

Appendix

A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 13 2021

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

MICHAEL R. FOWLER,

Petitioner-Appellant,

v.

FOX, Warden,

Respondent-Appellee.

No. 20-16016

D.C. No. 1:18-cv-01516-DAD-JLT
Eastern District of California,
Fresno

ORDER

Before: M. SMITH and HURWITZ, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2 & 3) 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
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

MICHAEL R FOWLER,

CASE NO: 1:18-CV-01516-DAD-JLT

v.

FOX,

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 4/27/2020**

Keith Holland
Clerk of Court

ENTERED: April 27, 2020

by: /s/ O. Rivera
Deputy Clerk

Appendix B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL R. FOWLER

No.: 1:18-cv-01516-NONE-JLT (HC)

Petitioner,

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS, DENYING
PETITION FOR WRIT OF HABEAS
CORPUS, DIRECTING CLERK OF COURT
TO ENTER JUDGMENT AND CLOSE CASE
AND DECLINING TO ISSUE CERTIFICATE
OF APPEALABILITY

WARDEN FOX.

(Doc. No. 28)

Respondent.

Petitioner Michael R. Fowler is a state prisoner proceeding in *propria persona* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 raising various claims all related to his contention that he was not afforded a fair trial in connection with the challenged judgment of conviction entered against him in state court. (Doc. No. 1.) Following a jury trial in state court, on July 22, 2015, petitioner was convicted of assault with a deadly weapon and false imprisonment. *People v. Fowler*, 2018 Cal. App. Unpub. LEXIS 2540, at *1 (Cal. App. 5th Dist. April 16, 2018). As a result of that conviction, petitioner is currently serving a sentence of 25-year to life in state prison, plus two 5-year terms for prior serious felony enhancements which were stayed. *Id.* at *2. Respondent Warden Fox filed an answer to the pending petition for federal habeas relief on December 5, 2019, contending that petitioner was properly sentenced

1 after he received a fair trial. (Doc. No. 24 at 1-24.) Petitioner responded with a traverse on
2 December 30, 2019. (Doc. No. 26.)

3 In a detailed findings and recommendations issued on February 7, 2020, the assigned
4 magistrate judge found petitioner's claims to lack merit and recommended that his habeas petition
5 be denied. (Doc. No. 28.) The findings and recommendations were served on all parties and
6 contained notice that any objections thereto were to be filed within thirty days from the date of
7 service. On March 16, 2020, petitioner filed his objections. (Doc. No. 31.)

8 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), the court has conducted a
9 *de novo* review of the case. As the pending findings and recommendations recount, after his
10 judgment of conviction was affirmed on appeal and his petition for review was denied, petitioner
11 filed state habeas petitions in the superior court, state appellate court, and state supreme court—
12 all of which were denied. (Doc. No. 28 at 2.) The magistrate judge considered and appropriately
13 rejected all of petitioner's arguments based on alleged violation of the Confrontation Clause, lack
14 of prosecutorial due diligence, prosecutorial misconduct, ineffective assistance of counsel, and
15 the trial judge's bias. (*Id.* at 5-18.) Having carefully reviewed the state courts' decisions and the
16 pending findings and recommendations, the court finds the magistrate judge's analysis and
17 conclusion to be supported by the record and the law.

18 Petitioner's objections to the findings and recommendations are unavailing. In those
19 objections petitioner advances arguments inconsistent with the deferential standard a federal
20 habeas court must apply in evaluating state court rulings under 28 U.S.C. § 2254. *See Briceno v.*
21 *Scribner*, 555 F.3d 1069, 1076 (9th Cir. 2009) (“§ 2254(d) established a highly deferential
22 standard for evaluating state court rulings.”). In this regard on federal habeas review, “[f]actual
23 determinations by state courts are presumed correct absent clear and convincing evidence to the
24 contrary.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Yet petitioner has failed to present
25 such clear and convincing evidence refuting the factual findings on which the state trial and
26 appellate courts made their rulings. Moreover, the arguments raised by petitioner in his
27 objections, (*see* Doc. No. 31 at 1-5), fail to overcome the deference this federal habeas court must
28 ////

1 afford to state court rulings, even on federal law issues. *See Harrington v. Richter*, 562 U.S. 86,
2 103 (2011). The court will therefore adopt the pending findings and recommendations.

3 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
4 district court's denial of his petition, and an appeal is only allowed in certain circumstances.
5 *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). Specifically, the federal rules governing
6 habeas cases brought by state prisoners require a district court issuing an order denying a habeas
7 petition to either grant or deny therein a certificate of appealability. *See Rules Governing § 2254*
8 *Case, Rule 11(a)*. A judge shall grant a certificate of appealability “only if the applicant has made
9 a substantial showing of the denial of a constitutional right,” 28 U.S.C. § 2253(c)(2), and the
10 certificate must indicate which issues satisfy this standard. 28 U.S.C. § 2253(c)(3). “Where a
11 district court has rejected the constitutional claims on the merits, the showing required to satisfy §
12 2253(c) is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find
13 the district court's assessment of the constitutional claims debatable or wrong.” *Slack v.*
14 *McDaniel*, 529 U.S. 473, 484 (2000). Here, petitioner has not made such a showing.
15 Accordingly, a certificate of appealability will not be issued.

16 For the reasons set forth above:

17 1. The findings and recommendations, filed February 7, 2020 (Doc. No. 28), is
18 adopted in full;

19 2. The petition for writ of habeas corpus is denied;

20 3. The clerk of court is directed to enter judgment and close this case; and,

21 4. The court declines to issue a certificate of appealability.

22 This order terminates the action in its entirety.

23 IT IS SO ORDERED.

24 Dated: April 26, 2020


25 _____
UNITED STATES DISTRICT JUDGE

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Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL R FOWLER,) Case No.: 1:18-cv-01516-NONE-JLT (HC)
Petitioner,)
v.) FINDINGS AND RECOMMENDATION TO
WARDEN FOX,) DENY PETITION FOR WRIT OF HABEAS
Respondent.) CORPUS
)
)
)

Petitioner is currently serving a sentence of 25 years to life plus two five-year terms for prior serious felony enhancements for his conviction of assault with a deadly weapon and false imprisonment. He filed the instant habeas petition challenging the conviction. As discussed below, the Court finds the claims to be without merit and recommends the petition be **DENIED**.

I. PROCEDURAL HISTORY

On July 22, 2015, Petitioner was convicted at the conclusion of a jury trial of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count II) and false imprisonment (*id.*, § 236; count III). *People v. Fowler*, 2018 Cal. App. Unpub. LEXIS 2540, at *1 (Cal. App. 5th Dist. April 16, 2018). The jury acquitted defendant of domestic violence (*id.*, § 273.5, subd. (a)(1); count I). *Id.* In a bifurcated proceeding on September 8, 2015, the trial court found true the enhancements alleged in the second amended information that defendant had prior serious felony convictions for assault with a deadly weapon in 2001 and residential burglary in 1986. *Id.* These enhancements were alleged pursuant

1 to Penal Code section 667, subdivision (a) and the three strikes law (*id.*, § 667, subds. (b)-(i)). *Id.* The
2 trial court also found true three prior prison term enhancements (*id.*, § 667.5, subd. (b)). *Id.* at *1-2. On
3 January 26, 2016, the trial court sentenced defendant to 25 years to life on count II, plus two 5-year
4 terms for the prior serious felony enhancements. *Id.* at *2. The trial court's sentence on count III and
5 the prison term enhancements were stayed. *Id.*

6 Petitioner appealed to the California Court of Appeal, Fifth Appellate District ("Fifth DCA").
7 The Fifth DCA affirmed the judgment. *Id.* Petitioner filed a petition for review in the California
8 Supreme Court on May 24, 2018, which was denied on June 27, 2018. (Docs. 25-13, 25-14.)

9 Petitioner filed a state habeas petition in the Tuolumne County Superior Court on September
10 11, 2018. (Doc. 25-15.) That petition was denied on November 5, 2018. (Doc. 25-16.) Petitioner then
11 filed a petition in the Fifth DCA on April 5, 2019, which was denied on May 2, 2019. (Docs. 25-17,
12 25-18.) Petitioner filed a habeas petition in the California Supreme Court on May 6, 2019, which was
13 denied on August 28, 2019. (Docs. 25-19, 25-20.)

14 On November 1, 2018, Petitioner filed the instant federal habeas corpus petition in this Court.
15 (Doc. 1.). Respondent filed an answer to the petitioner on December 5, 2019. (Doc. 24.) On December
16 30, 2019, Petitioner filed a traverse. (Doc. 26.)

17 **II. FACTUAL BACKGROUND**

18 The Court adopts the Statement of Facts in the Fifth DCA's unpublished decision¹:

19 On March 20, 2014, around 1:00 p.m., Melissa P. heard what sounded like fighting
20 in a neighbor's house in rural Groveland. Ms. P., who knew defendant and was
21 familiar with his voice, heard him yelling, "I am going to kill you." She also heard a
woman pleading, "No, no." Ms. P. called 911.

22 Tuolumne County Sheriff's Deputy Phillip Halencak responded at 2:00 p.m. to
23 defendant's residence. Defendant and B.M. were being separated by California
24 Highway Patrol officers. Halencak took a statement from B.M., who told the deputy
she and defendant were packing to move and had been arguing since 11:00 a.m.
25 When B.M. pulled the cord off the satellite receiver, defendant became enraged and
began to strangle her with the cord until she nearly lost consciousness. When B.M.
tried to run out of the trailer, defendant would shove her down onto the bed or hold

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28 ¹ The Fifth DCA's summary of facts in its unpublished opinion is presumed correct. 28 U.S.C. §§ 2254(d)(2), (e)(1).
Therefore, the Court will adopt the Fifth DCA's summary of the facts. Moses v. Payne, 555 F.3d 742, 746 (9th Cir.
2009).

1 her in a bear hug. Defendant continued to yell at her. Defendant kept her inside the
2 trailer until officers arrived. B.M. declined any medical attention or a protective
3 order because her daughter was coming to take her away from defendant anyway.

4 Deputy Halencak has experience in investigating strangulations and observed a red
5 linear mark on the right side of B.M.'s neck and extending to the back of her neck.
6 Halencak entered the bedroom of the residence and observed a coaxial cable for a
7 satellite system coming out of the wall. The other end of the cable was detached
8 from the satellite receiver.

9 Defense investigator Bill Perreira testified B.M. came to his office in December
10 2014 and told him the police report summarizing her statement was incorrect. She
11 said they had wrestled around and she got tangled in the cords, but defendant never
12 hit or strangled her. B.M. also said she had thrown a television set.

13 Defendant testified he told Halencak before his arrest that he and B.M. only argued,
14 wrestled, and got tangled in the cords. When B.M. threw the television at defendant,
15 he stepped outside to avoid more fighting. Defendant denied punching or hitting
16 B.M. Defendant denied using a cord to strangle B.M. Defendant explained he did
17 not inflict any injury to B.M. and saw no injury on her. Defendant also denied
18 threatening to kill B.M. Defendant admitted pushing her away several times because
19 she was hitting him. Defendant said B.M. was prone to having violent outbursts.
20 Defendant denied preventing B.M. from leaving. Defendant gave B.M. a pickup
21 truck and registered it under her name so she could come and go as she pleased.

22 Fowler, 2018 Cal. App. Unpub. LEXIS 2540, at *11-13.

23 **III. DISCUSSION**

24 A. Jurisdiction

25 Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to
26 the judgment of a state court if the custody is in violation of the Constitution, laws, or treaties of the
27 United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 n.
28 7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the United States
Constitution. The challenged conviction arises out of the Tuolumne County Superior Court, which is
located within the jurisdiction of this court. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(d).

29 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of
30 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its enactment.
31 Lindh v. Murphy, 521 U.S. 320 (1997) (holding the AEDPA only applicable to cases filed after
32 statute's enactment). The instant petition was filed after the enactment of the AEDPA and is therefore

1 governed by its provisions.

2 B. Legal Standard of Review

3 A petition for writ of habeas corpus under 28 U.S.C. § 2254(d) will not be granted unless the
4 petitioner can show that the state court's adjudication of his claim: (1) resulted in a decision that was
5 contrary to, or involved an unreasonable application of, clearly established Federal law, as determined
6 by the Supreme Court of the United States; or (2) resulted in a decision that "was based on an
7 unreasonable determination of the facts in light of the evidence presented in the State court
8 proceeding." 28 U.S.C. § 2254(d); Lockyer v. Andrade, 538 U.S. 63, 70-71 (2003); Williams, 529
9 U.S. at 412-413.

10 A state court decision is "contrary to" clearly established federal law "if it applies a rule that
11 contradicts the governing law set forth in [the Supreme Court's] cases, or "if it confronts a set of facts
12 that is materially indistinguishable from a [Supreme Court] decision but reaches a different result."
13 Brown v. Payton, 544 U.S. 133, 141 (2005) (citing Williams, 529 U.S. at 405-406).

14 In Harrington v. Richter, 562 U.S. 86, 101 (2011), the U.S. Supreme Court explained that an
15 "unreasonable application" of federal law is an objective test that turns on "whether it is possible that
16 fairminded jurists could disagree" that the state court decision meets the standards set forth in the
17 AEDPA. The Supreme Court has "said time and again that 'an unreasonable application of federal
18 law is different from an incorrect application of federal law.'" Cullen v. Pinholster, 563 U.S. 170, 203
19 (2011). Thus, a state prisoner seeking a writ of habeas corpus from a federal court "must show that
20 the state court's ruling on the claim being presented in federal court was so lacking in justification that
21 there was an error well understood and comprehended in existing law beyond any possibility of
22 fairminded disagreement." Harrington, 562 U.S. at 103.

23 The second prong pertains to state court decisions based on factual findings. Davis v.
24 Woodford, 384 F.3d 628, 637 (9th Cir. 2003) (citing Miller-El v. Cockrell, 537 U.S. 322 (2003)).
25 Under § 2254(d)(2), a federal court may grant habeas relief if a state court's adjudication of the
26 petitioner's claims "resulted in a decision that was based on an unreasonable determination of the facts
27 in light of the evidence presented in the State court proceeding." Wiggins v. Smith, 539 U.S. 510, 520
28 (2003); Jeffries v. Wood, 114 F.3d 1484, 1500 (9th Cir. 1997). A state court's factual finding is

1 unreasonable when it is “so clearly incorrect that it would not be debatable among reasonable jurists.”
2 Jeffries, 114 F.3d at 1500; see Taylor v. Maddox, 366 F.3d 992, 999-1001 (9th Cir. 2004), *cert. denied*,
3 Maddox v. Taylor, 543 U.S. 1038 (2004).

4 To determine whether habeas relief is available under § 2254(d), the federal court looks to the
5 last reasoned state court decision as the basis of the state court’s decision. See Ylst v. Nunnemaker,
6 501 U.S. 979, 803 (1991); Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004). “[A]lthough we
7 independently review the record, we still defer to the state court’s ultimate decisions.” Pirtle v.
8 Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002).

9 The prejudicial impact of any constitutional error is assessed by asking whether the error had
10 “a substantial and injurious effect or influence in determining the jury’s verdict.” Brecht v.
11 Abrahamson, 507 U.S. 619, 623 (1993); see also Fry v. Pliler, 551 U.S. 112, 119-120 (2007) (holding
12 that the Brecht standard applies whether or not the state court recognized the error and reviewed it for
13 harmlessness).

14 C. Review of Petition

15 Petitioner argues the following: (1) That his confrontation rights were violated; (2) That the
16 prosecution was not sufficiently diligent in locating the victim for the state court to have determined
17 her “unavailable” under the Evidence Code; (3) That defense counsel rendered ineffective assistance
18 in the following ways: a) failing to locate witness Dr. Rourke, and b) failing to retain an expert witness
19 on photography; (4) That the trial judge should not have denied his recusal motion under California
20 Civil Procedure section 170.6; and (5) That the prosecutor committed misconduct by statements made
21 during closing arguments regarding the victim’s statement.

22 1. Right to Confrontation

23 Petitioner, in multiple claims, argues that his confrontation rights were violated: “The victim in
24 this case has never been on a witness stand to be cross examined,” and “[t]here was insufficient
25 evidence that the unavailability of the victim was the result of any wrongdoing [by Petitioner].” (Doc.
26 1 at 4.) In the last reasoned decision, the Fifth DCA denied the arguments as follows:

27 **Issues**

28 Defendant argues the trial court erred in relying on section 1370 because it was

1 superseded by *Crawford* and section 1390. Defendant argues there was no evidence
2 he acted wrongfully pursuant to section 1390, so there is insufficient evidence
3 supporting forfeiture by wrongdoing. Defendant further argues the People failed to
4 demonstrate due diligence in trying to procure B.M.'s presence at trial. We reject
5 these contentions.

6 ***Forfeiture by Wrongdoing***

7 The confrontation clause bars admission of testimonial hearsay unless "the declarant
8 is unavailable, and ... the defendant has had a prior opportunity to cross-examine."
9 (*Crawford, supra*, 541 U.S. at p. 59.) A defendant's confrontation rights are subject
10 to certain exceptions, including the forfeiture by wrongdoing doctrine, which allows
11 admission of unconfronted testimonial statements "where the defendant ha[s]
12 engaged in wrongful conduct designed to prevent a witness's testimony." (*Giles v.*
13 *California* (2008) 554 U.S. 353, 366, 128 S. Ct. 2678, 171 L. Ed. 2d 488;
14 see *Crawford, supra*, 541 U.S. at p. 62 ["the rule of forfeiture by wrongdoing (which
15 we accept) extinguishes confrontation claims on essentially equitable
16 grounds"]; *United States v. Jackson* (4th Cir. 2013) 706 F.3d 264, 265 ["so long as
17 a defendant intends to prevent a witness from testifying, the forfeiture-by-
18 wrongdoing exception applies even if the defendant also had other motivations for
19 harming the witness"]; *People v. Banos* (2009) 178 Cal.App.4th 483, 504, 100 Cal.
20 Rptr. 3d 476.)

21 California's counterpart to the forfeiture by wrongdoing doctrine is codified
22 in section 1390. The doctrine of forfeiture by wrongdoing is aimed at protecting the
23 integrity of court proceedings and applies to anyone who obtains the absence of a
24 witness by wrongdoing, regardless of the nature of the wrongdoing. (*People v.*
25 *Jones* (2012) 207 Cal.App.4th 1392, 1399, 144 Cal. Rptr. 3d 571.)

26 Defendant contends the trial court improperly relied on section 1370 in making its
27 ruling; defendant is reading the in limine hearing transcript too literally. In his
28 written motion, the prosecutor cited to and relied on both section 1370 and section
1390 and made arguments based on both statutes. During their oral arguments on
the in limine motion, both the prosecutor and defense counsel argued the issue of
whether there was evidence defendant acted wrongfully in causing B.M.'s absence
at trial. Although the trial court referred to Code of Civil Procedure section 1219,
subdivision (b) and cited to sections 240 and 1370 in making its ruling, the trial
court also made a finding relating to defendant's wrongful conduct. Specifically, the
court noted defendant's conduct, while not criminal in nature, caused the witness to
become unavailable. Parenthetically, a finding of wrongful conduct by defendant
was not necessary for the trial court's ruling on B.M.'s unavailability as a witness
pursuant to section 240. Under section 240, there is no requirement the witness's
unavailability must be caused by someone's wrongful conduct.

29 Thus, while the trial court did not expressly rely on section 1390, its ruling included
30 a finding, without expressly calling it so, that defendant had acted wrongfully in
31 causing the victim's absence as a witness. Consequently, section 1390's requirement

1 the defendant wrongfully caused the witness's absence, which is necessary to apply
2 the doctrine of forfeiture by wrongdoing, was satisfied by the court's implied finding.
3 Remanding the case for a formal finding on section 1390 would serve no purpose
4 because the trial court still complied with the requirements of the statute.

5 The trial court's citation to section 1370 also does not indicate a misapplication of
6 the law. Once the doctrine of forfeiture by wrongdoing has been
7 invoked, subdivision (b)(4) of section 1390 requires the court to consider the
8 reliability of the proffered statement. In doing so, a trial court cannot err in relying
9 on the criteria for determining reliability set forth in section 1370. Had the trial court
10 failed to make a finding concerning the wrongfulness of defendant's conduct, it
11 would not have complied with the requirements of section 1390, and the
12 introduction of the hearsay statement could have constituted a violation of
13 the confrontation clause. The doctrine of forfeiture by wrongdoing acts as an
14 exception to the introduction of testimonial hearsay prohibited by *Crawford* and its
15 progeny. We therefore reject defendant's argument the trial court improperly
16 admitted B.M.'s hearsay statements to Deputy Halencak and that section 1370 has
17 been superseded by *Crawford*.

18 ***Evidence of Wrongdoing***

19 Defendant argues insufficient evidence was produced at the in limine hearing to
20 show he acted wrongfully. Although this issue is factually close, we conclude the
21 evidence supports the trial court's ruling.

22 The reviewing court determines if there is substantial evidence to support the trial
23 court's express or implied finding the defendant acted to prevent a witness from
24 testifying. (*People v. Banos, supra*, 178 Cal.App.4th at p. 502.) Rulings by the trial
25 court on the admissibility of evidence are reviewed for abuse of discretion. (*People
v. Thompson* (2016) 1 Cal.5th 1043, 1120, 210 Cal. Rptr. 3d 667, 384 P.3d 693.)

26 Although criminal defendants have no duty to assist the state in proving their guilt,
27 they do have a duty to refrain from acting in ways that destroy the integrity of the
28 trial system. (*Davis v. Washington* (2006) 547 U.S. 813, 833, 126 S. Ct. 2266, 165
L. Ed. 2d 224.) For the doctrine of forfeiture by wrongdoing to apply, the defendant
must affirmatively engage in conduct designed to prevent the witness from
testifying. (*Giles v. California, supra*, 554 U.S. at pp. 359, 365.) As noted above,
conduct causing the absence of a witness satisfies the doctrine of forfeiture by
wrongdoing, whatever the nature of the wrongdoing. (*People v. Jones, supra*, 207
Cal.App.4th at pp. 1396-1397, 1399 [defendant recorded in jail dissuading witness
from telling police what he did].)

29 Wrongdoing under this forfeiture doctrine can include conduct that is otherwise
30 legal, including marriage with a victim to prevent her testimony through invocation
31 of the marital privilege doctrine. (*Commonwealth v. Szerlong* (2010) 457 Mass. 858,
32 862-865, 933 N.E.2d 633; *U.S. v. Montague* (10th Cir. 2005) 421 F.3d 1099, 1102-
33 1103.) Collusion by a defendant with a witness not to testify at a criminal trial also

satisfies the doctrine of forfeiture by wrongdoing. (See *Commonwealth v. Edwards* (2005) 444 Mass. 526, 537-542, 830 N.E.2d 158.)

The trial court noted defendant's conduct was not criminal but included conduct to put the witness beyond the authority of the court and make her testimony unavailable. At a pretrial hearing, B.M. herself represented to the court she was married to defendant. At another hearing, B.M. told the court she would refuse to testify. B.M. at first attended several court proceedings with defendant, sat with him in court, and left with him at the conclusion of the hearing. The prosecutor made a record to this effect during more than one pretrial hearing without objection from defendant.

Defendant moved with B.M. to Klamath Falls and applied for utilities to the residence in his name. B.M. stopped receiving public assistance in California, but resumed receiving it at her residence in Klamath Falls. Shortly after defendant substituted counsel, the trial court increased his bail. Defendant stated he was homeless and living in his truck, when in fact his vehicle registration was in B.M.'s name and listed their Klamath Falls address.

This is a case where the People had to show, by a preponderance of the evidence, defendant acted wrongfully to prevent B.M. from testifying. Absent a direct statement threatening the witness, showing the intent of a defendant is always difficult. A defendant's mental state is rarely susceptible to direct proof and must usually be proven circumstantially. (*People v. Thomas* (2011) 52 Cal.4th 336, 355, 128 Cal. Rptr. 3d 489, 256 P.3d 603.) Viewed separately, any piece of the evidence presented by the prosecution to establish defendant's wrongdoing could appear innocuous. Examined in its entirety, however, there is substantial circumstantial evidence defendant colluded with B.M. so she would not testify at his trial. We find the doctrine of forfeiture by wrongdoing applicable to this case and B.M.'s statement to the investigating deputy to be reliable.

[FN 6:] B.M.'s statements to Deputy Halencak were corroborated by Halencak's own observations of the strangulation marks on B.M.'s neck and her demeanor when he encountered her. Halencak saw California Highway Patrol officers holding defendant and B.M. apart when he arrived at the scene. The hearsay statements were corroborated by the neighbor who called 911 after hearing the fight between defendant and B.M., which included his threat to kill her and her own pleas of "No, no." The People also introduced photographs depicting strangulation injuries to B.M.'s neck. B.M.'s statements were made to Halencak very shortly after the incident.

¹³ Fowler, 2018 Cal. App. Unpub. LEXIS 2540, at *13-19.

a. *Legal Standard*

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. Const.,

1 Amend. VI. The Confrontation Clause bars “admission of testimonial statements of a witness who did
2 not appear at trial unless he was unavailable to testify, and the defendant . . . had a prior opportunity
3 for cross-examination.” Crawford v. Washington, 541 U.S. 36, 53–54 (2004); Davis v. Washington,
4 547 U.S. 813, 821 (2006). The Confrontation Clause applies only to “‘witnesses’ against the accused,
5 i.e., those who ‘bear testimony.’” Crawford, 541 U.S. at 51 (citation omitted); Davis, 547 U.S. at
6 823–24. “‘Testimony,’ in turn, is typically a solemn declaration or affirmation made for the purpose
7 of establishing or proving some fact.” Crawford, 541 U.S. at 51 (citation and some internal
8 punctuation omitted); Davis, 547 U.S. at 824. Nevertheless, the Confrontation Clause “does not bar
9 the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”
10 Crawford, 541 U.S. at 59 n. 9. Additionally, a Confrontation Clause violation is subject to harmless
11 error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). A Confrontation Clause violation
12 is harmless, and does not justify habeas relief, unless it had substantial and injurious effect or
13 influence in determining the jury’s verdict. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

b. Analysis

15 The state court applied the correct legal standard under the Sixth Amendment by applying
16 Crawford, 541 U.S. 36, and Giles v. California, 554 U.S. 353, 358 (2008). Thus, the only question
17 remaining is whether the state court's adjudication is objectively unreasonable. The Court concludes
18 that it is not.

19 First, the Confrontation Clause is not implicated because, as the state court found, the
20 Petitioner intentionally and wrongfully caused the victim’s absence from trial. Fowler, 2018 Cal. App.
21 Unpub. LEXIS 2540, at *13-19. After notifying the court that she and Petitioner had gotten married,
22 the victim repeatedly sat alongside Petitioner during his hearings and accompanied him when they left.
23 Fowler, 2018 Cal. App. Unpub. LEXIS 2540, at *18; (Doc. 24 at 17.) Petitioner later lied about his
24 housing, claiming he was homeless when actually he was living with the victim in Klamath Falls,
25 Oregon. Id. The Fifth DCA found these acts showed that Petitioner acted wrongfully to prevent the
26 victim from testifying, such that the doctrine of forfeiture by wrongdoing was applicable. Fowler,
27 2018 Cal. App. Unpub. LEXIS 2540, at *19. Second, even if there was error, Petitioner is not entitled
28 to relief because the statements did not have a “substantial and injurious effect or influence on the

1 jury's verdict." Brecht, 507 U.S. at 637. As noted by the Fifth DCA, the victim's statements were
2 corroborated by Deputy Halencak's own observations, by the neighbor who called 911, and
3 photographs depicting strangulation injuries to the victim's neck. Fowler, 2018 Cal. App. Unpub.
4 LEXIS 2540, at *19 n. 6. Therefore, Petitioner is not entitled to habeas relief because the state court
5 decision was not contrary to or an unreasonable application of clearly established Supreme Court
6 precedent. Even if error occurred, it could have had no effect on the jury's verdict. The claim should
7 be denied.

8 2. Prosecution's Due Diligence

9 In his next claim, Petitioner contends that the prosecution was not sufficiently diligent in
10 locating the victim for the state court to have determined her "unavailable" under the Evidence Code.
11 In the last reasoned decision, the Fifth DCA denied the arguments as follows:

12 ***People's Due Diligence***

13 Defendant argues the People failed to show due diligence in trying to secure B.M.'s
14 presence at trial, and their efforts to do so were insufficient pursuant to section 240.
15 We disagree.

16 Information from social service agencies indicated B.M. lived at the Klamath
17 Falls address. Deputy Halencak and Investigator Snyder both sought assistance from
18 local authorities in Klamath Falls to locate B.M. at the address she purportedly
19 shared with defendant. Several attempts to locate B.M. by Oregon officials failed.
B.M. was not personally served with notice to attend the trial and the prosecutor
obtained a body attachment, but the ability to execute it was hampered by Code of
Civil Procedure section 1219, subdivision (b).

20 A similar scenario occurred in *People v. Cogswell* (2010) 48 Cal.4th 467, 106 Cal.
21 Rptr. 3d 850, 227 P.3d 409. There, a woman visiting from Colorado was sexually
22 attacked and testified at the preliminary hearing that Cogswell was her attacker. But
23 she thereafter refused to return to California to testify at trial. The prosecution sought
24 her attendance through the Uniform Act to Secure Attendance of Witnesses from
25 without the State in Criminal Cases (Pen. Code, § 1334 et seq.) (Uniform Act).
26 Although a Colorado court issued a subpoena for the witness's appearance, she did
27 not appear for trial. The Court of Appeal found the prosecution failed to use due
28 diligence to secure the witness's presence at trial. The California Supreme Court
concluded the prosecution did use reasonable diligence. (*People v. Cogswell, supra*,
at pp. 471, 477-479.) The court in *Cogswell* noted Code of Civil Procedure section
1219, subdivision (b) was added by the Legislature to prevent the victims of sexual
assault or domestic violence from being jailed for contempt for refusing to testify
against the attacker. (*Cogswell, supra*, at p. 478.) The victim in *Cogswell* refused to
return to California. The prosecutor could reasonably conclude that invoking the

1 Uniform Act's "custody-and-delivery" provision would not have altered the victim's
2 decision not to testify about the sexual assault and would have been a waste of time
3 and resources. Further, confinement of a sexual assault victim to ensure her presence
4 at the assailant's trial would not be a reasonable means of securing her presence.
(Cogswell, at p. 479.)

5 The same conclusion is reasonable here even though the People did not seek to
6 employ the Uniform Act. B.M. had professed in open court her refusal to testify.
7 When she was under subpoena to attend court in California and still a resident of
8 this state, she was unavailable for trial on more than one occasion. B.M. married
9 defendant during the course of these proceedings and moved to Oregon with him.
10 Oregon officials could not find B.M. at her residence in Klamath Falls. As
11 in *Cogswell*, Code of Civil Procedure section 1219, subdivision (b) creates a legal
12 barrier to the use of contempt and ultimately of confinement as a means to secure a
13 witness's presence at trial. The prosecution's attempt to employ the Uniform Act in
14 this case would have been just as futile as the use of the Uniform Act turned out to
15 be in *Cogswell*.

16 Defendant relies on *People v. Foy* (2016) 245 Cal.App.4th 328, 349-350, 199 Cal.
17 Rptr. 3d 208, to support his contention the People should have been required to use
18 the Uniform Act here. *Foy* is distinguishable from this case because it involved a
19 witness from another state who was the victim of second degree robbery, with the
defendant using a gun. (*People v. Foy, supra*, at p. 332.) The witness was not the
victim of a sexual assault or domestic violence and Code of Civil Procedure section
1219, subdivision (b) had no bearing on that case. In *Foy*, the outcome of employing
the Uniform Act was not certain or automatic. (*Foy*, at p. 350.) Here, use of the
Uniform Act would have been futile given the witness's history in failing to attend
court proceedings, her vow to never testify, her marriage to defendant, and her move
with defendant to Oregon. The People cannot, under these circumstances, be faulted
for failing to go through the motion of trying to apply the Uniform Act to an
obviously hostile witness with whom defendant colluded to keep from testifying at
trial.

20 Fowler, 2018 Cal. App. Unpub. LEXIS 2540, at *19-22.

21 a. *Legal Standard and Analysis*

22 Respondent is correct that Petitioner fails to present a federal claim, since Petitioner is
23 challenging the application and interpretation of state law. It is well-settled that federal habeas relief
24 is not available to state prisoners challenging state law. Estelle, 502 U.S. at 67 (1991) ("We have
25 stated many times that federal habeas corpus relief does not lie for errors of state law); Langford v.
26 Day, 110 F.3d 1380, 1389 (9th Cir. 1997) ("alleged errors in the application of state law are not
27 cognizable in federal habeas corpus" proceedings). Thus, to the extent Petitioner disagrees with the
28 state court's determination that the prosecution showed due diligence in trying to secure the victim's

1 presence at trial, he fails to present a federal question. Likewise, his disagreement with the state court
2 determination that the prosecution's efforts were sufficient under the California Evidence Code section
3 240 fails to present a federal claim. Thus, the claim is not cognizable on federal habeas and should be
4 rejected.

5 In addition, a habeas petitioner is not entitled to relief unless the error “had substantial and
6 injurious effect or influence in determining the jury's verdict.”” Brecht v. Abrahamson, 507 U.S. 619,
7 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). In other words, state
8 prisoners seeking federal habeas relief may obtain plenary review of constitutional claims of trial
9 error, but are not entitled to habeas relief unless the error resulted in “actual prejudice.” Id. (citation
10 omitted); see Calderon v. Coleman, 525 U.S. 141, 146–47 (1998).

11 In this case, Petitioner fails to show any prejudice. As noted by the Fifth DCA, the victim was
12 an obviously hostile witness who had professed in open court her refusal to testify. Fowler, 2018 Cal.
13 App. Unpub. LEXIS 2540, at *21-22. It was reasonable for the Fifth DCA to find that the victim was
14 unavailable given the witness's history of failing to attend court proceedings, her vow to never testify,
15 her marriage to defendant, and her move with defendant to Oregon. See id. Also, Respondent argues,
16 citing to Cal. Evid. Code §§ 240(a)(1) & 970, the victim was unavailable because of her marriage to
17 Petitioner; thus, “[b]ecause the victim would have been legally unavailable for a reason independent of
18 any prosecutorial diligence, there is no likelihood that an error regarding diligence would have
19 changed the trial court's ultimate conclusion that she was unavailable to testify.” (Doc. 24 at 21.) A
20 fairminded jurist could agree with the state court's determination that the prosecution showed
21 sufficient diligence and that Petitioner did not suffer any prejudice. Petitioner fails to establish that the
22 state court's determination was contrary to or an unreasonable application of Supreme Court authority.
23 The claim should be denied.

24 3. Ineffective Assistance of Counsel

25 Petitioner next alleges that defense counsel rendered ineffective assistance in the following
26 ways: (1) failing to locate witness Dr. Rourke, and (2) failing to retain an expert witness on
27 photography. (Doc. 1 at 5.) The state court rejected this claim raised in his habeas petition:

28 As to the first ground, Petitioner's claim of ineffective assistance of counsel lacks

1 that it was objectively unreasonable. Yarborough v. Gentry, 540 U.S. 1, 5 (2003). Moreover, because
2 the Strickland standard is a general standard, a state court has even more latitude to reasonably
3 determine that a defendant has not satisfied that standard. See Yarborough v. Alvarado, 541 U.S. 652,
4 664 (2004) (“[E]valuating whether a rule application was unreasonable requires considering the rule’s
5 specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-
6 case determinations.”)

7 *b. Analysis – Dr. Rourke*

8 Petitioner argues that his attorney was ineffective because he did not “even try to find a
9 witness on my behalf,” seeming to refer to the potential witness Dr. Rourke. (Doc. 1 at 5; Doc. 24 at
10 24.) To demonstrate prejudice resulting from defense counsel’s failure to call a witness, Petitioner
11 “must name the witness, demonstrate that the witness was available to testify and would have done so,
12 set out the content of the witness’s proposed testimony, and show that the testimony would have been
13 favorable to a particular defense.” Day v. Quarterman, 566 F.3d 527, 538 (5th Cir. 2009).

14 Petitioner fails to show that Dr. Rourke was available to testify and would have done so. In
15 addition, Petitioner merely speculates that Dr. Rourke’s testimony would have been helpful to his
16 defense. Thus, Petitioner makes no showing that the outcome would have been any different had
17 defense counsel called Dr. Rourke to testify. This claim should be denied.

18 *c. Analysis – Photography Expert*

19 Petitioner complains that his attorney failed or refused to secure expert testimony from a
20 photography expert to “refute Deput[y]’s photos + his lack of knowledge in photography.” (Doc. 1 at
21 5.) The claim is completely speculative. Petitioner provides no support for his contention that an
22 expert would have provided favorable evidence. As Respondent points out, “Petitioner never explains
23 why the only rational strategy required devoting resources to an expert in photography [and] does not
24 explain what that expert would have testified to, nor how that would have been vital to his case.”
25 (Doc. 24 at 23-24.) Petitioner also fails to provide information regarding counsel’s tactical decision.
26 The state court was reasonable to conclude that Petitioner’s claim of ineffective assistance of counsel
27 lacks the requisite specificity regarding his trial counsel’s alleged failures. See Strickland, 466 U.S. at
28 689 (counsel is afforded “wide latitude . . . in making tactical decisions”). Additionally, Petitioner fails

1 U.S. at 822.

2 In attempting to make out a claim of unconstitutional bias, a plaintiff must “overcome a
3 presumption of honesty and integrity” on the part of the judge. Larkin, 421 U.S. at 47. A judge is
4 unconstitutionally biased if he has a deep-seated favoritism or antagonism that makes fair judgment
5 impossible. Mayberry, 400 U.S. at 465-66. Recusal is required only if the judge’s bias is 1) directed
6 against a party; 2) stems from an extrajudicial source; and 3) is such as a reasonable person knowing
7 all the facts would conclude that the judge’s impartiality might reasonably be questioned. Liteky, 510
8 U.S. at 545-546. While the judge may have made rulings unfavorable to a petitioner, “[j]udicial
9 rulings alone almost never constitute a valid basis” for finding bias. Liteky v. United States, 510 U.S.
10 540, 555 (1994) (citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)). “In the absence of
11 evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient
12 remarks are generally sufficient to overcome the presumption of judicial integrity, even if those
13 remarks are ‘critical or disapproving of, or even hostile to, counsel, the parties, or their cases.’”
14 Larson v. Palmateer, 515 F.3d 1057, 1067 (9th Cir. 2008) (quoting Liteky, 510 U.S. at 555).

15 Finally, if a criminal defendant is not tried by an impartial adjudicator, the error is structural,
16 i.e., reversal is required without consideration of whether the error was harmless. Neder v. United
17 States, 527 U.S. 1, 8 (1999); Gomez v. United States, 490 U.S. 858, 876 (1989) (denial of “right to an
18 impartial adjudicator, be it judge or jury” can never be harmless error) (citation omitted).

19 b. *Analysis*

20 Initially, the Court notes that it cannot consider Petitioner’s argument that the state court
21 incorrectly applied California law on federal habeas review. Essentially, Petitioner seeks federal
22 review of a state court determination of state law. A federal court may not do so. See Bradshaw v.
23 Richey, 546 U.S. 74, 76 (2005) (per curiam) (federal court is bound by state court determination of
24 state law).

25 The state court reasonably denied his claim because his motion failed to meet the statute’s
26 requirements. Nevertheless, Petitioner’s judicial bias claim would not merit relief because it is entirely
27 unsupported. As Respondent argues, Petitioner does not show or allege that the judge was biased.
28 (Doc. 24 at 27.) He simply argues that his California Code of Civil Procedure section 170.6 motion

1 should not have been denied as untimely. (See *id.*) In his traverse, Petitioner attempts to argue that the
2 judge and district attorney were friends and the rulings from the judge confirm this. (Doc. 26 at 8.)
3 However, such judicial rulings have been found inadequate to show bias. See Liteky, 510 U.S. at 555.
4 Petitioner fails to demonstrate any evidence of judicial bias in this case that could form the basis of a
5 constitutional claim. Certainly, Petitioner has not shown that the state court rejection of his claim was
6 contrary to or an unreasonable application of controlling Supreme Court authority. The claim should
7 be denied.

8 5. Prosecutorial Misconduct

9 In his final claim, Petitioner alleges prosecutorial misconduct. Although Petitioner casts the
10 claim as “suppression” or “withholding” of evidence, his argument focuses on the prosecutor’s
11 statements during closing argument. (Doc. 24 at 28.) The state court rejected this claim raised in his
12 habeas petition:

13 Petitioner has not demonstrated any prejudice from the alleged statement by the
14 district attorney to the jury that “the victim never tried to correct the report.” As the
15 Court of Appeal’s opinion reflects, the jury was presented with evidence from a
16 defense investigator that the victim told him “the police report summarizing her
statement was incorrect.” No information “vital” to the defense was withheld from
the jury.

17 (Doc. 24 at 52-53.)

18 a. *Legal Standard*

19 A petitioner is entitled to habeas corpus relief if the prosecutor’s misconduct “so infected the
20 trial with unfairness as to make the resulting conviction a denial of due process.” Donnelly v.
21 DeChristoforo, 416 U.S. 637, 643 (1974). To constitute a due process violation, the prosecutorial
22 misconduct must be “of sufficient significance to result in the denial of the defendant’s right to a fair
23 trial.” Greer v. Miller, 485 U.S. 756, 765 (1987) (quoting United States v. Bagley, 473 U.S. 667
24 (1985)). Any claim of prosecutorial misconduct must be reviewed within the context of the entire
25 trial. Id. at 765-66; United States v. Weitzenhoff, 35 F.3d 1275, 1291 (9th Cir. 1994). The Court must
26 keep in mind that “[t]he touchstone of due process analysis in cases of alleged prosecutorial
27 misconduct is the fairness of the trial, not the culpability of the prosecutor” and “the aim of due
28 process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial

1 to the accused.” Smith v. Phillips, 455 U.S. 209, 219 (1982). If prosecutorial misconduct is
2 established, and it was constitutional error, the error must be evaluated pursuant to the harmless error
3 test set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993). See Thompson, 74 F.3d at 1577 (Only if
4 constitutional error is established “would we have to decide whether the constitutional error was
5 harmless.”).

6 *b. Analysis*

7 The state court reasonably determined that no prejudice resulted from the alleged statement by
8 the district attorney to the jury that “the victim never tried to correct the report.” (See Doc. 24 at 52.)
9 The court further noted that the jury was presented with evidence from a defense investigator that the
10 victim told him “the police report summarizing her statement was incorrect.” (Doc. 24 at 52-53.) The
11 state court concluded that “[n]o information ‘vital’ to the defense was withheld from the jury.” (Doc.
12 24 at 53.) The state court determination was not unreasonable, and the claim should be rejected.

13 Even if Petitioner could demonstrate that the prosecutor should have disclosed the attempted
14 recantation, the failure was immaterial because the jury was presented with evidence regarding the
15 victim’s statement being incorrect. Also, as Respondent points out, the jury heard evidence that the
16 victim and Petitioner were now married, and the victim did not want to cooperate with the trial. (Doc.
17 24 at 30.) Respondent argues that the victim’s recantation of her original statement was “cumulative
18 on the issue of her inconsistency and minimally probative of the actual crimes.” (Doc. 24 at 30.)
19 Moreover, the victim’s statements were corroborated by Deputy Halencak’s own observations of the
20 strangulation marks on the victim’s neck and her demeanor when he encountered her, the neighbor
21 who called 911, and photographs depicting strangulation injuries to the victim’s neck. Fowler, 2018
22 Cal. App. Unpub. LEXIS 2540, at *19 n. 6.

23 A fairminded jurist could conclude that the prosecutor’s statements during closing argument
24 could not reasonably be seen as “infect[ing] the trial with unfairness as to make the resulting
25 conviction a denial of due process.” Donnelly, 416 U.S. at 643. The claim should be denied.

26 **IV. RECOMMENDATION**

27 Accordingly, the Court RECOMMENDS that the Petition for Writ of Habeas Corpus be
28 DENIED with prejudice on the merits.

1 This Findings and Recommendation is submitted to the United States District Court Judge
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
3 Rules of Practice for the United States District Court, Eastern District of California. Within thirty
4 days after being served with a copy of this Findings and Recommendation, any party may file written
5 objections with the Court and serve a copy on all parties. Such a document should be captioned
6 "Objections to Magistrate Judge's Findings and Recommendation." Replies to the Objections shall be
7 served and filed within ten court days (plus three days if served by mail) after service of the
8 Objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
9 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive
10 the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 | IT IS SO ORDERED.

Dated: **February 7, 2020**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE