial court broad discretion to control the interrogation of witnesses. [People v. Chenault, 227 Cal. App. 4th 1503, 1514 (2014).] On appeal, we review the court's exercise of its authority under [Cal. Evid. Code § 765] for an abuse of discretion. [People v. Tafoya, 42 Cal. 4th 147, 175 (2007).] And here, the court properly controlled [Petitioner]'s direct examinations of Detective Antillon and Sergeant Gonzalez.
>
> In questioning the detective about his interview with Doe, [Petitioner] kept asking the detective what Doe told him her doctors told her about her injuries, even though the questions called for hearsay and the court properly sustained the prosecutor's hearsay objections to the questions. [Petitioner] complains that Doe was allowed to testify on her direct examination that her doctors told her she had a concussion, but [Petitioner] did not object to the question on hearsay or other grounds.
>
> [Petitioner] also asked the detective whether Doe's injuries constituted great bodily injury, which called for an improper legal conclusion, and tried to play a videotape of the detective's interview with Doe without authenticating the videotape. Finally, the court terminated the examination after [Petitioner] kept asking the detective what he wrote in his report, without showing that the report contained any inconsistent

> statements or using it to refresh the detective's recollection. In terminating the examination, the court did not abuse its discretion. [Petitioner] was continually asking improper questions.
>
> In questioning Sergeant Gonzalez, [Petitioner] kept asking whether the sergeant verified that Doe gave him her real name by checking her driver's license. The court admonished [Petitioner] that he was not to elicit Doe's real name and to ask relevant questions. [Petitioner] told the court he was trying to prove that Doe gave the sergeant a false name. [Petitioner] complains that the court "rudely interrupted" him at this point, which caused him to end the examination, but the court simply told [Petitioner] that it was "not going to give you advice or lead you by the hand with this witness. Ask relevant questions in compliance with my orders or rest." The admonition was appropriate. [Petitioner] was not asking proper questions, and it appeared he was trying to interject Doe's real name into the proceedings. Finally, after [Petitioner] asked the sergeant, for the third time, whether Reyes told him she did not want Doe in her house, the court sustained the prosecutor's "asked and answered" objection. At that point, [Petitioner] said he had "[n]o further questions." The court did not "cut off" the examination.

[Dkt. No. 20-1, LD 1, pp. 22-24].

2. Federal law and analysis

"[T]he Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986) (internal citations omitted). However, criminal defendants do not have an absolute constitutional right to introduce all evidence that may be relevant to the defense. Montana v. Egelhoff, 518 U.S. 37, 42 (1996) (plurality); Taylor v. Illinois, 484 U.S. 400, 410 (1988) ("The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."). When evidence is excluded based on a valid application of a state evidentiary rule, such exclusion may violate due process only if the evidence is sufficiently reliable and crucial to the defense. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In general, however, there must be "unusually compelling circumstances . . . to outweigh the strong state

interest in administration of its trials." Perry v. Rushen, 713 F.2d 1447, 1452 (9th Cir. 1983).

Here, Petitioner has failed to establish that he is entitled to federal habeas relief. The state appellate court concluded that the trial judge was within his discretion by controlling Petitioner's direct examination under the state evidentiary code. The Court is bound by that determination. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) ("a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"). Petitioner fails to identify any evidence, let alone evidence that was "crucial to the defense," that would have come from Antillon had Petitioner been permitted to continue with his examination. See Chambers, 410 U.S. at 302. Finally, Petitioner does not dispute that he had "no further questions" for Gonzalez at trial. [Dkt. No. 20-21, LD 16, pp. 114-15]. Accordingly, Petitioner has failed to show he was prejudiced by the trial court's control of his direct examination, or any "unusually compelling circumstances" that outweighed the state court's administration of its trials. See Brecht, 507 U.S. at 623; Perry, 713 F.2d at 1452.

Petitioner is not entitled to federal habeas relief on this ground.

D. Termination of closing argument (Ground 1(e))

In Ground 1(e), Petitioner contends the trial court erred by cutting-off his closing argument because his statement, "this is my life on the line," was not improper. [Dkt. No. 1, pp. 18-19].

1. Background and state court decision

During opening statement, Petitioner told the jury that Doe was "going to make sure that I got to prison." [Dkt. No. 20-20, LD 16, p. 165]. He also said, "my grandma is going to die while I am in prison." [Id., p. 166]. He told the jury, "This is my life. My grandma is 75-years-old." [Id., p. 173]. At that point, the court admonished the jury it was not to consider "penalty, punishment, sympathy or any effect it might have on [Petitioner]'s family." [Id.]. Petitioner then proceeded to tell the jury "this is my life." [Id., p. 174]. The court instructed Petitioner not to ask the jury to contemplate the effect its verdict might have on his life. [Id.]. Not to be deterred, Petitioner again told the jury, "this is my life," and the court warned him that continuing to argue penalty or punishment would result in the court deeming his opening statement to have concluded. [Id., p. 175].

During closing argument, Petitioner continued with a similar line of argument. He said, "If . . . I'm proved guilty on any of these charges, I am looking at 10 years." [Dkt. No. 20-22, LD 16, p. 35]. The court sustained the prosecutor's objection and admonished Petitioner: "[Y]ou have been warned about this several times throughout the trial. The jury was just ordered by me not to consider penalties or punishment, sympathy, any of those improper bases for deciding the case. Should you violate this order one more time, I will deem you to have rested your closing argument and I will have you sit down." [Id.]. Later, Petitioner said, "I tell you ladies and gentlemen, this is my life on the line. This is very serious." [Id., p. 45]. The court sustained the prosecutor's objection and reminded Petitioner of its prior orders. The court then deemed Petitioner's closing argument concluded and said he may sit down. [Id.].

Petitioner admitted on direct appeal that his statement about facing 10 years in prison was improper, but nonetheless argued that his statement, "my life [is] on the line," was proper. [Dkt. No. 20-1, LD 1, p. 25]. The California Court of Appeal disagreed:

> . . . . "It is settled that in the trial of a criminal case the trier of fact is not to be concerned with the question of penalty, punishment or disposition in arriving at a verdict as to guilt or innocence." [People v. Allen, 29 Cal. App. 3d 932, 936 (1973) (footnote mitted); People v. Nichols, 54 Cal. App. 4th 21, 24 (1997).] [Petitioner]'s reference to his "life" being "on the line" plainly and improperly suggested to the jury that it should consider the punishment he might face in determining his guilt.
>
> Additionally, the trial court has a duty to limit closing argument to relevant and material matters [Cal. Pen. Code § 1044; People v. Edwards, 57 Cal. 4th 658, 743 (2013)] and has broad discretion in controlling the duration and scope of closing argument [Herring v. New York, 422 U.S. 853, 862 (1975) (court has broad discretion to terminate argument when continuation would be repetitive or redundant, and to ensure that the argument does not impede the fair and orderly conduct of the trial)]. [Petitioner] made improper references to his potential punishment throughout the trial, beginning with his opening statement and continuing through his closing argument. Thus, the court acted within its discretion in ending [Petitioner]'s closing argument after he again violated the court's order not to refer to his punishment if convicted.

[Dkt. No. 20-1, LD 1, p. 25].

2. Federal law and analysis

"There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial." Herring, 422 U.S. at 858. Accordingly, a defendant "has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge." Id. However, "[t]he presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or

redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion." Id. at 862.

Here, the state appellate court properly identified the governing federal law. [Dkt. No. 20-1, LD 1, p. 25 (citing Herring)]. After detailing Petitioner's repeated improper references to punishment, the appellate court concluded that the trial court acted within its discretion by ending Petitioner's closing argument. [Id.]. Given the "great latitude" trial judges have in controlling argument before them, this was not an unreasonable application Herring. See 422 U.S. at 862.

Petitioner is not entitled to federal habeas relief on this ground.

E. Immunity impeachment (Ground 1(f))

In Ground 1(f), Petitioner contends the trial court improperly limited him from cross-examining the victim about immunity. [Dkt. No. 1, pp. 20-21].

1. Background and state court decision

Before trial, the prosecutor granted Doe immunity from prosecution for two prior incidents in which Doe was allegedly violent toward Petitioner. [Dkt. No. 20-1, LD 1, p. 26; Dkt. No. 20-20, LD 16, pp. 128-29, 212=14; Dkt. No. 20-24, LD 18, pp. 155-56]. The trial court also granted the prosecutor's motion to preclude Petitioner from presenting evidence of Doe's alleged prior violent acts because they were irrelevant unless Petitioner claimed that he acted in self-defense. [Dkt. No. 20-1, LD 1, p. 26; Dkt. No. 20-5, LD 5, pp. 83-84]. Petitioner did not indicate at that time whether he would claim self-defense or that someone else struck Doe. [Dkt. No. 20-1, LD 1, p. 26].

During opening statement, Petitioner stated that he would prove Doe was "receiving immunity for her testimony." [Id.; Dkt. No. 20-20, LD 16, p. 167]. The

prosecutor objected but the trial court overruled it at that "point." [Dkt. No 20-20, LD 16, p. 167]. After direct examination of Doe, the prosecutor moved to preclude Petitioner from cross-examining her about the immunity agreement and the alleged prior acts. [Id., pp. 212-15]. The court granted the motion, noting the evidence was irrelevant and would be "until such time as [Petitioner] testifies about self defense or imperfect self defense." [Id., p. 215]. Petitioner did not assert self-defense; he presented his girlfriend's testimony that she assaulted Doe in self-defense. [Dkt. No. 20-21, LD 16, pp. 95-107].

Petitioner challenged the trial court's determination in direct appeal. The California Court of Appeal rejected his argument:

> We conclude the court did not abuse its discretion in precluding [Petitioner] from impeaching Doe with her immunity agreement. [People v. Avila, 38 Cal. 4th 491, 578 (2006) (trial court rulings excluding evidence on relevance and Cal. Evid. Code § 352 grounds reviewed for abuse of discretion).] If [Petitioner] was going to claim that someone else fought with Doe and caused her injuries—as he ultimately did—then allowing him to impeach Doe with her use immunity agreement and her alleged prior acts of violence toward him may well have confused the issues and been more prejudicial than probative on the question of Doe's credibility in testifying that [Petitioner] attacked her and caused her injuries. [Cal. Evid. Code §§ 780(f) (existence of bias, interest, or motive relevant to witness credibility), 352 (relevant evidence may be excluded if its probative value is substantially outweighed by the probability it will confuse the issues).]

[Dkt. No. 20-1, LD 1, p. 27].

2. Analysis

Petitioner has failed to establish that he is entitled to federal habeas relief. The state appellate court concluded that the trial judge properly excluded evidence of Doe's immunity agreement under the state evidence code and was within his discretion by controlling Petitioner's cross-examination of the witness under state law. The Court is bound by that determination. See Bradshaw, 546 U.S. at 76.

Moreover, as explained, trial judges "retain wide latitude" to impose limitations on cross-examination. See Van Arsdall, 475 U.S. at 679. Because Petitioner never claimed he fought with Doe in self-defense, but rather claimed that someone else did, the prior acts of violence against him were at most peripheral to his defense. See Sully, 725 F.3d at 1075. The state court did not unreasonably deny Petitioner's claim, especially given the high deference entitled to the determination. See Pinholster, 563 U.S. at 181. There was no "extreme malfunction" at trial. Richter, 562 U.S. at 102-03.

Petitioner is not entitled to federal habeas relief on this ground.

F. Prosecutor's *Batson* challenge (Ground Four)

In Ground Four, Petitioner contends the trial court erred in granting the prosecution's Batson motion. [Dkt. No. 1, p. 6].

1. Background and state court decision

During jury selection, and outside the presence of the venire, the prosecution alleged that Petitioner was exercising his peremptory challenges to prospective jurors in an improper, gender-based fashion. [Dkt. No. 20-23, LD 17, p. 143]. After a hearing on the matter, and interviewing a prospective juror, the trial court agreed and denied Petitioner's use of a peremptory challenge. [Id., pp. 146-47]. Petitioner challenged the determination on direction appeal. The California Court of Appeal summarized the relevant background:

> Each side could use 10 peremptory challenges during jury selection. [Cal. Code Civ. Proc. § 231.] [Petitioner] used five of his first six peremptory challenges to excuse female prospective jurors. The prosecutor objected when [Petitioner] tried to use his seventh peremptory challenge to excuse a sixth female prospective juror, Prospective Juror No. 20.

> Outside the presence of the jury, the court found there were gender-neutral reasons for [Petitioner]'s excusals of two of the six female prospective jurors, namely, Nos. 4 and 27. The court noted that Prospective Juror No. 4 said she could not be fair, and No. 27 said she always assumed people told the truth under oath.
>
> The court found "no discernable reason" for [Petitioner]'s peremptory excusals of Prospective Juror Nos. 8, 31, 44, or 20. The court thus found that the prosecutor made "a prima facie case the [Petitioner] is exercising peremptory challenges based on gender in a case where the named victim is female," and asked [Petitioner] whether he would like to be heard. [Petitioner] explained that he recognized Prospective Juror No. 20 as a member of a family with whom his family had engaged in an unspecified "domestic dispute." Still outside the presence of the venire, the court called Prospective Juror No. 20 into the courtroom and asked her whether she knew [Petitioner] and whether her family had been involved in any domestic dispute with [Petitioner]'s family. Prospective Juror No. 20 denied knowing [Petitioner], and said she had "never had any domestic disputes." The court then found [Petitioner] was using his peremptory challenges to excuse female prospective jurors based on gender, and found his gender-neutral justification for excusing Prospective Juror No. 20 "wholly fabricated" and "just a lie." The court noted that Prospective Juror No. 20 "appeared baffled" when asked about the domestic dispute between the families.

[Dkt. No. 20-1, LD 1, pp. 11-12]. The state appellate court then summarized relevant federal and state law, including Batson and its state-law analogue, People v. Wheeler, 22 Cal. 3d 258, 276 (1978), and the "familiar three-step inquiry" employed to analyze challenges under those cases. [Id., pp. 12-14]. The appellate court then rejected Petitioner's claim, in relevant part:

> Substantial evidence supports the court's conclusion that the People made a prima facie showing that [Petitioner] was attempting to exclude female Prospective Juror No. 20 on the basis of her gender. Before he attempted to use his seventh peremptory challenge to excuse female Prospective Juror No. 20, [Petitioner] used five of his first six peremptory challenges to excuse other female prospective jurors.
>
> And, as the court found, there appeared to be "no discernable reason," other than their gender, to excuse female Prospective Juror No. 20 and three of the other five female prospective jurors whom [Petitioner]

previously excused: Prospective Juror Nos. 8, 31, and 44.[5] [. . . .] The trial court carefully considered whether there were any ostensible gender-neutral reasons for excusing each of the prospective jurors [Petitioner] previously excused; [Petitioner] offered the court no reason for his peremptory excusals of Prospective Juror Nos. 8, 31, and 44.

The burden thus shifted to [Petitioner] to state a gender-neutral reason for excusing Prospective Juror No. 20, and he failed to do so. [People v. Montes, 58 Cal. 4th 809, 852 (2014) (justifications for challenged peremptories need only be given if the court finds a prima facie showing of purposeful discrimination).] After speaking to Prospective Juror No. 20, the court found that [Petitioner]'s proffered gender-neutral justification for excusing her—that he had seen her before and her family had been engaged in some unspecified "domestic dispute" with his family—was "wholly fabricated" and was "just a lie." Substantial evidence supports this conclusion: Prospective Juror No. 20 denied knowing [Petitioner], denied having seen him before, and denied having been involved in any domestic dispute with his family.

"So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered [for excusing a prospective juror], its conclusions are entitled to deference on appeal. [Citation.]" [People v. Burgener, 29 Cal. 4th 833, 864 (2003).] And here, the court made a sincere and reasoned effort to evaluate [Petitioner]'s proffered gender-neutral justification for excusing Prospective Juror No.

---

[5] Prospective Juror No. 8 was married to a police officer; her "hobby" was raising her seven-year-old son; she worked for the County of San Bernardino; knew a lot of people in the legal community because of her husband's work; and had been the victim of a robbery "a long time ago," but no charges were filed.

Prospective Juror No. 31 was married and expecting her first child; was a full-time mathematics teacher; did not know anyone who worked in the legal community or anyone who had been the victim of a crime or accused of a crime; and believed she could be fair and impartial.

Prospective Juror No. 44 was divorced, lived alone, and had three adult sons and grandchildren. Her hobbies were "being a grandma and the activities that go with that." She had been a registered nurse for 39 years, specializing in wound care and "acute rehabilitation." Her son and daughter-in-law had had their vehicle stolen twice.

Prospective Juror No. 20 was married with a 12-year-old daughter; her husband was a "stay-at-home dad"; and she had worked as the director of operations for an appliance and electronics distribution company. Like Prospective Juror No. 8, she had also been the victim of a robbery "a long time ago," and the perpetrator was never caught. She did not know anyone who had been accused of a crime and believed she could be fair and impartial.

> 20, and reasonably found it not credible. Thus, the People's Batson /Wheeler motion was properly granted, and the court properly refused to allow [Petitioner] to peremptorily excuse Prospective Juror No. 20.

[Dkt. No. 20-1, LD 1, pp. 14-16].

2. Federal law and analysis

Excluding venire members from a trial jury based on an improper ground, such as race or gender, violates the Equal Protection Clause of the Constitution. Batson, 476 U.S. at 97; J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 130-43 (1994). Analysis of a Batson claim involves a three-step process to determine if a party engaged in purposeful discrimination. Miller-El v. Cockrell, 537 U.S. 322, 328 (2003).

At the first step, the opponent of the peremptory strike must "make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose" in the exercise of the strike. Batson, 476 U.S. at 93-94. If a prima facie case is shown, the burden shifts to the proponent of the strike at step two of Batson to show a gender-neutral explanation for the challenges. J.E.B., 511 U.S. at 145. Finally, at the third step, the trial court determines whether the opponent of the strike has established "purposeful discrimination." Johnson v. California, 545 U.S. 162, 168 (2005); Paulino v. Harrison (Paulino II), 542 F.3d 692, 699 (9th Cir. 2008).

On federal habeas review, AEDPA "imposes a highly deferential standard for evaluating state-court rulings" regarding Batson claims. It is a standard that "demands that state-court decisions be given the benefit of the doubt." Felkner v. Jackson, 562 U.S. 594, 598 (2011) (quotation omitted); Rico-Arreola v. Smith, 740 F. App'x 126, 127 (9th Cir. 2018) (applying Felkner, state supreme court "was not objectively unreasonable . . . to defer to a credibility determination by the trial court").

Preliminarily, the Court notes that Petitioner challenges the trial court's determination at step one of Batson only, contending that the prosecutor failed to make a prima facie case. [Dkt. No. 1, pp. 6, 39-44]. Indeed, that is the only aspect of the trial court's ruling that Petitioner raised and exhausted on direct review. [Dkt. No. 20-3, LD 3, pp. 10, 38-49; Dkt. No. 20-26, LD 19, pp. 36-47; Dkt. No. 20-28, LD 21, p. 14]. Petitioner made no mention before the state courts, or here, of the trial court's remaining findings under Batson, including the determination that his proffered gender-neutral justification was "not credible," or the state appellate court's determinations regarding those findings. [Dkt. No. 20-1, LD 1, pp. 16]. The Court therefore restricts its review to Petitioner's limited challenge.

Here, Petitioner has failed to show the state appellate court unreasonably applied Batson in determining the prosecutor had made a "prima facie" showing at the first step. As mentioned, the appellate court noted that before Petitioner tried to exercise his seventh peremptory challenge on Prospective Juror No. 20, he had used five of his first six peremptory challenges to excuse other prospective female jurors. [Id., p. 15]. The appellate court also agreed with the trial judge's determination that there was "'no discernable reason,' other than their gender, to excuse Prospective Juror No. 20 and three of the other five female prospective jurors whom [Petitioner] excluded earlier: Prospective Juror Nos. 8, 31 and 44." [Id.]. Finally, the state appellate court found that the trial court carefully considered whether there were any "ostensible gender-neutral reasons" for excusing the prospective jurors Petitioner had previously excused, and that Petitioner had "offered the court no reason" for his excusals of Prospective Juror Nos. 8, 31, and 44." [Id.].

Petitioner has failed to refute this statistical disparity, and, more importantly, he failed to show that the state appellate court unreasonably relied on it. This disparity was sufficient to demonstrate a prima facie showing alone. See, e.g., Shirley v. Yates, 807 F.3d 1090, 1101 (9th Cir. 2015) (finding first step of Batson satisfied where "two-thirds of the black venire members not removed for cause were struck by the prosecutor"); United States v. Collins, 551 F.3d 914, 921 (9th Cir. 2009) ("We have found an inference of discrimination where the prosecutor strikes a large number of panel members from the same racial group, or where the prosecutor uses a disproportionate number of strikes against members of a single racial group.") (citation omitted); Williams v. Runnels, 432 F.3d 1102, 1107 (9th Cir. 2006) (prima facie showing made where prosecutor used three of first four peremptory challenges to remove African Americans and, at pertinent time, only four of 49 potential jurors were African American); Paulino v. Castro (Paulino I), 371 F.3d 1083, 1090-91 (9th Cir. 2004) (inference of bias established where prosecutor struck five out of six possible African-American jurors, and used five out of six–over 83 percent–of its peremptory challenges to strike African-Americans).

As mentioned, Petitioner failed to challenge the credibility determinations made at the remaining steps of Batson. As the court of appeal noted, Juror No. 20's statements that she did not know Petitioner, had never seen him before trial, and was not involved in any domestic disputes with his family supported the trial court's conclusion that Petitioner's alleged reason for striking the juror was "'wholly fabricated'" and "'just a lie.'" [Dkt. No. 20-1, LD 1, p. 16; Dkt. No. 20-23, LD 17, pp. 145-46]. Petitioner would have to show the state appellate court was objectively unreasonable in

deferring to this finding, a daunting task he has not attempted to do here. See Felkner, 562 U.S. at 598; Rico-Arreola, 740 F. App'x at 127.

Petitioner is not entitled to federal habeas relief on this ground.

G. Prosecutor's alleged *Batson* violation (Ground Five)

In Ground Five, although Petitioner did not raise a Batson challenge at trial, he nonetheless contends the prosecutor violated Batson by exercising a peremptory challenge against a prospective black juror. [Dkt. No. 1, pp. 45-46].

A prisoner "may not raise a Batson claim in his habeas petition if the petitioner failed to object to the prosecution's use of peremptory challenges at trial." Haney v. Adams, 641 F.3d 1168, 1169 (9th Cir. 2011); Cash v. Barnes, 532 F. App'x 768, 769 (9th Cir. 2013) ("Since Petitioner did not raise a religion-based objection during jury selection, he cannot raise it here.").

The Ninth Circuit explained, "The Supreme Court has never allowed a Batson challenge to be raised on appeal or on collateral attack, if no objection was made during jury selection. Indeed, . . . Batson itself presupposes a timely objection." Haney, 641 F.3d at 1171. The Ninth Circuit concluded that it would be "unwise to allow defendants to manipulate the trial system to the extreme prejudice of the prosecution by allowing post-conviction Batson claims" that they did not assert at trial. Id. at 1173 (quotation omitted).

Accordingly, because Petitioner failed to raise his Batson challenge at trial, he is barred from raising it here. Haney, 641 F.3d at1169; Cash, 532 F. App'x at 769; Labon v. Martel, 2016 WL 8470181, at *16 (C.D. Cal. July 21, 2016) ("This Court cannot review the parties' adherence to the three-step procedure mandated by Batson when no

objection was made and there is no record of the prosecutor's reasons for exercising her peremptory challenges.")

Petitioner is not entitled to federal habeas relief on this ground.

H. For-cause challenges (Ground 1(b))

In Ground 1(b), Petitioner contends the trial court erred by denying his for-cause challenges to Prospective Juror Nos. 4, 8, and 27, and Juror No. 23. [Dkt. No. 1, p. 13-14; Dkt. No. 53, pp. 16-17]. Regarding Juror No. 23, Petitioner contends she should have been struck because the transcript indicates she said, "I don't see myself being a fair and impartial juror." [Dkt. No. 1, p. 13].

1. Background

Petitioner challenged Juror Nos. 4, 8, 23, and 27 for cause. [Dkt. No. 20-23, LD 17, pp. 94, 96, 98-99.][6] The court denied Petitioner's challenges to Juror Nos. 4, 8, and 27 [id., pp. 94-95, 98], but then Petitioner used peremptory challenges to strike those jurors [id., pp. 101, 115].

In responding to the trial judge's voir dire about prior jury duty, Juror No. 23 stated, "First time being in the jury here. It is interesting." [Id., p. 33]. The juror said she did not know anyone in the case, she never worked in a legal-related job, and she had an uncle who was campaigning for a judgeship in Albuquerque, but that it "wouldn't be related to this." [Id.]. She said she didn't know anyone who had been a victim of a crime, or accused of a crime, and didn't have any religious beliefs that would pertain to the case "or anything." [Id.]. The juror then said, "I don't see myself being a fair and

[6] In the transcript, at times the court and the parties refer to the jurors by their seat numbers, 13, 17, 16, and 2, respectively. [Dkt. No. 20-23, LD 17, pp. 94, 96, 98-99].

impartial juror. As far as anything else, just first time doing this, I guess, so pretty interesting." [Id., pp. 33-34].

During Petitioner's voir dire of Juror No. 23, she confirmed she had no prior jury experience and that neither she nor any family members nor friends had been charged with a crime. [Id., p. 71]. The juror agreed that Petitioner was innocent until proven guilty. [Id.]. The juror also knew that her reason for doubt could be different from another juror's and that she had the right to choose whatever verdict she wanted, even if the other jurors felt otherwise. [Id.]. The juror additionally said, "I won't be swayed by peer situation or peer pressure. I go with what I believe." [Id.].

During the prosecutor's voir dire, Juror No. 23 said that she could judge the credibility of people older than her, that age "wouldn't sway my decision," and that she was willing to judge the facts on the evidence, and she was willing to decide the case based on the evidence. [Id., p. 87].

Later, Petitioner expressed some confusion about why certain jurors were not excused, and he attempted to strike Juror No. 23. [Id., p. 99]. Petitioner then stated that Juror No. 23 said she couldn't be a fair and impartial juror. [Id., p. 99-100]. The trial judge stated that he didn't believe she said that; rather, [s]he indicated she could, [and that] she was eager to be here." [Id., p. 99]. The trial judge also stated that he thought Petitioner was thinking of another juror, to which Petitioner replied, "Excuse me. That is the wrong one." [Id.]. Petitioner then moved to another juror, and then asked if he could make his peremptory challenges. [Id.]. The judge said Petitioner could as soon as he brought in the jury, which he immediately did. [Id.]. The judge then excused certain jurors and allowed the parties to use their peremptory challenges. [Id., p. 100-01]. Petitioner never excused Juror No. 23.

2. Federal law and analysis

The Sixth Amendment right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). Due process requires that the defendant be tried by "a jury capable and willing to decide the case solely on the evidence before it." Smith v. Phillips, 455 U.S. 209, 217 (1982); Pappas v. Miller, 750 F. App'x 556, 559 (9th Cir. 2018). Jurors are objectionable if they have formed such deep and strong impressions that they will not listen to testimony with an open mind. Irvin, 366 U.S. 717, n.3.

"[I]n each case a broad discretion and duty reside[s] in the [trial] court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality." Frazier v. United States, 335 U.S. 497, 511 (1948). The trial judge has broad discretion in the questioning of potential jurors during voir dire to detect bias. See, e.g., Mu'Min v. Virginia, 500 U.S. 415, 423-24 (1991). To disqualify a juror for cause requires a showing of either actual or implied bias – "that is . . . bias in fact or bias conclusively presumed as a matter of law." United States v. Gonzalez, 214 F.3d 1109, 1111-12 (9th Cir. 2000). Jurors are presumed to be impartial. Irvin, 366 U.S. at 723.

On de novo review, Petitioner has failed to show he is entitled to relief. First, Petitioner does not dispute that Prospective Juror Nos. 4, 8 and 27 did not serve on his jury, and he fails explain how their absence meant the jury that heard his case was not impartial. Accordingly, even if those prospective jurors were biased, the trial court's failure to excuse them for cause did not violate Petitioner's constitutional rights. See United States v. Martinez-Salazar, 528 U.S. 304, 307 (2000) ("if the defendant elects to cure . . . an error by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or

constitutional right"); Comer v. Schriro, 480 F.3d 960, 990 (9th Cir. 2007); ("Even if the trial court erred in failing to strike . . . venirepersons . . . , such error does not constitute an unconstitutional denial of a fair and impartial jury unless the venirepersons sit on the jury.")

Second, after dialogue with the trial court regarding Juror No. 23, Petitioner did not follow up with a challenge. Instead, voir dire simply moved on without complaint by Petitioner. But, even if he did not abandon the challenge by his inaction, he has not shown he is entitled to relief. Although the transcript indicates Juror No. 23 stated during the trial judge's voir dire, "I don't see myself being a fair and impartial juror" [Dkt. No. 20-23, LD 17, pp. 33-34], the remainder of the juror's answers indicate that this was likely a reporting error[7] or that she misspoke. Notably, the statement didn't trigger any follow up questions from the court, Petitioner, or the prosecutor. The juror affirmed that Petitioner was innocent until proven guilty, that she would make up her mind despite the views of other jurors, that she wouldn't be swayed by peer pressure, and she would decide the facts based on the actual evidence. [Id., p. 71, 87].

Accordingly, Petitioner has not shown that the trial judge erred in his broad discretion in questioning and ensuring that the final jury was impartial. See Frazier, 335 U.S. at 511; Mu'Min, 500 U.S. at 423-24. Taking the entire voir dire into consideration, Petitioner has not demonstrated the juror was in fact biased or conclusively presumed to

[7] The Court notes at least one other reporting error in Petitioner's exchange with the court. The transcript erroneously attributes a response from Petitioner as coming from "PROSPECTIVE JUROR" instead of from "THE DEFENDANT." [Dkt. No. 20-23, LD 17, p. 99]. It is clear from the exchange that Petitioner was the only person responding to the trial judge's questions, and no jurors were in the courtroom at that point. [Id., pp. 100].

be biased as a matter of law, and he has also failed to overcome the presumption that jurors are impartial. See Gonzalez, 214 F.3d at 1111-12; Irvin, 366 U.S. at 723.

Petitioner is not entitled to federal habeas relief on this ground.

I. Change of clothes (Ground 2(b))

In Ground 2(b), Petitioner contends the trial court erred by limiting him to two changes of clothes a week during trial. [Dkt. No. 1, p. 25].

Petitioner does not cite any law, Supreme Court[8] or otherwise, that guarantees him a "different outfit for every day of trial." [Id.]. Petitioner's cursory claim, without citation to facts or law, is insufficient to warrant relief. See Blackledge, 431 U.S. at 75 n.7; Greenway, 653 F.3d at 804.

The only remotely relevant law is that, as a matter of due process and equal protection, "the State cannot . . . compel an accused to stand trial before a jury while dressed in identifiable prison clothes[.]" Estelle v. Williams, 425 U.S. 501, 512 (1976). But that is not what happened here. Petitioner was tried in civilian clothes and allowed to change two times per week under the Sheriff's Department policy. [Dkt. No. 20-5, LD 5, p. 95]. Petitioner makes no allegation that the clothes – which were provided by his mother [id.] – looked like prison garb or that the change was so infrequent that it suggested he was in custody. See, e.g., Purscelley v. Biter, 2012 WL 4513712, at *7 (C.D. Cal. Aug. 13, 2012) (petitioner not entitled to relief because his clothes did not "look like

---

[8] For this reason, Respondent contends that Petitioner's claim is barred by Teague v. Lane, 489 U.S. 288 (1989). [Dkt. No. 19-1, p. 42]. Because the Court does not recommend granting habeas relief, however, it is not necessary to address Teague. Leavitt v. Arave, 383 F.3d 809, 816 (9th Cir. 2004) ("If a state properly argues that the district court granted a habeas petition on the basis of a new rule of constitutional law that is Teague-barred, we must address the Teague issue first.") (emphasis added).

prison garb" and "the fact that he wore the same clothes every day of the week did not suggest that he was in custody").

Petitioner is not entitled to federal habeas relief on this ground.

J. Prosecutorial misconduct – "handpicking" judge (Ground 2(a))

In Ground 2(a), Petitioner contends the prosecutor committed misconduct by "handpicking" the trial court judge "to effect the outcome of the trial." [Dkt. No. 1, pp. 5, 24-25; Dkt. No. 53, pp. 6-10].

1. Background

When the parties indicated they were ready for trial, the assigned trial judge, Judge Stull, said he was "starting trial in about ten minutes in another matter." [Dkt. No. 20-5, LD 5, p. 38]. The trial judge had assumed that Petitioner was not ready, and after Petitioner said he was, the trial judge briefly discussed a motion Petitioner brought regarding the victim's mental health records. [Id., pp. 38-39]. The parties also discussed their availability that day and the next, and the availability of a jury panel. [Id., pp. 39-40]. At one point, the prosecutor said, "Your Honor, I was just in Judge Powell's courtroom. I believe that he is available." [Id.]. Judge Stull again commented, "I just have another trial that I'm supposed to be starting, and I don't know which one of these I'm going to start." [Id.]. After a break, Judge Stull stated, "This matter's reassigned forthwith to Department 26 [Judge Powell] for trial." [Id., pp. 40-41].

2. Federal law and analysis

In evaluating a claim that a prosecutor engaged in misconduct, a court must determine whether the prosecutor's comments or actions "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986). Considerations include whether the prosecutor's

remarks or conduct were improper; if so, the court must then consider whether the remarks or conduct affected the trial unfairly. Tak Sun Tan v. Runnels, 413 F.3d 1101, 1112 (9th Cir. 2005). Such unfairness may occur when there is an "overwhelming probability" that the prosecutorial misconduct was "devastating to the defendant" at trial. Davis v. Woodford, 384 F.3d 628, 644 (9th Cir. 2004) (quoting Greer v. Miller, 483 U.S. 756, 766 n.8 (1987)); Wood v. Ryan, 693 F.3d 1104, 1113 (9th Cir. 2012) (applying Brecht harmless error standard).[9]

Here, under de novo review, the record shows the prosecutor did not "handpick" Judge Powell to decide Petitioner's case. In a discussion of the court's conflicting schedule with two trials, the prosecutor merely pointed out that Judge Powell was available. Judge Stull decided to reassign the case based on the workload in front of him and the availability of another judge. There is no indication that the prosecutor's comment "so infected" Judge Stull's decision to transfer the case such that there was a violation of due process. Darden, 477 U.S. at 181. There was nothing improper in the prosecutor's remarks or conduct during the scheduling hearing, and no showing that it was "devastating" to Petitioner that another judge handled his case. See Tan, 413 F.3d at 1112; Davis, 384 F.3d 628.

Petitioner is not entitled to federal habeas relief on this ground.

---

[9] Respondent contends Petitioner's claim is Teague-barred because "[t]he Supreme Court has never held that a prosecutor's suggestion that a particular judge be assigned to the case violates the Constitution." [Dkt. No. 19-1, p. 40]. As with the last claim, it is not necessary to address Teague because the Court does not recommend granting habeas relief. Leavitt, 383 F.3d at 816.

K. Prosecutorial misconduct – interview video (Ground 2(c))

In Ground 2(c), Petitioner contends the prosecutor committed misconduct by suppressing a DVD of a police interview of the victim. [Dkt. No. 1, pp. 5, 27-32]. Petitioner contends the DVD showed Doe's actual injuries, and when Petitioner attempted to introduce it, he overheard the prosecutor tell the detective to "just say [the transcript is] not" the same as the DVD so the jury wouldn't get to see the DVD. [Id., p. 27, 30-31].

1. Background

During Direct examination of Detective Antillon, Petitioner tried to introduce a DVD of the detective's interview with Doe and said "we have our transcripts ready" and that he "[w]ant[ed] to pass them out to the jurors." [Dkt. No. 20-21, LD 16, 66-68]. When Petitioner attempted to lay foundation for admission of the DVD, the witness revealed that he had not yet reviewed the transcript of the DVD for accuracy. [Id., p. 68]. The trial court therefore ruled that Antillon was unable to verify that the "transcript is an accurate match to the . . . DVD itself," and recessed so the detective could watch the video to see if it matched, and if not, to edit and correct it. [Id.]. When the proceedings resumed, the court informed the jury that additional work needed to be done on the transcript. [Id.]. Petitioner then proceeded to question Antillon about other matters. [Id.].

The next day, Petitioner asked about playing the DVD. [Id., pp. 84-85]. The prosecutor informed the court that Antillon had started correcting the transcript because it was not "word for word," but he had not completed it when the proceedings resumed. [Id., pp. 85-86]. The court noted the transcript was a court exhibit at that point and the "real issue" was that it had released Antillon because of Petitioner's

misconduct. [Id., p. 86.] The court added that Petitioner's inability to examine his own witness in his own case in chief, and his inability to properly prepare a transcript and introduce an exhibit were among the hazards of self-representation. [Id., p. 87]. Petitioner objected that the prosecutor had committed misconduct by not proving the transcript her office had provided was not sufficiently accurate to give to the jury. [Id.]. He also claimed, "vindictive prosecution." [Id.]. The court overruled the objection, noting there was no evidence of vindictive prosecution, ample evidence of the charged crimes, and no evidence "anything untoward" had been done to him, and reminded Petitioner that Antillon had been excused do to Petitioner's own misconduct. [Id., p. 88].

2. Analysis

Here, on de novo review, Petitioner has failed to show the prosecutor committed misconduct. The record indicates Antillon attempted to correct the transcript but was unable to do so before he was excused due to Petitioner's misconduct, not prosecutorial misconduct. Petitioner's allegation that the prosecutor "coerced" Antillon to say the transcript was inaccurate is only supported by his self-serving allegation in the Petition [Dkt. No. 1, p. 30], and, notably, Petitioner neglected to raise the allegation at trial when the parties and the court were discussing the matter. Petitioner has failed to provide a proper evidentiary basis for relief for his claim. See Blackledge, 431 U.S. at 75 n.7; Greenway, 653 F.3d at 804; Freeman v. Cate, 2012 WL 6162518, at *39 (S.D. Cal. July 31, 2012) (petitioner's claim that prosecutor must have altered report because witness could not authenticate it denied as conclusory, self-serving speculation), aff'd, 705 F. App'x 513 (9th Cir. 2017), cert. denied, 139 S. Ct. 314 (2018).

Finally, Petitioner was not prejudiced. He alleges the DVD showed the victim's injuries were not sufficiently serious to amount to great bodily injury. But Petitioner elicited testimony from Antillon describing Doe's appearance: her eyes were black, the whites of "her eyes were completely blood red," her arms were bruised, and she complained of pain to her head. [Dkt. No. 20-21, LD 16, pp. 55-59]. The jury was also shown a photograph Antillon took of the victim. [Dkt. No. 20-20, LD 16, pp. 205-08]. Accordingly, considering this evidence, Petitioner has not demonstrated he was prejudiced because the jury didn't also see the DVD. Brecht, 507 U.S. at 623; Wood, 693 F.3d at 1113.

Petitioner is not entitled to federal habeas relief on this ground.

L. Sufficiency of the evidence (Ground 3)

In Ground 3, Petitioner contends there was insufficient evidence to support the jury's great bodily injury finding. [Dkt. No. 1, pp. 6, 34-38; see also Dkt. No. 53, pp. 37-44].

1. Federal law and state substantive elements

Under the Due Process Clause, a criminal defendant may be convicted only by proof beyond a reasonable doubt of every element necessary to constitute a charged crime or enhancement. Jackson v. Virginia, 443 U.S. 307, 319 (1979). The relevant issue "is whether, 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." Id. (emphasis in original). Under Jackson, the only question to be asked about a jury's finding is whether it was "so insupportable as to fall below the threshold of bare rationality." Coleman v. Johnson, 566 U.S. 650, 656 (2012) (per curiam).

A federal habeas court has "no license" to evaluate the credibility or reliability of a witness who testified in a state court case. Marshall v. Lonberger, 459 U.S. 422, 434 (1983). Instead, a reviewing court "must respect the province of the jury to determine the credibility of witnesses" who give evidence at trial. Walters v. Maass, 45 F.3d 1355, 1358 (9th Cir. 1995). Except in "the most exceptional of circumstances, a jury's credibility determinations are . . . entitled to near-total deference" on federal habeas review. Bruce v. Terhune, 376 F.3d 950, 957-58 (9th Cir. 2004). Moreover, the testimony of even a single witness on an evidentiary issue can be sufficient to support a conviction under Jackson. Id. at 957-58.

In applying the Jackson standard, "federal courts must look to state law for 'the substantive elements of the criminal offense,' . . . but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." Johnson, 566 U.S. at 655 (internal citation omitted).

California Penal Code Section 12022.7(a) provides that "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison of three years." "[G]reat bodily injury" is defined as "significant or substantial physical injury." Cal. Penal Code § 12022.7(f). Under California law, "some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury.'" People v. Washington, 210 Cal. App. 4th 1042, 1047 (2012).

2. Analysis

Under de novo review, ample evidence supports the jury's great bodily injury finding. The victim, Doe, testified that Petitioner pulled her hair, yanked her to the

ground by her legs, and beat her on the head for what seemed like forty blows. [Dkt. No. 20-20, LD 16, pp. 197-98]. Doe said that she suffered two black eyes, a swollen face, a cut above her left eye, and bruised arms. [Id., pp. 202-07]. The treating physician told Doe that she had a mild concussion and that they were going to glue her laceration. [Id., p. 204]. Doe was given pain medication at the hospital through an IV and was released that night. [Id., pp. 205, 207]. She said she was "too out of it" to feel pain and did not "remember feeling pain" that night. [Id., p. 208]. It took her almost a month to recover from the injuries. [Id., pp. 208-09].

Sergeant Gonzalez was the first to respond to Petitioner's grandmother's 911 call. When he walked up to Doe, "she was laying face down with a large pool of blood around her. She was unresponsive and very pale." [Dkt. No. 20-21, LD 16, pp. 108-09, 113]. Officer Smith interviewed Doe at the hospital that night and observed a one-inch cut above her left eye and severe swelling to her right and left eye and front of her forehead. [Id., pp. 10, 13]. Doe told him Petitioner punched her in the face ten to thirteen times. [Id., p. 75]. During a follow-up interview, Detective Antillon observed that Doe had two black eyes, the whites of her eyes were "completely blood red," and her arms were bruised, and she complained of pain. [Id., pp. 55-59]. The jury saw photographs of Doe's injuries that were taken at the hospital on the night of the incident, including a photo of the cut above her eye, and, as mentioned, the photographs that Antillon took on the day of his interview with her. [Dkt. No. 20-20, LD 16, pp. 202-08].

Here, Doe's testimony alone, even without all the other corroborating testimony and evidence, was sufficient to support the conviction. Bruce, 376 F.3d at 957-58 (upholding conviction based entirely on the uncorroborated testimony of the victim); United States v. McClendon, 782 F.2d 785, 790 (9th Cir. 1986) (testimony of one

eyewitness, even where inconsistent with other evidence, may support a conviction). The Court cannot say – despite Petitioner's denial – that Doe's account of the incident and the extent of her injuries was "physically impossible and simply could not have occurred as described." Bruce, 376 F.3d at 957-58. Accordingly, a rational trier of fact could easily have found the essential elements of great bodily injury beyond a reasonable doubt. See Jackson, 443 U.S. at 319, Bruce, 376 F. 3d at 957-58.

Petitioner is not entitled to federal habeas relief on this ground.

M. Admission of 911 call (Ground 6)

In Ground 6, Petitioner contends that the trial court violated the Confrontation Clause by admitting his grandmother's 911 call. [Dkt. No. 1, pp. 47-49].

1. Background

Petitioner objected to the admission of his grandmother's 911 call on the ground that she was not being called as a witness. [Dkt. No. 20-5, LD 5, p. 78]. The trial court agreed with the prosecutor that there was no Confrontation Clause violation in admitting the call because the statements were not testimonial, and multiple hearsay exception applied. [Id.].

The 911 call was played for the jury. Petitioner's grandmother told the dispatcher that Petitioner beat up Doe and that Doe needed the Paramedics. [Dkt. No. 20-25, LD 18, pp. 118-21, 123]. She also said Petitioner had left in a vehicle, and that she thought authorities "should hurry" because Doe was not talking to her and just lying on the ground. [Id., pp. 120-22]. The dispatcher connected Petitioner's grandmother to the Paramedics through the Fire Department. [Id., p. 121]. In response to the dispatcher's questions, Petitioner's grandmother also said that she couldn't describe

Doe's injuries because it was dark out, that Petitioner did not have any weapons on him, and that she did not know if Doe had been drinking or using drugs. [Id., pp. 122-23].

2. Federal law and analysis

The Confrontation Clause of the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had . . . a prior opportunity for cross examination." Crawford v. Washington, 541 U.S. 36, 53-54 (2004) (emphasis added). A statement is "testimonial" when the "primary purpose" of the questioning that elicited the statement was to "establish or prove past events potentially relevant to later criminal prosecution." Davis v. Washington, 547 U.S. 813, 822 (2006).

Davis involved the admission of a statement from a victim to a 911 operator regarding an ongoing domestic dispute. In that context, the Davis Court explained the distinction between "nontestimonial" and "testimonial" statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822 (emphasis added). Admission of statements that are "nontestimonial" generally does "not violate the Confrontation Clause." Michigan v. Bryant, 562 U.S. 344, 348 (2011) (wounded victim's statements to numerous police officers were not testimonial) (citing Davis).

Further, as mentioned, even if evidence has been admitted in violation of the Confrontation Clause, the error is subject to harmless error analysis under Brecht. Ocampo, 649 F.3d at 1114.

Here, under de novo review, the trial court did not violate the Confrontation Clause when it admitted the 911 call. The call was in response to an ongoing emergency where Doe was unresponsive and in need of medical attention. The questions assisted the dispatcher, the Fire Department, and Paramedics in assessing and responding to the situation. Admission of Petitioner's grandmother's answers to these questions was not a violation of federal law. See Crawford, 541 U.S. at 53-54; Davis, 547 U.S. at 822, 827; Bryant, 562 U.S. at 348; see also Nava v. Baughman, 2017 WL 1927873, at *3 (C.D. Cal. May 9, 2017) (no Confrontation Clause violation in admitting petitioner's mother's 911 call because statements "were made in response to the 911 operator's questions and involved an ongoing, potentially dangerous situation."); Green v. Paramo, 2015 WL 1893312, at *3-4 (E.D. Cal. 2015) (no Confrontation Clause violation in admitting 911 call because, even though call occurred after petitioner left, ongoing emergency had not ended as caller was worried he would return and she was unsure whether she needed an ambulance).

Finally, even if the state court erred, Petitioner cannot demonstrate prejudice. Contrary to Petitioner's assertion, ample evidence at trial established that Petitioner was the culprit, not his "other girlfriend." [Dkt. No. 1, p. 48]. Petitioner presented the jury with the testimony from the other girlfriend, DeAvila, and the jury rejected it. [Dkt. No. 20-1, LD 1, p. 10]. As explained above in Section L, the victim's detailed testimony alone was more than sufficient to establish Petitioner as her assailant. See Bruce, 376 F.3d at 957-58; McClendon, 782 F.2d at 790. Petitioner was not prejudiced by admission of the 911 call. Brecht, 507 U.S. at 637.

Petitioner is not entitled to federal habeas relief on this ground.

N. Judicial bias and cumulative error (Grounds 1(g) & 1(h))

In Grounds 1(g) and 1(h), Petitioner raises related claims based on the trial judge's management and rulings in Petitioner's case.

Petitioner alleges the trial judge's remarks and rulings addressed in Grounds 1(a)-(f) show he was biased. [Dkt. No. 1, pp. 5, 11-23; Dkt. No. 53, pp. 14-15, 24, 31, 35, 56-61]. A judge's misconduct can lead to habeas relief when her or his "behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." Duckett v. Godinez, 67 F.3d 734, 740 (9th Cir. 1996). However, the showing necessary to establish such a violation is high; in the "absence of any evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity." Larson v. Palmateer, 515 F.3d 1057, 1067 (9th Cir. 1995). In the Court's de novo review of the relevant portions of the record, the trial judge's administration of Petitioner's case, at most, shows a general frustration with a difficult pro se defendant. Petitioner's unhappiness with the judge's rulings, none of which the Court finds form a basis for relief, is not sufficient to show the judge was biased. See id. ("Because Larson has provided no evidence of the trial court's alleged bias outside of these rulings and remarks—which themselves revealed little more than the occasional mild frustration with Larson's pro se lawyering skills—his claim that he was denied a fair trial also fails.").

Similarly, Petitioner claims the cumulative errors in his trial warrant a new trial. [Dkt. No. 1, p. 21]. "The cumulative error doctrine in habeas recognizes that, even if no single error were prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal." Parle v. Runnels, 387

F.3d 1030, 1045 (9th Cir. 2004) (internal quotation marks and citation omitted). Here, as discussed, the state appellate court identified two state-law errors at trial: limiting voir dire time and requiring the parties to refer to the victim as Doe. But the Court has determined that neither of those errors, nor any of the other claims raised by Petitioner, warrant federal habeas relief. That is dispositive of Petitioner's cumulative error claim. See Fairbank v. Ayers, 650 F.3d 1243, 1257 (9th Cir. 2011) ("[B]ecause we hold that none of Fairbank's claims rise to the level of constitutional error, 'there is nothing to accumulate to a level of a constitutional violation.'") (citation omitted); Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible.") (citation omitted).

Petitioner is not entitled to federal habeas relief on these grounds.

O. Ineffective assistance of appellate counsel (Ground 7)

In Ground Seven, Petitioner contends appellate counsel was ineffective by failing to raise Ground 1(b) (denial of challenges for cause), Ground 1(g) (judicial bias), Ground 2(a) ("hand-picking" trial judge), Ground 3 (insufficient evidence), Ground 6 (admission of 911 call), and a sentencing error claim. [Dkt. No. 26, pp 1-7; Dkt. No. 53, pp. 6-15, 17-36-61].

1. Federal law

The Sixth Amendment of the Constitution guarantees a criminal defendant the right to effective assistance of a lawyer. Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective assistance under Strickland, "a defendant must show both deficient performance by counsel and prejudice." Knowles v. Mirzayance, 556 U.S. 111, 112 (2009). A criminal defendant "bears the burden of overcoming the strong presumption" that a lawyer provided adequate representation. Cheney v.

Washington, 614 F.3d 987, 994 (9th Cir. 2010). "Failure to satisfy either prong of the Strickland test obviates the need to consider the other." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002).

Ineffective assistance by an appellate lawyer is measured by the Strickland criteria. Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002). An appellate attorney is not required to raise "every colorable" or "nonfrivolous issue" on appeal. Jones v. Barnes, 463 U.S. 745, 750-52 (1983). Rather, the "weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989). An appellate lawyer does not act unreasonably in failing to raise a meritless claim, nor will a criminal defendant be prejudiced by that omission. Moormann v. Ryan, 628 F.3d 1102, 1107 (9th Cir. 2010).

"Surmounting Strickland's high bar is never an easy task." Padilla, 559 U.S. at 371. Establishing that a state court's application of Strickland was unreasonable under AEDPA "is all the more difficult." Richter, 562 U.S. at 105. The standards created by Strickland and Section 2254(d) are both "highly deferential"; when the two apply in tandem, "review is doubly so." Id. (quotation omitted).

2. Analysis

Petitioner has provided the Court with letters from appellate counsel providing tactical reasons why he didn't raise Grounds 1(b), 1(g), 2(a), 3, and 6 on direct appeal. [Dkt. No. 26, pp. 9, 11, 34, 36]. Those reasons generally comport with the reasons the Court denied the claims above. Because none of the claims have merit, Petitioner can show neither deficient performance, nor prejudice, due to appellate counsel's failure to raise them. See Barnes, 463 U.S. at 750-52; Miller, 882 F.2d at 1434; Moormann, 628 F.3d at 1107.

Regarding Petitioner' sentencing claim, not discussed above, Petitioner alleges appellate counsel should have argued the trial court erred by imposing an upper-term sentence and the maximum restitution fine. [Dkt. No. 26, pp. 4-5; Dkt. No. 53, pp. 54-61]. In a letter to Petitioner, appellate counsel explained that he did not raise either issue because Petitioner failed to object at sentencing, and thus, under California law, he forfeited those issues. [Dkt. No. 26, p. 14]. Appellate counsel further noted that the issues would have been reviewed on appeal under a difficult standard and concluded there was no reason to "antagonize" the appellate justices by raising "unsupported" allegations. [Id.].

Petitioner has not shown appellate counsel was deficient in this assessment, particularly considering Petitioner's forfeiture of the claims at sentencing. Similarly, Petitioner cursory argument wholly fails to explain how his sentence or the fine would have been different had the issues been raised, and how the result of his appeal would have been different. See Blackledge, 431 U.S. at 75 n.7; Greenway, 653 F.3d at 804. Accordingly, Petitioner has failed both prongs of Strickland. See Barnes, 463 U.S. at 750-52; Miller, 882 F.2d at 1434; Moormann, 628 F.3d at 1107.

On deferential, independent review, the state court was not objectively unreasonable in denying Petitioner's ineffective assistance of appellate counsel claim. See Richter, 562 U.S. at 98. The state court could have denied habeas relief for the reasons outlined above. Id. at 102; Rowland, 876 F.3d at 1181.

Petitioner is not entitled to federal habeas relief on this ground.

VI. EVIDENTIARY HEARING

Petitioner filed a motion contending he is entitled to an evidentiary hearing on his claims. [Dkt. No. 36; see also Dkt. 53, pp. 62-63]. Because he has failed to

demonstrate the state record received and reviewed by the Court is insufficient to resolve the claims, his requests for an evidentiary hearing should be denied. Pinholster, 563 U.S. 170 (federal court's habeas review ordinarily "is limited to the record that was before the state court that adjudicated the claim on the merits"); Schrirro v. Landrigan, 550 U.S. 465, 474 (2007).

VII. CERTIFICATE OF APPEALABILITY

For reasons stated above, the Court finds that Petitioner has not shown that "jurists of reason would find it debatable whether": (1) "the petition states a valid claim of the denial of a constitutional right"; and (2) "the district court was correct in its procedural ruling." See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Thus, it is recommended that a certificate of appealability be denied.

VIII. RECOMMENDATION

Therefore, it is recommended that the District Judge issue an order, as follows: (1) accepting this Report and Recommendation and dismissing this case with prejudice; (2) denying a Certificate of Appealability; and (3) directing that Judgment be entered accordingly.

Dated: May 14, 2020

/s/ Autumn D. Spaeth
THE HONORABLE AUTUMN D. SPAETH
United States Magistrate Judge