No._____

In the
Supreme Court of the United States

CARLOS AMEZCUA, Petitioner

v.

JOE A. LIZARRAGA, Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit
19-55910

VOLUME OF APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX A
NINTH CIRCUIT MEMORANDUM OPINION

FILED

APR 16 2021

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS AMEZCUA, Petitioner-Appellant, v. JOE A. LIZARRAGA, Warden; XAVIER BECERRA, Respondents-Appellees.	No. 19-55910 D.C. No. 3:18-cv-01317-GPC-MSB MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Gonzalo P. Curiel, District Judge, Presiding

Submitted April 14, 2021**
Pasadena, California

Before: M. SMITH and IKUTA, Circuit Judges, and STEELE,*** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

California prisoner Carlos Amezcua appeals the district court's denial of his habeas petition under 28 U.S.C. § 2254. We have jurisdiction pursuant to § 2253(a) and affirm.

Because "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," *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam), we are bound by the California Court of Appeal's conclusion that Amezcua's extrajudicial statements to the police were admissible at trial under California's corpus delicti rule. Therefore, the California Court of Appeal's rejection of Amezcua's claim that there was insufficient evidence to uphold his convictions for counts 7, 9 and 10 was not contrary to *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

AFFIRMED.

APPENDIX B
NINTH CIRCUIT ORDER DENYING PETITION FOR REHEARING

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS AMEZCUA, Petitioner-Appellant, v. JOE A. LIZARRAGA, Warden; XAVIER BECERRA, Respondents-Appellees.	No. 19-55910 D.C. No. 3:18-cv-01317-GPC-MSB Southern District of California, San Diego ORDER

Before: M. SMITH and IKUTA, Circuit Judges, and STEELE,* District Judge.

The panel has unanimously voted to deny appellant's petition for panel rehearing, filed on June 1, 2021. Judge M. Smith and Judge Ikuta voted to deny the petition for rehearing en banc and Judge Steele so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and rehearing en banc (Dkt. 51) are DENIED.

* The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

APPENDIX C
ORDER OF THE DISTRICT COURT DENYING HABEAS PETITION BUT GRANTING CERTIFICATE OF APPEALABILITY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CARLOS AMEZCUA, Petitioner, v. JOE A. LIZARRAGA, Warden, Respondent.	Case No.: 18cv1317 GPC (MSB) **ORDER:** **(1) DENYING PETITION FOR WRIT OF HABEAS CORPUS and** **(2) GRANTING CERTIFICATE OF APPEALABILITY IN PART AND DENYING IN PART**

I. INTRODUCTION

Petitioner Carlos Amezcua (Petitioner" or "Amezcua"), a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his San Diego Superior Court conviction in case number SCD258616 for six counts of lewd and lascivious acts on a child under 14 years of age. (Pet. at 1, ECF No. 1 "Pet.")[1] The Court has reviewed the Petition, the Answer and Memorandum of Points and Authorities in Support of the Answer, the lodgments, and all the supporting

[1] Page numbers for docketed materials cited in this Report and Recommendation refer to those imprinted by the court's electronic case filing system.

documents submitted by both parties. For the reasons discussed below, the Court the Petition is **DENIED**.

II. FACTUAL BACKGROUND

This Court gives deference to state court findings of fact and presumes them to be correct; Petitioner may rebut the presumption of correctness, but only by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (West 2006); *see also Parke v. Raley*, 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences properly drawn from those facts, are entitled to statutory presumption of correctness). The following facts are taken from the California Court of Appeal opinion:

> This case involves Amezcua's molestation of two female relatives when they were young girls, Jane Doe 1 and Jane Doe 2.
>
> The molestation first came to light when Jane Doe 1, who was 22 years old at the time of trial, disclosed to a relative that Amezcua had molested her when she was eight years old. Family members confronted Amezcua about the allegations, and he admitted to having molested Jane Doe 1. He also disclosed to family members that he had molested Jane Doe 2, who was 13 years old at the time of trial.
>
> In an interview with police that was video-recorded and played for the jury at trial, Amezcua admitted to molesting Jane Doe 1 and Jane Doe 2 and described the details of the molestations.
>
> As to Jane Doe 1, Amezcua told police that on at least three occasions when Jane Doe 1 was eight or nine years old, he rubbed her buttocks and vagina while cuddling with her. In addition, Amezcua recalled one occasion when he put Jane Doe 1's hand on his penis for a few seconds. As to Jane Doe 2, Amezcua stated that he started touching Jane Doe 2 on the buttocks and vagina over her clothing when she was approximately seven years old. According to Amezcua, he touched Jane Doe 2 in that manner "a few times" when he lived at a residence in Riverside County, including one instance during which he touched Jane Doe 2's bare skin beneath her underwear. Amezcua also stated that later, when he moved to San Diego and Jane Doe 2 was approximately 10 years old, he touched Jane Doe 2's buttocks and vagina on one occasion over her clothes. Amezcua told police that he was "aroused" during the molestation of the two girls, but he claimed that he never had an erection.

Amezcua was charged with five counts of committing lewd acts against Jane Doe 1 (counts 1–5) and seven counts of committing lewd acts against Jane Doe 2 (counts 6–12). (§ 288, subd. (a).) The information described the acts that gave rise to each count. As to the counts concerning Jane Doe 2, three of them were alleged to have taken place at Amezcua's San Diego residence and four of them at his Riverside County residence. Counts 6, 9, 10, 11 and 12 were based on allegations that Amezcua touched Jane Doe 2's vagina. Counts 7 and 8 alleged a touching of Jane Doe 2's buttocks and Jane Doe 2's chest, respectively.

Jane Doe 1 testified that when she was eight years old, Amezcua molested her in the same manner on six or seven occasions. Specifically, on each occasion Amezcua would rub Jane Doe 1's clitoris beneath her underwear, touch her breasts and put her hand on his erect penis over his clothes. On one occasion Amezcua also put his mouth on Jane Doe 1's breast and licked her nipple. According to Jane Doe 1, Amezcua suggested that she not tell anyone about the molestation.

Jane Doe 2 testified that when she was 11 or 12 years old Amezcua molested her on two occasions, and both occurred at his residence in San Diego. According to Jane Doe 2, Amezcua touch her vagina on only one occasion. Specifically, Jane Doe 2 stated that on that occasion, Amezcua caressed her arms and touched her vagina with a "slight tap" over her clothes. On the second occasion, Amezcua caressed her arm and also touched her chest near her collarbone but did not touch her vagina. When the prosecutor followed up with Jane Doe 2 about whether Amezcua touched her vagina on a second occasion, Jane Doe 2 reiterated that Amezcua did not. When the prosecutor followed up as to whether Amezcua had molested Jane Doe 2 on more than two occasions, Jane Doe 2 stated that there was no third occasion on which Amezcua molested her. Jane Doe 2 testified that Amezcua told her not to tell anyone about the molestation.

Amezcua testified at trial. He stated that he had touched Jane Doe 1 as he described during his police interview, but stated that it was done in a "playful" manner and that he did not touch her to become sexually aroused. He denied that he ever directly touched Jane Doe 1's clitoris underneath her clothes and claimed that the only time Jane Doe 1 touched his penis was by accident when he was picking her up.

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As to Jane Doe 2, Amezcua testified that he touched her on only two occasions, stating "I remember two situations with [Jane Doe 2], just two situations." Although Amezcua provided sparse detail during his testimony about the ways in which he touched Jane Doe 2 on those two occasions, he did admit that he touched Jane Doe 2's vagina on one occasion at his San Diego residence.

Later in his testimony, Amezcua admitted that he touched Jane Doe 2's vagina at the Riverside County residence. On that subject the following testimony was presented at trial when the prosecutor asked Amezcua about a description of the molestation at the Riverside County residence that Amezcua had given to police:

> "[Prosecutor]: Do you remember the detective asking you, can you tell me what happened with [Jane Doe 2]? And then you replied, 'It was again, cuddling, playing. I noticed that -- uh, see if I could touch her, and I did. In the back again, start . . . in the rear end and rubbed her thighs and again in her private part.' You reference that section of your interview. Would it be fair to say that that instance of the touching was not an accident?
>
> "[Amezcua]: Yes, it was not an accident.
>
> "[Prosecutor]: You did it on purpose?
>
> "[Amezcua]: Yes."

[Footnote 2: Earlier in his testimony Amezcua also seemed *generally* admit to this same molestation at his Riverside County residence when the prosecutor asked him about his statements to police about that incident.

> Prosecutor: You told the detective you were playing piggyback or goofy games and that you and touched her – and this was at the [Riverside County] house – you touched her on her vagina on that occasion.
>
> [Amezcua]: I think so.

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> [Prosecutor]: And then they asked you how many more times it happened. You said three more times at the [Riverside County] house' is that correct?
>
> [Amezcua]: I remember two situations with [Jane Doe 2], just two situations.]
>
> Amezcua also testified that he did not touch Jane Doe 2 with any sexual intent and did not consider himself to be a child molester because he had no desire to penetrate either of the girls or to have sex with them. Although admitting that he told the police that he was "aroused" during the molestations, he tried to minimize that statement during his trial testimony by claiming that "[i]t was aroused in the sense of thinking, I shouldn't be doing this" and it "wasn't related to . . . sexual desire."

(Lodgment No. 6 at 2-7, ECF No. 7-10.)

III. PROCEDURAL BACKGROUND

On March 30, 2015, the San Diego District Attorney's Office filed an information charging Amezcua with twelve counts of committing a lewd act upon a child under the age of fourteen, pursuant to California Penal Code section 288(a). (Lodgment No. 1, Clerk's Tr. at 24-26, ECF No. 7-1.) Five counts involved Petitioner's conduct with Jane Doe 1 between April 11, 2001 to April 11, 2003 (counts 1–5); three counts involved his conduct with Jane Doe 2 between October 16, 2011 and October 16, 2013 (counts 6–8); and four counts were related to conduct with Jane Doe 2 between October 16, 2009 and October 16, 2011 (counts 9–12). (*Id.* at 26-32.)

As to counts one through six and nine through twelve, it was further alleged that Amezcua committed the offenses against more than one victim and had substantial sexual conduct with a victim under 14 years of age, pursuant to California Penal Code sections 1203.066(a)(7) and (a)(8). (*Id.* at 26-31.) As to all counts it was also alleged that Petitioner committed the offenses against more than one victim, under California Penal Code sections 667.61(b), (c) & (e). (*Id.*)

Jury trial began on August 26, 2015. (*Id.* at 247.) On September 1, 2015, after the close of evidence, defense counsel moved for a judgment of acquittal as to all counts,

under California Penal Code section 1118.1.[2] (Lodgment No. 2, Rep.'s Tr. vol. 2 at 18-22, ECF No. 7-3.) The trial court granted Amezcua's motion to dismiss the section 1203.066(a)(8) allegation as to count six and denied the motion as to all other counts. (*Id.* at 26.) The jury began deliberations on September 1, 2015. (*See* Lodgment No. 1, Clerk's Tr. at 256, ECF No. 7-1.)

On September 8, 2015, the jury returned guilty verdicts on counts two, four, six, seven, nine and ten. (*Id.* at 170-79.) The jury further found true the section 1203.066(a)(7) allegations attached to counts two, four, six, nine and ten. (*Id.* at 170, 172, 174, 176, 178.) The jury also found the section 667.61 allegations to be true. (*Id.* at 170-79.) The jury deadlocked on counts one, three, five, eight, eleven and twelve. (Lodgment No. 2, Rep.'s Tr. vol. 3, at 41-43, ECF No. 7-4; *see also* Lodgment No. 1, Clerk's Tr. at 268-69, ECF No. 7-1.) The trial court declared a mistrial on those counts and they were later dismissed on the prosecutor's motion. (Lodgment No. 2, Rep.'s Tr. vol. 3 at 42, ECF No. 7-4; *see also* Lodgment No. 1, Clerk's Tr. at 272, ECF No. 7-1.) On December 16, 2015, the trial court sentenced Amezcua to 45 years to life in prison.[3] (Lodgment No. 1, Clerk's Tr. at 218-19, 277-79, ECF No. 7-1.)

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[2] Section 1118.1 states:

> In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.

Cal. Penal Code § 1118.1.

[3] The court sentenced Petitioner to an indeterminate term of 15 years to life on count two; a determinate upper term of eight years on count four, to run concurrently; an indeterminate term of 15 years to life on count six, to run consecutively; an indeterminate term of 15 years to life on count seven, to run concurrently; an indeterminate term of 15 years to life on count nine, to run consecutively; and an indeterminate term of 15 years to life on count ten, to run concurrently. (Lodgment No. 1, Rep.'s Tr vol. 5 at 12-13, ECF No. 7-6; *see also* Lodgment No. 1, Clerk's Tr. at 218-19, 277, ECF No. 7-1.)

Amezcua appealed his conviction to the California Court of Appeal. (*See* Lodgment No. 3, ECF No. 7-7.) On appeal, Petitioner argued that (1) his convictions on counts six, seven, nine and ten should be reversed because they were not supported by substantial evidence, (2) all counts related to Jane Doe 2 should be reversed because there was insufficient evidence to establish the requisite specific intent, (3) the prosecutor committed misconduct during closing argument, and (4) trial counsel was ineffective. (*See id.*) On March 10, 2017, the California Court of Appeal affirmed Petitioner's convictions in a reasoned opinion. (*See* Lodgment No. 6, ECF No. 7-10.)

Amezcua then filed a petition for review in the California Supreme Court, raising the same claims he presented to the appellate court. (*See* Lodgment No. 7, ECF No. 7-11.) The court denied the petition on June 15, 2017, without comment or citation. (*See* Lodgment No. 8, ECF No. 7-12.)

On June 18, 2018, Amezcua, proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court. (*See* Pet., ECF No. 1.) On August 31, 2018, Respondent filed an Answer, a Memorandum of Points and Authorities in Support of the Answer and Lodgments of the state court records. (*See* ECF Nos. 6 & 7.)

IV. SCOPE OF REVIEW

Amezcua's Petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320 (1997). Under AEDPA, a habeas petition will not be granted unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 8 (2002).

A federal court is not called upon to decide whether it agrees with the state court's determination; rather, the court applies an extraordinarily deferential review, inquiring only whether the state court's decision was objectively unreasonable. *See Yarborough v. Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Hornung*, 386 F.3d 872, 877 (9th Cir. 2004). In

order to grant relief under § 2254(d)(2), a federal court "must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *See Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004).

A federal habeas court may grant relief under the "contrary to" clause if the state court applied a rule different from the governing law set forth in Supreme Court cases, or if it decided a case differently than the Supreme Court on a set of materially indistinguishable facts. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may grant relief under the "unreasonable application" clause if the state court correctly identified the governing legal principle from Supreme Court decisions but unreasonably applied those decisions to the facts of a particular case. *Id.* Additionally, the "unreasonable application" clause requires that the state court decision be more than incorrect or erroneous; to warrant habeas relief, the state court's application of clearly established federal law must be "objectively unreasonable." *See Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). "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 the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Where there is no reasoned decision from the state's highest court, the Court "looks through" to the underlying appellate court decision and presumes it provides the basis for the higher court's denial of a claim or claims. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805-06 (1991). If the dispositive state court order does not "furnish a basis for its reasoning," federal habeas courts must conduct an independent review of the record to determine whether the state court's decision is contrary to, or an unreasonable application

of, clearly established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (overruled on other grounds by *Andrade*, 538 U.S. at 75-76); *accord Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). However, a state court need not cite Supreme Court precedent when resolving a habeas corpus claim. *See Early*, 537 U.S. at 8. "[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent,]" id., the state court decision will not be "contrary to" clearly established federal law. *Id.* Clearly established federal law, for purposes of § 2254(d), means "the governing principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Andrade*, 538 U.S. at 72.

V. DISCUSSION

Amezcua raises four grounds for relief. In both claims one and two, he argues his convictions on counts six, seven, nine and ten were based on insufficient evidence, in violation of his right to due process. (Pet. at 6-7, ECF No. 1.) In ground three, Petitioner argues that the prosecutor misstated the law during closing argument, in violation of his due process rights. (*Id.* at 8.) Finally, in ground four, Amezcua contends that counsel was ineffective in failing to object to the prosecutor's purportedly improper closing argument, in violation of his Sixth Amendment rights. (*Id.* at 9.)

Respondent argues that ground one is not cognizable on federal habeas and that ground three is procedurally defaulted. (*See* Mem. P. & A. Supp. Answer at 10-11, 14, ECF No. 6-1.) Respondent further argues that Amezcua's remaining claims are without merit because the state court's denial of them was neither contrary to, nor an unreasonable application of, clearly established law. (*See id.* at 11-16.) For ease of analysis, the Court will address Petitioner's claims in a different order than presented in the Petition.

A. Sufficiency of Evidence: Specific Intent (ground two)

Amezcua contends that his convictions on counts six, seven, nine and ten were based on insufficient evidence to support a finding that he touched Jane Doe 2 with the requisite specific intent. (Pet. at 7, ECF No. 1.) Respondent argues that the state court's

denial of the claim was neither contrary to, nor an unreasonable application of, clearly established federal law. (Mem. P. & A. Supp. Answer at 11-13, ECF No. 6-1.)

1. State Court Decision

As noted above, Amezcua raised this claim in his petition for review to the California Supreme Court. (*See* Lodgment No. 7, ECF No. 7-11.) The court denied the petition without comment or citation. (Lodgment No. 8, ECF No. 7-12.) As such, this Court looks through to the last reasoned state court opinion, that of the California Court of Appeal. *See Ylst*, 501 U.S. at 805-06.

The appellate court denied the claim, stating:

> Amezcua contends that none of the lewd act convictions arising out of his touching of Jane Doe 2 are supported by sufficient evidence because the evidence does not support a finding that he performed the touching with any sexual intent.
>
> In considering a challenge to the sufficiency of the evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*People v. Albillar* (2010) 51 Cal. 4th 47, 60.)
>
> Amezcua was convicted of committing lewd acts against a child under section 288, subdivision (a) for touching Jane Doe 2's vagina. That provision makes it a crime when "any person . . . willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child."

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"[S]ection 288 'prohibits all forms of sexually motivated contact with an underage child. . . .' [Citation.] Thus, any touching of a child under the age of 14 is a felony offense 'even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the intent to arouse or gratify the sexual desires of either the perpetrator or the victim.' [Citations.] . . . [¶] To determine whether a defendant acted with sexual intent, all the circumstances are examined. Relevant factors include the nature and manner of the touching, the defendant's extrajudicial statements, the relationship of the parties and 'any coercion, bribery or deceit used to obtain the victim's cooperation or avoid detection.' [Citation.] The requisite intent 'must be inferred from all the circumstances. . . .'" (*In re R.C.* (2011) 196 Cal.App.4th 741, 749-750.)

Here, substantial evidence supports a finding that Amezcua acted with sexual intent in touching Jane Doe 2. The strongest evidence of Amezcua's intent in touching Jane Doe 2 is found in his own admissions during the police interview. Amezcua told the police that he was "aroused," although without an erection, when he touched Jane Doe 1 and Jane Doe 2. Further, Jane Doe 1 testified that Amezcua's penis was erect when he made her touch it during the molestations. From this testimony, a reasonable juror could infer that touching young girls is arousing to Amezcua because it is sexually stimulating to him, and that is why he committed the acts.

Although Amezcua attempted during his trial testimony to minimize his admission to being "aroused" during the molestations by claiming that he meant "aroused in the sense of thinking, I shouldn't be doing this," and claimed that he did not touch Jane Doe 2 for any sexual purpose, it was for the jury to decide whether to credit Amezcua's trial testimony on that issue. A reasonable juror could decide that Amezcua's attempt to minimize his admission to police was not credible because it contradicted his earlier statements and there is no sensible explanation for why someone in Amezcua's position would touch a young girl's vagina except for the purpose of sexual stimulation.

Amezcua's sexual intent in touching Jane Doe 2 is also shown by evidence supporting a finding that Amezcua knew that what he was doing was wrong. Specifically, (1) Amezcua told Jane Doe 2 not to tell anyone about the touching; (2) Amezcua admitted that he knew he was "not supposed to do this" while he was touching Jane Doe 2; and (3) Amezcua described his thought process upon initiating the molestation as "[my] stupid brain would take me down that way." A reasonable juror could infer that

> because Amezcua viewed his acts as improper, because the touching involved a young girl in various places, including her vagina, and Amezcua used the word "aroused" when explaining his state of mind, Amezcua was doing the acts with sexual intent.
>
> In sum, under the totality of the circumstances, we conclude that ample evidence supports a finding that Amezcua's touching of Jane Doe 2 was done "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." (§ 288, subd. (a).)

(Lodgment No. 6 at 13-16, ECF No. 7-10.)

2. Discussion

It is clearly established that due process clause is violated "if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *see also Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (per curiam); *Juan H. v. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005). This Court must review the state court record and view the evidence in the "light most favorable to the prosecution and all reasonable inferences that may be drawn from this evidence." *Juan H.*, 408 F.3d at 1276 (citing *Jackson*, 443 U.S. at 319).

A petitioner faces a "heavy burden" when seeking habeas relief by challenging the sufficiency of evidence used to obtain a state conviction on federal due process grounds. *Juan H.*, 408 F.3d at 1274. The federal habeas court must "apply the standards of *Jackson* with an additional layer of deference" under Section 2254(d)(1). *Id.*; *see also Coleman v. Johnson*, 566 U.S. 650, 651 (2012) ("We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference."). This doubly deferential standard limits the federal habeas court's inquiry to whether the state court's rejection of a sufficiency of the evidence challenge was an objectively unreasonable application of *Jackson*. *Emery v. Clark*, 643 F.3d 1210, 1214 (9th Cir. 2011); *see also Johnson*, 566 U.S. at 651.

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Furthermore, "[c]ircumstantial evidence and inferences drawn from that evidence may be sufficient to sustain a conviction." *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) (quoting *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir.) amended on denial of reh'g, 798 F.2d 1250 (9th Cir. 1986)). A petitioner's insufficient evidence claim must be examined "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004) (en banc) (quoting *Jackson*, 443 U.S. at 324 n. 16).

California Penal Code section 288(a) states, in relevant part:

> Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony.

Cal. Penal Code § 288(a). The statute is violated if there is "'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." *People v. Martinez*, 11 Cal. 4th 434, 452 (Cal. 1995). In short, the offense has two elements: "(a) the touching of an underage child's body (b) with a sexual intent." *United States v. Baron-Medina*, 187 F.3d 1144, 1147 (citing *Martinez*, 11 Cal.4th at 452); *United States v. Farmer*, 627 F.3d 416, 419 (9th Cir. 2010).

To satisfy the intent element, the prosecution must establish that the defendant had "the specific intent of arousing, appealing to, or gratifying the lust of the child or the accused." *People v. Warner*, 39 Cal. 4th 548, 557 (Cal. 2006). "Because intent for purposes of . . . section 288 can seldom be proven by direct evidence, it may be inferred from the circumstances." *In re Mariah T.*, 159 Cal. App. 4th 428, 440 (Cal. App. 2008).

Where the "defendant's physical conduct might be consistent with a nonsexual purpose, the jury can look to surrounding circumstances and rely on them to draw inferences about his intent." *People v. Valenti*, 243 Cal. App. 4th 1140, 1160 (Cal. App. 2016). Relevant factors can include a defendant's "extrajudicial statements, other acts of lewd conduct admitted or charged in the case, the relationship of the parties, and any

coercion, bribery, or deceit used to obtain the victim's cooperation or to avoid detection." *Martinez*, 11 Cal. 4th at 445 (internal citations omitted).

Here, as the appellate court discussed, Amezcua stated during his interview with detectives that when he touched both Jane Does 1 and 2, he was "[a]roused but not where, um with erections but aroused." (*Id.* at 94.) He admitted that he was "mentally. . . aroused." (*Id.*) This alone could have been enough for a reasonable juror to infer that Petitioner touched Jane Doe 2 with "specific intent to arousing, appealing to, or gratifying the lust" of Petitioner. *See Warner*, 39 Cal. 4th at 557.

In addition, Amezcua stated during his interview that he was attracted to Jane Doe 2's physical appearance. When detectives asked Petitioner why he had singled out Jane Does 1 and 2 and not his other grandchildren, the following exchange took place:

> [Detective]: Was it . . . did they have a certain personality that really . . . that you identified with? And what about them was it that was exciting?
>
> Amezcua: Their rear-end, their butts.
>
> [Detective]: What's different about say Ashley, or Alexa, or Hope's rear-end that isn't the same as theirs?
>
> Amezcua: It didn't, uh, it never attracted me in that, in that way. . . .
>
> [Detective]: What about [Jane Doe 2]? Was there a specific incident that set that off?
>
> Amezcua: No, other than she's very boisterous, very loud, very playful. And she's gonna be a beautiful girl, very, very beautiful. She's gonna be a beautiful young, young woman.
>
> [Detective]: But for her [it] was her butt? Just the way it looked?
>
> Amezcua: The way it was shaped.
>
> [Detective]: Yeah. And so when you would put your hands down their pants I mean what was the goal.

> Amezcua: They were . . . they really didn't know what was goin' on. I'll be honest with you they didn't know what was goin' on.
>
> [Detective]: I would imagine that they wouldn't. What was your goal?
>
> Amezcua: My goal was to satisfy this thought.
>
> [Detective]: And what's that thought?
>
> Amezcua: That I was touching their private, their, their vaginas, in my mind.

(Lodgment No. 1, Clerk's Tr. at 106-08, ECF No. 7-1.) Amezcua also stated that once Jane Doe 2 was about 14 years old, he had "no attraction" to her anymore. He admitted that his could have been because she had gotten older. (*Id.* at 100.) Amezcua urged Jane Doe 2 not to tell anyone about the touching. (Lodgment No. 1, Clerk's Tr. at 86.) Given Petitioner's statements about his "attraction" to Jane Doe 2 and his attempt to hide his conduct from others, a reasonable juror could have inferred that he touched her with sexual intent. *See Martinez*, 11 Cal. 4th at 445.

Finally, a reasonable juror could have inferred Petitioner's sexual intent as to Jane Doe 2 based on the testimony of Jane Doe 1. As the appellate court noted, Jane Doe 1 testified that on more than one occasion, Amezcua had rubbed her clitoris and her breasts for about 15 minutes. While he did this, Petitioner put Jane Doe 1's hand on his erect penis. (Lodgment No. 1, Rep.'s Tr. vol. 1 at 115-16, 118.) During his interview with detective, Amezcua admitted that he put Jane Doe 1's hand on his penis. (Lodgment No. 1, Clerk's Tr. vol. 1 at 92-93.) Although Petitioner denied that his penis was erect, he conceded that he was "aroused." (*Id.* at 94.) The jury was permitted to consider Jane Doe 1's testimony that Petitioner placed her hand on his erect penis several times as circumstantial evidence of Petitioner's sexual intent while touching Jane Doe 2. *See Martinez*, 11 Cal. 4th at 445 (holding that a jury may consider the surrounding circumstances and rely on them to draw inferences about a defendant's specific intent, including evidence of "other acts of lewd conduct admitted or charged in the case"); *see*

also People v. Gilbert, 5 Cal. App. 4th 1372, 1380 (Cal. App. 1992). While Amezcua testified at trial that his touching of Jane Does 1 and 2 not "sexual" (Lodgment No. 2, vol. 1 at 182), it was for the jury to resolve any evidentiary conflicts. *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995). And under *Jackson*, the jury's credibility determination is "entitled to near-total deference." *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004).

Based on the foregoing and viewing all the evidence and all reasonable inferences in the light most favorable to the verdict, there is sufficient evidence to support the jury's implicit finding that Amezcua touched Jane Doe 2 with sexual intent. A reasonable juror could have inferred such intent from Petitioner's pretrial statements, his trial testimony and the testimony of both Jane Doe 1 and Jane Doe 2. *See Jackson*, 443 U.S. at 319. Accordingly, the state court's denial of Amezcua's claim was neither contrary to, nor an unreasonable application of, clearly established law. *See* 28 U.S.C. § 2254(d); *Williams*, 529 U.S. at 407-08. The claim is **DENIED.**

B. Sufficiency of Evidence: Corpus Delicti (ground one)

Amezcua argues that there was insufficient evidence to support his convictions on counts seven, nine and ten because the prosecution failed to establish corpus delicti as to those counts. (Pet. at 6, ECF No. 1.) Respondent argues that Petitioner has failed to raise a cognizable claim on federal habeas and as such, the claim must be dismissed. (Mem. P. & A. Supp. Answer at 10-11, ECF No. 6-1.)

1. State Court Decision

Amezcua raised this claim in his petition for review to the California Supreme Court, which was denied without comment or citation. (*See* Lodgment Nos. 7 & 8, ECF Nos. 7-10, 7-12.) This Court therefore looks through the silent denial to the California Court of Appeal's reasoned decision. *See Ylst*, 501 U.S. at 805-06. In denying the claim,[4] the appellate court stated:

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[4] One appellate justice on the three-judge panel dissented on the issue of corpus delicti, stating that "no evidence was presented at trial, independent of Amezcua's extrajudicial statements, that Amezcua touched Jane Doe 2's buttocks at the San Diego residence as alleged in count 7 or that he touched Jane

We first consider Amezcua's contention that the evidence was insufficient to convict him of three of the counts alleging lewd acts against Jane Doe 2 (counts 7, 9 & 10) because the prosecution did not establish the corpus delicti of those offenses and improperly premised the convictions solely on Amezcua's extrajudicial statements.

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.) "Though no statute or constitutional principle requires it, California, like most American jurisdictions, has historically adhered to the rule that the . . . corpus delicti . . . cannot be proved by exclusive reliance on the defendant's extrajudicial statements." (*Id*. at p. 1165.) Put another way, "[t]he corpus delicti rule requires the prosecution to prove that 'the charged crime actually happened' exclusive of the accused's extrajudicial statements." (*People v. Ray* (1996) 13 Cal.4th 313, 342, italics added.) "This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*Alvarez*, supra, at p. 1169, italics added.)

Although the corpus delicti rule requires that the prosecution present proof that a crime occurred independent of the defendant's extrajudicial statements, "[t]he independent proof may be by circumstantial evidence [citation], and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. [Citation.] If the independent proof meets this threshold requirement, the accused's admissions may then be considered to strengthen the case on all issues." (*People v. Alcala* (1984) 36 Cal.3d 604, 624–625.)

In *People v. Jennings* (1991) 53 Cal.3d 334, 368, the court explained the minimal burden of proof required for corpus delicti, and the reasons for the rule. The court said:

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Doe [2's] vagina, skin-to-skin at the Riverside residence as alleged in count 9." (Lodgment No. 6 at 25, ECF No. 7-10.) The dissenting justice concluded that "the convictions in counts 7 and 9 were *not* supported by sufficient evidence due to the operation of the corpus delicti rule." *Id.* (emphasis in original). As for count ten, the dissenting justice concluded that it was supported by admissions made by Amezcua during his trial testimony, independent of his extrajudicial statements, and as such the corpus delicti rule did not undermine his conviction on count ten. *Id.*

> "We reemphasize that the quantum of evidence the People must produce in order to satisfy the corpus delicti rule is quite modest; case law describes it as a 'slight or prima facie' showing. [Citations.] This minimal standard is better understood when we consider that the purpose of the corpus delicti rule is 'to protect the defendant against the possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator.' [Citation.] As one court explained, 'Today's judicial retention of the rule reflects the continued fear that confessions may be the result of either improper police activity or the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically.'" (*Id*. at p. 368.)

We infer from the court's comments that proof of corpus delicti is not intended to verify each detail of a defendant's out-of-court statements; rather it is to avoid false confessions, particularly those that might arise from the pressure of police interrogation. Consistent with the policy underlying the rule, courts in child molestation cases involving multiple acts, have not required count-by-count proof of corpus delicti. In *People v. Tompkins* (2010) 185 Cal.App.4th 1253 (*Tompkins*), the court squarely held that "separate evidence is not required as to each individual count to establish the corpus delicti; rather, evidence that multiple molestations took place will establish the corpus delicti for multiple counts." (*Id*. at p. 1260.)

The approach taken in *Tompkins*, supra, 185 Cal.App.4th 1253 is based on the observation that "[t]he testimony of young children concerning a series of events cannot be as perfect as a phonographic record thereof. It would practically close the doors against the prosecution of many of such wrongs if girls of tender years were required to give detailed and unvarying description of each transaction and its circumstances." (*People v. Durfee* (1947) 79 Cal.App.2d 632, 634.)

[Footnote 4: Similar to the liberal approach taken in cases considering whether the corpus delicti rule has been satisfied in child molestation cases, when sufficiency of the evidence of a child molestation conviction is challenged, courts apply the rule that a defendant may properly be convicted of acts of child molestation based on a witness's testimony that the defendant generally molested her in a specific manner

over the course of time, even if the witness is unable to provide details about "precise date, time, place or circumstance. (*People v. Jones* (1990) 51 Cal.3d 294, 315.)]

In *Tompkins*, the defendant was convicted of multiple counts of lewd acts against his minor daughter and argued that based on the corpus delicti rule, he should not have been convicted of six of the counts because "the only evidence to support those counts was his own statements" to an investigator, in which he described the specific acts of molestation. (*Tompkins*, supra, 185 Cal.App.4th at p. 1259.) *Tompkins* concluded that because the victim's testimony generally described numerous instances of molestation, including that "defendant molested her more than once but less than 50 times, [that] she had visitation with defendant approximately every other weekend during that period, and defendant molested her on some, but not all, of those visits," and she also told an investigator that the defendant had touched her "'on many occasions,'" the evidence "was amply sufficient" to establish the corpus delicti for the six specific counts of molestation that defendant challenged. (*Id*. at p. 1260.)

In *People v. Culton* (1992) 11 Cal.App.4th 363 (*Culton*), the corpus delicti for the defendant's conviction for 10 counts of committing a lewd act on a child was supplied by expert medical testimony from a doctor who performed a forensic genital examination of the victim. (*Id*. at pp. 365, 368.) Specifically, the doctor testified that the victim's physical condition was consistent with having been abused over a long period of time, which established the corpus delicti for all the offenses. (*Id*. at p. 372.)

Jane Doe 2 did not testify at trial to any of the acts described in counts 7, 9 and 10, as she described only two incidents: one in which Amezcua touched her arms and vagina at the San Diego residence; and one in which Amezcua touched her arms and her chest near the collarbone at the San Diego residence. However, during Amezcua's own testimony at trial, he admitted to committing the act charged in count 10, which was touching Jane Doe 2's vagina "over the clothes, the first time" at the Riverside County residence.

Specifically, as we have described above, Amezcua generally seemed to admit at trial that he touched Jane Doe 2 at his Riverside County residence as he described during his police interview.

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> [Prosecutor]: You told the detectives you were playing piggyback or goofy games and that you had touched her -- and this was at the [Riverside County] house -- you touched her on her vagina on that occasion.
>
> [Amezcua]: I think so.
>
> [Prosecutor]: And then they asked you how many more times it happened. You said three more times at the [Riverside County] house; is that correct?
>
> [Amezcua]: I remember two situations with [Jane Doe 2], just two situations."

Later in his trial testimony, Amezcua was asked about an admission during his police interview about the first incident at the Riverside County residence, and he specifically admitted that he purposely touched Jane Doe 2's vagina on that occasion.

> [Prosecutor]: Do you remember the detective asking you, can you tell me what happened with [Jane Doe 2]? And then you replied, 'It was again, cuddling, playing. I noticed that -- uh, see if I could touch her, and I did. In the back again, start in the rear end and rubbed her thighs and again in her private part.' You reference that section of your interview. Would it be fair to say that that instance of the touching was not an accident?
>
> [Amezcua]: Yes, it was not an accident.
>
> [Prosecutor]: You did it on purpose?
>
> [Amezcua]: Yes.

Amezcua seeks to distinguish both *Culton*, supra, 11 Cal.App.4th 363 and *Tompkins*, supra, 185 Cal.App.4th 1253, thus arguing his proposed count-by-count application of corpus delicti in child molestation cases is warranted. We find his proposed distinctions of controlling authority are not persuasive.

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Amezcua contends *Culton*, supra, 11 Cal.App.4th 363 is distinguishable because there was medical testimony in that case which supported a finding of child molestation, perhaps on multiple occasions. In this case, there was no medical evidence. However, in *Culton* the defendant was convicted of multiple counts of child molestation, without independent evidence on a count-by-count basis. The court reasoned that the purpose of the corpus delicti rule did not require such an expanded form of corroboration.

Similarly, Amezcua argues *Tompkins*, supra, 185 Cal.App.4th 1253, which like *Culton*, supra, 11 Cal.App.4th 363, was decided by Division Two of our court, is distinguishable. The attempted distinction is that the *Tompkins* case relied on generalized testimony regarding on going child molestation, whereas Jane Doe 2's testimony in this case was specific. Again, we find the proposed distinction is not persuasive.

The court in *Tompkins* was very clear in its analysis of the application of corpus delicti in multiple count child molestation cases. The court said: "We read *Culton*[, supra, 11 Cal.App.4th 363] as standing for the proposition that separate evidence is not required as to each individual count to establish the corpus delicti; rather, evidence that multiple molestations took place will establish the corpus delicti for multiple counts." (*Tompkins*, supra, 185 Cal.App.4th at p. 1260.)

We are persuaded by the opinions in *Culton*, supra, 11 Cal.App.4th 363 and *Tompkins*, supra, 185 Cal.App.4th 1253 and follow their reasoning. We also find some independent evidence in Amezcua's testimony. Although Jane Doe 2 testified that no molestation occurred in Riverside County, Amezcua's testimony provides some independent evidence of such acts.

As we have quoted above, Amezcua testified that some "playful activities" involving Jane Doe 2, including touching her vagina, occurred in Riverside County. Jane Doe 2 also testified there was only one occasion of molestation, and that occurred in San Diego. Again, as we have quoted above, Amezcua testified there were "two instances" involving the touching of Jane Doe 2. Although Amezcua's testimony was often vague or inconsistent, a reasonable jury could conclude his testimony provided some independent evidence that Jane Doe 2 was molested twice, once in Riverside County and once in San Diego.

> Based on the controlling appellate authority and on drawing all reasonable inferences in favor of the decision of the trier of fact, we are satisfied that the challenged conviction for counts involving Jane Doe 2 are supported by sufficient evidence of corpus delicti. Accordingly, we reject Amezcua's arguments to the contrary.

(Lodgment No. 6 at 7-13, ECF No. 7-10.)

2. Discussion

Respondent argues this claim must be denied because it is not cognizable on federal habeas. (Mem. P. & A. Supp. Answer at 10-11, ECF No. 6-1.) A person in custody pursuant to the judgment of a state court can obtain a federal writ of habeas corpus only grounds that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). As such, federal habeas relief is generally not available for alleged errors of state law. *See Swarthout v. Cooke*, 562 U.S. 216, 219 (2011).

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself -- i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying exclusively upon the extrajudicial statements, confessions, or admissions of the defendant." *People v. Alvarez*, 27 Cal. 4th 1161, 1168-69 (Cal. 2002). Generally, the corpus delicti rule requires a defendant's confession be corroborated by some independent evidence in order to serve as the basis for a conviction. *United States v. Lopez-Alvarez*, 970 F.2d 583, 589 (9th Cir. 1992). Only a slight or prima facie showing, permitting the reasonable inference that the crime was committed, is required. *People v. Ray*, 13 Cal. 4th 313, 342 (Cal. 1996). As explained in *Alvarez*, "once the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues." *Alvarez*, 27 Cal. 4th at 1171.

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The California Supreme Court has stated that the requirement that some independent evidence support a defendant's extrajudicial statement is a matter of state law. *Alvarez*, 27 Cal. 4th at 1173 ("[i]t is undisputed that the corpus delicti rule is not a requirement of federal law"). Thus, to the extent Petitioner alleges purely a violation of California's corpus delicti law, his claim is not cognizable on federal habeas.

But here, Amezcua argues that his due process rights were violated because there was insufficient evidence, due to a lack of corpus delicti, to support his conviction and therefore amounted to a violation of the Due Process Clause under *Jackson v. Virgina*. (Pet. at 6, ECF No. 1.) Petitioner, however, cites no authority for the proposition that application of a state corpus delicti rule is constitutionally mandated in a *Jackson* analysis. Although the corpus delicti rule is applied in federal criminal cases,[5] it has not been held by the Supreme Court a requirement under the U.S. Constitution.

The Fifth Circuit Court of Appeals considered Texas' corpus delicti law in conjunction with a sufficieny of evidence claim and held that "'in challenges to state convictions under 28 U.S.C. § 2254, only *Jackson [v. Virgina]* need be satisfied, even if state law would impose a more demanding standard of proof.'" *West v. Johnson*, 92 F.3d 1385, 1394 (5th Cir. 1996). The Eighth Circuit has also held that there are "no constitutional rights are at stake" in raising a corpus delicti argument in a sufficiency of evidence claim. *Evans v. Luebbers*, 371 F.3d 438, 442 (8th Cir. 2004) (concluding Missouri's corpus delicti requirement that the prosecution present some independent proof of the death of the victim that the death was caused by human agency (i.e., not by accident or suicide), prior to introducing incriminating statement made by the defendant, was not cognizable on habeas review).[6] Thus, the misapplication of the corpus delicti

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[5] As with California's corpus delicti rule, a defendant in a federal criminal case cannot be convicted based solely on his or her uncorroborated statements or confessions. *See Smith v. United States*, 348 U.S. 147, 153-54 (1954); *Wong Sun v. United States*, 371 U.S. 471, 489 (1963).

[6] Missouri's corpus delicti rule is somewhat different than California's. In Missouri, there must be corroborating evidence in order to admit the defendant's incriminating statements as evidence. *See*

rule does not appear to affect a federal constitutional right regarding the sufficiency of the evidence.

Nonetheless, even assuming Amezcua's claim is cognizable, he would not be entitled to relief. Ultimately, "[t]he issue for [the Court], always, is whether the state proceedings satisfied due process; the presence or absence of a state law violation is largely beside the point." *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991) ("While adherence to state evidentiary rules suggests that the trial was conducted in a procedurally fair manner, it is certainly possible to have a fair trial even when state standards are violated; conversely, state procedural and evidentiary rules may countenance processes that do not comport with fundamental fairness.").

In making that determination, this Court is bound by the state court's interpretation of California law unless its interpretation is so arbitrary or capricious such that it violates due process. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam) ("We have repeatedly held that 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."); *Richmond v. Lewis*, 506 U.S. 40, 50 (1992) (state court's application of state law does not raise a cognizable federal question unless it was so arbitrary or capricious as to constitute an independent due process violation).

Here, Amezcua argues that his due process rights were violated because there was no corroborating evidence to support his conviction on counts seven, nine and ten. All three counts involved incidents that took place in Jane Doe 2's former residence in Winchester, California. (*See* Lodgment No. 1, Clerk's Tr. at 29-30, ECF No. 7-1.) At trial, Jane Doe 2 testified that Amezcua touched on only two occasions, both when she was living in San Diego, California. When asked if there were any other instances, she

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Evans, 371 F.3d at 442 (noting Missouri's corpus delicti rule is of an evidentiary nature). In contrast, under California's delicti rule a defendant's statements are admissible regardless of corroboration. *Alvarez*, 27 Cal. 4th at 1174 (holding that California's corpus delicti rule does not restrict the admissibility of incriminatory extrajudicial statements by the accused).

stated unequivocally that there were not. (Lodgment No. 2, vol. 1 at 98, 106 ECF No. 7-2.) Thus, her testimony provided no direct evidence to support counts seven, nine and ten.

As the appellate court found, in cases of child molestation, California courts have held that evidence of multiple molestations can provide corroboration sufficient to satisfy the corpus delicti rule. In *People v. Tompkins*, 185 Cal. App. 4th 1253 (Cal. App. 2010), the prosecution charged the defendant with 11 counts of lewd and lascivious acts on a child under 14. The defendant argued the corpus delicti rule prohibited convicting him of acts described only by his out-of-court statements to an investigator. Relying on *People v. Culton*, 11 Cal. App. 4th 363 (Cal. App. 1992), the *Tompkins* court rejected the argument. "We read *Culton* as standing for the proposition that separate evidence is not required as to each individual count to establish the corpus delicti; rather, evidence that multiple molestations took place will establish the corpus delicti for multiple counts. [Citation.]" *Tompkins*, 185 Cal. App. 4th at 1260. In light of this case law, the appellate court reviewing Amezcua's claim concluded that the testimony from Jane Doe 1 and Jane Doe 2 as to other molestations was sufficient to satisfy corpus delicti as to counts seven, nine and ten. (*See* Lodgment No. 6 at 12, ECF No. 7-10).

This Court defers to the California appellate court's construction of state law. *See Bradshaw*, 546 U.S. at 76. The state court's interpretation of the corpus delicti law was not arbitrary or capricious, *see Richmond*, 506 U.S. at 50, nor was it "untenable or amount[ing] to a subterfuge to avoid federal review of a constitutional violation." *See Oxborrow v. Eikenberry*, 877 F.2d 1395, 1399 (9th Cir. 1989). Thus, even if clearly established federal law protected Petitioner from conviction without corpus delicti, he has not shown that the state court erred, or that its decision was "untenable or amounts to a subterfuge to avoid federal review of a constitutional violation." *See id.*; *see also Venegas v. Davey*, 2014 WL 2042057, at *14 (E.D. Cal. 2014) (dismissing claim,

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explaining that federal habeas corpus court was bound by the state court's interpretation of the state's corpus delicti rule unless that interpretation was untenable or an attempt to avoid review of federal questions). Therefore, claim one is **DENIED.**

C. Prosecutorial Misconduct: Closing Argument (ground three)

In ground three, Petitioner argues the prosecutor committed misconduct by misstating the corpus delicti rule during closing argument, violating his right to due process. (Pet. at 8, ECF No. 1.) Respondent contends the claim must be denied because it is procedurally defaulted. (Mem. P. & A. Supp. Answer at 14, ECF No. 6-1.)

1. State Court Decision

Amezcua raised this claim in his petition for review to the California Supreme Court and it was denied without comment or citation. (*See* Lodgment Nos. 7 & 8, ECF Nos. 7-11, 7-12.) As such, this Court looks through to the California Court of Appeal's opinion. *See Ylst*, 501 U.S. at 805-06. The appellate court denied Petitioner's claim, concluding that the claim was barred due to defense counsel's failure to object at trial. The court stated:

> Where a prosecutor uses deceptive or reprehensible methods to attempt to persuade a jury, he or she has committed misconduct. (*People v. Fuvia* (2012) 53 Cal. 4th 622, 679.) However, a defendant may not raise an issue regarding the prosecutor's arguments for the first time on appeal. (*People v. Samayoa* (1997) 15 Cal. 4th 795, 841.) Failure to timely object can be excused only where an objection would have been futile or where the harm caused by the prosecutor's argument cannot be cured by objection. (*Fuvia*, supra, at p. 679; *People v. Jablonski* (2006) 37 Cal. 4th 774, 835; *People v. Morales* (2001) 25 Cal. 4th 34, 43-44.)
>
> During closing arguments, the prosecutor said that he could prove corpus delicti of the offenses involving Jane Doe 2 by showing multiple molestations of her had occurred. Amezcua now claims such comments were erroneous and caused him prejudice. He recognizes failure to object during argument ordinarily forfeits the claim. Amezcua claims, without support in the record, that an objection would have been futile. We find nothing in the record to show that timely objection and admonition would not have cured any alleged error. The jury had been properly instructed on the principles of corpus delicti, and they had been told the judge was the

> person who stated the law, not the attorneys. We find nothing in the record to justify relieving Amezcua of the application of the long established rule that failure to timely object to arguments results in forfeiture of the issue. Accordingly, we do not discuss the merits of Amezcua's contentions on this issue.

(Lodgment No. 6 at 16-17, ECF No. 7-10.)

2. Procedural Default

Respondent argues this claim is procedurally defaulted because defense counsel failed to make a contemporaneous objection at trial. (Mem. P. & A. Supp. Answer at 14, ECF No. 6-1.) Because the appellate court clearly found that defense counsel failed to make a timely objection to the prosecutor's closing argument, this Court presumes the California Supreme Court found the claim barred for failure to object. *See Lee v. Jacquez*, 788 F.3d 1124, 1133 (9th Cir. 2015) ("If the California Supreme Court denies a habeas petition without explanation, the federal courts will presume that a procedural default was imposed if 'the last reasoned opinion on the claim explicitly impose[d] a procedural default.'")

"The procedural default doctrine 'bar[s] federal habeas [review] when a state court decline[s] to address a prisoner's federal claims because the prisoner has failed to meet a state procedural requirement.'" *Calderon v. United States District Court*, 96 F.3d 1126, 1129 (9th Cir. 1996) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). The doctrine "'is a specific application of the general adequate and independent state grounds doctrine.'" *Id*. (quoting *Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir. 1994)). Federal courts "'will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Id*. (quoting *Coleman*, 501 U.S. at 729); *Park*, 202 F.3d at 1151.

The Ninth Circuit has held that because procedural default is an affirmative defense, Respondent must first have "adequately pled the existence of an independent and adequate state procedural ground." *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir.

2003). Once the defense is placed at issue, the burden shifts to the petitioner, who must then "assert[] specific factual allegations that demonstrate the inadequacy of the state procedure. . . ." *Id*. The "ultimate burden" of proving procedural default, however, belongs to the state. *Id*. If the state meets this burden, federal review of the claim is foreclosed unless the petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

Respondent contends California's contemporaneous objection rule is adequate and independent of federal law. (*See* Mem. P. & A. Supp. Answer at 14, ECF No. 6-1.) Thus, the burden shifts to Petitioner to assert "specific factual allegations" demonstrating the inadequacy of the rule. *Bennett*, 322 F.3d at 586. For his part, Amezcua provides no response to the procedural bar asserted by Respondent and therefore he has failed to meet his burden. *See King v. LaMarque*, 464 F.3d 963, 967 (9th Cir. 2006) ("*Bennett* requires the petitioner to 'place [the procedural default] defense in issue' to shift the burden back to the government."). Furthermore, the Ninth Circuit has determined that California's contemporaneous objection rule is "an independent and adequate state procedural rule" that bars federal habeas review of a claim. *See Zapata v. Vasquez*, 788 F.3d 1106, 1111-12 (9th Cir. 2015) (concluding prosecutorial misconduct claim was procedurally defaulted where the where there was a complete failure to object at trial to alleged prosecutorial misconduct); *see also Tong Xiong v. Felker*, 681 F.3d 1067, 1075 (9th Cir. 2012); *Fairbank v. Ayers*, 650 F.3d 1243, 1257 (9th Cir. 2011); *Zapien v. Martel*, 849 F.3d 787, 793 n.2 (9th Cir. 2015); *Vansickel v. White*, 166 F.3d 953, 957-58 (9th Cir. 1999).

Amezcua's failure to comply with a state's contemporaneous objection rule therefore results in a procedural default that bars federal consideration of the claim unless he can establish cause for his noncompliance and actual prejudice, or demonstrate that a miscarriage of justice would result. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995);

Coleman, 501 U.S. at 750; *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977); *Cook v. Schriro*, 538 F.3d 1000, 1025-26 (9th Cir. 2008) (absent a showing of cause and prejudice, petitioner is barred from raising a claim on federal habeas review where he failed to meet state's contemporaneous objection rule).

The cause standard requires Petitioner to show that "some objective factor external to the defense" or constitutionally ineffective assistance of counsel impeded his efforts to comply with the state's procedural rule. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986). For ineffective assistance of counsel to constitute cause, the ineffective assistance claim must have been presented as an independent claim to the state courts. *Id*. at 489. Moreover, Petitioner must establish that his attorney was "constitutionally ineffective under the standard established in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *Murray*, 477 U.S. at 488.

Here, Amezcua raised an ineffective assistance of counsel claim on appeal in state court, based on counsel's failure to object during closing argument. (*See* Lodgment No. 3 at 38-40, ECF No. 7-7.) For the reasons discussed below in section V(D) of this Report and Recommendation, however, Petitioner's claim does not amount to constitutionally ineffective assistance of counsel under *Strickland* because counsel's performance was not deficient. *See Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013) (stating that failure to object during closing argument is within the 'wide range' of permissible professional legal conduct). Amezcua has therefore not established cause to excuse the procedural default.

Nor has he established prejudice. To satisfy the prejudice part of the cause-and-prejudice test, Amezcua must show actual prejudice resulting from the errors of which he complains. *See McCleskey v. Zant*, 499 U.S. 467, 494 (1991). Prejudice is "actual harm resulting from the claimed constitutional violation." *LaGrand v. Stewart*, 173 F.3d 1144, 1148 (9th Cir. 1999) (citing *Magby v. Wawrzazsek*, 741 F.2d 240, 244 (9th Cir. 1984). Here, as discussed in section V(D) below, the prosecutor's statements during closing argument were not prejudicial because the jury was properly instructed on corpus delicti

by the trial judge. *United States v. Mendoza*, 244 F.3d 1037, 1045 (9th Cir. 2001) (stating that a misstatement of law by a prosecutor can be rendered harmless by the court's proper instruction to the jury).

Finally, Petitioner has not alleged that a miscarriage of justice will result should the Court not consider the claim. The miscarriage of justice exception provides that a federal court may still hear the merits of procedurally defaulted claims if the petitioner can make a showing of actual innocence. *See McQuiggin v. Perkins*, 569 U.S. 383, 393-94 (2013). "The miscarriage of justice exception is limited to those extraordinary cases where the petitioner asserts his innocence and establishes that the court cannot have confidence in the contrary finding of guilt." *See Johnson v. Knowles*, 541 F.3d 933, 936-38 (9th Cir. 2008) (emphasis in original).

Petitioner has not established that the Court cannot have confidence in his guilt. To demonstrate "actual innocence," Amezcua must present new reliable evidence, such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that would create a credible claim of actual innocence. *Schlup*, 513 U.S. at 321. Petitioner merely argues there was insufficient evidence to corroborate his pretrial admissions. (*See* Pet. at 6, 8, ECF No. 1.) Given Amezcua's inculpatory statements to detectives, he cannot establish actual innocence. *See id.*

In sum, the state court denied this claim pursuant to adequate and independent state procedural grounds that were correctly applied and as such, federal habeas review of this claim is defaulted. *See Coleman*, 501 U.S. at 729-30. Petitioner has failed to demonstrate either cause and prejudice to excuse the default, or that the failure to consider this claim on the merits would result in a miscarriage of justice. *See Schlup*, 513 U.S. at 324.

3. Merits

Even if the claim were not procedurally defaulted, Petitioner would not be entitled to relief. Because the state court did not discuss the merits of this claim, the Court reviews it de novo. *See Pirtle v. Morgan*, 313 F.3d 1160, 1167-68 (9th Cir. 2002)

(holding that where "there is no state court decision on [the merits of the constitutional violation alleged] to which to accord deference," courts review the claim de novo").

A criminal defendant's due process rights are violated when a prosecutor's misconduct results in a trial that is "fundamentally unfair." *See Darden v. Wainwright*, 477 U.S. 168, 193 (1986); *Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."). To obtain federal habeas relief on this claim, Amezcua must do more than demonstrate that the prosecutor's comments were improper. *Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005); *see also Darden*, 477 U.S. at 180-81. He must show they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)); *accord Greer v. Miller*, 483 U.S. 756, 765 (1987); *Tak Sun Tan*, 413 F.3d at 1112; *Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir. 1996). If prosecutorial misconduct is established, and it was constitutional error, the court must decide whether the constitutional error was harmless. *Thompson*, 74 F.3d at 1576-77.

Where a habeas claim of prosecutorial misconduct during closing argument is alleged, the likely effects of the prosecutor's statements are examined "in the context in which they were made to determine 'whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Turner v. Calderon*, 281 F.3d 851, 868 (9th Cir. 2002) (quoting *Darden*, 477 U.S. at 181)). "A court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly*, 416 U.S. at 647. During closing arguments, a prosecutor is allowed a reasonably wide latitude and can argue reasonable inferences from the evidence. *Fields v. Brown*, 431 F.3d 1186, 1206 (9th Cir. 2005); *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989). However, it is improper for a prosecutor to make statements or inferences to the jury that he knows to

be false or has a strong reason to doubt. *United States v. Reyes*, 577 F.3d 1069, 1077 (9th Cir. 2009).

Here, Petitioner contends the prosecutor misstated the corpus delicti rule when he told the jury that the corpus of a section 288(a) violation could be established by evidence of other molestations. Specifically, Amezcua claims the prosecutor misstated the law when he argued as follows:

> Cassandra testified she was touched at least twice in San Diego. Multiply molestations can be corpus for multiple acts of molestation because children are not going to remember. If you're being abused over a period of time, especially when you're young, you're not going to either remember or be aware of it because the crime occurs solely with the defendant who is charged with this crime. And that's because the defendant has to act willfully by touching a child and then with the lewd intent. The child's mindset -- the child doesn't have to agree to it. It has nothing to do what the child's action are or what the child's state of mind is. A defendant can be guilty of molesting a child, if I presented corpus of multiple.

(Lodgment No. 2, Rep.'s Tr. vol. 2 at 52, ECF No. 7-3.) Petitioner also points to a portion of the prosecutor's rebuttal argument, during which he stated:

> Corpus instruction, and I'm just going to quote the paragraph from it. I want you to read the whole thing tonight. I don't want to take it out of context. 359, that other evidence may be slight -- need only be enough to support a reasonable inference that a crime was committed. So for the purposes of corpus, only two instances in which Cassandra said she was touched inappropriately. That's more than slight. That's a lot more than slight evidence. Other evidence. So we have it. We know that he committed those offenses. In Riverside county we have the slight evidence to support that charge for the corpus rule and hold him accountable for those acts.

(*Id.* at 104.)

First, it is far from clear that the prosecutor misstated the law with regard to California's corpus delicti rule. As discussed above, the appellate court found that in cases of child molestation, California courts have held that evidence of multiple

molestations can provide corroboration sufficient to satisfy the corpus delicti rule. Relying on *Culton*, 11 Cal. App. 4th at 363 and *Tompkins*, 185 Cal. App. 4th at 1260, the court stated that "separate evidence is not required as to each individual count to establish the corpus delicti; rather, evidence that multiple molestations took place will establish the corpus delicti for multiple counts." (Lodgment No. 6 at 12, ECF No. 7-10.)

While it is true that the dissenting judge in this case found *Tompkins* and *Culton* distinguishable from Amezcua's case (*see* Lodgment No. 6 at 20-26, ECF No. 7-10), this Court must defer to the state court's majority conclusion. *See Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997) (stating that federal habeas courts must "accept a state court's interpretation of state law"); *Bradshaw*, 546 U.S. at 76 ("[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.").

Moreover, even assuming the prosecutor's characterization of corpus delicti was inaccurate, Petitioner has not shown it rendered the trial fundamentally unfair. "A slight misstatement of law by a prosecutor can be rendered harmless by the court's proper instruction to the jury." *United States v. Mendoza*, 244 F.3d 1037, 1045 (9th Cir. 2001). Here, the trial judge instructed the jury on the corpus delicti requirement, using the standard California Criminal Jury Instruction No. 359, as follows:

> The defendant may not be convicted of any crime based on his out-of-court statements alone. You may rely on the defendant's out-of-court statements to convict him only if you first conclude that other evidence shows that the charged crime was committed.
>
> That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.
>
> This requirement of other evidence does not apply to proving the identity of the person who committed the crime. If other evidence shows that the charged crime was committed, the identity of the person who committed it may be proved by the defendant's statements alone.

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> You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt.

(Lodgment No. 1, Clerk's Tr. at 182-83, ECF No. 7-1.) This standard instruction has been held to be an accurate statement of California's corpus delicti law. *People v. Rosales*, 222 Cal. App. 4th 1254, 1260 (Cal. App. 2014) (holding CALCRIM No. 359 "correctly states the law"). The prosecutor specifically referred to this instruction during his rebuttal argument and urged the jurors to read the entire instruction. (Lodgment No. 2, Rep.'s Tr. vol. 2 at 52, ECF No. 7-3.) The jury also was instructed that the trial court's instructions constituted the law that applied to the case and to follow the law as the trial court explained it. (Lodgment No. 1, Clerk's Tr. at 119, ECF No. 7-1.) The trial court instructed the jury specifically about statements regarding the law made by the attorneys during closing arguments, stating:

> If you believe that the attorneys' comments during their closing arguments when they talk – if they talk about the law and it conflicts with my instructions, you must follow my instructions. So I want you to pay careful [attention], follow these instructions, and consider them as a whole.

(Lodgment No. 2, Rep.'s Tr. vol. 2 at 29, ECF NO. 7-3.) The jury is presumed to follow the trial court's instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000). Thus, even assuming the prosecutor misstated corpus delicti law during closing, given the instructions provided the jury by the trial court, given the instructions provided the jury, it did not "so infect[] the trial with fundamental unfairness" as to result in a denial of due process. *See Darden*, 477 U.S. at 1181.

4. Conclusion

In sum, Petitioner's prosecutorial misconduct claim is procedurally defaulted. *See Coleman*, 501 U.S. at 729-30. Even assuming the claim was not barred from review, Amezcua would not be entitled to relief because has cannot establish that his due process rights were violated by the prosecutor's closing argument. *See Darden*, 477 U.S. at 193. Claim three is **DENIED**.

D. Ineffective Assistance of Counsel (ground four)

Lastly, Amezcua contends that trial counsel was ineffective in failing to object to the prosecutor's purported misstatement of the law regarding corpus delicti during closing argument. (Pet. at 9, ECF No. 1.) Respondent argues that the claim must be denied because the state court's denial of the claim was neither contrary to, nor an unreasonable application of, clearly established law. (Mem. P. & A. Supp. Answer at 15-16, ECF No. 6-1.)

1. State Court Decision

As with his other claims, Petitioner raised this argument in his petition for review to the California Supreme Court. (Lodgment No. 7, ECF No. 7-11.) This Court looks through the California Supreme Court's silent denial to the reasoned opinion of the California Court of appeal. *See Ylst*, 501 U.S. at 805-06.

The appellate court denied the claim, stating:

> In order to establish ineffective assistance of trial counsel, an appellant must first show that counsel's performance fell below the appropriate standard of care, i.e., a significant error or failure to act. Once error is shown, the defendant must also show prejudice by establishing that there is a reasonable likelihood a more favorable result would have occurred in the absence of counsel's failure. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Amezcua has not met his burden on this issue.
>
> There is nothing in this record to explain why trial counsel did not object to the argument, which has been identified on appeal. Given the considerable deference afforded to trial counsel's tactical decisions we have nothing from which we can assess counsel's performance on this record. As our Supreme Court has pointed out it is often difficult on appeal to assess counsel's failure to take some action that appellate counsel now deems necessary. In *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267-268, the court noted that in such cases the appellant's remedy, if any, is by way of a petition for writ of habeas corpus.

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> We find it unnecessary to address the prejudice prong of *Strickland v. Washington*, supra, 466 U.S. 668, other than to observe the challenged comments of the prosecutor are almost quotes from *Culton*, supra, 11 Cal.App.4th at page 367, and *Tompkins*, supra, 185 Cal.App.4th at page 1260. The current record presents no discernable prejudice to the defendant.

(Lodgment No. 6 at 18, ECF No. 7-10.)

2. Discussion

To establish ineffective assistance of counsel, a petitioner must first show his attorney's representation fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

Amezcua must also show he was prejudiced by counsel's errors. *Id.* at 694. Prejudice can be demonstrated by a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Fretwell v. Lockhart*, 506 U.S. 364, 372 (1993). "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). The Court need not address both the deficiency prong and the prejudice prong if the defendant fails to make a sufficient showing of either one. *Id.* at 697.

There is a "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." *Id.* at 686-87. "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial." *Strickland*, 466 U.S. at 687.

Under the standards of both 28 U.S.C. § 2254(d) and *Strickland*, judicial review is "highly deferential and when the two apply in tandem, review is doubly so." *Richter*, 562

U.S. at 105 (internal quotation marks and citations omitted). As a result, "the question [under § 2254(d)] is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.* The *Strickland* prejudice analysis is complete in itself and there is no need for an additional harmless error review under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *See Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009) ("[W]here a habeas petition governed by AEDPA alleges ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), we apply *Strickland's* prejudice standard and do not engage in a separate analysis applying the *Brecht* standard."); *Avila v. Galaza*, 297 F.3d 911, 918 n.7 (9th Cir. 2002).

Here, Petitioner has not shown defense counsel's failure to object during closing argument amounted to deficient performance. The Ninth Circuit has indicated that "[b]ecause many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." *Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013), (quoting *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993)); *cf. Zapata v. Vasquez*, 788 F.3d 1106, 1116 (9th Cir. 2015) (holding that "patent, inflammatory and repeated misconduct" was "egregious").

The prosecutor's statements concerning corpus delicti rule were not egregious misstatements of the law. As discussed above in section V(C)(3), the prosecutor made two brief references to the corpus delicti rule during argument and rebuttal. And based on the appellate court's majority decision, the prosecutor's description of the rule was consistent with California law. The appellate court specifically found that evidence of multiple molestations could be sufficient to provide corroboration of Petitioner's pretrial admissions. (*See* Lodgment No. 6 at 9-13, ECF No. 7-10.) While the dissenting justice may have rule differently, this Court defers to the majority decision. *See Bradshaw*, 546 U.S. at 76 ("[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."). As such, defense counsel's failure to object to the brief references to corpus delicti law was a reasonable tactical decision. *See Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (deference to counsel's tactical decisions in closing is particularly important because of the broad range of legitimate defense strategy at that stage); *Necoechea*, 986 F.2d at 1281 (counsel's failure to object during closing argument within the wide range of reasonable professional assistance for which a strong presumption of sound judgment is due); *see also Clabourne v. Lewis*, 64 F.3d 1373, 1383 (9th Cir. 1995) (no error found where counsel may have had many reasons for not objecting or interrupting during opening or closing); *Cunningham*, 704 F.3d at 1159 (stating that a decision not to object a prosecutor's comments during closing, in order to avoid highlighting them, was a reasonable strategic decision).

Moreover, defense counsel's failure to object was not prejudicial. Because the prosecutor's statements during closing were not inconsistent with California law, Petitioner cannot establish a reasonable probability that the result would have been different had defense counsel objected. *See Strickland*, 466 U.S. at 689; *see also Rupe v. Wood*, 93 F.3d 1434, 1445 (9th Cir. 1996) (concluding that there was no prejudice when there was no reasonable probability the petitioner would have prevailed on the issue had an objection been raised by defense counsel); *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel.).

Accordingly, the state court's denial of Petitioner's ineffective assistance of counsel claim was neither contrary to, nor an unreasonable application of, clearly established law. *See* 28 U.S.C. § 2254(d); *Williams*, 529 U.S. at 407-08. Claim four is therefore **DENIED**.

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VI. CERTIFICATE OF APPEALABILITY

Under AEDPA, a state prisoner seeking to appeal a district court's denial of a habeas petition must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). The district court may issue a certificate of appealability if the petitioner has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The federal rules governing habeas cases brought by state prisoners require a district court that issues an order denying a habeas petition to either grant or deny a certificate of appealability. *See* Rules Governing § 2254 Cases, Rule 11(a). The Ninth Circuit has noted that the standard for granting a certificate of appealability is "relatively low." *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002). A petitioner "need not show that he should prevail on the merits," *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000), but may be entitled to a certificate when the "questions are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983) (citation omitted), superseded on other grounds by 28 U.S.C. § 2253(c)(2). Here, Petitioner has made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and reasonable jurists would find debatable this Court's assessment of Petitioner's claim that there was insufficient evidence, due to a purported lack of corpus delicti, to support counts seven, nine and ten. *See Slack*, 529 U.S. at 484. Accordingly, a certificate of appealability is **GRANTED** on claim one.[7] A certificate of appealability is **DENIED** as to claims two, three and four.

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[7] Petitioner is advised that despite the grant of a limited certificate of appealability, if he wishes to appeal he must file a notice of appeal within thirty days of the date the judgment is entered. *See* Rule 11(b), Rules Governing § 2254 Cases.

VII. CONCLUSION

Based on the foregoing, the Court **DENIES** the petition for writ of habeas corpus and **GRANTS** a limited certificate of appealability as to claim one and **DENIES** a certificate of appealability as to claims two, three and four.

IT IS SO ORDERED.

Dated: May 29, 2019

Hon. Gonzalo P. Curiel
United States District Judge

APPENDIX D
STATE COURT APPELLATE DECISION

Filed 3/10/17

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CARLOS AMEZCUA, Defendant and Appellant.	D069505 (Super. Ct. No. SCD258616)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Rubin, Judge. Affirmed.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore M. Cropley and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

In a case involving the molestation of two different victims, a jury found Carlos Amezcua guilty of six counts of lewd and lascivious acts on a child under age 14. (Pen.

Code, § 288, subd. (a).)[1] The trial court sentenced Amezcua to prison for a term of 45 years to life.

Amezcua contends (1) insufficient evidence supports the convictions for counts 7, 9 and 10 based on the corpus delicti rule because Amezcua's extra-judicial statements provided the sole evidence to support those convictions; (2) insufficient evidence supports the convictions for counts 6, 7, 9 and 10 because he did not act with the intent of arousing, appealing to or gratifying the lust, passions or sexual desires of himself or the victim; and (3) the prosecutor committed prejudicial misconduct during closing argument when describing the corpus delicti rule.

We conclude that, based on the application of the corpus delicti rule, counts 6, 7, 9 and 10 are supported by sufficient evidence. In addition, we find no merit to Amezcua's remaining arguments. Accordingly, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

This case involves Amezcua's molestation of two female relatives when they were young girls, Jane Doe 1 and Jane Doe 2.

The molestation first came to light when Jane Doe 1, who was 22 years old at the time of trial, disclosed to a relative that Amezcua had molested her when she was eight years old. Family members confronted Amezcua about the allegations, and he admitted

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1 Unless otherwise indicated, all further statutory references are to the Penal Code.

to having molested Jane Doe 1. He also disclosed to family members that he had molested Jane Doe 2, who was 13 years old at the time of trial.

In an interview with police that was video-recorded and played for the jury at trial, Amezcua admitted to molesting Jane Doe 1 and Jane Doe 2 and described the details of the molestations.

As to Jane Doe 1, Amezcua told police that on at least three occasions when Jane Doe 1 was eight or nine years old, he rubbed her buttocks and vagina while cuddling with her. In addition, Amezcua recalled one occasion when he put Jane Doe 1's hand on his penis for a few seconds. As to Jane Doe 2, Amezcua stated that he started touching Jane Doe 2 on the buttocks and vagina over her clothing when she was approximately seven years old. According to Amezcua, he touched Jane Doe 2 in that manner "a few times" when he lived at a residence in Riverside County, including one instance during which he touched Jane Doe 2's bare skin beneath her underwear. Amezcua also stated that later, when he moved to San Diego and Jane Doe 2 was approximately 10 years old, he touched Jane Doe 2's buttocks and vagina on one occasion over her clothes. Amezcua told police that he was "aroused" during the molestation of the two girls, but he claimed that he never had an erection.

Amezcua was charged with five counts of committing lewd acts against Jane Doe 1 (counts 1-5) and seven counts of committing lewd acts against Jane Doe 2 (counts 6-12). (§ 288, subd. (a).) The information described the acts that gave rise to each count. As to the counts concerning Jane Doe 2, three of them were alleged to have taken place at Amezcua's San Diego residence and four of them at his Riverside County

residence. Counts 6, 9, 10, 11 and 12 were based on allegations that Amezcua touched Jane Doe 2's vagina. Counts 7 and 8 alleged a touching of Jane Doe 2's buttocks and Jane Doe 2's chest, respectively.

Jane Doe 1 testified that when she was eight years old, Amezcua molested her in the same manner on six or seven occasions. Specifically, on each occasion Amezcua would rub Jane Doe 1's clitoris beneath her underwear, touch her breasts and put her hand on his erect penis over his clothes. On one occasion Amezcua also put his mouth on Jane Doe 1's breast and licked her nipple. According to Jane Doe 1, Amezcua suggested that she not tell anyone about the molestation.

Jane Doe 2 testified that when she was 11 or 12 years old Amezcua molested her on two occasions, and both occurred at his residence in San Diego. According to Jane Doe 2, Amezcua touch her vagina on only one occasion. Specifically, Jane Doe 2 stated that on that occasion, Amezcua caressed her arms and touched her vagina with a "slight tap" over her clothes. On the second occasion, Amezcua caressed her arm and also touched her chest near her collarbone but did not touch her vagina. When the prosecutor followed up with Jane Doe 2 about whether Amezcua touched her vagina on a *second* occasion, Jane Doe 2 reiterated that Amezcua did not. When the prosecutor followed up as to whether Amezcua had molested Jane Doe 2 on more than two occasions, Jane Doe 2 stated that there was no third occasion on which Amezcua molested her. Jane Doe 2 testified that Amezcua told her not to tell anyone about the molestation.

Amezcua testified at trial. He stated that he had touched Jane Doe 1 as he described during his police interview, but stated that it was done in a "playful" manner

and that he did not touch her to become sexually aroused. He denied that he ever directly touched Jane Doe 1's clitoris underneath her clothes and claimed that the only time Jane Doe 1 touched his penis was by accident when he was picking her up.

As to Jane Doe 2, Amezcua testified that he touched her on only two occasions, stating "I remember two situations with [Jane Doe 2], just two situations." Although Amezcua provided sparse detail during his testimony about the ways in which he touched Jane Doe 2 on those two occasions, he did admit that he touched Jane Doe 2's vagina on one occasion at his San Diego residence.

Later in his testimony, Amezcua admitted that he touched Jane Doe 2's vagina at the Riverside County residence. On that subject the following testimony was presented at trial when the prosecutor asked Amezcua about a description of the molestation at the Riverside County residence that Amezcua had given to police:

> "[Prosecutor]: Do you remember the detective asking you, can you tell me what happened with [Jane Doe 2]? And then you replied, 'It was again, cuddling, playing. I noticed that -- uh, see if I could touch her, and I did. In the back again, start . . . in the rear end and rubbed her thighs and again in her private part.' You reference that section of your interview. Would it be fair to say that that instance of the touching was not an accident?
>
> "[Amezcua]: Yes, it was not an accident.
>
> "[Prosecutor]: You did it on purpose?
>
> "[Amezcua]: Yes."[2]

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2 Earlier in his testimony Amezcua also seemed to *generally* admit to this same molestation at his Riverside County residence when the prosecutor asked him about his statements to the police about that incident.

Amezcua also testified that he did not touch Jane Doe 2 with any sexual intent and did not consider himself to be a child molester because he had no desire to penetrate either of the girls or to have sex with them. Although admitting that he told the police that he was "aroused" during the molestations, he tried to minimize that statement during his trial testimony by claiming that "[i]t was aroused in the sense of thinking, I shouldn't be doing this" and it "wasn't related to . . . sexual desire."

The jury convicted Amezcua of two counts of committing lewd acts against Jane Doe 1 and four counts of committing lewd acts against Jane Doe 2, but were unable to reach a verdict on the remaining counts.[3] As to Jane Doe 1, the jury convicted Amezcua in count 2 based on touching Jane Doe 1's vagina, and in count 4 based on placing Jane Doe 1's hand on his penis. As to Jane Doe 2, the jury convicted Amezcua (1) in count 6 based on touching Jane Doe 2's vagina at the San Diego residence; (2) in count 7 based on touching Jane Doe 2's buttocks at the San Diego residence; (3) in count 9 based on touching Jane Doe 2's vagina "skin to skin" at the Riverside County residence; and (4) in count 10 based on touching Jane Doe 2's vagina "over the clothes, the first time" at the

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"[Prosecutor]: You told the detectives you were playing piggyback or goofy games and that you had touched her — and this was at the [Riverside County] house — you touched her on her vagina on that occasion.

"[Amezcua]: I think so.

"[Prosecutor]: And then they asked you how many more times it happened. You said three more times at the [Riverside County] house; is that correct?

"[Amezcua]: I remember two situations with [Jane Doe 2], just two situations."

3 The People eventually dismissed the remaining counts.

Riverside County residence. The jury also made a true finding that Amezcua's crimes were committed against more than one victim. (§§ 667.61, subds. (b), (c), (e), 1203.066, subd. (a)(7).)

The trial court sentenced Amezcua to prison for a term of 45 years to life. Specifically, the trial court ordered that the 15-year-to-life terms for counts 2, 6 and 9 run consecutively to each other, and that the 15-year-to-life terms for counts 7 and 10 run concurrently to the other counts, along with a concurrent determinate term of eight years on count 4.

II

DISCUSSION

A. Based on the Corpus Delicti Rule, the Evidence Was Sufficient to Support the Convictions in Counts 6, 7, 9 and 10

We first consider Amezcua's contention that the evidence was insufficient to convict him of three of the counts alleging lewd acts against Jane Doe 2 (counts 7, 9 & 10) because the prosecution did not establish the corpus delicti of those offenses and improperly premised the convictions solely on Amezcua's extrajudicial statements.

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.) "Though no statute or constitutional principle requires it, California, like most American jurisdictions, has historically adhered to the rule that the . . . corpus delicti . . . cannot be proved by *exclusive* reliance on the defendant's extrajudicial statements." (*Id*. at p. 1165.) Put

another way, "[t]he corpus delicti rule requires the prosecution to prove that 'the charged crime actually happened' *exclusive of the accused's extrajudicial statements*." (*People v. Ray* (1996) 13 Cal.4th 313, 342, italics added.) "This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, *of a crime that never happened*." (*Alvarez, supra*, at p. 1169, italics added.)

Although the corpus delicti rule requires that the prosecution present proof that a crime occurred *independent* of the defendant's extrajudicial statements, "[t]he independent proof may be by circumstantial evidence [citation], and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. [Citation.] If the independent proof meets this threshold requirement, the accused's admissions may then be considered to strengthen the case on all issues." (*People v. Alcala* (1984) 36 Cal.3d 604, 624-625.)

In *People v. Jennings* (1991) 53 Cal.3d 334, 368, the court explained the minimal burden of proof required for corpus delicti, and the reasons for the rule. The court said:

> "We reemphasize that the quantum of evidence the People must produce in order to satisfy the corpus delicti rule is quite modest; case law describes it as a 'slight or prima facie' showing. [Citations.] This minimal standard is better understood when we consider that the purpose of the corpus delicti rule is 'to protect the defendant against the possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator.' [Citation.] As one court explained, 'Today's judicial retention of the rule reflects the continued fear that confessions may be the result of either improper police activity or the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically.' " (*Id.* at p. 368.)

We infer from the court's comments that proof of corpus delicti is not intended to verify each detail of a defendant's out-of-court statements; rather it is to avoid false confessions, particularly those that might arise from the pressure of police interrogation. Consistent with the policy underlying the rule, courts in child molestation cases involving multiple acts, have not required count-by-count proof of corpus delicti. In *People v. Tompkins* (2010) 185 Cal.App.4th 1253 (*Tompkins*), the court squarely held that "separate evidence is not required as to each individual count to establish the corpus delicti; rather, evidence that multiple molestations took place will establish the corpus delicti for multiple counts." (*Id.* at p. 1260.)

The approach taken in *Tompkins, supra*, 185 Cal.App.4th 1253 is based on the observation that "[t]he testimony of young children concerning a series of events cannot be as perfect as a phonographic record thereof. It would practically close the doors against the prosecution of many of such wrongs if girls of tender years were required to give detailed and unvarying description of each transaction and its circumstances." (*People v. Durfee* (1947) 79 Cal.App.2d 632, 634.)[4]

In *Tompkins*, the defendant was convicted of multiple counts of lewd acts against his minor daughter and argued that based on the corpus delicti rule, he should not have

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4 Similar to the liberal approach taken in cases considering whether the corpus delicti rule has been satisfied in child molestation cases, when sufficiency of the evidence of a child molestation conviction is challenged, courts apply the rule that a defendant may properly be convicted of acts of child molestation based on a witness's testimony that the defendant *generally* molested her in a specific manner over the course of time, even if the witness is unable to provide *details* about "precise date, time, place or circumstance." (*People v. Jones* (1990) 51 Cal.3d 294, 315.)

been convicted of six of the counts because "the only evidence to support those counts was his own statements" to an investigator, in which he described the specific acts of molestation. (*Tompkins*, *supra*, 185 Cal.App.4th at p. 1259.) *Tompkins* concluded that because the victim's testimony generally described numerous instances of molestation, including that "defendant molested her more than once but less than 50 times, [that] she had visitation with defendant approximately every other weekend during that period, and defendant molested her on some, but not all, of those visits," and she also told an investigator that the defendant had touched her " 'on many occasions,' " the evidence "was amply sufficient" to establish the corpus delicti for the six specific counts of molestation that defendant challenged. (*Id*. at p. 1260.)

In *People v. Culton* (1992) 11 Cal.App.4th 363 (*Culton*), the corpus delicti for the defendant's conviction for 10 counts of committing a lewd act on a child was supplied by expert medical testimony from a doctor who performed a forensic genital examination of the victim. (*Id*. at pp. 365, 368.) Specifically, the doctor testified that the victim's physical condition was consistent with having been abused over a long period of time, which established the corpus delicti for all the offenses. (*Id.* at p. 372.)

Jane Doe 2 did not testify at trial to any of the acts described in counts 7, 9 and 10, as she described only two incidents: one in which Amezcua touched her arms and vagina at the San Diego residence; and one in which Amezcua touched her arms and her chest near the collarbone at the San Diego residence. However, during Amezcua's *own* testimony at trial, he admitted to committing the act charged in count 10, which was

touching Jane Doe 2's vagina "over the clothes, the first time" at the Riverside County residence.

Specifically, as we have described above, Amezcua generally seemed to admit at trial that he touched Jane Doe 2 at his Riverside County residence as he described during his police interview.

> "[Prosecutor]: You told the detectives you were playing piggyback or goofy games and that you had touched her — and this was at the [Riverside County] house — you touched her on her vagina on that occasion.
>
> "[Amezcua]: I think so.
>
> "[Prosecutor]: And then they asked you how many more times it happened. You said three more times at the [Riverside County] house; is that correct?
>
> "[Amezcua]: I remember two situations with [Jane Doe 2], just two situations."

Later in his trial testimony, Amezcua was asked about an admission during his police interview about the first incident at the Riverside County residence, and he *specifically admitted* that he purposely touched Jane Doe 2's vagina on that occasion.

> "[Prosecutor]: Do you remember the detective asking you, can you tell me what happened with [Jane Doe 2]? And then you replied, 'It was again, cuddling, playing. I noticed that -- uh, see if I could touch her, and I did. In the back again, start in the rear end and rubbed her thighs and again in her private part.' You reference that section of your interview. Would it be fair to say that that instance of the touching was not an accident?
>
> "[Amezcua]: Yes, it was not an accident.
>
> "[Prosecutor]: You did it on purpose?
>
> "[Amezcua]: Yes."

Amezcua seeks to distinguish both *Culton, supra,* 11 Cal.App.4th 363 and *Tompkins, supra,* 185 Cal.App.4th 1253, thus arguing his proposed count-by-count

application of corpus delicti in child molestation cases is warranted. We find his proposed distinctions of controlling authority are not persuasive.

Amezcua contends *Culton, supra,* 11 Cal.App.4th 363 is distinguishable because there was medical testimony in that case which supported a finding of child molestation, perhaps on multiple occasions. In this case, there was no medical evidence. However, in *Culton* the defendant was convicted of multiple counts of child molestation, without independent evidence on a count-by-count basis. The court reasoned that the purpose of the corpus delicti rule did not require such an expanded form of corroboration.

Similarly, Amezcua argues *Tompkins, supra,* 185 Cal.App.4th 1253, which like *Culton, supra,* 11 Cal.App.4th 363, was decided by Division Two of our court, is distinguishable. The attempted distinction is that the *Tompkins* case relied on generalized testimony regarding on going child molestation, whereas Jane Doe 2's testimony in this case was specific. Again, we find the proposed distinction is not persuasive.

The court in *Tompkins* was very clear in its analysis of the application of corpus delicti in multiple count child molestation cases. The court said: "We read *Culton*[, *supra,* 11 Cal.App.4th 363] as standing for the proposition that separate evidence is not required as to each individual count to establish the corpus delicti; rather, evidence that multiple molestations took place will establish the corpus delicti for multiple counts." (*Tompkins, supra,* 185 Cal.App.4th at p. 1260.)

We are persuaded by the opinions in *Culton, supra,* 11 Cal.App.4th 363 and *Tompkins, supra,* 185 Cal.App.4th 1253 and follow their reasoning. We also find some independent evidence in Amezcua's testimony. Although Jane Doe 2 testified that no

molestation occurred in Riverside County, Amezcua's testimony provides some independent evidence of such acts.

As we have quoted above, Amezcua testified that some "playful activities" involving Jane Doe 2, including touching her vagina, occurred in Riverside County. Jane Doe 2 also testified there was only one occasion of molestation, and that occurred in San Diego. Again, as we have quoted above, Amezcua testified there were "two instances" involving the touching of Jane Doe 2. Although Amezcua's testimony was often vague or inconsistent, a reasonable jury could conclude his testimony provided some independent evidence that Jane Doe 2 was molested twice, once in Riverside County and once in San Diego.

Based on the controlling appellate authority and on drawing all reasonable inferences in favor of the decision of the trier of fact, we are satisfied that the challenged conviction for counts involving Jane Doe 2 are supported by sufficient evidence of corpus delicti. Accordingly, we reject Amezcua's arguments to the contrary.

B. Substantial Evidence Supports a Finding That Amezcua Touched Jane Doe 2 with Sexual Intent

Amezcua contends that none of the lewd act convictions arising out of his touching of Jane Doe 2 are supported by sufficient evidence because the evidence does not support a finding that he performed the touching with any sexual intent.

In considering a challenge to the sufficiency of the evidence, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—

from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

Amezcua was convicted of committing lewd acts against a child under section 288, subdivision (a) for touching Jane Doe 2's vagina. That provision makes it a crime when "any person . . . willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child."

"[S]ection 288 'prohibits *all* forms of sexually motivated contact with an underage child. . . .' [Citation.] Thus, any touching of a child under the age of 14 is a felony offense 'even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the *intent* to arouse or gratify the sexual desires of either the perpetrator or the victim.' [Citations.] . . . [¶] To determine whether a defendant acted with sexual intent, all the circumstances are examined. Relevant factors include the nature and manner of the touching, the defendant's extrajudicial statements, the relationship of the parties and 'any coercion, bribery or deceit used to obtain the victim's cooperation or avoid detection.'

[Citation.] The requisite intent 'must be inferred from all the circumstances . . . .' " (*In re R.C.* (2011) 196 Cal.App.4th 741, 749-750.)

Here, substantial evidence supports a finding that Amezcua acted with sexual intent in touching Jane Doe 2 . The strongest evidence of Amezcua's intent in touching Jane Doe 2 is found in his own admissions during the police interview. Amezcua told the police that he was "aroused," although without an erection, when he touched Jane Doe 1 and Jane Doe 2. Further, Jane Doe 1 testified that Amezcua's penis was erect when he made her touch it during the molestations. From this testimony, a reasonable juror could infer that touching young girls is arousing to Amezcua because it is sexually stimulating to him, and that is why he committed the acts.

Although Amezcua attempted during his trial testimony to minimize his admission to being "aroused" during the molestations by claiming that he meant "aroused in the sense of thinking, I shouldn't be doing this," and claimed that he did not touch Jane Doe 2 for any sexual purpose, it was for the jury to decide whether to credit Amezcua's trial testimony on that issue. A reasonable juror could decide that Amezcua's attempt to minimize his admission to police was not credible because it contradicted his earlier statements and there is no sensible explanation for why someone in Amezcua's position would touch a young girl's vagina except for the purpose of sexual stimulation.

Amezcua's sexual intent in touching Jane Doe 2 is also shown by evidence supporting a finding that Amezcua knew that what he was doing was wrong. Specifically, (1) Amezcua told Jane Doe 2 not to tell anyone about the touching; (2) Amezcua admitted that he knew he was "not supposed to do this" while he was

touching Jane Doe 2; and (3) Amezcua described his thought process upon initiating the molestation as "[my] stupid brain would take me down that way." A reasonable juror could infer that because Amezcua viewed his acts as improper, because the touching involved a young girl in various places, including her vagina, and Amezcua used the word "aroused" when explaining his state of mind, Amezcua was doing the acts with sexual intent.

In sum, under the totality of the circumstances, we conclude that ample evidence supports a finding that Amezcua's touching of Jane Doe 2 was done "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." (§ 288, subd. (a).)

C. There Was No Prosecutorial Misconduct

Amezcua contends, for the first time on appeal, that the prosecutor committed misconduct during closing argument by reason of his discussion of proof requirements for corpus delicti as to some of the counts regarding Jane Doe 2. Amezcua did not object to the prosecutor's arguments in the trial court. He claims an objection would have been futile and if the issue has been forfeited, that trial counsel provided ineffective assistance.

We will find the issues regarding the prosecutor's arguments have been forfeited by failure to raise them in the trial court. We will also find Amezcua has not established ineffective assistance of counsel. Thus, we will reject his contentions regarding alleged prosecutorial misconduct.

Where a prosecutor uses deceptive or reprehensible methods to attempt to persuade a jury, he or she has committed misconduct. (*People v. Fuvia* (2012) 53

Cal.4th 622, 679.) However, a defendant may not raise an issue regarding the prosecutor's arguments for the first time on appeal. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Failure to timely object can be excused only where an objection would have been futile or where the harm caused by the prosecutor's argument cannot be cured by objection. (*Fuvia, supra,* at p. 679; *People v. Jablonski* (2006) 37 Cal.4th 774, 835*; People v. Morales* (2001) 25 Cal.4th 34, 43-44.)

During closing arguments, the prosecutor said that he could prove corpus delicti of the offenses involving Jane Doe 2 by showing multiple molestations of her had occurred. Amezcua now claims such comments were erroneous and caused him prejudice. He recognizes failure to object during argument ordinarily forfeits the claim. Amezcua claims, without support in the record, that an objection would have been futile. We find nothing in the record to show that timely objection and admonition would not have cured any alleged error. The jury had been properly instructed on the principles of corpus delicti, and they had been told the judge was the person who stated the law, not the attorneys. We find nothing in the record to justify relieving Amezcua of the application of the long established rule that failure to timely object to arguments results in forfeiture of the issue. Accordingly, we do not discuss the merits of Amezcua's contentions on this issue.

In order to avoid the impact of forfeiture, appellate counsel offers the usual backup argument that trial counsel was ineffective for failing to object. We also reject this contention.

In order to establish ineffective assistance of trial counsel, an appellant must first show that counsel's performance fell below the appropriate standard of care, i.e., a significant error or failure to act. Once error is shown, the defendant must also show prejudice by establishing that there is a reasonable likelihood a more favorable result would have occurred in the absence of counsel's failure. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Amezcua has not met his burden on this issue.

There is nothing in this record to explain why trial counsel did not object to the argument, which has been identified on appeal. Given the considerable deference afforded to trial counsel's tactical decisions we have nothing from which we can assess counsel's performance on this record. As our Supreme Court has pointed out it is often difficult on appeal to assess counsel's failure to take some action that appellate counsel now deems necessary. In *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267-268, the court noted that in such cases the appellant's remedy, if any, is by way of a petition for writ of habeas corpus.

We find it unnecessary to address the prejudice prong of *Strickland v. Washington, supra,* 466 U.S. 668, other than to observe the challenged comments of the prosecutor are almost quotes from *Culton, supra,* 11 Cal.App.4th at page 367, and *Tompkins, supra,* 185 Cal.App.4th at page 1260. The current record presents no discernable prejudice to the defendant.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

I CONCUR:

O'ROURKE, J.

IRION, J., Dissenting.

I disagree with my colleagues' analysis of the corpus delicti challenge raised in Amezcua's appeal. As I will explain, application of the relevant case law on the corpus delicti rule leads me to conclude that counts 7 and 9 are not supported by sufficient evidence. I would accordingly reverse the judgment as to those counts.

I agree with my colleagues that "[t]he corpus delicti rule requires the prosecution to prove that 'the charged crime actually happened' *exclusive of the accused's extrajudicial statements*." (*People v. Ray* (1996) 13 Cal.4th 313, 342, italics added.) I further agree that case law establishes that the corpus delicti rule may be applied in a liberal manner in child molestation cases. (*People v. Tompkins* (2010) 185 Cal.App.4th 1253 (*Tompkins*); *People v. Culton* (1992) 11 Cal.App.4th 363 (*Culton*).) Specifically, in child molestation cases "separate evidence is not required as to each individual count to establish corpus delicti; rather, evidence that *multiple molestations took place* will establish corpus delicti for multiple counts." (*Tompkins*, at p. 1260, italics added.)

In *Tompkins*, the corpus delicti rule was satisfied for the six specific counts of molestation alleged against the defendant because the victim testified in a general manner about numerous instances of molestation, including that "defendant molested her more than once but less than 50 times, she had visitation with defendant approximately every other weekend during that period, and defendant molested her on some, but not all, of those visits," and she told an investigator that the defendant had touched her " 'on many occasions.' " (*Tompkins*, *supra*, 185 Cal.App.4th at p. 1260.) Similarly in *Culton*, the

corpus delicti rule was satisfied for the 10 counts of lewd acts alleged against the defendant because a doctor testified that based on his physical examination of the victim, her condition was consistent with being molested multiple times. (*Culton*, *supra*, 11 Cal.App.4th at p. 372.)

The rule established in *Tompkins* and *Culton* is that when a victim of child molestation is unable to provide an exact description of each instance of molestation, proof of the corpus delicti for multiple counts of molestation will be satisfied by evidence that the victim was sexually molested on *multiple unspecified occasions*. The rule exists because "[i]t would practically close the doors against the prosecution of many of such wrongs if girls of tender years were required to give detailed and unvarying description of each transaction and its circumstances." (*People v. Durfee* (1947) 79 Cal.App.2d 632, 634.) Thus, for instance, in this case if Jane Doe 2 had been unable to recall how many times Amezcua molested her and was unable to relate the details of the molestation, but she was able to testify *in general* that Amezcua molested her on multiple occasions over a period of time, that evidence would amply satisfy the requirements of the corpus delicti rule because it would establish that "multiple molestations took place." (*Tompkins*, *supra*, 185 Cal.App.4th at p. 1260.)

However, that is simply not the evidence presented in this case. To the contrary, Jane Doe 2 was able to remember the molestation in detail and was very clear in testifying that Amezcua touched her *on only two specific occasions*. In describing those two occasions, Jane Doe 2 unambiguously testified that the molestation was not perpetrated on an ongoing basis or on multiple unspecified occasions. In fact, when

asked whether "there was a third time that [Amezcua] touched you that made you uncomfortable," Jane Doe 2 clearly answered, "No."[1]

My colleagues suggest that Amezcua's testimony could be interpreted to provide evidence that Amezcua molested Jane Doe 2 on an ongoing basis on multiple occasions because he referred to engaging in "playful" activities with Jane Doe 2. I disagree. The testimony to which my colleagues refer occurred during defense counsel's examination of Amezcua. In an attempt to develop Amezcua's defense that he did not touch the girls in a sexual manner, defense counsel first asked Amezcua about his intent in touching Jane Doe 1, and Amezcua answered that he always touched her in a "playful manner." Turning to the subject of Jane Doe 2, defense counsel asked, "What kind of touchings occurred with [Jane Doe 2]?" Amezcua answered, "[Jane Doe 2] was, again, always in a playful manner." During this portion of his testimony, Amezcua said nothing in my view that could be taken as an admission that he molested Jane Doe 2 on multiple unspecified occasions over the course of time. Indeed, when specifically asked by the prosecutor how many times he molested Jane Doe 2, Amezcua stated, "I remember two situations with [Jane Doe 2], just two situations."

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1 My colleagues accurately summarize the content of Jane Doe 2's testimony, acknowledging that Jane Doe 2 testified Amezcua touched her on two occasions. Specifically, Amezcua touched her vagina on only one occasion and on the second occasion, Amezcua caressed her arm and also touched her chest near her collarbone but did not touch her vagina. As my colleagues recognize, "[w]hen the prosecutor followed up as to whether Amezcua had molested Jane Doe 2 on more than two occasions, Jane Doe 2 stated that there was no third occasion on which Amezcua molested her." (Maj. opn, *ante*, at p. 4.)

Accordingly, in this case there is simply no evidence that Amezcua committed multiple molestations of Jane Doe 2 on unspecified occasions over the course of time sufficient to satisfy the liberal approach to the corpus delicti rule for child molestation cases as described in *Tompkins* and *Culton*.

As the exception to the corpus delicti rule described in *Tompkins* and *Culton* does not apply here, in my view the correct analysis is to determine whether, under the normally applicable corpus delicti rules, the evidence presented at trial — apart from Amezcua's extrajudicial statements — creates a reasonable inference that Amezcua committed the lewd acts alleged in counts 7, 9 and 10.[2]

Turning to those three counts, count 7 was based on the finding that Amezcua touched Jane Doe 2's buttocks at the San Diego residence; count 9 was based on the finding that Amezcua touched Jane Doe 2's vagina "skin to skin" at the Riverside County residence; and count 10 was based on the finding that Amezcua touched Jane Doe 2's vagina "over the clothes, the first time" at the Riverside County residence.

As an initial matter, I would note that Jane Doe 2's testimony does not supply evidence to satisfy the corpus delicti rule as to the challenged counts because, as my colleagues accurately point out, "Jane Doe 2 did not testify at trial to any of the acts described in counts 7, 9 and 10, as she described only two incidents: one in which Amezcua touched her arms and vagina at the San Diego residence; and one in which

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[2] Amezcua does not argue that the corpus delicti rule bars his conviction for the lewd act charged in count 6, consisting of touching Jane Doe 2's vagina at the San Diego residence, as Jane Doe 2's testimony provided evidence of that count.

Amezcua touched her arms and her chest near the collarbone at the San Diego residence." (Maj. opn, *ante*, at p. 10.)

However, Amezcua's own trial testimony provides evidence to satisfy the corpus delicti rule for count 10 because it creates a reasonable inference that Amezcua touched Jane Doe 2's vagina, over her clothes, at the Riverside County residence. Specifically, Amezcua admitted at trial that he touched Jane Doe 2 at his Riverside County residence on two occasions:

> "[Prosecutor]: You told the detectives you were playing piggyback or goofy games and that you had touched her — and this was at the [Riverside County] house — you touched her on her vagina on that occasion.
>
> "[Amezcua]: I think so.
>
> "[Prosecutor]: And then they asked you how many more times it happened. You said three more times at the [Riverside County] house; is that correct?
>
> "[Amezcua]: I remember two situations with [Jane Doe 2], just two situations."

Amezcua also admitted that he purposely touched Jane Doe 2's vagina during the first incident at the Riverside County residence:

> "[Prosecutor]: Do you remember the detective asking you, can you tell me what happened with [Jane Doe 2]? And then you replied, 'It was again, cuddling, playing. I noticed that -- uh, see if I could touch her, and I did. In the back again, start in the rear end and rubbed her thighs and again in her private part.' You reference that section of your interview. Would it be fair to say that that instance of the touching was not an accident?
>
> "[Amezcua]: Yes, it was not an accident.
>
> "[Prosecutor]: You did it on purpose?
>
> "[Amezcua]: Yes."

Amezcua denied at trial that he ever touched Jane Doe's vagina in a skin-to-skin touching. Therefore, his trial testimony about the incidents involving Jane Doe 2 at the Riverside County residence must be understood as an admission of a touching over Jane Doe 2's clothes.

Based on these admissions during Amezcua's trial testimony, sufficient evidence *independent* of Amezcua's extrajudicial statements, supports a finding that Amezcua committed the crime of touching Jane Doe 2's vagina, over her clothes, at the Riverside County residence as charged in count 10. Accordingly, the corpus delicti rule does *not* undermine Amezcua's conviction in count 10.

However, no evidence was presented at trial, independent of Amezcua's extrajudicial statements, that Amezcua touched Jane Doe 2's buttocks at the San Diego residence as alleged in count 7 or that he touched Jane Doe's vagina, skin-to-skin at the Riverside County residence as alleged in count 9. Neither Jane Doe 2's trial testimony nor Amezcua's trial testimony described such acts. The only evidence that such acts occurred is in Amezcua's extrajudicial statements. Accordingly, the convictions in counts 7 and 9 are *not* supported by sufficient evidence due to the operation of the corpus delicti rule.

I would therefore reverse the convictions in counts 7 and 9 because, due to the corpus delicti rule, they are not supported by substantial evidence.

IRION, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

03/10/2017

KEVIN J. LANE, CLERK

By Deputy Clerk

APPENDIX E
CIVIL DOCKETS FOR DISTRICT COURT AND NINTH CIRCUIT

APPEAL,CLOSED,HABEAS,HabeasPSLC,REOPEN

U.S. District Court
Southern District of California (San Diego)
CIVIL DOCKET FOR CASE #: 3:18-cv-01317-GPC-MSB

Amezcua v. Lizarraga et al
Assigned to: Judge Gonzalo P. Curiel
Referred to: Magistrate Judge Michael S. Berg
Case in other court: USCA, 19-55910
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 06/18/2018
Date Terminated: 05/29/2019
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Carlos Amezcua
AY6574
Mule Creek State Prison
P.O. Box 409060
Ione, CA 95640

represented by **Charles R. Khoury , Jr**
Law Offices of Charles R. Khoury
P.O. Box 791
Del Mar, CA 92014
(858) 764-0644
Fax: (858) 876-1977
Email: charliekhouryjr@yahoo.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Respondent

Joe A. Lizarraga
Warden

represented by **Attorney General**
State of California
Office of the Attorney General
600 West Broadway
Suite 1800
San Diego, CA 92101-3702
(619)645-2076
Fax: (619)645-2313
Email: docketingsdawt@doj.ca.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jennifer Anne Jadovitz
Office of the Attorney General
600 West Broadway
Suite 1800
San Diego, CA 92101
(619) 738-9213
Email: jennifer.jadovitz@doj.ca.gov

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Respondent

Xavier Becerra
The Attorney General of the State of California, Additional Respondant

represented by **Attorney General**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/18/2018	1	Petition for Writ of Habeas Corpus against Xavier Becerra, Joe A. Lizarraga, filed by Carlos Amezcua. ($5 Filing Fee, Fee Not Paid, IFP Not Filed) (Attachments: # 1 Civil Cover Sheet) The new case number is 3:18-cv-1317-GPC-NLS. Judge Gonzalo P. Curiel and Magistrate Judge Nita L. Stormes are assigned to the case.[*Case in Screening*] (jms) (Entered: 06/19/2018)
06/26/2018	2	ORDER DISMISSING CASE Without Prejudice. If Petitioner wishes to proceed with this case, he must submit, no later than August 24, 2018, a copy of this Order with the $5.00 fee or with adequate proof of his inability to pay the fee. Signed by Judge Gonzalo P. Curiel on 6/26/18.(All non-registered users served via U.S. Mail Service & blank IFP form mailed to Petitioner)(dlg) (Entered: 06/26/2018)
06/26/2018	3	Fee for Habeas Petition: Paid on 6/26/2018. (Receipt Number: 101839) (no document attached) (jms) (Entered: 06/26/2018)
07/10/2018	4	Order Reopening Case and Setting Briefing Schedule - Motion to Dismiss due 8/31/18 Opposition to Motion due 10/1/18 OR Answer by Respondent due 8/31/2018 Traverse by Petitioner due 10/1/2018. Signed by Magistrate Judge Nita L. Stormes on 7/5/18.(All non-registered users served via U.S. Mail Service)(NEF regenerated to send Petition to Attorney General) (dlg) (Entered: 07/10/2018)
07/24/2018	5	NOTICE of Appearance by Jennifer Anne Jadovitz on behalf of Joe A. Lizarraga (Jadovitz, Jennifer)Attorney Jennifer Anne Jadovitz added to party Joe A. Lizarraga(pty:res) (jms). (Entered: 07/24/2018)
08/31/2018	6	RESPONSE to 1 Petition for Writ of Habeas Corpus, by Joe A. Lizarraga. (Attachments: # 1 Memo of Points and Authorities Memo of P's And A's)(Jadovitz, Jennifer) (dsn) (Entered: 08/31/2018)
08/31/2018	7	NOTICE of Lodgment of State Court Record by Joe A. Lizarraga re 6 Response to Habeas Petition (Attachments: # 1 Lodgment 1, # 2 Lodgment 2 - RT 1 of 5, # 3 Lodgment 2 - RT 2 of 5, # 4 Lodgment 2 - RT 3 of 5, # 5 Lodgment 2 - RT 4 of 5, # 6 Lodgment 2 - RT 5 of 5, # 7 Lodgment 3, # 8 Lodgment 4, # 9 Lodgment 5, # 10 Lodgment 6, # 11 Lodgment 7, # 12 Lodgment 8)(Jadovitz, Jennifer) (dsn) (Entered: 08/31/2018)
11/06/2018	8	ORDER OF TRANSFER. Magistrate Judge Nita L. Stormes is no longer assigned. Case reassigned to Magistrate Judge Michael S. Berg for all further proceedings.

		The new case number is 18cv01317-GPC-MSB. Signed by Magistrate Judge Nita L. Stormes on 11/6/18.(All non-registered users served via U.S. Mail Service)(dlg) (Entered: 11/07/2018)
05/29/2019	9	ORDER: (1) Denying Petition for Writ of Habeas Corpus and (2) Granting Certificate of Appealability in Part and Denying in Part. Signed by Judge Gonzalo P. Curiel on 5/29/2019. (All non-registered users served via U.S. Mail Service) (tcf) (jao). (Entered: 05/29/2019)
05/29/2019	10	CLERK'S JUDGMENT. IT IS SO ORDERED AND ADJUDGED that the Court DENIES the petition for writ of habeas corpus and GRANTS a limited certificate ofappealability as to claim one and DENIES a certificate of appealability as to claims two, three and four. (All non-registered users served via U.S. Mail Service) (tcf) (jao). (Entered: 05/29/2019)
07/25/2019	11	MOTION re 10 Clerk's Judgment, by Carlos Amezcua. (Attachments: # 1 Declaration of assisting atty, # 2 Declaration of sister to petitioner, # 3 Declaration second dec of sister, # 4 Memo of Points and Authorities)(Khoury, Charles)Attorney Charles R. Khoury, Jr added to party Carlos Amezcua(pty:pet) (jms). Modified on 7/31/2019 (dlg). (Entered: 07/25/2019)
07/31/2019	12	ORDER granting 11 Petitioner's Motion to Re-Open Time to Appeal. Accordingly, pursuant to Federal Rule of Appellate Procedure 4(a)(6), Petitioner has 14 days from the date of entry of the instant Order to file his notice of appeal of the order entering judgment on May 29, 2019 denying his petition for writ of habeas corpus and granting a limited certificate of appealability as to Claim One and denying a certificate of appealability as to claims two, three and four. Signed by Judge Gonzalo P. Curiel on 7/31/2019. (akr) (Entered: 07/31/2019)
08/02/2019	13	MOTION for Leave to Appeal in forma pauperis by Carlos Amezcua. (Attachments: # 1 Declaration for IFP status)(Khoury, Charles). (akr). (Entered: 08/02/2019)
08/02/2019	14	NOTICE OF APPEAL to the 9th Circuit as to 10 Clerk's Judgment by Carlos Amezcua. IFP Filed. (Notice of Appeal electronically transmitted to the US Court of Appeals.) (Khoury, Charles). (Modified on 8/2/2019: In 9 Order, the US District Court granted in part a Certificate of Appealability.) (akr). (Entered: 08/02/2019)
08/02/2019	15	ORDER denying 13 Petitioner's Motion for In Forma Pauperis Status. Petitioner has failed to comply with the requirements of Rule 24(a)(1). Accordingly, the Court DENIES Petitioner's request for in forma pauperis in this Court. Signed by Judge Gonzalo P. Curiel on 8/2/2019. (Order electronically transmitted to the US Court of Appeals. All non-registered users served via U.S. Mail Service.) (akr) (Entered: 08/02/2019)
08/05/2019	16	USCA Case Number 19-55910 for 14 Notice of Appeal to the 9th Circuit filed by Carlos Amezcua. (akr) (Entered: 08/05/2019)
08/05/2019	17	USCA Time Schedule Order as to 14 Notice of Appeal to the 9th Circuit filed by Carlos Amezcua. (akr) (Entered: 08/05/2019)
10/28/2019	18	ORDER of USCA as to 14 Notice of Appeal to the 9th Circuit filed by Carlos Amezcua. Appellant's motion for leave to proceed in forma pauperis is granted. The Clerk shall change the docket to reflect appellant's in forma pauperis status.

		The motion of Charles R. Khoury Jr., Esq., for leave to withdraw as retained counsel of record and to be appointed under the Criminal Justice Act is granted. Briefing schedule issued. (akr) (Entered: 10/28/2019)
04/03/2020	19	ORDER of USCA as to 14 Notice of Appeal to the 9th Circuit filed by Carlos Amezcua. Appellant's unopposed motion for an extension of time to file the opening brief is granted. Briefing schedule issued. (akr) (Entered: 04/03/2020)
04/06/2020	20	ORDER of USCA as to 14 Notice of Appeal to the 9th Circuit filed by Carlos Amezcua. Appellant's motion for an extension of time to file the opening brief is granted. Briefing schedule issued. (akr) (Entered: 04/06/2020)
06/02/2020	21	ORDER of USCA as to 14 Notice of Appeal to the 9th Circuit filed by Carlos Amezcua. Appellant's unopposed motion for an extension of time to file the opening brief is granted. Briefing schedule issued. Any further motion for an extension of time to file the opening brief is disfavored. (akr) (Entered: 06/02/2020)

PACER Service Center

Transaction Receipt

07/25/2020 15:04:00

PACER Login:	charliekhouryjr	**Client Code:**	AMEZCUA
Description:	Docket Report	**Search Criteria:**	3:18-cv-01317-GPC-MSB
Billable Pages:	4	**Cost:**	0.40
Exempt flag:	Exempt	**Exempt reason:**	Exempt CJA

PACER fee: Exempt Change

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 19-55910
Nature of Suit: 3530 Habeas Corpus
Carlos Amezcua v. Joe Lizarraga, et al
Appeal From: U.S. District Court for Southern California, San Diego
Fee Status: IFP

Docketed: 08/05/2019
Termed: 04/16/2021

Case Type Information:
1) prisoner
2) state
3) 2254 habeas corpus

Originating Court Information:
District: 0974-3 : 3:18-cv-01317-GPC-MSB
Trial Judge: Gonzalo P. Curiel, District Judge
Date Filed: 06/18/2018

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
05/29/2019	05/29/2019	08/02/2019	08/02/2019

Prior Cases:
None

Current Cases:
None

CARLOS AMEZCUA (State Prisoner: AY6574) Petitioner - Appellant,	Charles Roger Khoury, Jr., Esquire, Attorney Direct: 858-764-0644 Email: charliekhouryjr@yahoo.com [COR LD NTC CJA Appointment] P.O. Box 791 Del Mar, CA 92014
v.	
JOE A. LIZARRAGA, Warden Respondent - Appellee,	Mary Katherine Strickland, Esquire, Attorney Direct: 619-738-9060 Email: mary.strickland@doj.ca.gov [COR NTC Dep State Aty Gen] AGCA - Office of the Attorney General (San Diego) 600 W Broadway Suite 1800 San Diego, CA 92101
XAVIER BECERRA Respondent - Appellee,	

CARLOS AMEZCUA,

Petitioner - Appellant,

v.

JOE A. LIZARRAGA, Warden; XAVIER BECERRA,

Respondents - Appellees.

08/05/2019	☐ 1 25 pg, 621.17 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: No. The schedule is set as follows: Appellant Carlos Amezcua opening brief due 10/01/2019. Appellees Xavier Becerra and Joe A. Lizarraga, Warden answering brief due 10/31/2019. Appellant's optional reply brief is due 21 days after service of the answering brief. [11386773] (WL) [Entered: 08/05/2019 11:13 AM]
08/05/2019	☐ 2 3 pg, 97.09 KB	Filed Appellant Carlos Amezcua motion to proceed In Forma Pauperis. Deficiencies: None. Served on 08/01/2019. [11386788] (WL) [Entered: 08/05/2019 11:16 AM]
08/19/2019	☐ 3 6 pg, 513.54 KB	Filed (ECF) Appellant Carlos Amezcua Motion for appointment of counsel. Date of service: 08/19/2019. [11402879] [19-55910] (Khoury, Charles) [Entered: 08/19/2019 10:23 PM]
08/31/2019	☐ 4 4 pg, 512.6 KB	Filed (ECF) Appellant Carlos Amezcua Supplemental Motion for appointment of counsel. Date of service: 08/31/2019. [11417675] [19-55910] (Khoury, Charles) [Entered: 08/31/2019 11:20 AM]
09/25/2019	☐ 5 9 pg, 224.93 KB	Filed clerk order (Deputy Clerk: MKN): The court has received appellant's motion to proceed in forma pauperis. The motion, however, is not accompanied by a completed financial affidavit. Within 21 days after the date of this order, appellant shall complete and file a Form 4 financial affidavit. Failure to comply with this order may result in the denial of the motion to proceed in forma pauperis. The briefing schedule for this appeal remains stayed. The Clerk shall serve a Form 4 financial affidavit on appellant. [11443969] (AF) [Entered: 09/25/2019 04:19 PM]
10/12/2019	☐ 6 8 pg, 1.97 MB	Filed (ECF) Appellant Carlos Amezcua Motion to proceed In Forma Pauperis. Date of service: 10/12/2019. [11462939] [19-55910] (Khoury, Charles) [Entered: 10/12/2019 11:41 AM]
10/28/2019	☐ 7 1 pg, 132.5 KB	Filed order (Appellate Commissioner): Appellant's motion for leave to proceed in forma pauperis (Docket Entry Nos. [2] and [6]) is granted. The Clerk shall change the docket to reflect appellant's in forma pauperis status. The motion of Charles R. Khoury Jr., Esq., for leave to withdraw as retained counsel of record and to be appointed under the Criminal Justice Act (Docket Entry Nos. [3] and [4]) is granted. See 18 U.S.C. § 3006A(a)(2)(B); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). The Clerk shall serve a Form CJA 24 and this order on counsel Charles R. Khoury Jr. See 28 U.S.C. § 753(f). The opening brief and excerpts of record are due January 21, 2020; the answering brief is due February 20, 2020; and the optional reply brief is due within 21 days after service of the answering brief. [11480057] (AF) [Entered: 10/28/2019 01:52 PM]
10/29/2019	☐ 8	Criminal Justice Act electronic voucher created. (Counsel: Mr. Charles Roger Khoury, Jr., Esquire for Carlos Amezcua) [11480936] (JN) [Entered: 10/29/2019 07:52 AM]
01/28/2020	☐ 9 5 pg, 66.5 KB	Filed (ECF) Appellant Carlos Amezcua Motion to extend time to file Opening brief until 03/30/2020. Date of service: 01/28/2020. [11576725] [19-55910] (Khoury, Charles) [Entered: 01/28/2020 01:36 PM]
01/28/2020	☐ 10 1 pg, 95.56 KB	Filed clerk order (Deputy Clerk: LBS):Appellant's late unopposed motion [9] for an extension of time to file the opening brief is granted. The opening brief is due March 30, 2020. The answering brief is due April 29, 2020. The optional reply brief is due within 21 days after service of the answering brief. [11576934] (LBS) [Entered: 01/28/2020 02:33 PM]
04/02/2020	☐ 11 4 pg, 52.04 KB	Filed (ECF) Appellant Carlos Amezcua Motion to extend time to file Opening brief until 04/30/2020. Date of service: 04/02/2020. [11650646] [19-55910] (Khoury, Charles) [Entered: 04/02/2020 11:11 PM]
04/03/2020	☐ 12 1 pg, 95.42 KB	Filed clerk order (Deputy Clerk: LBS): Appellant's unopposed motion [11] for an extension of time to file the opening brief is granted. The opening brief is due April 30, 2020. The answering brief is due June 1, 2020. The optional reply brief is due within 21 days after service of the answering brief. [11651403] (LBS) [Entered: 04/03/2020 02:44 PM]
04/03/2020	☐ 13 4 pg, 52.09 KB	Filed (ECF) Appellant Carlos Amezcua Motion to extend time to file Opening brief until 05/29/2020. Date of service: 04/03/2020. [11651514] [19-55910] (Khoury, Charles) [Entered: 04/03/2020 03:33 PM]
04/06/2020	☐ 14 1 pg, 101.69 KB	Filed clerk order (Deputy Clerk: LBS): Appellant's motion (Docket Entry No. [13]) for an extension of time to file the opening brief is granted. The opening brief is due May 29, 2020. The answering brief is due June 29, 2020. The optional reply brief is due within 21 days after service of the answering brief. [11652873] (AF) [Entered: 04/06/2020 02:50 PM]
05/28/2020	☐ 15 4 pg, 52.41 KB	Filed (ECF) Appellant Carlos Amezcua Motion to extend time to file Opening brief until 08/28/2020. Date of service: 05/28/2020. [11703288] [19-55910] (Khoury, Charles) [Entered: 05/28/2020 07:11 AM]
06/02/2020	☐ 16 1 pg, 99.89 KB	Filed order (Appellate Commissioner): Appellant's unopposed motion (Docket Entry No. [15]) for an extension of time to file the opening brief is granted. The opening brief is due July 28, 2020. The answering brief is due August 27, 2020. The optional reply brief is due within 21 days after service of the answering brief. Any further motion for an extension of time to file the opening brief is disfavored. (Pro Mo) [11708796] (AF) [Entered: 06/02/2020 03:28 PM]
07/30/2020	☐ 17 4 pg, 54.9 KB	Filed (ECF) Appellant Carlos Amezcua Motion to file a late brief. Date of service: 07/30/2020. [11771823] [19-55910] (Khoury, Charles) [Entered: 07/30/2020 11:12 AM]

07/30/2020	☐ 18 61 pg, 224.12 KB	Submitted (ECF) Opening Brief for review. Submitted by Appellant Carlos Amezcua. Date of service: 07/30/2020. [11771833] [19-55910] (Khoury, Charles) [Entered: 07/30/2020 11:13 AM]
07/30/2020	☐ 19 759 pg, 20.13 MB	Submitted (ECF) excerpts of record. Submitted by Appellant Carlos Amezcua. Date of service: 07/30/2020. [11771851] [19-55910]--[COURT UPDATE: Attached corrected Volume 5. 08/03/2020 by SML] (Khoury, Charles) [Entered: 07/30/2020 11:17 AM]
08/04/2020	☐ 20 1 pg, 101.44 KB	Filed clerk order (Deputy Clerk: LBS): Appellant's motion (Docket Entry No. [17]) for leave to file the opening brief late is granted. The Clerk will file the opening brief submitted at Docket Entry No. [18]. The answering brief is now due August 31, 2020. The optional reply brief is due within 21 days after service of the answering brief. [11777458] (AF) [Entered: 08/04/2020 04:44 PM]
08/04/2020	☐ 21 2 pg, 96.99 KB	Filed clerk order: The opening brief [18] submitted by Carlos Amezcua is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: blue. The excerpts of record [19] submitted by Carlos Amezcua are filed. Within 7 days of this order, filer is ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [11777493] (LA) [Entered: 08/04/2020 04:55 PM]
08/10/2020	☐ 22	Received 3 paper copies of excerpts of record [19] in 5 volume(s) filed by Appellant Carlos Amezcua. [11783796] (KWG) [Entered: 08/10/2020 04:06 PM]
08/10/2020	☐ 23	Received 6 paper copies of Opening Brief [18] filed by Carlos Amezcua. [11783994] (SD) [Entered: 08/10/2020 05:09 PM]
08/24/2020	☐ 24	Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellee Joe A. Lizarraga. New requested due date is 09/30/2020. [11799264] [19-55910] (Jadovitz, Jennifer) [Entered: 08/24/2020 08:09 AM]
08/24/2020	☐ 25	**Streamlined request [24] by Appellee Joe A. Lizarraga to extend time to file the brief is approved. Amended briefing schedule: Appellees Xavier Becerra and Joe A. Lizarraga, Warden answering brief due 09/30/2020. The optional reply brief is due 21 days from the date of service of the answering brief.** [11800113] (DLM) [Entered: 08/24/2020 12:28 PM]
09/22/2020	☐ 26 3 pg, 17.7 KB	Filed (ECF) Appellee Joe A. Lizarraga Motion to extend time to file Answering brief until 10/30/2020. Date of service: 09/22/2020. [11832969] [19-55910] (Jadovitz, Jennifer) [Entered: 09/22/2020 01:46 PM]
09/23/2020	☐ 27 1 pg, 96.14 KB	Filed clerk order (Deputy Clerk: LBS): Appellees' unopposed motion [11833235-2] for an extension of time to file the answering brief is granted. The answering brief is due October 30, 2020. The optional reply brief is due within 21 days after service of the answering brief. [11834347] (LBS) [Entered: 09/23/2020 12:50 PM]
10/30/2020	☐ 28 37 pg, 142.94 KB	Submitted (ECF) Answering Brief for review. Submitted by Appellees Xavier Becerra and Joe A. Lizarraga. Date of service: 10/30/2020. [11877395] [19-55910] (Jadovitz, Jennifer) [Entered: 10/30/2020 02:23 PM]
10/30/2020	☐ 29 18 pg, 942.79 KB	Submitted (ECF) supplemental excerpts of record. Submitted by Appellees Xavier Becerra and Joe A. Lizarraga. Date of service: 10/30/2020. [11877401] [19-55910] (Jadovitz, Jennifer) [Entered: 10/30/2020 02:25 PM]
11/02/2020	☐ 30 2 pg, 97.03 KB	Filed clerk order: The answering brief [28] submitted by Xavier Becerra and Joe A. Lizarraga is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: red. The supplemental excerpts of record [29] submitted by Xavier Becerra and Joe A. Lizarraga are filed. Within 7 days of this order, filer is ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [11878485] (LA) [Entered: 11/02/2020 10:05 AM]
11/09/2020	☐ 35	Received 3 paper copies of supplemental excerpts of record [29] in 1 volume(s) filed by Appellees Xavier Becerra and Joe A. Lizarraga. [11960663] (LA) [Entered: 01/12/2021 11:29 AM]
11/09/2020	☐ 36	Received 6 paper copies of Answering Brief [28] filed by Xavier Becerra and Joe A. Lizarraga. [11960692] (SD) [Entered: 01/12/2021 11:39 AM]
11/15/2020	☐ 31 4 pg, 62.3 KB	Filed (ECF) Appellant Carlos Amezcua Motion to extend time to file Reply brief until 12/21/2020. Date of service: 11/15/2020. [11893301] [19-55910] (Khoury, Charles) [Entered: 11/15/2020 10:39 AM]
11/17/2020	☐ 32 1 pg, 94.68 KB	Filed clerk order (Deputy Clerk: LBS): Appellant's unopposed motion [31] for an extension of time to file the reply brief is granted. The reply brief is due December 21, 2020. [11896579] (LBS) [Entered: 11/17/2020 04:31 PM]
12/04/2020	☐ 33	This case is being considered for an upcoming oral argument calendar in Pasadena Please review the Pasadena sitting dates for April 2021 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates,

		please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully. When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: Correspondence to Court; **Subject**: request for mediation).[11915039]. [19-55910] (AW) [Entered: 12/04/2020 10:51 AM]
12/21/2020	☐ 34 5 pg, 55.18 KB	Filed (ECF) Appellant Carlos Amezcua Motion to extend time to file Reply brief until 01/20/2021. Date of service: 12/21/2020. [11934882] [19-55910] (Khoury, Charles) [Entered: 12/21/2020 12:03 PM]
01/20/2021	☐ 37	Filed text clerk order (Deputy Clerk: AF): Appellant's motion to file a late reply brief, Dkt. [34], is granted. [11969891] (AF) [Entered: 01/20/2021 02:22 PM]
01/20/2021	☐ 38 12 pg, 96.3 KB	Submitted (ECF) Reply Brief for review. Submitted by Appellant Carlos Amezcua. Date of service: 01/20/2021. [11974174] [19-55910] (Khoury, Charles) [Entered: 01/20/2021 10:50 PM]
01/21/2021	☐ 39 2 pg, 96.51 KB	Filed clerk order: The reply brief [38] submitted by Carlos Amezcua is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be submitted to the principal office of the Clerk. [11974655] (LA) [Entered: 01/21/2021 10:48 AM]
01/28/2021	☐ 40	Received 6 paper copies of Reply Brief [38] filed by Carlos Amezcua. (sent to panel) [11984976] (SD) [Entered: 01/28/2021 02:28 PM]
01/31/2021	☐ 41	Notice of Oral Argument on Wednesday, April 14, 2021 - 09:00 A.M. - Courtroom 3 - Scheduled Location: Pasadena CA. The hearing time is the local time zone at the scheduled hearing location, even if the argument is fully remote. View the Oral Argument Calendar for your case here. NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. *See* Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, any argument may be held **remotely** with all of the judges and attorneys appearing by video or telephone. Travel to a courthouse will not be required. If the panel determines that it will hold oral argument, the Clerk's Office will be in contact with you directly at least two weeks before the set argument date to make any necessary arrangements for remote appearance. Be sure to review the GUIDELINES for important information about your hearing, including when to be available (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). If you are the specific attorney or self-represented party who will be arguing, use the **ACKNOWLEDGMENT OF HEARING NOTICE** filing type in CM/ECF no later than 21 days before Wednesday, April 14, 2021. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice.[11987035]. [19-55910] (AW) [Entered: 01/31/2021 06:10 AM]
03/10/2021	☐ 42	Filed (ECF) notice of appearance of Mary K. Strickland (Office of the Attorney General, State of California; 600 W. Broadway, Ste. 1800; San Diego, CA 92101) for Appellees Xavier Becerra and Joe A. Lizarraga. Substitution for Attorney Jennifer Jadovitz for Appellee Joe A. Lizarraga. Date of service: 03/10/2021. (Party was previously proceeding with counsel.) [12031326] [19-55910] (Strickland, Mary) [Entered: 03/10/2021 03:49 PM]
03/10/2021	☐ 43	Attorney Jennifer Jadovitz substituted by Attorney Mary Katherine Strickland. [12031345] (RL) [Entered: 03/10/2021 03:55 PM]
03/24/2021	☐ 44	Filed (ECF) Acknowledgment of hearing notice by Attorney Ms. Mary Katherine Strickland, Esquire for Appellee Joe A. Lizarraga. Hearing in Pasadena on 04/14/2021 at 09:00 A.M. (Courtroom: CR3). Filer sharing argument time: No. (Argument minutes: 10.) Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 03/24/2021. [12051816] [19-55910] (Strickland, Mary) [Entered: 03/24/2021 11:06 AM]
03/24/2021	☐ 45	Filed (ECF) Acknowledgment of hearing notice by Attorney Mr. Charles Roger Khoury, Jr., Esquire for Appellant Carlos Amezcua. Hearing in Pasadena on 04/14/2021 at 09:00 A.M. (Courtroom: CR-3). Filer sharing argument time: No. (Argument minutes: 20.) Special accommodations: NO. Filer admission status: I

		certify that I am admitted to practice before this Court. Date of service: 03/24/2021. [12052682] [19-55910] (Khoury, Charles) [Entered: 03/24/2021 10:36 PM]
04/01/2021	☐ 46 1 pg, 33.17 KB	Filed clerk order (Deputy Clerk: WL): The Court is of the opinion that the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. Therefore, this matter is ordered submitted without oral argument on April 14, 2021, at Pasadena, California. Fed. R. App. P. 34(a)(2)(C). [12060769] (WL) [Entered: 04/01/2021 12:22 PM]
04/14/2021	☐ 47	SUBMITTED ON THE BRIEFS TO MILAN D. SMITH, JR., SANDRA S. IKUTA and JOHN E. STEELE. [12073874] (DLM) [Entered: 04/14/2021 11:20 AM]
04/16/2021	☐ 48 6 pg, 164.16 KB	FILED MEMORANDUM DISPOSITION (MILAN D. SMITH, JR., SANDRA S. IKUTA and JOHN E. STEELE) AFFIRMED. FILED AND ENTERED JUDGMENT. [12076668] (MM) [Entered: 04/16/2021 08:41 AM]
04/29/2021	☐ 49 4 pg, 50.85 KB	Filed (ECF) Appellant Carlos Amezcua Motion to extend time to file petition for rehearing until 06/01/2021. Date of service: 04/29/2021. [12097427] [19-55910] (Khoury, Charles) [Entered: 04/29/2021 04:40 PM]
04/30/2021	☐ 50	Filed text clerk order (Deputy Clerk: AF): Appellant's motion for a 30-day extension of time to file a petition for rehearing and rehearing en banc is granted. See Dkt. No. [49]. The petition for rehearing and rehearing en banc shall be filed on or before May 31, 2021. [12098222] (AF) [Entered: 04/30/2021 12:19 PM]
06/01/2021	☐ 51 14 pg, 144.59 KB	Filed (ECF) Appellant Carlos Amezcua petition for panel rehearing and petition for rehearing en banc (from 04/16/2021 memorandum). Date of service: 06/01/2021. [12130473] [19-55910] (Khoury, Charles) [Entered: 06/01/2021 11:00 PM]
06/25/2021	☐ 52 1 pg, 34.15 KB	Filed order (MILAN D. SMITH, JR., SANDRA S. IKUTA and JOHN E. STEELE): The panel has unanimously voted to deny appellant's petition for panel rehearing, filed on June 1, 2021. Judge M. Smith and Judge Ikuta voted to deny the petition for rehearing en banc and Judge Steele so recommended. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration. The petition for rehearing and rehearing en banc (Dkt. [51]) are DENIED. [12154314] (AF) [Entered: 06/25/2021 09:36 AM]
07/06/2021	☐ 53 1 pg, 94.59 KB	MANDATE ISSUED.(MDS, SSI and JES) [12162831] (QDL) [Entered: 07/06/2021 08:59 AM]

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