No._____

In the
Supreme Court of the United States

TED AMPARAN, Petitioner

v.

M. ELLIOT SPEARMAN, Warden, Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit
20-55756

VOLUME OF APPENDICES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APPENDIX A	Ninth Circuit MEMORANDUM OPINION Affirming the District Court Judgment
APPENDIX B	Ninth Circuit Order Denying the Petition for Rehearing
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APPENDIX A

Ninth Circuit MEMORANDUM OPINION
Affirming the District Court Judgment

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TED AMPARAN, Petitioner-Appellant, v. M. ELIOT SPEARMAN, Warden, Respondent-Appellee.	No. 20-55711 D.C. No. 3:18-cv-02522-BTM-WVG MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Barry Ted Moskowitz, District Judge, Presiding

Submitted April 6, 2022**
Pasadena, California

Before: SCHROEDER and GRABER, Circuit Judges, and McNAMEE,*** District Judge.

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

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

*** The Honorable Stephen M. McNamee, United States District Judge for the District of Arizona, sitting by designation.

Petitioner Ted Amparan appeals the district court's denial of his petition for writ of habeas corpus under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254. Reviewing de novo, Lopez v. Thompson, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc), we affirm.

1. The state court of appeals permissibly found that Amparan was sentenced under subdivision (c) of California Penal Code Section 667.6. Though the sentencing court stated initially that it would sentence Amparan under subdivision (d) only, the court later stated it would "do it under both." We must afford the state court deference on questions of fact, Lopez, 202 F.3d at 1116, and Amparan has not rebutted the presumption of correctness here. Additionally, the court of appeals' finding was not unreasonable, and thus does not meet the requirements for relief under § 2254(d).

2. Amparan's consecutive sentences under subdivision (c) cannot be the basis for habeas relief. Under subdivision (c), consecutive sentences are discretionary, but to impose consecutive sentences, the court is required to provide a statement of reasons or, at minimum, recognize "that two sentence choices are involved." People v. Senior, 5 Cal. Rptr. 2d 14, 24 (Cal. Ct. App. 1992). Here, the sentencing court did not provide a statement of reasons. But a "trial court's alleged failure to list reasons for imposing consecutive sentences" cannot function as the

basis for federal habeas relief, Souch v. Schaivo, 289 F.3d 616, 623 (9th Cir. 2002), because the decision to impose sentences "consecutively is a matter of state criminal procedure and is not within the purview of federal habeas corpus," Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (denying habeas relief where the petitioner argued his due process rights were violated because the trial court imposed consecutive sentences without explanation).

3. Amparan also asserts, for the first time on appeal, a Sixth Amendment violation. We decline to consider the issue. See Cacoperdo, 37 F.3d at 507 ("Habeas claims that are not raised before the district court in the petition are not cognizable on appeal.").

AFFIRMED.

APPENDIX B

Ninth Circuit Order Denying the Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TED AMPARAN, Petitioner-Appellant, v. M. ELIOT SPEARMAN, Warden, Respondent-Appellee.	No. 20-55711 D.C. No. 3:18-cv-02522-BTM-WVG Southern District of California, San Diego ORDER

Before: SCHROEDER and GRABER, Circuit Judges, and McNAMEE,* District Judge.

The panel judges have voted to deny Appellant's petition for panel rehearing and recommend denial of the petition for rehearing en banc.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing en banc, Docket No. 60, is DENIED.

* The Honorable Stephen M. McNamee, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX C

Denial of Petition by the District Court and Grant of Certificate of Appealability

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TED AMPARAN,

Petitioner,

v.

M. E. SPEARMAN, Warden,

Respondent.

Case No.: 18cv2522-BTM (WVG)

ORDER:

(1) ADOPTING IN PART AS MODIFIED AND DECLINING TO ADOPT IN PART THE FINDINGS AND CONCLUSIONS OF UNITED STATES MAGISTRATE JUDGE;

(2) DENYING PETITION FOR A WRIT OF HABEAS CORPUS; and

(3) ISSUING A LIMITED CERTIFICATE OF APPEALABILITY

Petitioner Ted Amparan is a state prisoner proceeding pro se with a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) He challenges his San Diego County Superior Court convictions for eight felony counts involving kidnapping and sexual assault of six women, and his sentence of life in prison plus 75 years to life in prison plus 15 years in prison. (Id. at 1.) He claims the state appellate court's decision denying his claims of insufficiency of the evidence (claim one), imposition of multiple sentences

for the same offense (claim two), and imposition of consecutive sentences (claim three), is contrary to clearly established federal law and based on an unreasonable determination of the facts. (*Id.* at 4-5.) Respondent has filed an Answer, contending the state court adjudication of claim one is neither contrary to nor an unreasonable application of federal law nor based on an unreasonable determination of the facts, and that claims two and three are not cognizable on federal habeas. (ECF No. 6.)

United States Magistrate Judge William V. Gallo has filed a Report and Recommendation ("R&R") finding that the state court denial of claim one is not contrary to clearly established federal law and claims two and three are not cognizable on federal habeas, and recommending the Petition be denied. (ECF No. 8.) No party has filed Objections to the R&R.

The Court has reviewed the R&R pursuant to 28 U.S.C. § 636(b)(1), which provides that: "A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." 28 U.S.C. § 636(b)(1). Having conducted a de novo review of the entirety of the Magistrate Judge's findings and conclusions irrespective of the absence of objections, the Court **ADOPTS AS MODIFIED** the Magistrate Judge's findings and conclusions as to claim one, **DECLINES TO ADOPT** the Magistrate Judge's findings and conclusions as to claims two and three, **DENIES** habeas relief on all claims, and **ISSUES** a Certificate of Appealability limited to claim three.

1. Claim One

Petitioner claimed in the state appellate court that his federal due process rights were violated by his conviction on count 5 (rape by a foreign object) because the victim could not remember at trial, which took place more than four years later, whether she had been digitally penetrated by Petitioner. (ECF No. 7-20 at 30-37.) The appellate court found

sufficient evidence of digital penetration was presented at trial notwithstanding the victim's inability to remember, in the form of the victim's statements in a recorded 911 call and to a responding police officer she had been digitally penetrated. (ECF No. 7-23 at 5-10.) The state supreme court summarily denied the petition for review of that opinion raising the same claim. (ECF No. 7-25.) Because claim one was adjudicated on the merits in state court, in order to be entitled to federal habeas relief Petitioner must first show the state appellate court adjudication is contrary to or involves an unreasonable application of clearly established federal law or is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2); Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (holding that later unexplained orders addressing the same claim are presumed to rest on the same grounds).

Magistrate Judge Gallo correctly found that the state appellate court adjudication of claim one is not contrary to clearly established United States Supreme Court precedent which requires a habeas petitioner to overcome a heavy burden of showing no rational trier of fact could have found him guilty beyond a reasonable doubt. (ECF No. 8 at 5-7.) The Court adopts that finding with the following modifications. Petitioner has failed to show for the same reasons set forth in the R&R that the state court adjudication of claim one involved an unreasonable application of clearly established federal law. In addition, Petitioner has failed to establish the state court adjudication of this claim is based on an unreasonable determination of the facts in light of the evidence presented to the state court because he has failed to establish that the state court factual findings are objectively unreasonable. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). For the reasons set forth in the R&R, with those modifications, the Court denies habeas relief on claim one.

2. Claim Two

Petitioner claimed in the state appellate court that the trial court erred in imposing separate sentences on counts 6 and 7 because they involved the same victim and an indivisible course of conduct. (ECF No. 7-20 at 36-41.) The appellate court agreed and granted relief on this claim, ordering the sentence to be modified accordingly. (ECF No.

7-23 at 10-14.) Petitioner alleges in claim two here that the appellate court adjudication was contrary to clearly established federal law or based on an unreasonable determination of the facts. (ECF No. 1 at 4.) The Magistrate Judge recommended denial of this claim because it is not cognizable on federal habeas. (ECF No. 8 at 7-8.) The Court declines to adopt that finding and denies relief on claim two because Petitioner has obtained complete relief on this claim in state court.

3. Claim Three

Petitioner claimed in the state appellate court that the trial court erred in running his sentences consecutively on count 1 (forcible rape) and count 2 (forcible sexual penetration) because they involved the same victim on the same occasion. (ECF No. 7-20 at 42-54.) The appellate court noted that the victim testified Petitioner put his finger in her vagina and then put his penis in her vagina, but the attorneys did not elicit facts showing Petitioner had a reasonable opportunity for reflection between those two acts. (ECF No. 7-23 at 17.) The appellate court noted that although California Penal Code § 667.6(d) mandates consecutive sentences for these sex offenses when they involve the same victim on separate occasions, it agreed with Petitioner that the trial judge erred in imposing consecutive sentences under that provision because there was insufficient evidence to show the digital penetration and rape occurred as separate instances. (Id. at 14-17.) The court denied relief, however, because Petitioner had forfeited the claim by failing to raise it in the trial court, and, even assuming the claim could have been brought as an ineffective assistance of counsel claim alleging a failure to object at trial, the trial judge had discretion under Penal Code § 667.6(c) to run the sentences consecutively. (Id. at 17-18.) Although that provision requires the trial court to state on the record it was aware of its discretion to impose consecutive or concurrent sentences and it failed to do so, the appellate court found Petitioner had waived any claim by not requesting the trial court make a record, and, even if he had brought an ineffective assistance of counsel claim alleging a failure by his attorney to do so, there was no basis to find the trial court would have decided differently had it been asked to make a record. (Id.) Although Petitioner did not raise a federal claim in the appellate court, the

state supreme court summarily denied his subsequent claim in the petition for review that it was inconsistent with the Fourteenth Amendment for the appellate court to interpret the California Penal Code to allow for consecutive sentences when there is insufficient evidence of separate acts. (ECF No. 7-24 at 15.) Petitioner claims here that the appellate court's decision is contrary to clearly established federal law and based on an unreasonable determination of the facts. (ECF No. 1 at 5.)

The Magistrate Judge recommended denying relief on this claim on the basis that clearly established federal law provides that the exercise of discretion of statutory authority by a state court to run sentences consecutively is a matter of state criminal procedure which does not present a cognizable federal claim. (ECF No. 8 at 8.) The Court declines to adopt that finding. Although a federal habeas petitioner generally may not bring a cognizable federal habeas claim based merely on an erroneous application of state law, there is a well-recognized exception providing that a Fourteenth Amendment violation can arise from a state court sentencing decision involving an arbitrary application of state law or an erroneous factual finding amounting to fundamental unfairness. See Richmond v. Lewis, 506 U.S. 40, 50 (1992) (holding that a state court's application of state law does not rise to the level of a federal due process violation unless it was so arbitrary or capricious as to constitute an independent due process violation); Fetterly v. Paskett, 997 F.2d 1295, 1300 (9th Cir. 1993) ("[T]he failure of a state to abide by its own statutory commands [regarding sentencing] may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."); Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (holding that a state statute which vested sentencing discretion in a jury created "a substantial and legitimate expectation that [a defendant] will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.") (citation omitted).

Here, the trial court erred under state law in imposing consecutive sentences under Penal Code § 667.6(d) because there is insufficient evidence counts 1 and 2 were separate

incidents, and although the trial court had discretion to impose consecutive sentences under Penal Code § 667.6(c), it erred under state law in failing to state on the record it was aware of its discretion as required by that provision. Although Petitioner argued in the appellate court that Penal Code § 667.6(d) did not apply, he did not raise a federal claim in that court. (ECF No. 7-20 at 42-54.) The appellate court denied relief, stating:

> As Amparan notes, when exercising its discretion to sentence under section 667.6(c), the trial court failed to provide a statement of reasons. Amparan, however, forfeited the issue by failing to object below. (*People v. Scott* (2015) 61 Cal.4th 363, 406 (holding forfeited defendant's claim that the trial court erred by failing to state its reasons for imposing full consecutive terms under section 667.6(c)).) Amparan does not make an alternative claim of ineffective assistance of counsel based on his counsel's failure to object when the trial court did not provide a statement of reasons. Even if he had made this claim, we would reject it as there is not a reasonable probability the outcome of the proceedings would have been different had an objection been made. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694.) The record reflects the trial court's understanding that it had the discretion to sentence Amparan under section 667.6(c). There is no reason to believe that the court would have reached a different conclusion had it been asked to state the reasons for making the sentences on counts 1 and 2 consecutive. Accordingly, any ineffective assistance of counsel claim fails as Amparan has not met his burden of showing prejudice. (*People v. Porter* (1987) 194 Cal.App.3d 34, 39 ("it would be idle to remand to the trial court for a new statement of reasons, as it is not reasonably probable that a result more favorable to appellant would occur").)

(ECF No. 7-23 at 18.)

In his petition for review of that opinion in the state supreme court Petitioner claimed that consecutive sentences under Penal Code § 667.6(d) or (c) imposed for continuous acts is inconsistent with the due process protections of the Fourteenth Amendment where there is no additional basis in the record as to why the sentences were ordered to run consecutively. (ECF No. 7-24 at 9-15.) That petition was summarily denied. (ECF No. 7-25.) Because Petitioner did not raise a federal claim in the appellate court, the Court must independently review the record in applying the provisions of 28 U.S.C. § 2254(d) to the silent denial of the federal claim by the state supreme court, but it looks to the appellate

court opinion to the extent it is relevant to that analysis. See Frantz v. Hazey, 533 F.3d 724, 738 (9th Cir. 2008) (en banc) (holding that even if the state court does not address the constitutional issue, where its reasoning is relevant to resolution of the constitutional issue it must be part of federal habeas court's consideration).

Under a liberal construction of the federal Petition, Petitioner is claiming that he is serving consecutive sentences on counts 1 and 2 in violation of the Fourteenth Amendment's prohibition on fundamentally unfair sentencing procedures, and argues that the state appellate court's finding as to what the trial court would have done had the state procedures been followed is arbitrary, in that it is without a factual foundation and wholly speculative, and relies on an erroneous finding he could not show prejudice from his counsel's failure to object to the trial judge's failure to make a record. That claim is cognizable on federal habeas and the Court will address it in the first instance.

Petitioner's claim may be procedurally defaulted because the appellate court found his failure to contemporaneously object resulted in its forfeiture. See Vansickel v. White, 166 F.3d 953, 957-58 (9th Cir. 1999) (affirming denial of habeas relief on procedural default grounds based on California's contemporaneous objection rule). However, the Court will address the merits because Respondent has not raised the defense and Petitioner has not been provided an opportunity to establish relief from a default in this Court.

As the state appellate court noted, Penal Code § 667.6(d) provides for mandatory consecutive sentences but does not apply here, whereas Penal Code § 667.6(c) provides for discretion to impose consecutive or concurrent sentences and provides that "the court ideally should explain choosing consecutive rather than concurrent and full rather than subordinate, though the same reason may justify both choices. At a minimum the record must reflect a recognition that two sentencing choices are involved." (ECF No. 7-23 at 17-18.) The appellate court found that the record supported a finding the trial court was aware it had discretion to impose either sentence, and that there was no basis to conclude the trial judge would have decided differently had it been asked by Petitioner's counsel to make a record. (Id. at 18.) At the sentencing hearing the trial judge stated that count 2 "should be

consecutive" under Penal Code § 667.6(d), and that she would follow the recommendation of the probation officer. (ECF No. 7-17 at 13-14.) The probation officer's report erroneously concluded that counts 1 and 2 were required to run consecutively under Penal Code § 667.6(d) because they involved separate incidents. (ECF No. 7-19 at 99.) When the prosecutor asked the judge to state the reasons for running the sentences consecutively under Penal Code § 667.6(c), the trial judge responded that she had imposed the consecutive sentences under Penal Code § 667.6(d), not § 667.6(c). (ECF No. 7-17 at 15.) The prosecutor replied: "You can do it – it's consecutive, but you can do it under both (d) and (c)." (Id.) The trial judge replied: "(c) is also applicable. You know, I could do it under both. So to make sure that it's clear, I will do it under both, but I believe it's - I think the (d) is controlling, but I can see where you could say that on review it might not be viewed as two separate acts. I will do that." (Id. at 15-16.)

Thus, the record shows the trial judge was aware she could run the sentences consecutively under either provision and was aware Penal Code § 667.6(c) might be necessary because there could be reasonable disagreement whether Penal Code § 667.6(d) applied. The record appears to reflect only that the trial judge was aware she could order consecutive sentences under both sections of the penal code and does not show she was aware she could order the sentences to run concurrently under Penal Code § 667.6(c). Assuming Petitioner could satisfy 28 U.S.C. § 2254(d)(2) by showing the state appellate court made an objectively unreasonable factual determination that the record reflects the trial judge was aware she had discretion to run the sentences concurrently under Penal Code § 667.6(c), he must still establish a federal violation. Frantz, 533 F.3d at 735-36. As set forth above, to do so he must show it was arbitrary for the trial court to impose consecutive sentences, or they were imposed based on an erroneous factual finding, so as to amount to a fundamentally unfair sentencing determination.

Petitioner was convicted of two separate crimes in count 1 (forcible rape) and count 2 (forcible sexual penetration), but because there was insufficient evidence produced at trial that he had adequate time to reflect between those two acts he was not subject to

mandatory consecutive sentences under California law. However, there is nothing arbitrary or fundamentally unfair about running the sentences consecutively on those counts because California law provides sentencing judges with such discretion. See Marzano v. Kincheloe, 915 F.2d 549, 552 (9th Cir. 1990) (holding that a sentence unauthorized by state law is unconstitutional); United States v. Hanna, 49 F.3d 572, 576-77 (9th Cir. 1995) (holding that sentence based on materially false or misleading evidence violates due process). Neither has Petitioner shown the trial judge based her decision on an erroneous factual determination that there was sufficient evidence he had time to reflect on his actions between commission of counts 1 and 2. Although the trial judge initially stated she was imposing consecutive sentences based on that erroneous finding, she acknowledged there could be reasonable disagreement over whether the mandatory provision applied and stated on the record she was imposing sentence based on both the mandatory and discretionary provisions. The record does not explicitly confirm the trial judge knew she had discretion under the discretionary provision, but neither does it contain any evidence she was unaware of such discretion. In fact, it would appear odd for the trial judge to impose sentence under both provisions if she believed both provisions required mandatory consecutive sentencing. Although this appears to violate California law requiring that "[a]t a minimum the record must reflect a recognition that two sentencing choices are involved," a federal constitutional violation cannot be predicated merely on a violation of state law, as Petitioner must show his sentence is fundamentally unfair because it is arbitrary or based on an erroneous factual finding. Although the trial judge erroneously found sufficient evidence to support mandatory sentencing under Penal Code § 667.6(d), she did not insist she was correct but acknowledged she could be wrong and imposed the sentence within her discretion under Penal Code § 667.6(d), and her mere failure to make a record that she had such discretion is not so fundamentally unfair or unjust so as to support federal habeas relief. See Souch v. Schaivo, 289 F.3d 616, 623 (9th Cir. 2002) ("[N]either an alleged abuse of discretion by the trial court in choosing consecutive sentences, nor the trial court's alleged failure to list reasons for imposing consecutive sentences, can form the basis for

federal habeas relief."); Pulley v. Harris, 465 U.S. 37, 41-42 (1984) (holding that a state court's decision must be so fundamentally unfair or unjust as to violate federal due process, a standard which is rarely satisfied).

In sum, assuming Petitioner could satisfy the provisions of 28 U.S.C. § 2254(d), he has not established a federal constitutional violation with respect to his claim that consecutive sentences on counts 1 and 2 is so fundamentally unfair as to violate his federal constitutional rights, and the Court denies habeas relief on claim three on that basis.

4. Certificate of Appealability

"[T]he only question [in determining whether to grant a Certificate of Appealability] is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Buck v. Davis, 580 U.S. ___, 137 S.Ct. 759, 773 (2017). The Court finds a Certificate of Appealability is appropriate under that standard as to claim three in the Petition only.

CONCLUSION AND ORDER

The Court **ADOPTS AS MODIFIED IN PART** and **DECLINES TO ADOPT IN PART** the findings and conclusions of the Magistrate Judge as set forth herein. The Petition for a Writ of Habeas Corpus is **DENIED**. The Court **ISSUES** a Certificate of Appealability limited to claim three in the Petition.

DATED: May 7, 2020

Barry Ted Moskowitz

BARRY TED MOSKOWITZ
UNITED STATES DISTRICT JUDGE

APPENDIX D

Magistrate's Report and Recommendation with State Court Appellate Decision Attached

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TED AMPARAN,

Petitioner,

v.

M.E. SPEARMAN, Warden,

Respondent.

Case No.: 18-CV-2522-BTM(WVG)

REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS

On November 2, 2018, Petitioner Ted Amparan a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging his criminal conviction of forcible sexual penetration under California Penal Code section 289 and the consecutive sentences imposed for forcible rape and forcible sexual penetration. Petitioner claims the evidence to support his conviction is insufficient and that the trial court erred in imposing consecutive sentences. Respondent contends that there is sufficient evidence to support the conviction and argues that whether a consecutive sentence is proper under state law is not a cognizable claim. The Court has considered the Petition and the Response and all supporting documents submitted by the parties. For the reasons set forth below, the Court RECOMMENDS the Petition be DENIED.

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I. BACKGROUND

A jury found Ted Amparan, a Marine stationed at Camp Pendleton, guilty of sexually assaulting six different women over a number of years. He was found guilty of two counts each of forcible rape and assault with intent to commit a specific felony; three counts of forcible sexual penetration; and kidnapping to commit a specific felony. The trial court sentenced Amparan to an aggregated indeterminate term of 75 years-to-life in prison, plus life, plus a total determinate term of 15 years in prison.

Amparan appealed, raising the claims in the state court that he raises now. The California Court of Appeal rejected those claims. This Court gives deference to state court findings of fact and presumes them to be correct unless Petitioner rebuts the presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *see also Parke v. Raley*, 506 U.S. 20, 36 (1992) (holding that findings of fact are entitled to statutory presumption of correctness). The following facts are taken from the California Court of Appeal's opinion on Petitioner's direct appeal, affirming the judgment of the trial court:

> *A. Gabriela (count 5)*[1]
>
> The jury found Amparan guilty of one count of sexual penetration by force against Gabriela. At trial, Gabriela testified that after Amparan tossed her to the ground he tried to pull her pants down, but was not able to access her private parts. She later clarified this statement meant that Amparan had not penetrated her vagina with his penis. Gabriela could not remember telling police that Amparan had put his finger in her vagina. She could not remember if Amparan put his finger in her "rear end." During cross-examination, Gabriela stated Amparan was able to pull her pants down to her thighs, but could not remember if he had digitally penetrated her anus. Gabriela, however, remembered speaking to the officers after the incident and telling them that Amparan had penetrated her anus. Gabriela admitted that she was very nervous coming into court to testify, a "10" on a scale of one to 10.

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[1] Petitioner challenges only his conviction for Count 5 against victim Gabriella.

> In rendering its decision, the jury also listened to a recording of the 911 telephone call Gabriela placed immediately after the incident in which she reported that Amparan had "stuck his finger in [her] ass and . . . tried to rape [her]." The jury heard testimony from San Diego Police Officer Wendy Valetin, who interviewed Gabriela immediately after the incident. Officer Valetin testified, without objection, that Gabriela told her that Amparan had thrown her to the ground and digitally penetrated her vagina twice and her anus five times. Officer Valetin testified that, in a later police interview, Gabriela told her that Amparan had digitally penetrated her vagina and anus.

(Lod. 5, ECF No. 7-18 at 2-6.); *see also People v. Amparan*, No. D069780, 2017 Cal. App. Unpub. LEXIS 3391, at *5-6 (Cal. Ct. App. 2017). Petitioner then appealed to the California Supreme Court, which denied the petition for review without comment. *People v. Amparan*, No. S242806, 2017 Cal. LEXIS 6222 (Cal. Aug. 9, 2017).

II. STANDARD OF REVIEW

This Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") because it was filed after April 24, 1996 and Petitioner is in custody pursuant to the judgment of a state court. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Under AEDPA, a court may not grant a habeas petition "with respect to any claim that was adjudicated on the merits in State court proceedings," 28 U.S.C. § 2254(d), unless the state court's judgment "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). The Ninth Circuit has further explained:

> An adjudication is contrary to clearly established Supreme Court precedent if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. It is an unreasonable application of clearly established Supreme Court precedent if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the

> facts of the prisoner's case. An unreasonable application of federal law is different from an incorrect application of federal law. The federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. A state court's adjudication is unreasonable only if the federal habeas court concludes that no fairminded jurist could conclude that the adjudication was consistent with established Supreme Court precedent.

Cain v. Chappell, 870 F.3d 1003, 1012 (9th Cir. 2017) (quotation omitted).

Where there is no reasoned decision from the highest state court to which the claim was presented, the court "looks through" to the last reasoned state court decision and presumes it provides the basis for the higher court's denial of a claim or claims. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805-06 (1991); *Cannedy v. Adams*, 706 F.3d 1148, 1156 (9th Cir. 2013), *as amended on denial of rehearing*, 733 F.3d 794 (9th Cir. 2013), *cert. denied*, 571 U.S. 1170 (2014). Where "the last reasoned opinion on the claim explicitly imposes a procedural default, [a court] will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Ylst*, 501 U.S. at 803.

III. DISCUSSION

Petitioner's contends (1) there is insufficient evidence to support one of his convictions for forcible sexual penetration because, at trial, the victim stated she could not recall whether Petitioner had digitally penetrated her, and (2) the trial court erred in imposing consecutive sentences on counts 1 and 2 for forcible rape and forcible sexual penetration. Respondent argues that the California Court of Appeal reasonably rejected both of Petitioner's claims. Respondent argues that this Court should deny the Petition because a rational trier of fact could conclude that the elements of the crime were met beyond a reasonable doubt and the consecutive sentencing issue is not a cognizable not claim for which relief can be granted. This Court agrees.

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A. There is Sufficient Evidence to Support Petitioner's Conviction on Count 5 for Forcible Sexual Penetration.

A court reviewing a state court conviction does not simply determine whether the evidence established guilt beyond a reasonable doubt. *See Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1993); *see also Coleman v. Johnson*, 566 U.S. 650, 655-56 (2012). Rather, the question is "whether, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Payne*, 982 F.2d at 338 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). Only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt is habeas relief warranted. *Jackson*, 443 U.S. at 324; *Payne*, 982 F.2d at 338. In applying this standard, a jury's credibility determinations are entitled to near-total deference. *See Schlup v. Delo*, 513 U.S. 298, 330 (1995); *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004).

28 U.S.C. § 2254(d) imposes a second layer of deference: the state court's decision denying a sufficiency of the evidence claim may not be overturned on federal habeas unless the decision was "objectively unreasonable." *See Williams v. Taylor*, 529 U.S. 362, 409-10, (2000); *Parker v. Matthews*, 567 U.S. 37, 43 (2012)).

The prosecution presented evidence of a 911 call placed by Gabriela immediately after the attack. (8 RT 726.) She told the operator that her attacker "stuck his finger in [her] ass and . . . tried to rape [her]." (1 CT 214.) Officer Wendy Valetin testified that in an interview immediately following the incident, Gabriela told her that Amparan digitally penetrated her vagina twice, and put his finger in her anus . . . five times." (9 RT 1074.) In another interview two weeks after the attack, Gabriella told Officer Valetin that Amparan "pushed her up against the wall and stuck his fingers in [her] vagina and butt." (9 RT 1079. At trial, however, Gabriela testified that she did not remember Amparan digitally penetrating her anus. (8 RT 743.) The recording of her 911 call played in trial did not refresh Gabriella's memory of the attack. (8 RT 727.)

Amparan argues that Gabriela's statements to the 911 operator do not constitute substantial evidence and her statements to police were not admissible because her failure to remember the event did not qualify as an inconsistent prior statement as her lack of memory was not feigned or evasive. The California Court of Appeal rejected these arguments:

> Gabriela lost her telephone during the attack. When she found her telephone, she called 911, which caused Amparan to leave. Gabriela made her statements immediately after the attack, while still under the stress of the situation and without the opportunity to reflect or contrive. Accordingly, the trial court did not abuse its discretion in admitting the 911 call under Evidence Code section 1240.
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> Additionally, the trial court properly admitted Gabriela's statements to Officer Valetin under the exception to the hearsay rule for prior inconsistent statements. Evidence Code sections 7702 and 12353 provide an exception to the general rule against hearsay evidence where a witness's prior statement is inconsistent with the witness's testimony in the present hearing, provided the witness is given the opportunity to explain or deny the statement.
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> When a witness does not recall or remember an event, there is no "inconsistency" within the meaning of Evidence Code section 1235. But, "'[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 711.) A trial court is not required to expressly find inconsistency or evasiveness before overruling a hearsay objection; on appeal we will infer from the ruling that the trial court made the necessary implied factual findings.
>
> The record demonstrates that a reasonable basis existed for the trial court to conclude that Gabriela's claimed lack of memory at trial amounted to a deliberate evasion, thus giving rise to an inconsistency. First, although the trial took place over four years after the incident, Gabriela had no trouble recalling that before Amparan approached her, she was at El Cajon Boulevard and 35th Street, near the Church's Chicken, waiting for a bus to take her downtown. She recalled that Amparan drove a new burgundy colored Altima that had a paper saying "Mossy Nissan" on it instead of a license plate. Given Gabriela's recall of these details it is inherently dubious she could not recall whether Amparan had digitally penetrated or vagina or anus. Whether we would have concluded differently is irrelevant. There is reasonable basis in the record for the trial court to have concluded that Gabriela was being evasive in claiming she could not remember if Amparan had digitally penetrated her

> vagina or anus. Thus, the trial court did not abuse its discretion in allowing Officer Valetin's testimony about Gabriela's statements under the exception to the hearsay rule for prior inconsistent statements.

People v. Amparan, No. D069780, 2017 Cal. App. Unpub. LEXIS 3391, at *8-11 (Cal. Ct. App. May 16, 2017) (most citations omitted). The California Court of Appeal's decision was not objectively unreasonable, and the evidence was sufficient to support the conviction.

To convict Amparan of forcible sexual penetration, the prosecution had to prove he digitally penetrated Gabriela's genital or anal opening, "however slight," against her "will by means of force, violence, duress, menace, or fear of immediate or unlawful bodily injury . . . ." Cal. Penal Code §§ 289(a)(1)(A); 289(k)(1). Although Gabriela could not recall at trial whether penetration occurred, the prosecution presented ample other evidence in the form of a 911 call that occurred immediately after the attack, a police interview that occurred shortly after the attack, and another police interview that occurred two weeks after the attack, thus corroborating the 911 call and the first interview. To find Petitioner guilty, the jury necessarily had to evaluate Gabriela's credibility at trial in light of these three pieces of evidence. The jury here did so, found Gabriela credible, and credited the three prior statements to the police and the 911 dispatcher. That determination is entitled to near-total deference by this Court. And in light of the three statements above, this Court cannot conclude that no rational trier of fact could have found proof of guilt beyond a reasonable doubt here. Accordingly, the Petition should be denied.

B. Claims Two and Three Are Not Cognizable

In his second claim, Petitioner contends the trial court violated California Penal Code section 654 when it sentenced him to separate sentences for his two offenses committed against victim Alicia. However, matters relating to sentencing and serving of a sentence generally are governed by state law and do not raise a federal constitutional question. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507-08 (9th Cir. 1994). Here, Petitioner's claim raising a violation of California Penal Code section 654 is not cognizable in federal habeas corpus proceedings. *Watts v. Bonneville*, 879 F.2d 685, 687 (9th Cir.

1989); *see also Quintero v. Muniz*, No. CV16-8195-AB (KS), 2019 U.S. Dist. LEXIS 72818, at *80 (C.D. Cal. Mar. 13, 2019); *Swanson v. Tampkins*, No. 17CV178-JLS(RBB), 2018 U.S. Dist. LEXIS 81004, at *7 (S.D. Cal. May 14, 2018).

In his third claim, Petitioner contends the trial court erred in imposing a consecutive sentence. However, the Supreme Court has never held that such state procedural requirements implicate the Constitution, and the Ninth Circuit has explicitly held "[t]he decision whether to impose sentences concurrently or consecutively is a matter of state criminal procedure *and is not within the purview of federal habeas corpus*." *Cacoperdo*, 37 F.3d at 507 (citing *Ramirez v. Arizona*, 437 F.2d 119, 120 (9th Cir. 1971) (per curiam)) (emphasis added); *see also Fierro v. MacDougall*, 648 F.2d 1259, 1260 n.1 (9th Cir. 1981). Thus, given the absence of any Supreme Court precedent on the matter and the Ninth Circuit's unequivocal holding in *Cacoperdo*, habeas relief is not warranted on Petitioner's consecutive sentence claim.

IV. CONCLUSION

For the aforementioned reasons, the Court RECOMMENDS Petitioner's Petition for Writ of Habeas Corpus be DENIED.

This Report and Recommendation is submitted to the assigned District Judge pursuant to the provision of 28 U.S.C. section 636(b)(1).

IT IS ORDERED that no later than **September 21, 2019** any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to objections shall be filed with the Court and served on all parties no later than **October 4, 2019**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal. *Martinez v. Ylst*, 951 F2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: August 9, 2019

Hon. William V. Gallo
United States Magistrate Judge

Filed 5/16/17

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TED AMPARAN, Defendant and Appellant.	D069780 (Super. Ct. No. SCD241069)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed as modified.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

Ted Amparan, a Marine stationed at Camp Pendleton, sexually assaulted six different women over a number of years. A jury found him guilty of two counts each of

forcible rape (Pen. Code,[1] § 261, subd. (a)(2); counts 1, 8) and assault with intent to commit a specific felony (§ 220, subd. (a)(1); counts 4, 7), three counts of forcible sexual penetration (§ 289, subd. (a); counts 2, 3, 5) and kidnapping to commit a specific felony (§ 209, subd. (b)(1); count 6). In relation to count 3, the jury found that Amparan had used a deadly weapon in the commission of the offense (§ 12022.3, subd (a); § 667.61, subds. (b), (c), (e)). In relation to counts 1, 2, 3, 5, and 8, the jury found Amparan committed an offense enumerated in section 667.61, subdivision (c), against more than one victim (§ 667.61, subds. (b), (c), (e)). The trial court sentenced Amparan to an aggregated indeterminate term of 75 years to life in prison, plus life, plus a total determinate term of 15 years in prison.

Amparan appeals, contending the evidence does not support count 5, one of his convictions for forcible sexual penetration. He also asserts the trial court erred in sentencing on (1) counts 6 and 7 because section 654 applied, and (2) counts 1 and 2 by erroneously applying section 667.6, subdivision (c). We modify the sentence to stay Amparan's prison term on count 7, but otherwise affirm the judgment.

GENERAL FACTUAL BACKGROUND

Because the parties are familiar with the facts, we summarize only the general facts concerning the underlying crimes. We present additional facts concerning the issues on appeal in our discussion below.

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1 Undesignated statutory references are to the Penal Code.

Laura (counts 1 and 2)

One day in March 2007, Amparan picked up Laura, a prostitute working a high-prostitution section of El Cajon Boulevard in San Diego known as the "blade." Amparan drove her to a secluded parking lot near the I-8 and I-805 freeway overpass, where he parked and negotiated sexual intercourse for $100. Amparan, while wielding a knife, told Laura he "was going to fuck [her], and [she] was going to like it." He forced her legs apart, penetrated her vagina with his fingers, and raped her. Laura got out of Amparan's car, put her clothes on, and left.

Amber (count 3)

On an evening in September 2010, Amber, a prostitute working on El Cajon Boulevard got into Amparan's car. They agreed to have sexual intercourse for $150. Amparan drove Amber to a parking lot near the freeway overpass at the intersection of I-8 and I-805. Amparan threw Amber to the ground, choked her and hit her head saying, "Bitch, you're going to get raped." He forced Amber's pants down and put his fingers inside her vagina. He also unzipped his pants, exposing his penis, and tried unsuccessfully to force sexual intercourse on her. After finishing the assault, Amparan pulled out a knife and told her to leave.

Gabriela (count 5)

On a day in September 2010, Gabriela was waiting at a bus stop on El Cajon Boulevard, seeking a way to get to downtown. Amparan offered Gabriela a ride, which she accepted. Instead, Amparan took her to parking lot and assaulted her. When Gabriela tried to call 911, Amparan got up and fled in his car.

Starlina (count 4)

On an afternoon in September 2010, Amparan approached Starlina, a prostitute working on El Cajon Boulevard, in his car. She agreed to have sexual intercourse with Amparan for $60 and got in his car. Amparan took her to a parking lot and tried to engage in anal intercourse, but Starlina refused. After Amparan put his hand around her neck, Starlina kneed him and ran to a nearby restaurant where she telephoned her pimp.

Alicia (counts 6 and 7)

On an evening in September 2010, Alicia left a friend's house near El Cajon Boulevard when Amparan approached her in his car, asking if she needed assistance. When Alicia got in Amparan's car, he took her to a dark parking lot in the area of a freeway overpass. After parking and nervously smoking a cigarette, Amparan grabbed Alicia and pulled her behind a dumpster. He then forced her to the ground, got on top of her, yelling "Spread them legs, girl. Spread them legs." Alicia escaped and telephoned a friend and the police.

Sarah (count 8)

On a day in September in 2011, Sarah, a prostitute working on El Cajon Boulevard got in Amparan's car. They agreed to have sexual intercourse for $100. Amparan drove to a secluded parking lot and parked. Amparan grabbed Sarah's neck, hit her head against the window and forcibly raped her, saying, "Oops, sorry. No money, babe." Amparan then opened the door and threw her out of the car.

DISCUSSION

I. *SUFFICIENCY OF EVIDENCE FOR COUNT 5*

A. *Additional Background*

The jury found Amparan guilty of one count of sexual penetration by force against Gabriela. At trial, Gabriela testified that after Amparan tossed her to the ground he tried to pull her pants down, but was not able to access her private parts. She later clarified this statement meant that Amparan had not penetrated her vagina with his penis. Gabriela could not remember telling police that Amparan had put his finger in her vagina. She could not remember if Amparan put his finger in her "rear end." During cross-examination, Gabriela stated Amparan was able to pull her pants down to her thighs, but could not remember if he had digitally penetrated her anus. Gabriela, however, remembered speaking to the officers after the incident and telling them that Amparan had penetrated her anus. Gabriela admitted that she was very nervous coming into court to testify, a "10" on a scale of one to 10.

In rendering its decision, the jury also listened to a recording of the 911 telephone call Gabriela placed immediately after the incident in which she reported that Amparan had "stuck his finger in [her] ass and . . . tried to rape [her]." The jury heard testimony from San Diego Police Officer Wendy Valetin, who interviewed Gabriela immediately after the incident. Officer Valetin testified, without objection, that Gabriela told her that Amparan had thrown her to the ground and digitally penetrated her vagina twice and her anus five times. Officer Valetin testified that, in a later police interview, Gabriela told her that Amparan had digitally penetrated her vagina and anus.

C. *Analysis*

Amparan claims the evidence did not support his conviction on count 5 for forcible sexual penetration of Gabriela because no reasonable juror could have concluded beyond a reasonable doubt that he had penetrated Gabriela with a foreign object. In making this argument, he asserts that Gabriela's statements to the 911 operator do not constitute substantial evidence and her statements to police were not admissible because her failure to remember the event did not qualify as an inconsistent prior statement as her lack of memory was not feigned or evasive.

Where a defendant challenges the sufficiency of the evidence supporting a conviction, our task is to review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) It is not our function to reweigh the evidence (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206) and reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

At trial, Amparan did not raise a hearsay objection to the admission of the 911 recording of Gabriela's telephone call to police, or her statements to Officer Valetin immediately after the incident and during a later interview. His failure to object forfeited the issue on appeal. (*People v. Williams* (2008) 43 Cal.4th 584, 620; see also Evid. Code, § 353.) Nonetheless, we address the merits of his arguments to avoid a habeas corpus petition for ineffective assistance of counsel.

Although not addressed by the parties, we note that Gabriela's 911 call was not testimonial, in that its primary purpose was to deal with an emergency, rather than produce evidence about past events for possible use in a criminal trial. (*People v. Cage* (2007) 40 Cal.4th 965, 984; *People v. Gann* (2011) 193 Cal.App.4th 994, 1008; *People v. Brenn* (2007) 152 Cal.App.4th 166, 176-177 [victim's statements in a 911 call were made during an ongoing emergency and nontestimonial, even though victim had left scene of assault and made call from a neighbor's house].) Therefore, its admission did not violate *Crawford v. Washington* (2004) 541 U.S. 36. Even if an out-of-court statement is not testimonial under *Crawford*, the statement still must be admissible under applicable state evidentiary rules, including hearsay rules. (*People v. Banos* (2009) 178 Cal.App.4th 483, 494, fn. 3.)

Inadmissible hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing . . . that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Excited utterances or spontaneous declarations are an exception to the hearsay rule. (Evid. Code, § 1240.) Several requirements must be met for the excited utterance exception to apply to hearsay evidence. (*People v. Gutierrez* (2000) 78 Cal.App.4th 170, 177.) First, there must have been an occurrence startling enough to produce nervous excitement and unreflecting statements. (*Ibid.*) Second, the statements must have been made before there was time to contrive and misrepresent. (*Ibid.*) Finally, the statements must have related to the circumstances of the occurrence that preceded them. (*Ibid.*) The trial court's determination of the preliminary facts, such as whether the declarant was under the stress of excitement when

the statements were made, will be upheld if supported by substantial evidence. (*People v. Phillips* (2000) 22 Cal.4th 226, 235-236; *People v. Brown* (2003) 31 Cal.4th 518, 540-541.) The court's ultimate decision to admit the evidence is reviewed for an abuse of discretion. (*Phillips*, at p. 236.)

Here, Gabriela lost her telephone during the attack. When she found her telephone, she called 911, which caused Amparan to leave. Gabriela made her statements immediately after the attack, while still under the stress of the situation and without the opportunity to reflect or contrive. Accordingly, the trial court did not abuse its discretion in admitting the 911 call under Evidence Code section 1240.

Additionally, the trial court properly admitted Gabriela's statements to Officer Valetin under the exception to the hearsay rule for prior inconsistent statements. (Evid. Code, § 1235.) Evidence Code sections 770[2] and 1235[3] provide an exception to the general rule against hearsay evidence where a witness's prior statement is inconsistent with the witness's testimony in the present hearing, provided the witness is given the opportunity to explain or deny the statement. (Evid. Code, § 770, subd. (a).)

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2 Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

3 Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 770."

When a witness does not recall or remember an event, there is no "inconsistency" within the meaning of Evidence Code section 1235. (*People v. Sam* (1969) 71 Cal.2d 194, 210; *People v. Price* (1991) 1 Cal.4th 324, 413-414 [substantial evidence supported determination that witness was truthful when he testified he could not remember many facts about his relationship with the victim as the lack of memory was neither total nor suspiciously selective].) But, " '[w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 711.) A trial court is not required to expressly find inconsistency or evasiveness before overruling a hearsay objection; on appeal we will infer from the ruling that the trial court made the necessary implied factual findings. (*Id.* at p. 710.)

The record demonstrates that a reasonable basis existed for the trial court to conclude that Gabriela's claimed lack of memory at trial amounted to a deliberate evasion, thus giving rise to an inconsistency. First, although the trial took place over four years after the incident, Gabriela had no trouble recalling that before Amparan approached her, she was at El Cajon Boulevard and 35th Street, near the Church's Chicken, waiting for a bus to take her downtown. She recalled that Amparan drove a new burgundy colored Altima that had a paper saying "Mossy Nissan" on it instead of a license plate. Given Gabriela's recall of these details it is inherently dubious she could not recall whether Amparan had digitally penetrated or vagina or anus. Whether we would have concluded differently is irrelevant. There is reasonable basis in the record for the trial court to have concluded that Gabriela was being evasive in claiming she could not remember if Amparan had digitally penetrated her vagina or anus. Thus, the trial

court did not abuse its discretion in allowing Officer Valetin's testimony about Gabriela's statements under the exception to the hearsay rule for prior inconsistent statements.

Finally, even assuming, without deciding, that the 911 recording and Gabriela's statements to police constituted inadmissible hearsay, " ' "[i]t is settled law that incompetent testimony, such as hearsay [], if received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding." ' " (*People v. Panah* (2005) 35 Cal.4th 395, 476; cf. *McDaniel v. Brown* (2010) 558 U.S. 120, 131 [" 'a reviewing court must consider all of the evidence admitted by the trial court,' regardless whether that evidence was admitted erroneously" when considering an insufficiency of the evidence claim].)

II. *SENTENCE ON COUNTS 6 AND 7*

A. *Additional Background*

Alicia got into Amparan's car believing he would drive her to the Burlington Coat Factory where her friends were waiting for her. Amparan took her to a dark parking lot where he parked, got out of the car and smoked a cigarette. When Alicia realized she was not at the Burlington Coat Factory, she started to get scared.

Alicia does not remember if she got out of the car, or whether Amparan pulled her out of the car. Nonetheless, she recalled Amparan grabbing her and pulling her behind a dumpster. Amparan then forced her to the ground, got on top of her yelling "Spread them legs, girl. Spread them legs." Alica, however, was able to escape.

For these acts, the jury found Amparan guilty of kidnapping to commit a specific felony (count 6) and assault with intent to commit a specific felony (count 7). The trial

court sentenced Amparan to life on count 6 and a consecutive term of six years on count 7.

B. *Analysis*

Relying on *People v. Latimer* (1993) 5 Cal.4th 1203 (*Latimer*), Amparan claims the trial court violated section 654 when it sentenced him on both offenses committed against Alicia: life imprisonment on count 6 (kidnapping with intent to commit forcible rape or forcible sexual penetration) and six years on count 7 (assault with intent to commit forcible rape or forcible sexual penetration). The People concede that although Amparan's commission of the kidnapping and assault were directed to an overarching objective to commit forcible rape or forcible sexual penetration, they were nonetheless discrete and divisible in time, as Amparan had completed the kidnapping before committing the assault and should be subject to multiple punishment. We agree with Amparan.

Section 654 prohibits multiple punishments for an indivisible course of conduct that has a common intent and objective, even though the conduct in question violates more than one statute. (*Latimer*, *supra*, 5 Cal.4th at pp. 1207-1208.) Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) The statute does not apply if a defendant had "separate, although sometimes simultaneous, objectives . . . ." (*Latimer*, at p. 1212.) Where a defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations

shared common acts or were parts of an otherwise indivisible course of conduct." (*Beamon*, at p. 639.) The intent-and-objective test must not define intent too broadly because that would improperly " 'reward the defendant who has the greater criminal ambition with a lesser punishment.' " (*People v. Harrison* (1989) 48 Cal.3d 321, 335-336.) A defendant's intent and objective are factual questions for the trial court (*People v. Coleman* (1989) 48 Cal.3d 112, 162) and its determination will be upheld if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) This deferential standard of review applies whether the trial court's findings are explicit or implicit. (*People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585.)

Here, the prosecutor argued that the kidnapping occurred when Amparan took Alicia to a parking lot instead of her desired destination. Alternatively, she argued that the kidnapping occurred when Amparan grabbed Alicia and moved her behind the dumpster. Defense counsel argued to the jury that it needed to decide whether Amparan's act of taking Alicia to other than her desired destination constituted kidnapping. The jury necessarily found that the facts supported one of these theories by convicting Amparan of kidnapping with the intent to commit forcible rape or forcible sexual penetration.

Kidnapping is a continuing offense (*Parnell v. Superior Court of Alameda County* (1981) 119 Cal.App.3d 392, 407-408); see *Wright v. Superior Court* (1997) 15 Cal.4th 521, 537 [citing *Parnell* with approval]) that inherently involves a continuous course of conduct. (*People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1231.) As long as Amparan continued to detain Alicia, her kidnapping continued. Under either theory of kidnapping to commit rape argued by counsel, the record does not contain evidence showing that in

kidnapping Alicia, Amparan had any other criminal ambitions besides sexually assaulting her. Amparan's kidnapping and assault constituted a continuous course of conduct with the single goal of sexually assaulting Alicia. Where, as here, all the crimes committed are incidental to, or were the means of facilitating one objective, a defendant can be punished only once. (*Latimer*, *supra*, 5 Cal.4th at p. 1208.) Under the People's analysis, any time a defendant commits a kidnapping for the purpose of committing a rape or sexual penetration, separate punishments would be permitted if the rape occurred after the defendant had some time to reflect on what he was about to do. This reasoning contravenes the holding of *Latimer*—where all the crimes committed are incidental to, or were the means of facilitating one objective, a defendant can be punished only once.[4] (*Ibid.*)

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4 This case is akin to *Latimer* where the defendant, while running errands with the victim, drove the victim to the desert, attacked and then raped the victim and forced her to orally copulate him. (*Latimer*, *supra*, 5 Cal.4th at p. 1206.) After the two dressed, defendant then drove another 50 to 75 yards further into the desert where he raped the victim again. (*Ibid.*) While the rapes and the kidnapping were clearly separate acts, the court held the only intent and objective of the kidnapping was for defendant to facilitate the rapes. (*Id.* at p. 1216.) In applying section 654, the court found that because defendant had been punished for both of the rapes, and the intent and objective of the kidnapping was to facilitate the rapes, defendant could not be separately punished for the kidnapping. (*Id.* at pp. 1216-1217.)

The People rely on *People v. Bradley* (1993) 15 Cal.App.4th 1144, disapproved on another ground in *People v. Rayford* (1994) 9 Cal.4th 1, 21. In *Bradley*, the defendant and his companion grabbed the victim as she used a pay phone. (*Id.* at pp. 1149-1150.) They forced the victim to walk 50 to 60 feet around the side of a building to a dumpster area enclosed by walls six and a half feet high. (*Id.* at p. 1150.) At the dumpster site, the defendant sexually molested the victim until the victim kicked the defendant in the shins and fled. (*Ibid.*) Defendant was convicted of kidnapping with intent to commit rape, assault with intent to commit rape and sexual battery. (*Id.* at p. 1149.) The *Bradley* court applied section 654 only to the sexual battery conviction. (*Bradley*, at pp. 1156-1157.)

Accordingly, we order the trial court to stay execution of Amparan's six-year sentence on count 7 (assault with intent to commit forcible rape or forcible sexual penetration), under section 654. (*People v. Galvan* (1986) 187 Cal.App.3d 1205, 1219 ["The proper remedy for failing to apply section 654 is to stay the execution of the sentence imposed for the lesser offense . . . ."].)

III. *SENTENCE ON COUNTS 1 AND 2*

A. *Additional Background*

Amparan penetrated Laura's vagina with his fingers, and raped her. For these actions, the jury found him guilty of forcible rape (count 1) and forcible sexual penetration (count 2). At sentencing, the trial court imposed consecutive 15-year-to-life sentences on counts 1 and 2 under section 667.6, subdivision (d) (section 667.6(d)). After sentencing Amparan, the trial court asked the People if there was anything further. The following dialogue took place:

> "[PROSECUTOR]: Yes, your Honor. If you could state on the record your reasoning for the consecutive and current sentence [] under the (c) section.
>
> "THE COURT: Currently?
>
> "[PROSECUTOR]: You can do it -- it's consecutive, but you can do it under both (d) and (c).
>
> "THE COURT: I thought I said (d).

The court viewed the defendant's objective in moving the victim as separate from his later objective in assaulting her and punished him for each of these convictions. (*Id.* at p. 1158.) The *Latimer* court did not overrule, or even address *Bradley*. (See *Latimer*, *supra*, 5 Cal.4th 1203.) To the extent the *Bradley* holding conflicts with *Latimer*, the Supreme Court's decision is controlling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

"[PROSECUTOR]: You said (d), but I'm asking you to also say (c).

"THE COURT: (c) is also applicable. You know, I could do it under both. So to make sure that it's clear, I will do it under both, but I believe it's—I think [] (d) is controlling, but I can see where you could say that on review it might not be viewed as two separate acts. I will do that."

The trial court then recessed after both the probation officer and defense counsel indicated they had nothing further.

B. *Analysis*

Amparan contends the trial court erred in imposing consecutive sentences on counts 1 and 2 (forcible rape and forcible sexual penetration, respectively). He claims Laura's testimony failed to show that there were two fully separate acts with an opportunity to reflect. Accordingly, he argues the trial court erred in finding that the crimes occurred on "separate occasions" under section 667.6(d). He also asserts the trial court erred in relying on section 667.6, subdivision (c) (section 667.6(c)) because it did not provide a statement of reasons for sentencing under this section.

The People assert Amparan forfeited any error under section 667.6(c) by failing to object at trial to the allegedly deficient statement of reasons. Thus, even assuming Amparan did not commit the offenses underlying counts 1 and 2 on separate occasions as required for consecutive sentencing under section 667.6(d), the trial court's valid imposition of such sentences under section 667.6(c), cured the error and foreclosed any claim of sentencing error under section 667.6.

Under certain aggravating circumstances, the One Strike Law (§ 667.61) requires courts to impose longer sentences on defendants who commit violent sex crimes like rape (§ 261; count 1) and sexual penetration by object (§ 289, subd. (a)(1)(A); count 2). (§ 667.61, subd. (c).) Section 667.6 sets forth sentencing rules for defendants with multiple convictions for certain sex offenses as set forth in subdivision (e) of that section. These offenses include those charged in counts 1 (rape) and 2 (rape by a foreign object). (§ 667.6, subds. (e)(1) & (e)(8).)

Section 667.6(d) mandates full, separate, and consecutive sentencing for certain enumerated sex offenses "involv[ing] separate victims or . . . the same victim on separate occasions." (§ 667.6(d).) Section 667.6(d) sets forth the factors to be considered in determining whether the crimes were committed on separate occasions, the principal one of which is whether "the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6(d).) A finding that the crimes occurred on separate occasions does not require a break of any specific duration, a change in physical location, or an obvious break in the defendant's behavior. (*People v. Jones* (2001) 25 Cal.4th 98, 104; *People v. King* (2010) 183 Cal.App.4th 1281, 1325.) We may reverse a finding that the defendant committed offenses on separate occasions under section 667.6(d) "only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.)

Here, when Amparan picked up Laura, he wore a white T-shirt and pants. Laura got in the backseat to undress and was close to fully naked when Amparan got in the backseat with her holding a knife. Laura could not remember if Amparan was undressed. Laura remembered that Amparan held her throat, kissed her chest, pulled her thighs open, put his fingers inside her vagina and then put his penis inside her. Laura did not know how long the sexual intercourse lasted, or whether Amparan ejaculated. Neither counsel elicited any facts suggesting Amparan had a reasonable opportunity for reflection after completing the digital penetration. This scant record is insufficient to support the trial court's finding that the digital penetration and rape occurred on separate occasions.

Recognizing that "on review" this court "might not [view the offenses] as two separate acts," the trial court also sentenced Amparan under section 667.6(c). In situations where a full consecutive term is not mandated by section 667.6(d) because the crimes occurred on the same occasion, a trial court has the discretion to impose a full consecutive term "if the crimes involve the same victim on the same occasion." (§ 667.6(c).) Sentencing under section 667.6(c) "is an additional sentence choice which requires a statement of reasons separate from those justifying the decision merely to sentence consecutively." (*People v. Belmontes* (1983) 34 Cal.3d 335, 347.) In exercising its discretion to impose a full consecutive term under section 667.6(c), "the court ideally should explain choosing consecutive rather than concurrent and full rather than subordinate, though the same reason may justify both choices. At a minimum the record must reflect a recognition that two sentence choices are involved." (*People v. Senior* (1992) 3 Cal.App.4th 765, 781.)

As Amparan notes, when exercising its discretion to sentence under section 667.6(c), the trial court failed to provide a statement of reasons. Amparan, however, forfeited the issue by failing to object below. (*People v. Scott* (2015) 61 Cal.4th 363, 406 [holding forfeited defendant's claim that the trial court erred by failing to state its reasons for imposing full consecutive terms under section 667.6(c)].) Amparan does not make an alternative claim of ineffective assistance of counsel based on his counsel's failure to object when the trial court did not provide a statement of reasons. Even if he had made this claim, we would reject it as there is not a reasonable probability the outcome of the proceedings would have been different had an objection been made. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694.) The record reflects the trial court's understanding that it had the discretion to sentence Amparan under section 667.6(c). There is no reason to believe that the court would have reached a different conclusion had it been asked to state the reasons for making the sentences on counts 1 and 2 consecutive. Accordingly, any ineffective assistance of counsel claim fails as Amparan has not met his burden of showing prejudice. (*People v. Porter* (1987) 194 Cal.App.3d 34, 39 ["it would be idle to remand to the trial court for a new statement of reasons, as it is not reasonably probable that a result more favorable to appellant would occur"].)

DISPOSITION

We affirm the convictions but modify the judgment as follows: The six-year term imposed on count 7 is ordered stayed pursuant to section 654. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and forward it to the Department of Corrections and Rehabilitation, Division of Adult Operations.

NARES, J.

WE CONCUR:

BENKE Acting, P. J.

HALLER, J.

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

WITNESS, my hand and the Seal of this Court.

05/16/2017

KEVIN J. LANE, CLERK

By A. Galvez Deputy Clerk

APPENDIX E Civil Dockets, District Court and Ninth Ckt

PACER fee: Exempt CJA Change

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 20-55711
Nature of Suit: 3530 Habeas Corpus
Ted Amparan v. M. Spearman
Appeal From: U.S. District Court for Southern California, San Diego
Fee Status: IFP

Docketed: 07/13/2020
Termed: 04/22/2022

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

Originating Court Information:
District: 0974-3 : 3:18-cv-02522-BTM-WVG
Trial Judge: Barry Ted Moskowitz, Senior District Judge
Date Filed: 11/02/2018

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
05/08/2020	05/08/2020	07/08/2020	07/10/2020

Prior Cases:
None

Current Cases:
None

TED AMPARAN (State Prisoner: AZ1393) Petitioner - Appellant,	Charles Roger Khoury, Jr., Esquire, Attorney Direct: 858-764-0644 Email: charliekhouryjr@yahoo.com [COR LD NTC CJA Appointment] P.O. Box 791 Del Mar, CA 92014
v.	
M. ELIOT SPEARMAN, Warden Respondent - Appellee,	Minh U. Le Direct: 619-645-3147 Email: minh.le@doj.ca.gov [COR NTC Asst State Aty Gen] AGCA - Office of the Attorney General (San Diego) 600 W Broadway Suite 1800 San Diego, CA 92101

TED AMPARAN,

Petitioner - Appellant,

v.

M. ELIOT SPEARMAN, Warden,

Respondent - Appellee.

07/13/2020	1 60 pg, 951.55 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL AND PRO SE APPELLANT. SEND MQ: No. The schedule is set as follows: Appellant Ted Amparan opening brief due 09/08/2020. Appellee M. Eliot Spearman, Warden answering brief due 10/08/2020. Appellant's optional reply brief is due 21 days after service of the answering brief. [11751048] (JBS) [Entered: 07/13/2020 03:12 PM]
07/23/2020	2 4 pg, 178.89 KB	Filed order (MARY M. SCHROEDER and CONSUELO M. CALLAHAN) Appellant's August 8, 2020 notice of appeal was not filed or delivered to prison officials within 30 days after entry of the district court's judgment on May 8, 2020. See 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A), 4(c); United States v. Sadler, 480 F.3d 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional). However, on May 29, 2020, appellant filed a motion for appointment of appellate counsel in the district court which constitutes a timely notice of appeal. Estrada v. Scribner, 512 F.3d 1227, 1236 (9th Cir. 2008) (pro se prisoner's motion for appellate counsel satisfied requirements for notice of appeal where motion identified party seeking to appeal, and referenced judgment and district court's issuance of certificate of appealability). Accordingly, this appeal shall proceed. A review of this court's docket reflects that the filing and docketing fees for this appeal remain due. Within 21 days after the date of this order, appellant shall pay to the district court the $505.00 filing and docketing fees for this appeal and file in this court proof of such payment or file in this court a motion to proceed in forma pauperis. Failure to pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. See 9th Cir. R. 42-1. The Clerk shall serve a Form CJA-23 financial affidavit on appellant. [11763699] (CKP) [Entered: 07/23/2020 01:04 PM]
07/31/2020	3 8 pg, 281.36 KB	Filed Appellant Ted Amparan motion to proceed In Forma Pauperis. Deficiencies: None. Served on 07/27/2020. [11773556] (CW) [Entered: 07/31/2020 02:56 PM]
08/26/2020	4 1 pg, 121.95 KB	Filed order (Appellate Commissioner): The motion to proceed in forma pauperis (Docket Entry No. [3]) is granted. The Clerk shall amend the docket to reflect this status. The opening brief is due October 30, 2020. The answering brief is due November 30, 2020. The optional reply brief is due within 21 days after service of the answering brief. Because appellant is proceeding without counsel, the excerpts of record requirement is waived. See 9th Cir. R. 30-1.2. Appellee's supplemental excerpts of record are limited to the district court docket sheet, the notice of appeal, the judgment or order appealed from, and any specific portions of the record cited in the answering brief. See 9th Cir. R. 30-1.7. (MOATT) [11803849] (AF) [Entered: 08/26/2020 02:44 PM]
08/31/2020	5 3 pg, 77.6 KB	Filed Appellant Ted Amparan motion to appoint counsel. Deficiencies: None. Served on 08/18/2020. [11808747] (CW) [Entered: 09/01/2020 06:47 AM]
09/08/2020	6 2 pg, 370.99 KB	**Streamlined request by Appellant Ted Amparan to extend time to file the brief is not approved because it is unnecessary. The briefing schedule is stayed. See 9th Cir. R. 27-11.** [11816383] (JN) [Entered: 09/08/2020 03:44 PM]
10/15/2020	7	Added Attorney(s) Charles Roger Khoury Jr. for party(s) Appellant Ted Amparan, in case 20-55711. [11860971] (AF) [Entered: 10/15/2020 05:52 PM]
10/15/2020	8 1 pg, 130.66 KB	Filed order (WILLIAM A. FLETCHER and JAY S. BYBEE): Appellant's motion for appointment of counsel (Docket Entry No. [5]) in this appeal from the denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus is granted. See 18 U.S.C. § 3006A(a)(2)(B); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Charles R. Khoury, Esq., P.O. Box 791, Del Mar, CA 92014, is appointe d. The opening brief and excerpts of record are due December 15, 2020. The answering brief is due January 14, 2021. The optional reply brief is due within 21 days after service of the answering brief. [11860972] (AF) [Entered: 10/15/2020 05:54 PM]
10/16/2020	9	Criminal Justice Act electronic voucher created. (Counsel: Mr. Charles Roger Khoury, Jr., Esquire for Ted Amparan) [11861091] (JN) [Entered: 10/16/2020 07:40 AM]
12/12/2020	10	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellant Ted Amparan. New requested due date is 01/14/2021. [11925297] [20-55711] (Khoury, Charles) [Entered: 12/12/2020 08:05 PM]
12/14/2020	11	**Streamlined request [10] by Appellant Ted Amparan to extend time to file the brief is approved. Amended briefing schedule: Appellant Ted Amparan opening brief due 01/14/2021. Appellee M. Eliot Spearman, Warden answering brief due 02/16/2021. The optional reply brief is due 21 days from the date of service of the answering brief.** [11926308] (JN) [Entered: 12/14/2020 01:03 PM]
01/13/2021	12	Filed (ECF) Streamlined request for extension of time to file Opening Brief by Appellant Ted Amparan. New requested due date is 02/12/2021. [11963123] [20-55711] (Khoury, Charles) [Entered: 01/13/2021 07:09 PM]
01/14/2021	13	**Streamlined request [12] by Appellant Ted Amparan to extend time to file the brief is not approved because filer requested a previous extension of time. The filer must file a motion per 9th Cir. R. 31-2.2(b).** [11963727] (DLM) [Entered: 01/14/2021 11:28 AM]
02/12/2021	14 5 pg, 48.28 KB	Filed (ECF) Appellant Ted Amparan Motion to extend time to file Opening brief until 03/15/2021. Date of service: 02/12/2021. [12002018] [20-55711] (Khoury, Charles) [Entered: 02/12/2021 10:40 AM]

02/12/2021	15 (1 pg, 94.3 KB)	Filed clerk order (Deputy Clerk: LBS): Appellant's late unopposed motion [14] for an extension of time to file the opening brief is granted. The opening brief is due March 15, 2021. The answering brief is due April 14, 2021. The optional reply brief is due within 21 days after service of the answering brief. [12002321] (LBS) [Entered: 02/12/2021 01:15 PM]
03/15/2021	16 (4 pg, 56.29 KB)	Filed (ECF) Appellant Ted Amparan Motion to extend time to file Opening brief until 04/29/2021. Date of service: 03/15/2021. [12042085] [20-55711] (Khoury, Charles) [Entered: 03/15/2021 10:39 PM]
03/18/2021	17 (1 pg, 95.08 KB)	Filed clerk order (Deputy Clerk: LBS): Appellant's late unopposed motion [16] for an extension of time to file the opening brief is granted. The opening brief is due April 29, 2021. The answering brief is due June 1, 2021. The optional reply brief is due within 21 days after service of the answering brief. [12046473] (LBS) [Entered: 03/18/2021 03:19 PM]
05/25/2021	18 (4 pg, 46.63 KB)	Filed (ECF) Appellant Ted Amparan Motion to extend time to file Opening brief until 06/24/2021. Date of service: 05/25/2021. [12124183] [20-55711] (Khoury, Charles) [Entered: 05/25/2021 02:37 PM]
05/26/2021	19 (2 pg, 58.73 KB)	Filed (ECF) Appellant Ted Amparan Correspondence: informing the Court there is no opposition to the Motion to Extend time to file the AOB. Date of service: 05/26/2021 [12125435] [20-55711] (Khoury, Charles) [Entered: 05/26/2021 01:17 PM]
06/02/2021	20 (1 pg, 101.12 KB)	Filed clerk order (Deputy Clerk: LBS): Appellant's late unopposed motion (Docket Entry No. [18]) for an extension of time to file the opening brief is granted. The opening brief is due June 24, 2021. The answering brief is due July 26, 2021. The optional reply brief is due within 21 days after service of the answering brief. [12131047] (OC) [Entered: 06/02/2021 11:52 AM]
06/28/2021	21 (4 pg, 44.54 KB)	Filed (ECF) Appellant Ted Amparan Motion to file a late brief. Date of service: 06/28/2021. [12156917] [20-55711] (Khoury, Charles) [Entered: 06/28/2021 10:34 PM]
06/28/2021	22 (24 pg, 141.24 KB)	Submitted (ECF) Opening Brief for review. Submitted by Appellant Ted Amparan. Date of service: 06/28/2021. [12156924] [20-55711]--[COURT UPDATE: Attached corrected brief. 07/02/2021 by LA] (Khoury, Charles) [Entered: 06/28/2021 10:40 PM]
06/28/2021	23 (164 pg, 4.06 MB)	Submitted (ECF) excerpts of record. Submitted by Appellant Ted Amparan. Date of service: 06/28/2021. [12156926] [20-55711]--[COURT UPDATE: Attached corrected excerpts. 07/02/2021 by LA] (Khoury, Charles) [Entered: 06/28/2021 10:43 PM]
07/06/2021	24 (1 pg, 99.83 KB)	Filed clerk order (Deputy Clerk: LBS): Appellant's unopposed motion (Docket Entry No. [21]) to file the opening brief late is granted. The Clerk will file the opening brief submitted at Docket Entry No. [22]. The answering brief is due August 5, 2021. The optional reply brief is due within 21 days after service of the answering brief. [12163268] (AF) [Entered: 07/06/2021 11:26 AM]
07/06/2021	25 (2 pg, 95.76 KB)	Filed clerk order: The opening brief [22] submitted by Ted Amparan is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: blue. The excerpts of record [23] submitted by Ted Amparan are filed. Within 7 days of this order, filer is ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [12163707] (LA) [Entered: 07/06/2021 02:23 PM]
07/20/2021	26	Received 3 paper copies of excerpts of record [23] in 3 volume(s) and index volume filed by Appellant Ted Amparan. [12177580] (KWG) [Entered: 07/20/2021 10:49 AM]
07/20/2021	27	Received 6 paper copies of Opening Brief [22] filed by Ted Amparan. [12178300] (SD) [Entered: 07/20/2021 05:00 PM]
07/27/2021	28	Filed (ECF) notice of appearance of Minh U. Le (California Department of Justice, Office of the Attorney General, 600 West Broadway, Suite 1800, San Diego, CA 92101) for Appellee M. Eliot Spearman. Substitution for Attorney Mr. Daniel Rogers for Appellee M. Eliot Spearman. Date of service: 07/27/2021. (Party was previously proceeding with counsel.) [12184083] [20-55711] (Le, Minh) [Entered: 07/27/2021 11:44 AM]
07/27/2021	29	Attorney Daniel Rogers in 20-55711 substituted by Attorney Minh U. Le in 20-55711 [12184102] (DJV) [Entered: 07/27/2021 11:50 AM]
08/03/2021	30	Filed (ECF) Streamlined request for extension of time to file Reply Brief by Appellee M. Eliot Spearman. New requested due date is 09/03/2021. [12190352] [20-55711] (Le, Minh) [Entered: 08/03/2021 09:47 AM]
08/03/2021	31	Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellee M. Eliot Spearman. New requested due date is 09/07/2021. [12190391] [20-55711] (Le, Minh) [Entered: 08/03/2021 10:02 AM]
08/03/2021	32	**Streamlined request [31], [30] by Appellee M. Eliot Spearman to extend time to file the brief is approved. Amended briefing schedule: Appellee M. Eliot Spearman, Warden answering brief due 09/07/2021. The optional reply brief is due 21 days from the date of service of the answering brief.**

		[12190456] (JN) [Entered: 08/03/2021 10:26 AM]
08/19/2021	33 3 pg, 553.12 KB	Filed (ECF) Appellee M. Eliot Spearman Unopposed Motion to extend time to file Answering brief until 10/07/2021. Date of service: 08/19/2021. [12205975] [20-55711] (Le, Minh) [Entered: 08/19/2021 12:05 PM]
08/23/2021	34 1 pg, 101.11 KB	Filed clerk order (Deputy Clerk: LBS): Appellee's unopposed motion (Docket Entry No. [33]) for an extension of time to file the answering brief is granted. The answering brief is due October 7, 2021. The optional reply brief is due within 21 days after service of the answering brief. [12209265] (AF) [Entered: 08/23/2021 04:29 PM]
09/29/2021	35 3 pg, 77.72 KB	Filed (ECF) Appellee M. Eliot Spearman Unopposed Motion to extend time to file Answering brief until 11/08/2021. Date of service: 09/29/2021. [12242791] [20-55711] (Le, Minh) [Entered: 09/29/2021 01:43 PM]
10/04/2021	36 1 pg, 100.25 KB	Filed clerk order (Deputy Clerk: LBS): Appellee's unopposed motion (Docket Entry No. [35]) for an extension of time to file the answering brief is granted. The answering brief is due November 8, 2021. The optional reply brief is due within 21 days after service of the answering brief. [12245958] (AF) [Entered: 10/04/2021 09:03 AM]
11/05/2021	37 28 pg, 285.22 KB	Submitted (ECF) Answering Brief for review. Submitted by Appellee M. Eliot Spearman. Date of service: 11/05/2021. [12280199] [20-55711]--[COURT UPDATE: Attached corrected PDF of the brief. 11/09/2021 by KWG] (Le, Minh) [Entered: 11/05/2021 03:49 PM]
11/05/2021	38 52 pg, 1.02 MB	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee M. Eliot Spearman. Date of service: 11/05/2021. [12280206] [20-55711] (Le, Minh) [Entered: 11/05/2021 03:52 PM]
11/09/2021	39 2 pg, 95.41 KB	Filed clerk order: The answering brief [37] submitted by M. Eliot Spearman is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: red. The supplemental excerpts of record [38] submitted by M. Eliot Spearman are filed. Within 7 days of this order, filer is ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [12282384] (KWG) [Entered: 11/09/2021 10:03 AM]
11/10/2021	40	Received 3 paper copies of supplemental excerpts of record [38] in 1 volume(s) filed by Appellee M. Eliot Spearman. [12284327] (KWG) [Entered: 11/10/2021 01:25 PM]
11/10/2021	41	Received 7 paper copies of Answering Brief [37] filed by M. Eliot Spearman. [12284645] (SD) [Entered: 11/10/2021 03:41 PM]
12/02/2021	42	Filed (ECF) Streamlined request for extension of time to file Reply Brief by Appellant Ted Amparan. New requested due date is 12/23/2021. [12304600] [20-55711] (Khoury, Charles) [Entered: 12/02/2021 10:21 PM]
12/03/2021	43	**Streamlined request [42] by Appellant Ted Amparan to extend time to file the brief is not approved because the request is late. The filer must file a motion per 9th Cir. R. 31-2.2(b).** [12304848] (DLM) [Entered: 12/03/2021 10:32 AM]
12/16/2021	44 4 pg, 44.7 KB	Filed (ECF) Appellant Ted Amparan Motion to extend time to file Reply brief until 01/19/2021. Date of service: 12/16/2021. [12318630] [20-55711] (Khoury, Charles) [Entered: 12/16/2021 07:04 PM]
12/22/2021	45 1 pg, 99.46 KB	Filed clerk order (Deputy Clerk: LBS): Appellant's unopposed motion (Docket Entry No. [44]) for an extension of time to file the reply brief is granted. The optional reply brief is due January 19, 2022. [12322713] (AF) [Entered: 12/22/2021 10:00 AM]
01/03/2022	46	This case is being considered for an upcoming oral argument calendar in Pasadena Please review the Pasadena sitting dates for April 2022 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully. When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: Correspondence to Court; **Subject**: request for mediation).[12328947]. [20-55711] (KS) [Entered: 01/03/2022 11:21 AM]
01/23/2022	47	Notice of Oral Argument on Wednesday, April 6, 2022 - 09:00 A.M. - Courtroom 1 - Scheduled Location: Pasadena CA. The hearing time is the local time zone at the scheduled hearing location.

		View the Oral Argument Calendar for your case here. NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. *See* Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, you may have the option to appear in person at the Courthouse or remotely by video. Check here for updates on the status of reopening as the hearing date approaches. At this time, even when in person hearings resume, an election to appear remotely by video will not require a motion, **and any attorney wishing to appear in person must provide proof of vaccination**. The court expects and supports the fact that some attorneys and some judges will continue to appear remotely. If the panel determines that it will hold oral argument in your case, the Clerk's Office will contact you directly at least two weeks before the set argument date to review any requirements for in person appearance or to make any necessary arrangements for remote appearance. Please note however that if you do elect to appear remotely, the court **strongly prefers** video over telephone appearance. Therefore, if you wish to appear remotely by telephone you will need to file a motion requesting permission to do so. Be sure to review the GUIDELINES for important information about your hearing, including when to be available (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). If you are the specific attorney or self-represented party who will be arguing, use the **ACKNOWLEDGMENT OF HEARING NOTICE** filing type in CM/ECF no later than 28 days before Wednesday, April 6, 2022. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice.[12348206]. [20-55711] (KS) [Entered: 01/23/2022 06:08 AM]
01/24/2022	48 3 pg, 201.73 KB	Authorization for CJA attorney Mr. Charles Roger Khoury, Jr., Esquire for Ted Amparan to travel to Pasadena to attend oral argument on 04/06/2022. See attached letter for details. [12348784] (DR) [Entered: 01/24/2022 11:55 AM]
01/24/2022	49	Filed (ECF) Acknowledgment of hearing notice by Attorney Minh U. Le for Appellee M. Eliot Spearman. Hearing in Pasadena on 04/06/2022 at 09:00 A.M. (Courtroom: Courtroom 1). Filer sharing argument time: No. (Argument minutes: 10) Appearance in person or by video: I wish to appear in person. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 01/24/2022. [12348972] [20-55711] (Le, Minh) [Entered: 01/24/2022 01:28 PM]
01/25/2022	50 4 pg, 45.06 KB	Filed (ECF) Appellant Ted Amparan Motion to file a late brief. Date of service: 01/25/2022. [12351368] [20-55711]--[COURT UPDATE: Removed brief (resubmitted in correct entry [51]), updated docket text to reflect content of filing. 01/26/2022 by LA] (Khoury, Charles) [Entered: 01/25/2022 10:34 PM]
01/25/2022	51 14 pg, 134.52 KB	Submitted (ECF) Reply Brief for review. Submitted by Appellant Ted Amparan. Date of service: 01/25/2022. [12351626]--[COURT ENTERED FILING to correct entry [50].] (LA) [Entered: 01/26/2022 10:02 AM]
01/26/2022	52 1 pg, 97.59 KB	Filed clerk order (Deputy Clerk: AF): Appellant's unopposed motion to file a late Reply Brief, Docket No. [50], is GRANTED. [12352543] (AF) [Entered: 01/26/2022 03:57 PM]
01/26/2022	53 2 pg, 94.91 KB	Filed clerk order: The reply brief [51] submitted by Ted Amparan is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be submitted to the principal office of the Clerk. [12352630] (LA) [Entered: 01/26/2022 04:18 PM]
02/01/2022	54	Filed (ECF) Acknowledgment of hearing notice by Attorney Mr. Charles Roger Khoury, Jr., Esquire for Appellant Ted Amparan. Hearing in Pasadena on 04/06/2022 at 09:00 A.M. (Courtroom: courtroom 1). Filer sharing argument time: No. (Argument minutes: 10) Appearance in person or by video: I wish to appear by video. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 02/01/2022. [12358097] [20-55711] (Khoury, Charles) [Entered: 02/01/2022 10:14 PM]
02/02/2022	55 3 pg, 201.72 KB	Authorization for CJA attorney Mr. Charles Roger Khoury, Jr., Esquire for Ted Amparan to travel to Pasadena to attend oral argument on 04/06/2022. See attached letter for details. [12358916] (MEC) [Entered: 02/02/2022 02:02 PM]
02/07/2022	56	Received 6 paper copies of Reply Brief [51] filed by Ted Amparan. (sent to panel) [12362682] (SD) [Entered: 02/07/2022 01:20 PM]
03/14/2022	57 1 pg, 32.03 KB	Filed clerk order (Deputy Clerk: WL): This case shall be submitted on the briefs and record, without oral argument, on Wednesday, April 6, 2022, in Pasadena, California, pursuant to Federal Rule of Appellate Procedure 34(a)(2). [12393955] (WL) [Entered: 03/14/2022 01:40 PM]
04/06/2022	58	SUBMITTED ON THE BRIEFS TO MARY M. SCHROEDER, SUSAN P. GRABER and STEPHEN M. MCNAMEE. [12413878] (BG) [Entered: 04/06/2022 11:18 AM]

04/22/2022	59 7 pg, 486.31 KB	FILED MEMORANDUM DISPOSITION (MARY M. SCHROEDER, SUSAN P. GRABER and STEPHEN M. MCNAMEE) AFFIRMED. FILED AND ENTERED JUDGMENT. [12428470] (MM) [Entered: 04/22/2022 09:25 AM]
05/02/2022	60 12 pg, 125.45 KB	Filed (ECF) Appellant Ted Amparan petition for panel rehearing and petition for rehearing en banc (from 04/22/2022 memorandum). Date of service: 05/02/2022. [12436494] [20-55711] (Khoury, Charles) [Entered: 05/02/2022 08:54 PM]
05/02/2022	61 5 pg, 79.4 KB	Filed (ECF) Appellant Ted Amparan Motion to stay appellate proceedings. Date of service: 05/02/2022. [12436504] [20-55711] (Khoury, Charles) [Entered: 05/02/2022 10:04 PM]
05/09/2022	62 1 pg, 96.33 KB	Filed order (MARY M. SCHROEDER, SUSAN P. GRABER and STEPHEN M. MCNAMEE): Appellant's motion to stay appellate proceedings, Docket No. [61], is DENIED. [12441784] (AF) [Entered: 05/09/2022 02:19 PM]
05/27/2022	63 1 pg, 32.44 KB	Filed order (MARY M. SCHROEDER, SUSAN P. GRABER and STEPHEN M. MCNAMEE): The panel judges have voted to deny Appellant's petition for panel rehearing and recommend denial of the petition for rehearing en banc. The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it. Appellant's petition for panel rehearing and rehearing en banc, Docket No. [60], is DENIED. [12458156] (AF) [Entered: 05/27/2022 10:32 AM]
06/06/2022	64 1 pg, 92.33 KB	MANDATE ISSUED.(MMS, SPG and SMM) [12463641] (DJV) [Entered: 06/06/2022 07:06 AM]

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CLOSED,HABEAS,HabeasPSLC

U.S. District Court
Southern District of California (San Diego)
CIVIL DOCKET FOR CASE #: 3:18-cv-02522-BTM-WVG

Amparan v. Spearman
Assigned to: Judge Barry Ted Moskowitz
Referred to: Magistrate Judge William V. Gallo
Case in other court: USCA, 20-55711
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 11/02/2018
Date Terminated: 05/08/2020
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Ted Amparan
AZ1393
High Desert State Prison
PO Box 3030
Susanville, CA 96127

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

V.

Respondent

M.E. Spearman
Warden

represented by **Attorney General**
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TERMINATED: 01/24/2020
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
11/02/2018	1	Petition for Writ of Habeas Corpus against M.E. Spearman, filed by Ted Amparan.($5 Filing Fee, Fee Not Paid, IFP Not Filed) (Attachments: # 1 Civil Cover Sheet) The new case number is 3:18-cv-2522-BTM-WVG. Judge Barry Ted Moskowitz and Magistrate Judge William V. Gallo are assigned to the case.[*Case in Screening*] (jms) (jao). (Entered: 11/05/2018)
12/14/2018	2	NOTICE OF POSSIBLE DISMISSAL OF PETITION FOR FAILURE TO PAY FILING FEE OR MOVE TO PROCEED IN FORMA PAUPERIS.. Signed by Judge Barry Ted Moskowitz on 12/14/2018.(All non-registered users served via U.S. Mail Service)(sjm) (Entered: 12/14/2018)
01/23/2019	3	Fee for Habeas Petition: Paid on 1/23/2019 (jms). (Entered: 01/24/2019)
01/29/2019	4	ORDER REQUIRING RESPONSE TO PETITION (28 U.S.C. § 2254) Respondent must file a Notice of Appearance no later than February 14 2019. Motion to Dismiss Deadline 3/29/2019. Responses due by 4/29/2019, Traverse due by 4/29/2019. Signed by Magistrate Judge William V. Gallo on 1/29/2019.(All non-registered users served via U.S. Mail Service)(sjm) (Entered: 01/29/2019)
02/06/2019	5	NOTICE of Appearance by David Delgado-Rucci on behalf of M.E. Spearman (Delgado-Rucci, David)Attorney David Delgado-Rucci added to party M.E. Spearman(pty:res) (jms). (Entered: 02/06/2019)
03/05/2019	6	RESPONSE to 1 Petition for Writ of Habeas Corpus, by M.E. Spearman. (Attachments: # 1 Memorandum of Points and Authorities in Support of the Petition for Writ of Habeas Corpus)(Delgado-Rucci, David) (sjm). (Entered: 03/05/2019)
03/05/2019	7	NOTICE of Lodgment of State Court Record by M.E. Spearman re 6 Response to Habeas Petition (Attachments: # 1 Lodgment 1 Part 1, # 2 Lodgment 1 Part 2, # 3 Lodgment 1 Part 3, # 4 Lodgment 1 Part 4, # 5 Lodgment 1 Part 5, # 6 Lodgment 1 Part 6, # 7 Lodgment 1 Part 7, # 8 Lodgment 1 Part 8, # 9 Lodgment 1 Part 9, # 10 Lodgment 1 Part 10, # 11 Lodgment 1 Part 11, # 12 Lodgment 1 Part 12, # 13 Lodgment 1 Part 13, # 14 Lodgment 1 Part 14, # 15 Lodgment 1 Part 15, # 16 Lodgment 1 Part 16, # 17 Lodgment 1 Part 17, # 18 Lodgment 2 Part 1, # 19 Lodgmen 2 Part 2, # 20 Lodgment 3, # 21 Lodgment 4, # 22 Lodgment 5, # 23 Lodgment 6, # 24 Lodgment 7, # 25 Lodgment 8)(Delgado-Rucci, David) (sjm). (Entered: 03/05/2019)

08/09/2019	8	REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS re 1 Petition for Writ of Habeas Corpus, filed by Ted Amparan. Objections due by 9/21/2019 Replies due by 10/4/2019. Signed by Magistrate Judge William V. Gallo on 8/9/2019. (All non-registered users served via U.S. Mail Service)(sjm) (Entered: 08/09/2019)
01/23/2020	9	NOTICE of Appearance *and Reassignment* by David Delgado-Rucci on behalf of M.E. Spearman (Delgado-Rucci, David) (sjm). (Entered: 01/23/2020)
01/30/2020	10	ORDER: This Courts hearing on Petitioners § 2254 petition is hereby set for hearing on January 31, 2020 at 11:00 a.m., at which time this Court will take this matter under submission. before Judge Barry Ted Moskowitz. No personal appearances will be required on that day, and no oral argument will be heard unless the Court orders otherwise. Signed by Judge Barry Ted Moskowitz on 1/30/2020.(All non-registered users served via U.S. Mail Service)(sjm) (Entered: 01/31/2020)
01/31/2020	11	MINUTE ORDER, Motions Submitted 8 REPORT AND RECOMMENDATION re 1 Petition for Writ of Habeas Corpus, filed by Ted Amparan (no document attached) (rfm) (Entered: 02/03/2020)
05/08/2020	12	ORDER: (1) Adopting in Part as Modified and Declines to Adopt in Part the Findings and Conclusions of the United States Magistrate Judge; (2) Denying Petition for a Writ of Habeas Corpus; and (3) Issuing a Limited Certificate of Appealability. Signed by Judge Barry Ted Moskowitz on 5/7/2020. (All non-registered users served via U.S. Mail Service)(sxa) (rmc). (Entered: 05/08/2020)
05/08/2020	13	CLERK'S JUDGMENT. The Court Adopts as Modified In Part and Declines to Adopt in Part the findings and conclusions of the Magistrate Judge as set forth in the Order Adopting in Part the Report and Recommendation. The Petition for a Writ of Habeas Corpus is Denied The Court Issues a Certificate of Appealability limited to claim three in the Petition.(All non-registered users served via U.S. Mail Service)(sxa) (rmc). (Entered: 05/08/2020)
06/10/2020	14	Notice of Document Discrepancies and Order Thereon by Judge Barry Ted Moskowitz Accepting Document: Motion for Appointment of Counsel, from Petitioner Ted Amparan. Non-compliance with local rule(s), OTHER: Case closed Civ.L. Rule 7.1 or 47.1 - Lacking memorandum of points and authorities in support as a separate document; Civ.L. Rule 5.1 - Missing time and date on motion and/or supporting documentation;. Nunc Pro Tunc 5/29/2020. Signed by Judge Barry Ted Moskowitz on 6/10/2020.(sxa) (Entered: 06/11/2020)
06/11/2020	15	MOTION for Appointment of Counsel by Ted Amparan. Nunc Pro Tunc 5/29/2020 (sxa) (Entered: 06/11/2020)
06/11/2020	16	ORDER Denying 15 Request to Appoint Counsel. Signed by Judge Barry Ted Moskowitz on 6/10/2020. (All non-registered users served via U.S. Mail Service)(sxa) (Entered: 06/11/2020)
07/08/2020	17	NOTICE OF APPEAL to the 9th Circuit by Ted Amparan as to 13 Clerk's Judgment. Fee not paid. (In 12 Order, the US District Court issued a limited Certificate of Appealability. Notice of Appeal electronically transmitted to the US Court of Appeals.) (akr) (Entered: 07/10/2020)
07/13/2020	18	USCA Case Number 20-55711 for 17 Notice of Appeal to the 9th Circuit filed by Ted Amparan. (akr) (Entered: 07/13/2020)

07/13/2020	19	USCA Time Schedule Order as to 17 Notice of Appeal to the 9th Circuit filed by Ted Amparan. (akr) (Entered: 07/13/2020)
07/23/2020	20	ORDER of USCA as to 17 Notice of Appeal to the 9th Circuit filed by Ted Amparan. Appellant's August 8, 2020 notice of appeal was not filed or delivered to prison officials within 30 days after entry of the USDC's judgment on May 8, 2020. However, on May 29, 2020, appellant filed a motion for appointment of appellate counsel in the USDC which constitutes a timely notice of appeal. Accordingly, this appeal shall proceed. A review of the USCA's docket reflects that the filing and docketing fees for this appeal remain due. Within 21 days after the date of this order, appellant shall pay to the USDC the $505.00 filing and docketing fees for this appeal and file in the USCA proof of such payment or file in the USCA a motion to proceed in forma pauperis. Failure to pay the fees or file a motion to proceed in forma pauperis shall result in the automatic dismissal of the appeal by the Clerk for failure to prosecute. (akr) (Entered: 07/23/2020)
08/26/2020	21	ORDER of USCA as to 17 Notice of Appeal to the 9th Circuit filed by Ted Amparan. The motion to proceed in forma pauperis is granted. The Clerk shall amend the docket to reflect this status. Briefing schedule issued. Because appellant is proceeding without counsel, the excerpts of record requirement is waived. Appellee's supplemental excerpts of record are limited to the USDC docket sheet, the notice of appeal, the judgment or order appealed from, and any specific portions of the record cited in the answering brief. (akr) (Entered: 08/26/2020)
10/15/2020	22	ORDER of USCA as to 17 Notice of Appeal to the 9th Circuit filed by Ted Amparan. Appellant's motion for appointment of counsel in this appeal from the denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus is granted. Charles R. Khoury, Esq., P.O. Box 791, Del Mar, CA 92014, is appointed. Briefing schedule issued. (akr) (Entered: 10/15/2020)
03/14/2022	23	ORDER of USCA as to 17 Notice of Appeal to the 9th Circuit filed by Ted Amparan. This case shall be submitted on the briefs and record, without oral argument, on Wednesday, April 6, 2022, in Pasadena, California, pursuant to Federal Rule of Appellate Procedure 34(a)(2). (akr) (Entered: 03/14/2022)
05/09/2022	24	ORDER of USCA as to 17 Notice of Appeal to the 9th Circuit filed by Ted Amparan. Appellant's motion to stay appellate proceedings is denied. (akr) (Entered: 05/09/2022)
05/27/2022	25	ORDER of USCA as to 17 Notice of Appeal to the 9th Circuit filed by Ted Amparan. Appellant's petition for panel rehearing and rehearing en banc is denied. (akr) (Entered: 05/27/2022)
06/10/2022	26	MANDATE of USCA affirming the decision of the USDC as to 17 Notice of Appeal to the 9th Circuit filed by Ted Amparan. (akr) (Entered: 06/10/2022)

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