UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 17 2021

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

FIDEL ANGUIANO GALLARDO,

Petitioner-Appellant,

v.

SCOTT KERNAN, Secretary of the Department of Corrections and Rehabiiitation,

Respondent-Appellee.

No. 20-55430

D.C. No. 2:17-cv-01438-MWF-JC
Central District of California,
Los Angeles

ORDER

Before: CANBY and LEE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 5) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIDEL GALLARDO, Petitioner, v. SCOTT KERNAN, Respondent.	Case No. 2:17-cv-01438-MWF-JC ORDER DENYING A CERTIFICATE OF APPEALABILITY

An appeal may not be taken from the denial by a United States District Judge of an application for a writ of habeas corpus in which the detention complained of arises from process issued by a state court "unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b).

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the District Court "must issue or deny a certificate of appealability when it enters a final order adverse to applicant."

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2). A "substantial showing . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted); see also Sassounian v. Roe, 230 F.3d 1097, 1101 (9th Cir. 2000). Thus, "[w]here a district court has rejected the constitutional claims on the merits, . . . [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484.

Concurrently with the issuance of this Order, the Court has denied the Petition for a Writ of Habeas Corpus ("Petition") on its merits and has directed that a final judgment adverse to the petitioner be entered.

In accordance with 28 U.S.C. § 2253(c)(2), the Court finds that petitioner has not made the requisite substantial showing of a denial of a constitutional right with respect to any of the grounds for relief set forth in the Petition.

THEREFORE, pursuant to 28 U.S.C. § 2253, a certificate of appealability is denied.

DATED: April 6, 2020

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIDEL GALLARDO, Petitioner, v. SCOTT KERNAN, Respondent.	Case No. 2:17-cv-01438-MWF-JC ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

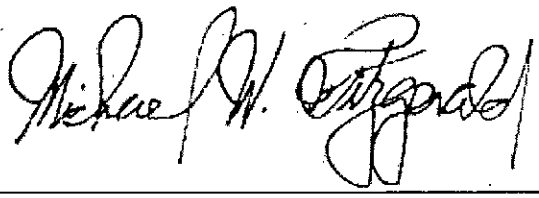
Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") and all of the records herein, including the December 19, 2019 Report and Recommendation of United States Magistrate Judge ("Report and Recommendation"), and petitioner's objections to the Report and Recommendation ("Objections"). The Court has further made a *de novo* determination of those portions of the Report and Recommendation to which objection is made. The Court concurs with and accepts the findings, conclusions, and recommendations of the United States Magistrate Judge and overrules the Objections.

IT IS HEREBY ORDERED that the Petition is denied, this action is dismissed with prejudice and Judgment be entered accordingly.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on petitioner and on respondent's counsel.

IT IS SO ORDERED.

DATED: April 6, 2020



MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIDEL GALLARDO, Petitioner, v. SCOTT KERNAN, Respondent.	Case No. 2:17-cv-01438-MWF-JC ORDER (1) STRIKING DOCUMENTS; AND (2) REOPENING CASE

IT IS HEREBY ORDERED:

The following documents, which were inadvertently issued before the expiration of the parties' deadline to file objections to the December 19, 2019 Report and Recommendation of United Magistrate Judge (and the accompanying (Proposed) Order and (Proposed) Judgment) are stricken: (1) Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge (Docket No. 30); and (2) Judgment (Docket No. 31). In light of the foregoing, this case – which was closed upon the entry of such inadvertently issued documents – is reopened.

IT IS SO ORDERED.

DATED: January 7, 2020

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIDEL GALLARDO, Petitioner, v. SCOTT KERNAN, Respondent.	Case No. 2:17-cv-01438-MWF-JC ~~(PROPOSED)~~ ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") and all of the records herein, including the December 19, 2019 Report and Recommendation of United States Magistrate Judge ("Report and Recommendation"). The Court approves and accepts the Report and Recommendation.

IT IS HEREBY ORDERED that the Petition is denied, this action is dismissed with prejudice and Judgment be entered accordingly.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on petitioner and on respondent's counsel.

IT IS SO ORDERED.

DATED: December 19, 2019

HONORABLE MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIDEL GALLARDO, Petitioner, v. SCOTT KERNAN, Respondent.	Case No. 2:17-cv-01438-MWF-JC REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I. SUMMARY

On February 22, 2017, petitioner, a state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254, and an attached memorandum ("Petition Memo"), challenging a judgment in Los Angeles County Superior Court Case No. NA090230 on multiple grounds.

On June 23, 2017, respondent filed an Answer and lodged multiple documents ("Lodged Doc."), including the Clerk's Transcript ("CT") and the

Reporter's Transcript ("RT"). On September 21, 2017, petitioner filed a Reply with an attached memorandum ("Reply Memo").

For the reasons stated below, the Petition should be denied, and this action should be dismissed with prejudice.

II. PROCEDURAL HISTORY

On February 18, 2014, a Los Angeles County Superior Court jury found petitioner guilty of first degree residential burglary by entering a dwelling where another person was present (count 1), assault with intent to commit a felony (count 2), committing a forcible lewd act upon a child (count 3), and assault with intent to commit a felony during the commission of a burglary (count 4). (CT 154-56). As to count 3, the jury found true an allegation that petitioner acted with the intent to commit a sex act. (CT 155). On July 7, 2014, the trial court sentenced petitioner to a total of 25 years to life in state prison. (CT 253-54).

On February 25, 2016, the California Court of Appeal reversed the judgment in part and affirmed the judgment in part in a reasoned decision. (Lodged Doc. 5). On March 16, 2016, the California Court of Appeal granted a petition for rehearing. (Lodged Docs. 6-7). On May 24, 2016, the California Court of Appeal again reversed the judgment in part and affirmed the judgment in part in a reasoned decision. See Lodged Doc. 10 (reversing petitioner's conviction on count 2 as a necessarily included lesser offense of count 4, reversing petitioner's conviction on count 3 with directions that the conviction be modified for an attempt unless retried, and otherwise affirming the judgment).[1] On August 17, 2016, the California Supreme Court denied review without comment. (Lodged Doc. 12).

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[1]As of March 3, 2017, the Los Angeles County Superior Court had not yet resentenced petitioner in accordance with the California Court of Appeal's order. See Lodged Doc. 16 at 27-29 (available record of sentencing and post-sentencing proceedings); see also Lodged Doc. 10 at 18 (ordering petitioner's resentencing). The record does not currently reflect whether or when such resentencing occurred.

III. FACTS[2]

In September 2011, Maribel Vega and her children lived in an apartment on Paramount Boulevard in Long Beach. On the night of September 30, Vega and her boyfriend Jhony Larraga went to sleep in a bedroom, and Vega's 10-year-old daughter T. fell asleep on the living room couch while watching television. Petitioner's son, Miguel Anguiano, lived in the apartment next door to Vega. That evening, petitioner smoked cigarettes and drank beer outside, next to the unlocked living room window of Vega's apartment.

At approximately 1:00 a.m. on October 1, 2011, T. woke up to find a stranger, whom she later identified as petitioner, next to her trying to pull down her pants. Light from the television and dining area illuminated petitioner's face. Petitioner asked T. if her parents were home. When she tried to get away, petitioner pushed her down and held her on the couch. Petitioner pulled down T.'s jeans. She tried to scream, but he put his hand over her mouth, instructing her, "Don't yell." When T. nodded her head, petitioner removed his hand from her mouth and pulled down her underpants to below her knees. T. screamed again, waking Vega and Larraga, who ran into the living room where they saw petitioner as he struggled to open the front door of the apartment. Petitioner escaped and ran towards Paramount Boulevard.

When police arrived, T. described petitioner. Although Vega and Larraga only saw petitioner from behind, they both described his clothing. Police broadcast a description of petitioner to patrol officers.

Approximately 10 minutes later, an officer in a patrol car saw petitioner, who matched the preliminary description of the suspect, two blocks away from

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[2]The Court has independently reviewed the entire state court record. See Nasby v. McDaniel, 853 F.3d 1049, 1052-55 (9th Cir. 2017) (essentially holding that federal habeas court required to review independently state court record where relief sought on basis of record before state court). The facts set forth are drawn from the Court of Appeal's decision on direct review and are consistent with the record. (Lodged Doc. 10 at 2-3).

Vega's apartment. Petitioner told the officer that he had walked from his son's apartment on Paramount Boulevard and was walking to a liquor store. The officer detained petitioner and brought him to Vega's apartment complex for a field show-up. At separate field show-ups, T., Vega and Larraga identified petitioner as the assailant.

Petitioner testified at trial, denying that he had any contact with T. He did, however, admit that he was at his son's apartment on the night of the crimes. Petitioner also explained that as he prepared to go to sleep, he realized he had left his cell phone and wallet in his truck. He left the apartment to retrieve the items and to look for cigarettes. When he discovered that he did not have any cigarettes in his truck, he decided to walk to a nearby mini-market to buy cigarettes and something to eat.

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Pursuant to 28 U.S.C. § 2254 ("Section 2254"), as amended by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal habeas courts are required to be "highly deferential" to state court decisions regarding a petitioner's federal claims. Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citation and internal quotation marks omitted). Accordingly, when a state court has adjudicated a petitioner's federal claim on the merits, federal habeas relief may not be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the [U.S.] Supreme Court. . . ," or (2) was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); see Sexton v. Beaudreaux, 138 S. Ct. 2555, 2558 (2018) (stating

same) (citation omitted); Tamplin v. Muniz, 894 F.3d 1076, 1082 (9th Cir. 2018) (same) (citation omitted).[3] The AEDPA standard is intentionally "difficult to meet," Sexton, 138 S. Ct. at 2558 (citations and quotation marks omitted), and the petitioner has the burden to show that federal habeas relief is warranted in a particular case, Cullen, 563 U.S. at 181 (citation omitted).

In applying the foregoing standards, federal courts look to the last relevant state court decision and evaluate the state court's adjudication of a federal claim after an independent review of the record. See Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018); Nasby v. McDaniel, 853 F.3d 1049, 1053 (9th Cir. 2017). Where the relevant state court did not explain its decision in a reasoned opinion, federal courts "look through the unexplained decision to the last related state-court decision that does provide a relevant rationale." Wilson, 138 S. Ct. at 1192 (noting rebuttable presumption that unexplained state-court decision "adopted the same reasoning" for rejecting prisoner's federal claims as the last state court that provided a reasoned opinion) (internal quotation marks omitted); see also Tamplin, 894 F.3d at 1082 ("Under AEDPA, we review the last reasoned state-court opinion.") (citation, internal quotation marks and internal brackets omitted). The last relevant decision denying petitioner's claims in this case is the California Court of Appeal's decision on direct review. (Lodged Doc. 10).

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[3]When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Harrington v. Richter, 562 U.S. 86, 99 (2011); see also Johnson v. Williams, 568 U.S. 289, 298-301 (2013) (extending Richter presumption to situations in which state court opinion addresses some, but not all of defendant's claims).

V. DISCUSSION[4]

Petitioner claims: (1) his trial counsel was ineffective for failing to move to suppress the assertedly unduly suggestive field identifications (Ground One); (2) the trial court violated his right to due process and a fair trial by admitting evidence of prior sexual offenses under California Penal Code Section 1108 (Ground Two); (3) California Penal Code Section 1108 violates due process and equal protection (Ground Three); (4) the trial court violated petitioner's right to have the jury determine his guilt by proof beyond a reasonable doubt by instructing the jury with CALJIC 2.50.01 (Ground Four); (5) the trial court violated petitioner's constitutional rights by instructing the jury with CALJIC 10.41 and 10.42, which petitioner maintains are impermissibly argumentative (Ground Five); and (6) the trial court violated petitioner's rights to due process and an impartial jury trial by denying a new trial motion based on alleged juror misconduct (Ground Six). (Petition Memo at 7-13). Petitioner is not entitled to federal habeas relief on any of these claims.

A. Petitioners's Ineffective Assistance of Counsel Claim Does Not Merit Federal Habeas Relief – Ground One

Petitioner claims that his trial counsel was ineffective in failing to file a motion to suppress the allegedly unduly suggestive pretrial field show-up identifications. (Ground One; Petition Memo at 7; Reply Memo at 7-14). The California Court of Appeal found that the field show-up was not unduly suggestive, and therefore counsel was not deficient in failing to file a motion to suppress the identification evidence because any such motion would have been denied. (Lodged Doc. 10 at 4-6). Petitioner is not entitled to federal habeas relief on this claim.

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[4]The Court has read, considered and rejected on the merits all of petitioner's contentions. The Court discusses petitioner's principal contentions herein.

1. Additional Pertinent Facts

The evidence adduced at trial established that within an hour of the incident, T., Vega and Larraga each separately identified petitioner in a field show-up where petitioner was the only suspect and was either seated in the back of a patrol car (in Larraga's case) (RT 1289-91, 1524), in handcuffs and pulled by police out of the patrol car for showing (in Vega's case) (RT 1558-60, 1578-80), or standing handcuffed between two parked police cars and being held by a police officer (in T.'s case) (RT 1933-35). Before the field show-ups, police had each witness sign a standard admonition form, and read the admonition to each witness (either in English or Spanish, as applicable), essentially advising that: (1) the suspect being detained may or may not be the person; (2) the witness was not required to identify someone; and (3) the witness was to identify the suspect if he was the person, or to say he is not the person if he was not. (RT 2127, 2131-32, 2136-37, 2179-80).

Petitioner had been detained by police eight minutes after the original dispatch call regarding the incident, after being spotted walking two blocks from where the incident occurred as matching the dispatched description of the perpetrator (*i.e.*, male Hispanic wearing a checkered shirt with a white undershirt). (RT 2168-73, 2731-36). Police determined from a record search that petitioner's residence was next door to where the incidents occurred. (RT 2175-76). At the time, petitioner was 48 years old, 5'8" tall, weighed 154 pounds, had short hair and a mustache, and was wearing a green and beige checkered short-sleeved collared shirt (with some red lines) over a white muscle shirt, jean shorts, and black tennis shoes. (RT 2174-75, 2182-85, 2187, 2199-2200; see also RT 2822 (detective testifying that depending on the light petitioner's shirt appeared to be a grey or black checkered pattern with a vertical red line going over it)).[5]

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[5]No socks were booked into evidence. (RT 2200).

a. Vega's Observation of the Assailant and Subsequent Identifications of Petitioner

Vega testified that she awoke shortly after 1:00 a.m. to T. screaming as if she were scared. (RT 1538-39, 1574, 1590). Vega got up and opened her bedroom door to see the back of a man who was running from the couch and struggling to open the front door. (RT 1539-43, 1568, 1574-75, 1587, 1590). The kitchen and hallway lights were on. (RT 1593-94). Vega noticed that the man was wearing white socks, high top shoes, and shorts. (RT 1539, 1557, 1578, 1587, 1590). Vega did not see the man's face. (RT 1578, 1587).

By then, T., whose pants and underwear were down to her ankles, was next to Vega. (RT 1543-45, 1549-52, 1577, 1591). The man ran out the front door. (RT 1587). To Vega, the man appeared tall (*i.e.*, "almost as tall as the door") and skinny (RT 1557-58). Vega ran out of the apartment after the man to see who he was, but the man was already gone. (RT 1545-46, 1575). Vega noticed there were beer cans and cigarette butts outside on the walkway underneath her apartment window. (RT 1554-56, 1569-71).

Vega called 911 from the sidewalk downstairs. (RT 1546-49, 1564; see also CT 114-16 (transcript of 911 call played for the jury)). Vega told the operator that five minutes earlier a man had broken into her house through a window and had tried to rape her 9-year-old daughter by trying to pull off her pants and cover her mouth. (CT 114-15; RT 1564). Vega said she had just seen the man's back, and described him as wearing a "colorful" "squared [checkered] shirt and a white under long sleeve shirt." (CT 114, 116; RT 1564-65 (describing the shirt as blue with lines on it)). The police arrived while Vega was talking to the operator. (CT 116).

Within an hour of the incident, Vega went downstairs with the police to see if she could identify a person as the man she saw in her apartment. (RT 1558, 1578-79). Vega saw a man in a police car and said the police pulled the man out

of the car in handcuffs for her to look. (RT 1558, 1579). Vega recognized her signature on an admonition form shown to her. (RT 1559-60). Vega had written on the form, "Yes, that is the guy I saw leaving the house. I know because of the shorts, socks and shorts." (RT 1560, 1578; see RT 1586 (Vega explaining she meant shorts, socks and shoes)). Vega realized when she was looking at petitioner in the show-up that she had seen him once or twice before, peeing from the balcony of a nearby apartment building. (RT 1560-62, 1580-81). Vega identified petitioner in court as the man she had seen previously. (RT 1562-63). Vega had not associated petitioner with the apartment next door to her. (RT 1580). Vega explained that petitioner's son previously lived in the other apartment where she used to see petitioner before his son moved next door to her. (RT 1581).

b. Larraga's Observation of the Assailant and Subsequent Identification of Petitioner

Larraga testified that he awoke to screaming, peeked into the living room and saw a man with his back to Larraga running out the door to the apartment toward the stairs to the left of the apartment. (RT 1262-66, 1276, 1281). Larraga did not see the man's face and saw the man only for "seconds." (RT 1263, 1525). Larraga could see the man was wearing a "loose, square shirt" with a pattern of squares and one white sock, but did not see any shoes. (RT 1265). Larraga had never seen the man before. (RT 1267). Larraga reported to responding police officers, who arrived in a little more than five minutes, that the assailant weighed 200 pounds, was around 5'9" tall, and was wearing blue shorts and a checkered short-sleeved dress shirt. (RT 1270, 1278-80, 1519, 1522-25).

When Larraga saw petitioner in the field show-up, Larraga said that petitioner could be the person, but that because Larraga had not seen the man's face, he did not know. (RT 1271, 1274, 1290-91). Larraga recognized the shirt petitioner was wearing as the one he saw the man wearing. (RT 1271, 1274). Larraga recalled signing papers but did not remember exactly what he signed or

what he was told because he was "kind of like lost" and "not really focusing." (RT 1272). Larraga, however, recognized the admonition that he signed before he attempted to identify anyone. (RT 1272-73). Larraga wrote on the form, "That's him, I remember the shirt and I remember the shorts." (RT 1290). Larraga said that the police officer asked him to come downstairs to look at a person who had been stopped or detained, who was seated inside a patrol car. (RT 1289). The police opened the door to the car and Larraga looked at petitioner from about six feet away. (RT 1289-90, 1524). Larraga did not identify petitioner in court. (RT 1274).

c. T.'s Observation of the Assailant and Subsequent Identifications of Petitioner

T. was 12 years old when she testified. (RT 1886). T. testified that she was asleep on the couch and awakened by a man standing (or sitting) next to the couch a foot away from her, touching her waist with his hands and starting to pull down her jeans. (RT 1899-1901, 1919-21, 1923). The man asked if T.'s mom and dad were home. (RT 1900, 1922, 2155). T. said that the man spoke English and did not have an accent. (RT 1921-23).[6] T. yelled and the man covered her mouth with his right hand and continued trying to take her pants down with his left hand. (RT 1902, 1928). T. nodded her head to indicate she would not scream again, and the man took his hand off her mouth and started pulling her pants farther down. (RT 1902, 1904, 1928-30). She yelled again and Larraga came out and chased the man who ran out the door. (RT 1902, 1904, 1906, 1908, 1928-29).

T. had never seen the man before. (RT 1904-05). She said she saw his face and identified petitioner in court as the man. (RT 1905, 2160). T. said that she went with her mom downstairs to look at a man who was standing next to a police

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[6]A police officer who spoke to petitioner said that petitioner sounded like a native Spanish speaker. (RT 2195). A detective said that petitioner spoke English with a "heavy accent." (RT 3013).

car, who she said looked the same as the man she saw in the apartment and appeared to be wearing the same clothes. (RT 1912-13). T. recognized the admonition form she signed on the night of the show-up. (RT 1913-14). T. did not remember telling the police what was recorded on her form. (RT 1915-16).

T. admitted she was really scared, and that the time from her waking up until the man put his hands on her waist happened really fast. (RT 1923-24). The room was lit only by the kitchen light and some light coming from the television. (RT 1924-27, 2151-53). T. said the man initially had his hand over her mouth for about ten seconds. (RT 1929-30). T. described the man as 40 or 50 years old, Mexican, approximately 5'10" tall with black hair and a mustache and a medium build, and wearing a black and red shirt ("like a checkers board"), but said she did not really pay attention to what the man was wearing. (RT 1930-32, 2157, 2161, 2734, 2737).[7]

T. admitted that when she walked downstairs to look at someone she expected to see the man who did this to her. (RT 1932-33). Petitioner was standing between two parked police cars, handcuffed, and being held by a police officer about 10 feet away from where T. was standing. (RT 1933-35). Petitioner appeared under arrest. (RT 1934). T. could see petitioner's face clearly during the show-up, and did not recall the police saying anything other than, "we have a person for you to see." (RT 1936). Vega had told T. to "make sure it's him" if she identified petitioner. (RT 2156). When T. saw petitioner, she reportedly said, "Yes, that is him. That is the same moustche [sic] and face." (RT 2138).

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[7]A second dispatch call described the suspect as dressed in a black long-sleeved t-shirt with red on the front with short hair and a mustache. (RT 2197-98, 2744). A responding police officer who interviewed all three witnesses separately reported that each witness described the perpetrator as wearing a checkered shirt, not a black t-shirt. (RT 2725-26, 2734).

d. Petitioner's Defense Strategy

Prior to trial, defense counsel acknowledged that petitioner's case was an "ID case" and indicated that her strategy would be to challenge the police investigation as narrowly focusing on petitioner rather than others in and around the apartment building who could have committed the crimes. (RT 9-10, 13). In her opening statement, defense counsel argued that the identifications were not accurate or reliable, the police focused only on petitioner, and none of the physical evidence allegedly tied petitioner to the scene. (RT 1215-18).[8] Counsel, however, did not otherwise argue that the identification evidence was suggestive, or move to exclude the identification evidence as unduly suggestive.

2. Pertinent Law

To prevail on an ineffective assistance of counsel claim, a federal habeas petitioner must establish: (1) counsel's performance was deficient, falling below "an objective standard of reasonableness"; and (2) counsel's deficient performance prejudiced the petitioner (*i.e.*, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). An ineffective assistance of counsel claim fails if either part of the Strickland standard has not been met. Id. at 697, 700.

There is a "strong presumption" that an attorney's representation falls within "the wide range of reasonable professional assistance." Harrington v.

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[8]One of the responding police officers testified that he spoke with petitioner's son at the scene and passed along information he obtained from that contact to other officers at the scene. (RT 2228-30, 2235-37). He also testified that he collected physical evidence (*i.e.*, T.'s clothing, cigarette butts and empty beer cans at the scene, and petitioner's clothing at the station), but said that he changed gloves before collecting each item to avoid contamination. (RT 2238-39). Counsel argued in closing that the identifications were tainted by the show-up, the DNA evidence did not conclusively establish T.'s DNA was on petitioner's hands and could reflect transfer, and petitioner's fingerprints were excluded from all prints recovered, yet the police did not test anyone else in the area for a possible match. (RT 4607-45).

Richter, 562 U.S. 86, 104 (2011) (citation omitted); see also Strickland, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential."). The presumption is overcome only when an attorney error was so egregious that counsel's representation ultimately "amounted to incompetence under 'prevailing professional norms.'" Richter, 562 U.S. at 105 (citation omitted); see also Maryland v. Kulbicki, 136 S. Ct. 2, 3 (2015) (per curiam) (attorney performance deficient where errors are "so serious" that attorney "no longer functions as 'counsel'" contemplated by the Sixth Amendment) (citing Strickland, 466 U.S. at 687). Courts judge the reasonableness of an attorney's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. Courts may not simply "second-guess" an attorney's trial strategy. Daire v. Lattimore, 818 F.3d 454, 465 (9th Cir. 2016).

Deficient performance is prejudicial if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability is one that is "sufficient to undermine confidence in the outcome" of the trial. Id. The likelihood that a verdict would have been different "must be substantial, not just conceivable." Richter, 562 U.S. at 112 (citation omitted).

Further, as here, where there has been a state court decision rejecting a Strickland claim, review is "doubly deferential." Richter, 562 U.S. at 105 (citing Knowles v. Mirzayance, 556 U.S. 111, 123-24 (2009)). "The pivotal question is whether the state court's application of the Strickland standard was unreasonable." Richter, 562 U.S. at 101; 28 U.S.C. § 2254(d). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Richter, 562 U.S. at 102 (citation omitted). The range of reasonable Strickland applications is "substantial." Id. at 105.

Evidence derived from a suggestive pretrial identification procedure may be inadmissible if the challenged procedure was "so impermissibly suggestive as to

give rise to a very substantial likelihood of irreparable misidentification." See Simmons v. United States, 390 U.S. 377, 384 (1968). To determine the admissibility of identification testimony, courts use a two step analysis. United States v. Love, 746 F.2d 477, 478 (9th Cir. 1984) (citations omitted). First, they determine whether the identification procedure was impermissibly suggestive. Id. Each case must be considered on its own facts, and whether due process was violated depends on the totality of the surrounding circumstances. Simmons, 390 U.S. at 383-84. If the court finds that a challenged procedure is not impermissibly suggestive, the due process inquiry ends. United States v. Bagley, 772 F.2d 482, 493 (9th Cir. 1985), cert. denied, 475 U.S. 1023 (1986). However, if a court finds that the procedure was impermissibly suggestive, it then determines whether the identification was nevertheless reliable under the totality of the circumstances. Neil v. Biggers, 409 U.S. 188, 198-99 (1972); Love, 746 F.2d at 478.

Impermissible suggestiveness may arise where a confrontation procedure or the circumstances underlying it placed a special focus upon a suspect such that it is suggested by police that the suspect is "the" person for a witness to identify, or a witness perceived pressure from police officers to "acquiesce" in identifying a particular individual such that the possibility is raised that the identification may have stemmed from suggestion and not from the witness's own recognition of the suspect. See Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (considering single-photograph display, fact that there was little pressure on witness to acquiesce in suggestion such display entailed, and fact that there was no coercive pressure to make identification arising from presence of another); Neil v. Biggers, 409 U.S. at 193-99 (one person show-up).

The factors to be considered in evaluating the reliability of an identification after an impermissibly suggestive identification procedure include:

> [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the

witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.

Biggers, 409 U.S. at 199-200. These five indicia of reliability must be balanced by the reviewing court against the corrupting effect of the suggestive pretrial identification procedure to determine whether the in-court identification should have been admitted. Manson v. Braithwaite, 432 U.S. at 114.

Finally, in a motion to suppress, the defense bears the burden to show the unconstitutionality of the identification procedure. See People v. DeSantis, 2 Cal.4th 1198, 1221-22 (1992), cert. denied, 508 U.S. 917 (1993).

3. Analysis

To prevail on a claim of ineffective assistance of counsel predicated on the failure to file a motion to suppress evidence, a petitioner must establish that the motion would have been meritorious and a reasonable probability that the jury would have reached a different verdict absent the introduction of the evidence in issue. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986); Ortiz-Sandoval v. Clarke, 323 F.3d 1165, 1170 (9th Cir. 2003). Petitioner does not do so here.

The mere fact that the witnesses identified petitioner in a one-person field show-up did not itself render such identification invalid or inadmissible. See United States v. Jones, 84 F.3d 1206, 1210 (9th Cir.) ("The fact that only one suspect is presented for identification does not make the identification procedure invalid."), cert. denied, 519 U.S. 973 (1996). Nor does the fact that petitioner was obviously in police custody. See, e.g., Jones, 84 F.3d at 1209-10 (upholding show-up of defendant standing by side of road near police officers who were holding robber's wig, hat and sunglasses; observing, "We have previously upheld suggestive procedures, recognizing the benefit of permitting witnesses to make an identification while the image of the perpetrator is still fresh in their minds."); Bagley, 772 F.2d at 492-93 (upholding identification at show-up where defendant

was seated in police car, handcuffed and surrounded by police). Even assuming that the show-ups in this case were impermissibly suggestive, petitioner's claim fails because the identifications were nevertheless reliable under the totality of the circumstances.

First, T.'s opportunity to view the intruder and his face strongly weighs in favor of the reliability of her identification of petitioner. T. looked at petitioner who was facing her from about a foot away for at least 10 seconds while he held his hand over her mouth, in a lit room. (RT 1900, 1924-27, 1929-30, 2151-53). Courts have upheld identifications as reliable under similar or worse situations. See Coleman v. Alabama, 399 U.S. 1, 4-6 (1970) (brief view on dark highway lit only by car headlights); United States v. Drake, 543 F.3d 1080, 1088-89 (9th Cir. 2008) (although robbery took less than a minute, victim "had ample opportunity to view the robber as they were standing face to face in close proximity to each other"); United States v. Gregory, 891 F.2d 732, 734-35 (9th Cir. 1989) (witnesses viewed robber at close range for approximately thirty seconds).

Second, T.'s degree of attention also strongly weighs in favor of the reliability of her identification of petitioner. T. was not a bystander; she was the victim. See United States v. Barrett, 703 F.2d 1076, 1085 (9th Cir. 1983) ("Being the target of the robbery, [the witness'] degree of attention was undoubtedly high."). As noted above, T.'s attention was focused on the intruder within the close proximity of a foot.

Third, T.'s prior description, albeit arguably imperfect as to petitioner's shirt, was not so inaccurate as to cause this factor to weigh heavily against reliability. Compare RT 1930-32, 2157, 2161 (T. testifying that the intruder was 40 to 50 years old, Mexican, and wearing a black and red shirt that looked like a checker board) and RT 2737, 2745-47 (T. reporting to a responding police officer that petitioner was about 50 years old, 5'10" tall, Hispanic (Mexican), with black hair and a mustache, a medium build, and wearing a checkered shirt) with RT

2174-75, 2181-85, 2187, 2199-2200 (petitioner, a 48-year-old male Hispanic with a mustache, was wearing a green and beige checkered shirt with some red lines over a white muscle shirt, jean shorts, and black tennis shoes (but not socks) when he was detained).

Fourth, T.'s degree of certainty at the field show-up weighs in favor of the reliability of her identification of petitioner. T. reportedly expressed no uncertainty while identifying petitioner at the field show-up. (RT 2138 (T. reportedly said, "Yes, that is him. That is the same moustche [sic] and face")); see United States v. Jarrad, 754 F.2d 1451, 1455 (9th Cir.) ("Most importantly, the witness expressed a high degree of confidence, '95%,' as to both her pretrial and in-court identifications."), cert. denied, 474 U.S. 830 (1985).

Finally, the length of time between the crime and T.'s identification of petitioner at the field show-up – within an hour (RT 2136) – strongly weighs in favor of the reliability of her identification of petitioner. See Manson, 432 U.S. at 115-16 (fact that photo identification occurred two days after the crime contributed to reliability of identification); Simmons, 390 U.S. at 385 (witnesses shown photographs only a day after the incident, "while their memories were still fresh"). Indeed, courts have deemed identifications reliable despite the lapse of longer time periods. See, e.g., Biggers, 409 U.S. at 201 (seven months between crime and identification); United States v. Montgomery, 150 F.3d 983, 993 (9th Cir.) (one year), cert. denied, 525 U.S. 917, 989 (1998); United States v. Matta-Ballesteros, 71 F.3d 754, 769-70 (9th Cir. 1995) (over five years), as amended on denial of rehearing , 98 F.3d 1110 (9th Cir. 1996), cert. denied, 519 U.S. 1118 (1997).

As for Larraga and Vega, each identified petitioner from the show-up only by petitioner's clothing. Their identifications were not so inaccurate as to weigh heavily against reliability. Compare RT 1265, 1270, 1278-80, 1519, 1522, 1523-25, 2748 (Larraga describing the man as 5'9" tall, 200 pounds, wearing a loose,

square checked short-sleeved dress shirt with a white, blue and green (or gray) pattern, blue shorts, one white sock but no shoes) and RT 1539, 1564-65, 1578, 2747, CT 114, 116 (Vega describing the man as 5'10" tall, thin, wearing shorts and a "colorful" "squared [checkered] shirt" and a white long sleeve shirt, white socks and high top shoes) with RT 2174-75, 2181-85, 2187, 2199-2200.

In short, the show-up was not impermissibly suggestive and, even assuming it was impermissibly suggestive, the five indicia of reliability when balanced against the arguably corrupting effect of the field show-up yield the conclusion that the show-up identifications and T.'s arguably derivative subsequent in-court identification of petitioner were nevertheless reliable under the totality of the circumstances. In light of the foregoing, there is no reasonable probability that a motion to suppress the field show-up identification and its potential fruits would have succeeded. Counsel was not deficient for failing to move to suppress the evidence where the motion would have been denied. See Gonzalez v. Knowles, 515 F.3d 1006, 1017 (9th Cir. 2008) (counsel cannot be deemed ineffective for failing to raise a meritless claim); Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996) ("the failure to take a futile action can never be deficient performance"), cert. denied, 519 U.S. 1142 (1997); Shah v. United States, 878 F.2d 1156, 1162 (9th Cir.) ("The failure to raise a meritless legal argument does not constitute ineffective assistance of counsel.") (citation and internal quotations omitted), cert. denied, 493 U.S. 869 (1989).

Assuming such a motion had been filed and granted, petitioner also fails to demonstrate a reasonable probability that the jury would have reached a different verdict absent the introduction of the field show-up identifications in light the other evidence of petitioner's guilt. Petitioner was detained two blocks from where the intrusion happened not long after the 911 call. (RT 2171-72). DNA matching petitioner's DNA was found on beer cans and cigarette butts recovered from outside the apartment. (RT 2112-16, 2119-23).

Petitioner's son Miguel Anguiano, who lived in the apartment right next door to where the intrusion occurred, testified that: (1) petitioner was outside the apartment smoking cigarettes and drinking beer on the day of the intrusion; and (2) petitioner had left the apartment some time between when Anguiano went to bed and when the police later were called. (RT 2423, 3405-06, 3611-12). Anguiano admitted that he told Vega some time after the intrusion, essentially, that he felt bad for what happened, if it was his father he was sorry, and that he was a Sureno and "we don't deal with that shit" – which he explained meant that he does not associate with child molesters or abusers. (RT 3620-21, 3644-45).[9]

Petitioner testified that he went to Anguiano's apartment at around 8:30 or 9:00 p.m, after dark, on the night of the intrusion. (RT 3672). Petitioner admitted to being outside the apartment smoking and drinking beer until around midnight. (RT 3683-85, 3916-21). Petitioner also admitted to touching the doorknob of Vega's apartment after police told him (in a ruse) that they found his DNA there. (RT 3909, 3932, 4258). Reference DNA samples from petitioner and T. were compared with DNA recovered from swabs of petitioner's palms taken shortly after he was detained, and the palms swabs were tested for evidence of a chemical (amylase) found in saliva. (RT 1839-63). Testing suggested an amount of the amylase was indicative of the presence of saliva on both of petitioner's palm samples, supporting an inference that he had put a hand over T.'s mouth as reported. (RT 1853). Testing also suggested the presence of DNA of at least three people, the presence of a fairly low level of DNA on the right palm swab for which T. could have been a possible contributor (*i.e.*, a one in 80 chance), and for the left palm swab a greater presence of DNA for which T. could have been a possible contributor (*i.e.*, a one in 1.4 million chance), also supporting an

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[9]Vega testified that Anguiano told her, "I'm sorry for what happened. I'm so sorry for what my dad did. I'm so ashamed. I disown him now. I'm a Sureno, we don't deal with that shit. . . . I'm moving out." (RT 3972-73, 3975).

inference that petitioner's palm had come into contact with T. (RT 1859, 1863-66, 1873).

For all the foregoing reasons, California Court of Appeal's rejection of Ground One was not contrary to, or an objectively unreasonable application of, Strickland, and was not based upon an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on this claim. See 28 U.S.C. § 2254(d); Richter, 562 U.S. at 100-03.

B. Petitioner's Evidentiary Claims Based on California Evidence Code Section 1108 Do Not Merit Federal Habeas Relief – Grounds Two and Three

Petitioner contends that the trial court's admission of evidence of petitioner's prior uncharged sexual offenses under California Penal Code Section 1108 ("Section 1108") deprived him of due process and a fair trial. (Ground Two; Petition Memo at 8-9; Reply Memo at 14-17). Petitioner also contends that Section 1108 is unconstitutional because it violates due process and equal protection. (Ground Three; Petition Memo at 9-10; Reply Memo at 17-18). The California Court of Appeal found that the admission of evidence of uncharged sexual offenses was proper and that Section 1108 is constitutional. (Lodged Doc. 10 at 10-14). Petitioner is not entitled to federal habeas relief on Grounds Two and Three.

1. Additional Pertinent Facts and Procedural History

Prior to trial, the prosecution filed a motion to admit Section 1108 evidence of petitioner's alleged uncharged prior sexual offenses against three victims, including two victims who, like T., alleged they were awakened by petitioner's unsolicited sexual advances. (Lodged Doc. 15; RT 157-71). The defense sought to exclude the same evidence, arguing that the evidence was unduly inflammatory and that there were factual differences between the uncharged offenses and the charged crimes in petitioner's case. (RT 153-57, 168-69). The trial court found

the evidence admissible, noting that the evidence against the two victims who were awakened by petitioner was "so similar that it starts to suggest a pattern and practice," and the evidence involving the third victim, while more problematic, was admissible under Section 1108. (RT 171).

Only two of three alleged victims actually testified about the uncharged prior sexual offenses. Patricia E., who was 24 years old when she testified in 2014, said that in July of 2009, she and her young daughter were living in an apartment on Paramount Boulevard with her twin sister Priscilla S., Priscilla's boyfriend Miguel Anguiano, Priscilla's young daughter, and petitioner (Anguiano's father). (RT 2247-50). On the night of July 30, 2009, Patricia was sleeping on the living room floor. (RT 2250-51). Petitioner was sleeping on a nearby couch. (RT 2251). Patricia said she was awakened by petitioner's lips kissing hers and his hand on her thigh. (RT 2252-54, 2259). Patricia slapped petitioner's face and fought with him for the telephone so she could call the police. (RT 2253-56). Patricia woke up Anguiano and Priscilla and eventually called the police and reported the incident. (RT 2257-58). Patricia denied telling the police that petitioner kissed her with his tongue or touched her vagina, or that she drank alcohol or smoked marijuana that night. (RT 2259, 2261-64, 2266-69, 2271; see RT 2719-20, 2729-30, 2763-65, 2769-72 (officers' contrary testimony that Patricia reported that petitioner touched her vagina and that she consumed alcohol and smoked marijuana)). No charges arising from this incident were ever filed. (RT 2265).

Priscilla S., Patricia's twin sister, testified that in September of 2008 she lived in an apartment with her then-boyfriend/petitioner's son Miguel Anguiano, her baby daughter, and petitioner. (RT 2403-05). One afternoon, Priscilla was dozing in her room with her baby asleep on Priscilla's belly when she was awakened by petitioner touching or grabbing her vaginal area over her pajamas. (RT 2406-10, 2444-45). Priscilla ordered petitioner out of the room. (RT 2410).

Priscilla called Anguiano and told him what happened but he did not believe her and told her not to call the police. (RT 2410-11). Priscilla also testified about being present and witnessing what happened immediately after the subsequent event involving Patricia. (RT 2412-15). Priscilla said that Patricia woke her up and told her that petitioner had gotten on top of Patricia and kissed her and touched Patricia. (RT 2415-18, 2443). Priscilla told Patricia to call the police, which Patricia already had done, and petitioner left. (RT 2418-19). Priscilla had refused to get involved with the police at the time. (RT 2431-32).

Petitioner's son Miguel Anguiano testified for the defense and reported different events than Patricia and Priscilla (*i.e.*, that Patricia had said only that petitioner had tried to kiss her, and that Priscilla told him only that petitioner had gone into her bedroom when she was sleeping and that it scared her). (RT 3343-44, 3346, 3392-93, 3396). Petitioner also testified in his defense that he asked Patricia for sex (which she declined three times), and subsequently that his mouth accidentally bumped into her cheek when he was going by her. (RT 3674-75, 3926-28). Petitioner admitted that he was arrested and booked into custody following the incident with Patricia but noted that he was released and not prosecuted. (RT 3676-77). As to Priscilla, petitioner said that he only entered the bedroom where she was and asked her a question and did not touch her. (RT 3678). The police were not called for the incident with Priscilla. (RT 3678-79).

2. Pertinent Law and Analysis

To the extent petitioner may assert that the trial court's evidentiary rulings were improper under California law, his claims are not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (correctness of state evidentiary rulings presenting only issues of state law not cognizable on federal habeas corpus review); Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) ("Simple errors of state [evidentiary] law do not warrant federal habeas relief.") (citing id. at 67); see also Larson v. Palmateer, 515 F.3d 1057, 1065 (9th

Cir.) (whether trial court's admission of evidence of petitioner's prior crimes was correct under state law "irrelevant" on federal habeas review) (citation omitted), cert. denied, 555 U.S. 871 (2008).

Petitioner's assertion that admission of the evidence in issue violated his due process and fair trial rights also does not entitle him to federal habeas relief. The United States Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant [federal habeas relief]." Holley, 568 F.3d at 1101. As relevant to Ground Two, the Supreme Court has expressly reserved the question of whether using evidence of a defendant's past crimes, even to show he has a propensity for criminal activity, could ever violate due process. See Larson v. Palmateer, 515 F.3d at 1066 (citing Estelle, 502 U.S. at 75 n.5); see also Jennings v. Runnels, 493 Fed. Appx. 903, 906 (9th Cir. 2012) (the United States Supreme Court has not held that propensity evidence violates due process, and the "absence of Supreme Court precedent on point forecloses any argument that the state court's decision [denying challenge to admission of propensity evidence] was contrary to or an unreasonable application of clearly established federal law") (citation omitted), cert. denied, 574 U.S. 842 (2014). Because the Supreme Court has left these questions unanswered, this Court cannot conclude that the Court of Appeal's adjudication of the instant claims was contrary to, or an unreasonable application of "clearly established" federal law. See Larson, 515 F.3d at 1066.[10]

In any event, petitioner otherwise fails to demonstrate that the admission of the foregoing evidence constitutes a denial of due process or merits federal habeas relief. "A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159,

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[10]In the absence of such authority, finding a constitutional right to the exclusion of such evidence would require the application of a new rule of law, an exercise this Court may not undertake in a habeas proceeding. Teague v. Lane, 489 U.S. 288 (1989).

1172 (9th Cir.), as amended on reh'g, 421 F.3d 1154 (9th Cir. 2005). A state trial court's admission of evidence in a criminal trial does not provide a basis for federal habeas relief unless the state court's ruling denied a defendant the benefit of a specific constitutional right, or rendered the trial fundamentally unfair such that it violated the Due Process Clause. See Perry v. New Hampshire, 565 U.S. 228, 237 (2012); see also Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir.) ("The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process.") (citing Estelle, 502 U.S. at 67-69), cert. denied, 516 U.S. 1017 (1995). Under Ninth Circuit precedent, the admission of evidence in a state trial violates due process "[o]nly if there are *no* permissible inferences the jury may draw from the evidence. . . ." Jammal v. Van de Kamp, 926 F.2d 918, 920 (1991) (emphasis in original); see also Windham v. Merkle, 163 F.3d 1092, 1103-04 (9th Cir. 1998) (admission of "other acts" evidence will violate due process only where there are no permissible inferences the jury may draw from it), cert. denied, 541 U.S. 950 (2004).

As the California Court of Appeal explained in rejecting Ground Two, there were permissible inferences that the jury could draw from the prior uncharged sexual conduct (*i.e.*, that petitioner engaged in a pattern of attacking young females who were asleep and vulnerable, when petitioner may have been consuming alcohol, which suggests a propensity for committing the crimes charged in the present case). See Lodged Doc. 10 at 12; see also Cal. Evid. Code § 1108 (exception to general prohibition against propensity evidence to establish defendant's tendency to commit such crimes).

Additionally, the Court of Appeal reasonably determined that the probative value of the evidence of prior uncharged acts was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice and that it was not otherwise inadmissible under Section 352, stating:

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> The uncharged crimes were not remote; they occurred only a couple of years before the charged incident. Also, the uncharged crimes are not more egregious than the charged crime, and thus, the admission of the uncharged conduct would not inflame the jury's emotions against [petitioner]. The evidence of [petitioner's] prior misconduct was not uncertain, confusing, or distracting. Its presentation did not place an undue burden on the defense. . . . Finally, the court admonished the jury here on the limited use of this evidence, and we have no reason to believe that the jury failed to heed that instruction.

(Lodged Doc. 10 at 12-13 (citations omitted)).

The Court of Appeal's analysis is well supported by the record and law. As there were permissible inferences the jury could draw from the prior uncharged incidents – *i.e.*, that petitioner acted with intent and per his propensity when he committed the acts against T. – the admission of such evidence was not constitutionally erroneous.

Finally, even assuming that the trial court constitutionally erred in admitting the evidence of the prior uncharged offenses, petitioner is not entitled to federal habeas relief because the admission of such evidence did not have a "substantial and injurious effect on the jury's verdict." See Plascencia v. Alameida, 467 F.3d 1190, 1203 (9th Cir. 2006) (applying Brecht v. Abrahamson, 507 U.S. 619, 623 (1993), harmless error analysis to claim that admission of evidence was improper). As detailed above, other evidence against petitioner strongly suggested his guilt of the charged offenses. Petitioner was apprehended within minutes of the crime, two blocks away from where the intrusion occurred, wearing a checkered shirt like the one the intruder had been described as wearing. Petitioner and his son lived next door to the victim. Petitioner admitted that he had been outside the window where the break-in occurred that evening. DNA for which T. was a potential

contributor was found on petitioner's palms, and there was evidence of saliva where she had testified that he put his hand over her mouth to prevent her from screaming.

As the Court of Appeal acknowledged, the trial court instructed the jury as to how it was to consider the evidence of the prior uncharged incidents, stating:

> . . . [Y]ou may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crimes of which he is accused. ¶ However, even though you find by a preponderance of the evidence that the defendant committed other sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes you are determining. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes that you are determining. ¶ Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(CT 181). The jury is presumed to have followed these instructions. Weeks v. Angelone, 528 U.S. 225, 226 (2000). In light of the evidence and the trial court's instruction, petitioner has not shown that the admission and use of the evidence of prior uncharged acts, even if constitutionally erroneous, had a substantial and injurious impact on the outcome.

Petitioner's argument that Section 1108 violates the Equal Protection Clause likewise does not entitle him to habeas relief. There is no United States Supreme Court case that either "squarely" holds that Section 1108, or a similar statute, violates equal protection, or establishes a legal principle that "clearly extends" to

this case. See Richter, 562 U.S. at 101 (it "is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court") (citation omitted); Carey v. Musladin, 549 U.S. 70, 77 (2006) (where Supreme Court precedent gives no clear answer to question presented, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'") (quoting 28 U.S.C. § 2254(d)(1)); Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009) ("[W]hen a Supreme Court decision does not 'squarely address the issue in the case' or establish a legal principle that 'clearly extends' to a new context to the extent required by the Supreme Court. . . , it cannot be said, under AEDPA, there is 'clearly established' Supreme Court precedent. . . .") (citation and internal brackets omitted).

The Ninth Circuit has rejected an equal protection challenge to Section 1108. See Porter v. McGrath, 268 Fed. Appx. 676, 677 (9th Cir. 2008) (citing United States v. LeMay, 260 F.3d 1018, 1030-31 (9th Cir. 2001), cert. denied, 534 U.S. 1166 (2002)). Federal courts that have considered the issue of introducing propensity evidence in similar circumstances have routinely rejected equal protection claims. See, e.g., United States v. Julian, 427 F.3d 471, 487 (7th Cir. 2005) (rejecting equal protection challenge to Federal Rule of Evidence 413, which allows admission of evidence that a defendant charged with sexual assault committed a prior sexual assault), cert. denied, 546 U.S. 1220 (2006); United States v. LeMay, 260 F.3d at 1030-31 (rejecting equal protection challenge to Federal Rule of Evidence 414, which allows the admission of evidence that a defendant charged with child molestation committed other uncharged acts of child molestation).

As the foregoing cases make clear (1) those who engage in sexual assaults are not a suspect class; and (2) criminal defendants do not have a fundamental right to a trial free from relevant propensity evidence that is not unduly prejudicial.

See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (legislation or official action that neither burdens a fundamental right nor targets a suspect class withstands an equal protection challenge so long as it "is rationally related to a legitimate state interest"); Julian, 427 F.3d at 487; LeMay, 260 F.3d at 1030-31. The importance and difficulty of prosecuting those who engage in sexual assaults provides a rational basis for Section 1108. See Petition Memo at 10 (petitioner acknowledging the "compelling state interest" behind Section 1108 in prosecuting sex offense cases). Accordingly, petitioner's equal protection challenge to Section 1108 does not merit federal habeas relief.

For the foregoing reasons, the Court of Appeal's rejection of Grounds Two and Three was not contrary to, and did not involve an unreasonable application of, clearly established federal law, and was not based upon an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on these claims. See 28 U.S.C. § 2254(d); Richter, 562 U.S. at 100-03.

C. Petitioner's Jury Instruction Claims Do Not Merit Federal Habeas Relief – Grounds Four and Five

Petitioner contends that instructing the jury with CALJIC No. 2.50.01 interfered with the presumption of innocence and the right to have the jury determine guilt beyond a reasonable doubt by permitting the jury to infer propensity under Section 1108 proved by a preponderance of the evidence. (Ground Four; Petition Memo at 10-11; Reply Memo at 19-24). Petitioner also contends that instructing the jury with CALJIC Nos. 10.41 and 10.42, which define a lewd act with a child under 14 years old, violated his constitutional rights because they are argumentative and distracted the jury from focusing on what must

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be proved for guilt.[11] (Ground Five; Petition Memo at 11-12; Reply Memo at 24-26).

The California Court of Appeal found, as to CALJIC No. 2.50.01, that California law squarely forecloses such a challenge. See Lodged Doc. 10 at 14 (citing, *inter alia*, People v. Reliford, 29 Cal.4th 1007, 1013-14 (2003) and Schultz v. Tilton, 659 F.3d 941, 945 (9th Cir. 2011) (holding that Reliford's interpretation of CALJIC No. 2.50.01 is not contrary to federal law), cert. denied, 566 U.S. 1010 (2012). As to CALJIC Nos. 10.41 and 10.42, the California Court of Appeal found that these instructions were not argumentative and, in any event, did not violate the Constitution because they did not alter the prosecution's burden of proof or bias the jury to determine guilt in an unconstitutional way. (Lodged Doc. 10 at 14-15). Petitioner is not entitled to federal habeas relief on Grounds Four and Five.

1. Pertinent Law

Claims of error concerning state jury instructions are generally matters of state law only. See Gilmore v. Taylor, 508 U.S. 333, 343 (1993) ("instructional errors of state law generally may not form the basis for federal habeas relief"); see also Menendez v. Terhune, 422 F.3d 1012, 1029 (9th Cir. 2005) (any error in state court's determination of whether state law allowed for instruction in case cannot

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[11]Such instructions state the elements of count 3 and its lesser included offense and, in pertinent part – except for the below-bracketed language which is present in only CALJIC 10.41, both instructions also state:

> A "lewd or lascivious act" is defined as any touching of the body of a child under the age of 14 years with the specific intent to arouse, appeal to, or gratify the sexual desires of either party . . . ¶ The law does not require [as an essential element of the crime] that the lust, passions, or sexual desires of either person be actually aroused, appealed to or gratified. . . . ¶ [It is no defense to this charge that the child under the age of 14 years may have consented to the alleged lewd and lascivious act.]

(CT 201-02, 204-05; RT 4539-40, 4542-43).

form basis for federal habeas relief). An instructional error "does not alone raise a ground cognizable in a federal habeas corpus proceeding." Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988); see also Van Pilon v. Reed, 799 F.2d 1332, 1342 (9th Cir. 1986) (claims that merely challenge correctness of jury instructions under state law cannot reasonably be construed to allege a deprivation of federal rights) (citation omitted). Federal habeas relief based upon a claim of instructional error is available only when a petitioner demonstrates that "[an] ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle, 502 U.S. at 72; see also Waddington v. Sarausad, 555 U.S. 179, 191 (same) (citations omitted). A challenged instruction must be evaluated in the context of the other jury instructions and the trial record as a whole, not in artificial isolation. Waddington, 555 U.S. at 191 (citations omitted).

2. Petitioner Has Not Shown That CALJIC No. 2.50.01 Violated Due Process

Petitioner has not established that CALJIC No. 2.50.01 – a permissive inference instruction relating to consideration of evidence of other sexual offenses – lowered the prosecution's burden of proof.[12] The instruction expressly limited

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[12]CALJIC 2.50.01 provides in pertinent part:

> In determining whether defendant has been proved guilty of any sexual crime of which he is charged, you should consider all relevant evidence, including whether the defendant committed any other sexual crimes, whether charged or uncharged, about which evidence has been received . . . ¶ If you find by a preponderance of the evidence that the defendant committed any such other sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crimes of which he is accused. ¶ However, even though you find by a preponderance of the evidence that the defendant committed other sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes you are determining. If you determine an inference properly can be drawn from this evidence, this inference

(continued...)

the purpose for which the jury was permitted to use evidence that petitioner had committed any other uncharged sexual offenses. (CT 181). The instruction also forbade jurors from using this evidence for any other purpose. (CT 181). Further, the instruction emphasized that this evidence was "only one item . . . to consider, along with all the other evidence," that it was "not sufficient by itself to prove beyond a reasonable doubt that [petitioner] committed the charged crimes" and that the jury still had to determine whether petitioner was "proved guilty beyond a reasonable doubt of the charged crimes." (CT 181). Other instructions defined "reasonable doubt" and noted that the reasonable doubt standard applied. See CT 189-90 (CALJIC Nos. 2.90 and 2.91). Viewed as a whole, the instructions adequately explained the burden of proof, the use of evidence of past bad acts, and the need to use such evidence for only the purpose for which it was introduced. The jury is presumed to have followed its instructions. Weeks v. Angelone, 528 U.S. at 234.

Moreover, as the California Court of Appeal noted, the Ninth Circuit has squarely rejected a due process challenge to CALJIC No. 2.50.01 as raised herein. See Schultz v. Tilton, 659 F.3d at 945 (holding that instruction concerning defendant's uncharged sexual misconduct "in no way suggests that a jury could reasonably convict a defendant for charged offenses based merely on a preponderance of the evidence," and finding that instruction "was unambiguous and made clear that [defendant] could be convicted only if the evidence as a whole 'proved [him] guilty beyond a reasonable doubt of the charged crime.'") (internal

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[12](...continued)
is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crimes that you are determining. ¶ Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(CT 181).

citations omitted). Considering this clear authority and the jury instructions in context, petitioner is not entitled to federal habeas relief on this claim.

3. Petitioner Has Not Shown That CALJIC Nos. 10.41 and 10.42 Violated His Constitutional Rights

Petitioner also has not established that CALJIC Nos. 10.41 and 10.42 violated his constitutional rights. Petitioner's constitutional argument appears to be that the instructions had the likely effect of depriving him of a fair trial because they focused on matters that need not be proved rather than on the elements of the offense. (Petition Memo at 12). The Court disagrees.

As the Court of Appeal explained, the instructions did not "impede" the jury in determining guilt beyond a reasonable doubt of every element of the charged crimes or bias the jury – the instructions "do not specify items of evidence, identify witnesses, or in any way favor the prosecution over the defense"; rather, they "accurately set out the elements in easily understood language and do not improperly diminish the weight to be given to any evidence." (Lodged Doc. 10 at 15). "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is 'whether the ailing instruction. . . so infected the entire trial that the resulting conviction violates due process.'" Middleton v. McNeil, 541 U.S. 433, 437 (2004) (quoting Estelle, 502 U.S. at 72).

Petitioner has not shown that the use of the instructions in issue deprived him of due process. Notwithstanding the language with which petitioner takes issue, the jury was still required to find that petitioner committed an act of "touching" the body of a victim under the age of 14 years with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of either party. (CT 201, 204). There is no evidence in the record to support petitioner's argument that the jury was somehow "distracted" by the "extraneous information unrelated to the elements of the offense" in the instructions. (Petition Memo at 11; Reply

Memo at 25). Considering the jury instructions in context, petitioner is not entitled to relief on this claim.

4. Conclusion

For the foregoing reasons, the Court of Appeal's rejection of Grounds Four and Five was not contrary to, and did not involve an objectively unreasonable application of, clearly established federal law and was not based upon an unreasonable determination of the facts in light of the evidence presented. Accordingly, petitioner is not entitled to federal habeas relief on these claims. See 28 U.S.C. § 2254(d); Richter, 562 U.S. at 100-03.

D. Petitioner's Claim Based on the Trial Court's Denial of His New Trial Motion Does Not Merit Federal Habeas Relief – Ground Six

Petitioner contends that the trial court erred in denying a new trial motion based on a juror allegedly having brought in outside evidence during deliberations. (Ground Six; Petition Memo at 12-13; Reply Memo at 27-29). Defense counsel moved for a new trial based on alleged juror misconduct, providing a declaration recounting a conversation counsel had with Juror No. 7 in which the juror allegedly stated that she had to "break down" what a one in 1.4 million chance meant for the rest of the jury in relation to DNA evidence about the presence of DNA which could have been provided by T. from petitioner's palm swab. (CT 234-39; Lodged Doc. 14 at 3-5). Defense counsel acknowledged that Juror No. 7 is a criminalist with the Orange County Sheriff's Department, who had disclosed in voir dire that she did this kind of analysis. (Lodged Doc. 14 at 4). The trial court denied the motion, finding that there was insufficient evidence of jury misconduct, since the juror's statement sounded like it was just the arithmetic evaluation of one in 1.4 million. (Lodged Doc. 14 at 6).

The California Court of Appeal also found no juror misconduct since jurors are permitted to bring their knowledge and beliefs and everyday life experience

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into deliberations. (Lodged Doc. 10 at 17). Petitioner is not entitled to federal habeas relief on this claim.

1. Pertinent Law

The Sixth Amendment guarantees criminal defendants the right to a "fair trial by a panel of impartial, 'indifferent' jurors." Irwin v. Dowd, 366 U.S. 717, 722 (1961), and to confront and cross-examine witnesses who testify against them. Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). "In a constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. 466, 472-73 (1965); Estrada v. Scribner, 512 F.3d 1227, 1238 (9th Cir.) (Sixth Amendment "requires the jury verdict to be based on the evidence produced at trial"), cert. denied, 554 U.S. 925 (2008); Grotemeyer v. Hickman, 393 F.3d 871, 877 (9th Cir. 2004) (a defendant "is entitled to a jury that reaches a verdict on the basis of evidence produced at trial, exclusive of 'extrinsic evidence'") (footnote omitted), cert. denied, 546 U.S. 880 (2005); Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986); see also Tong Xiong v. Felker, 681 F.3d 1067, 1075 (9th Cir. 2012) ("Extraneous influences on a jury can, under some circumstances, require the reversal of a conviction."), cert. denied, 568 U.S. 1147 (2013).

Juror misconduct occurs when a juror introduces into the jury's deliberations extrinsic facts that were not admitted in evidence or provided in the instructions. Thompson v. Borg, 74 F.3d 1571, 1574 (9th Cir.), cert. denied, 519 U.S. 889 (1996). The introduction of a "juror's personal knowledge of specific information concerning the defendant or the defendant's alleged crime constitutes impermissible extrinsic evidence" in violation of the Constitution. Mancuso v. Olivarez, 292 F.3d 939, 951 (9th Cir. 2002) (juror committed misconduct by informing fellow jurors that defendant had been convicted of prior felonies based

on juror having tampered with redacted trial exhibits and interpreting the same) (citations omitted), overruled on other grounds, Slack v. McDaniel, 529 U.S. 473 (2000); see generally Raley v. Ylst, 470 F.3d 792, 803 (9th Cir. 2006) ("A jury's exposure to extrinsic evidence deprives a defendant of the rights to confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.") (citation omitted), cert. denied, 552 U.S. 833 (2007).

However, a juror's "past personal experiences may be an appropriate part of the jury's deliberations." Grotemeyer v. Hickman, 393 F.3d at 879 (citation omitted). "The Sixth Amendment entitles a defendant to an 'impartial' jury, not to an ignorant one." Id. "It is expected that jurors will bring their life experiences to bear on the facts of a case." Hard v. Burlington N. R. R. Co., 870 F.2d 1454, 1462 (9th Cir. 1989) (citation omitted); see also United States v. Navarro-Garcia, 926 F.2d 818, 821 (9th Cir. 1991) ("jurors must rely on their past personal experiences when hearing a trial and deliberating on a verdict") (citation and internal brackets omitted).

Accordingly, courts have rejected claims that jurors improperly considered "extrinsic evidence" where the information in issue arose from a juror's own personal experiences. See, e.g., Murray v. McEwen, 673 Fed. Appx. 669, 671-72 (9th Cir. 2016) (jury foreperson's comment based on having served on prior juries that guilty people request jury trials was not misconduct), cert. denied, 137 S. Ct. 2198 (2017); United States v. Wong, 603 Fed. Appx. 639 (9th Cir. 2015) (juror's reliance on his personal experience in the banking industry to interpret evidence adduced at trial was not improper); United States v. Budziak, 697 F.3d 1105, 1111 (9th Cir. 2012) (juror's past personal experience with computers and computer program was not extraneous evidence improperly considered by the jury), cert. denied, 568 U.S. 1244 (2013); Rucker v. Lattimore, 369 Fed. Appx. 810, 813 (9th Cir.) (district court did not err in rejecting claim that two jurors discussed their past experiences as victims of sexual assault during deliberations in attempted

murder trial, such was an appropriate part of deliberations; citing Grotemeyer), cert. denied, 562 U.S. 934 (2010); Grotemeyer v. Hickman, 393 F.3d at 878 (juror who told other jurors that, based on her experience as a medical doctor, it was her opinion that Grotemeyer's mental disorders caused him to commit his crime and that he would receive treatment as part of his sentence did not engage in misconduct); Hard v. Burlington N. R. R. Co., 870 F.2d at 1462 (affirming denial of new trial despite allegation that a juror with special knowledge regarding x-ray interpretation attempted to use that knowledge to sway other jurors); compare Estrada v. Scribner, 512 F.3d at 1232-33, 1238 (juror's introduction of his mother's murder into otherwise impermissible sentencing discussions during deliberations was misconduct; juror allegedly told other jurors that if the defendant were not given a lengthy sentence he would repeat his offense, and assertedly was unduly influenced by the murder of his own mother); United States v. Navarro-Garcia, 926 F.2d at 821-23 (holding that a juror's personal knowledge or experience constitutes extrinsic evidence where the juror interjects his or her past personal experiences into deliberations in the absence of any record evidence on a given fact; in this case juror possibly conducted an experiment to determine whether a car would handle differently with 300 pounds in the trunk).

A petitioner raising a claim of juror misconduct predicated upon consideration of extrinsic evidence is entitled to federal habeas relief only if it can be established that the exposure to extrinsic evidence had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. at 637; Estrada v. Scribner, 512 F.3d at 1235 ("On collateral review, trial errors – such as extraneous information that was considered by the jury – are generally subject to 'harmless error' analysis, namely whether the error had a 'substantial and injurious' effect or influence in determining the jury's verdict.") (citing, *inter alia*, Brecht); Lawson v. Borg, 60 F.3d 608, 612 (9th Cir. 1995); compare Caliendo v. Warden of California Men's Colony, 365 F.3d 691,

695-98 (9th Cir.) (recognizing that United States Supreme Court jurisprudence requires courts to presume prejudice in cases involving unauthorized contact between a juror and a witness, an interested party, or the officer in charge), cert. denied, 543 U.S. 927 (2004).

2. Analysis

Here, there is no evidence that Juror No. 7 brought in extraneous evidence developed outside the witness stand (*e.g.*, such as results of a juror's experiment or independent research or extraneous documents). Compare Bell v. Uribe, 748 F.3d 857, 860-61 (9th Cir. 2014) (finding juror misconduct where evidence was that juror went home during deliberations, compiled information from a dictionary and from her profession, and presented that information from a notebook she brought from home to the jury when deliberations resumed), cert. denied, 575 U.S. 912 (2015). Rather, it appears that Juror No. 7 shared and was relying on her own specialized knowledge and experience to evaluate the DNA evidence adduced at trial – something she was permitted to do in deliberations. Assuming that Juror No. 7 told other jurors how to consider a one in 1.4 million chance in DNA analyses, the statement is not misconduct but rather permissible introduction of that juror's personal experience. See Grotemeyer, 393 F.3d at 878-79 ("Dr. Papadakis's experience was not shared by the entire jury. . . but there is nothing wrong with her using it."); Murray v. McEwen, 673 Fed. Appx. at 672 ("jurors' statements during deliberations do not constitute misconduct, because jurors are permitted to use their personal experiences during deliberations, particularly to evaluate credibility"). Like the Ninth Circuit in Grotemeyer, 393 F.3d at 878, this Court is not aware of any holding by the Supreme Court that a juror's reliance on, or sharing of, personal experiences to interpret testimony or evidence constitutes misconduct. If petitioner had been concerned that Juror No. 7 would unduly influence the jury, petitioner could have used a peremptory challenge to remove Juror No. 7 after it came out on voir dire that she is a criminalist who performs

DNA analyses. Id.; see also Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 866 (2017) (noting that "significant safeguards" that protect a defendant's right to an impartial and competent jury include examination of veniremembers during voir dire, observations by the court and counsel and by other sitting jurors during trial, and by non-juror evidence after a verdict is rendered) (citing Tanner v. United States, 483 U.S. 107, 127 (1987)).

To the extent petitioner argues that Juror No. 7's personal experience with DNA went beyond the evidence adduced at trial because the witnesses who testified about DNA did not explain the chances in the way Juror No. 7 explained the chances, petitioner has shown no error. As detailed above, the prosecution presented witnesses to testify about the DNA evidence and analysis in this case. As such evidence was presented and argued at trial, Juror No. 7's use of her own personal experience in understanding DNA analyses to evaluate this evidence was proper. See, e.g., United States v. Wong, 603 Fed. Appx. at 640 (similarly finding not extraneous juror's use of personal experience in the banking industry to evaluate evidence about the ability to cash cashier's checks, where the defendant testified that he could not cash said checks); Williams v. LaMarque, 2005 WL 2463906, at *3-*4 (N.D. Cal. Oct. 4, 2005) (same where jurors discussed personal experience with firearms and shared their expertise about the amount of force needed to pull the trigger on a revolver in a shooting case, where the defendant had claimed the gun went off by accident).

Even if Juror No. 7 committed misconduct by telling the other jurors how to interpret the DNA analyses, petitioner's claim would fail for lack of prejudice. Petitioner's speculation that Juror No. 7 acted as an unsworn expert, explaining DNA and urging other jurors to rely on her expertise is insufficient to show prejudice. See Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015) ("The Brecht standard reflects the view that a 'State is not to be put to th[e] arduous task [or retrying a defendant] based on mere speculation that the defendant was prejudiced

by trial error; the court must find that the defendant was actually prejudiced by the error.") (citation omitted).

For the foregoing reasons, the Court finds no juror misconduct and no prejudicial error from the trial court's denial of the new trial motion based thereon. See United States v. Budziak, 697 F.3d at 1111 (trial court did not abuse its discretion in denying new trial motion alleging juror misconduct without holding an evidentiary hearing where allegations were that juror referred to personal life experiences with computers and with a computer program rather than extraneous evidence; alleged juror conduct was not a legitimate subject of inquiry).

E. Petitioner Is Not Entitled to an Evidentiary Hearing

Petitioner also requests that he be afforded an evidentiary hearing on his claims. (Reply Memo at 5-6). Such request should be denied because petitioner has not alleged any material fact which he did not have a full and fair opportunity to develop in state court and which, if proved, would show his entitlement to habeas relief. See Cullen v. Pinholster, 563 U.S. at 180-181 (scope of record for 28 U.S.C. § 2254(d)(1) inquiry limited to record that was before state court that adjudicated claim on the merits); Schriro v. Landrigan, 550 U.S. 465, 474 (2007) (if record refutes applicant's factual allegations or otherwise precludes habeas relief, court not required to hold evidentiary hearing); Gandarela v. Johnson, 286 F.3d 1080, 1087 (9th Cir. 2002) (evidentiary hearing properly denied where the petitioner "failed to show what more an evidentiary hearing might reveal of material import"), cert. denied, 537 U.S. 1117 (2003).

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VI. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying the Petition and dismissing this action with prejudice; and (3) directing that Judgment be entered accordingly.

DATED: December 19, 2019

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE