No.

IN THE SUPREME COURT OF THE UNITED STATES

NUZZIO BEGAREN,

***Petitioner*,**

v.

SECRETARY OF CORRECTIONS, (CDCR),

***Respondent*.**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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NUZZIO BEGAREN

No.

IN THE SUPREME COURT OF THE UNITED STATES

NUZZIO BEGAREN,

***Petitioner*,**

v.

SECRETARY OF CORRECTIONS, (CDCR),

***Respondent*.**

QUESTION PRESENTED

Whether the Orange County District Attorney's Unlawful Scheme to Secretly Use and Failure to Disclose a Criminal Informant Violated *Brady*?

TOPICAL INDEX

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL CONSTITUTION

No.

NUZZIO BEGAREN,
***Petitioner*,**

v.

SECRETARY OF CORRECTIONS, (CDCR),
***Respondent*.**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nuzzio Begaren petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Memorandum affirming the denial of his petition for writ of habeas corpus. (Appendix A)

OPINION BELOW

On June 6, 2022, the Ninth Circuit Court of Appeals entered a Memorandum affirming the district court's order denying Begaren's petition for writ of habeas corpus. (Appendix A)

JURISDICTION

The Court has jurisdiction. 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

CUSTODY STATUS OF PETITIONER

Mr. Begaren is in custody serving a sentence of 25 years to life in state prison.

STATEMENT OF THE CASE

A. State Court Trial Proceedings

On September 6, 2013, an Orange County (OC) jury convicted Begaren of conspiracy to commit murder and first degree murder. (1-ER-7)

The trial court sentenced Begaren to 25 years to life in prison. (1-ER-27)

B. Direct Appeal

Begaren appealed to the California Court of Appeal (CCA), raising one state evidentiary error challenging the admission of phone records. The CCA rejected the claim and affirmed the judgment in a reasoned decision. (1-ER-26)

Begaren then filed a Petition for Review. On August 16, 2016, the California Supreme Court (CSC) summarily denied his

petition. (1-ER-25)

C. State Habeas Proceedings

In May 2017, Begaren, in pro se, filed a habeas corpus petition in the CSC. (1-ER-7) After the parties briefed the issues, on August 16, 2016, the CSC summarily denied the petition. (1-ER-24)

D. Federal Habeas Proceedings

On, December 2, 2017, Begaren, in pro se, filed a petition for writ of habeas corpus in the district court. (1-ER-6) Begaren presented three grounds for relief: (1) Ineffective assistance of trial counsel; (2) Prosecutorial misconduct; and (3) Ineffective assistance of appellate defense counsel. (1-ER-8)

On August 19, 2020, the district court denied Begaren's habeas petition but granted a certificate of appealability on all his claims. (1-ER-4, 2)

On September 9, 2020, Begaren appealed to the Ninth Circuit. (4-ER-615) On June 6, 2022, the Ninth Circuit Court of Appeals affirmed the district court's order denying Begaren's petition for writ of habeas corpus. (Appendix A)

SUMMARY OF ARGUMENT

The Orange County District Attorney (OCDA) Illegally Used a Criminal Informant to Coerce Duran to Inculpate Begaren and Failed to Disclose the Exculpatory *Brady* Evidence

This case involved the killing of Begaren's wife, Elizabeth Duran, by three assailants who followed Begaren as he drove on the freeway. Begaren told the police that while in a department store with Elizabeth and his daughter, he gave Elizabeth a huge sum of cash. Two men had watched him transfer the money to Elizabeth. The men then followed him as he drove on the freeway, forced him to stop his car, and killed Elizabeth as she ran from the car. The men then took Elizabeth's cash and fled the scene.

In 1998, the police investigated Elizabeth's killing but never arrested nor charged anyone. The case went cold until 2012, about fifteen years after Elizabeth's murder.

In 2012, the OCDA had no solid physical evidence linking Begaren except that Elizabeth had purchased a hefty life insurance policy and listed Begaren and his daughter as beneficiaries. On the morning of February 2, 2012, Wyatt arrested Begaren. On the afternoon of February 2, 2012, Wyatt

arrested Jose Sandoval who owned the sedan that had followed Begaren Sandoval inculpated Rudy Duran and Duran inculpated his cousin Guillermo Espinoza.

But Wyatt had no substantial evidence linking Begaren to Elizabeth's killing. Frustrated, the OCDA resorted to an illegal technique. Wyatt transferred Duran from Tehachapi state prison to the OC jail. (2-ER-241) Wyatt placed Raymond Cuevas, a well-known criminal informant, with Duran. (2-ER-241) During a May 2012 secretly recorded jail conversation, Cuevas threatened Duran with death unless he confessed to Elizabeth's killing and implicated Begaren as the mastermind. Duran confessed.

The OCDA never timely disclosed the illegal ongoing jailhouse informant scheme that Wyatt orchestrated to coerce Duran into implicating Begaren. After trial, on November 6, 2014, the OCDA sent a letter to Begaren's appellate counsel. The letter minimized the impact of the letter and simply referred to "a recorded witness statement that should have been provided to . . . Mr. Begaren" before trial. (2-ER-64)

The letter read in part, "My understanding is that the recording was made of R.D. [Duran] on May 23, 2012, while R.D.

[Duran] was in custody, speaking to an informant posing as a fellow inmate, prior to R.D. [Duran] ever being charged with the homicide. This recording took place prior to R.D. confessing on tape to Anaheim PD detectives." (2-ER-264)

The secretly audio recorded conversations between Cuevas and Duran should have been disclosed to Begaren before trial. Instead, the OCDA unlawfully withheld the favorable material evidence until more than a year long after Begaren's conviction and two years after Begaren's arrest.

The OCDA concealed exculpatory evidence showing that Cuevas, a criminal informant and prominent gang leader, threatened that Duran would be killed unless he confessed and implicated Begaren in the plot to kill Elizabeth. *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

The failure to disclose the *Brady* evidence deprived Begaren of due process, a fair trial, the right to confront and cross examine witnesses and the right to effective counsel. U.S. Const. amends. V, VI, XIV.

REASON TO GRANT CERTIORARI

I. THE OCDA'S UNLAWFUL SCHEME TO SECRETLY USE A CRIMINAL INFORMANT TO IMPLICATE BEGAREN

A. Introduction

The Orange County Sheriff's Department (OCSD) engaged in shocking, reprehensible conduct by transferring Raymond Cuevas, a well-known criminal informant, to the Orange County jail to extract a confession from Duran and ensuring that Duran implicated Begaren in the killing of Begaren's wife.

Detective Wyatt placed Raymond Cuevas, a well-known criminal informant, with Duran. (2-ER-241) During a May 23, 2012 secretly recorded jail conversation, Cuevas threatened Duran with death unless he confessed to Elizabeth's killing and implicated Begaren. (3-ER-434-437,241) At trial, Duran testified for the OCDA about Elizabeth's killing and implicated Begaren as the mastermind. (2-ER-278)

The prosecutor knew a successful prosecution required the jury to believe Duran's story that Begaren masterminded Elizabeth's killing. Duran's telephone number on Elizabeth's calling card alone would have been insufficient to convict

Begaren. The case stalled for fourteen years until the OCSD arrested Begaren on February 6, 2012. (4RT 702) (Dkt. 16-9) Unless Duran confessed, implicated Begaren and connected Begeren to the case, Begaren could not have been convicted.

If the jurors knew Duran had a motive to lie to Cuevas to avoid being killed by the Mexican Mafia, the jury would have known that Duran's "hope" for favorable treatment came after Cuevas threatened to kill Duran and after Duran's confession in which he implicated Begeren.

The OCDA disclosed the illegal jailhouse informant scheme after trial and during Begaren's appeal. *Brady v. Maryland*, 373 U.S. at 87 required the OCDA to disclose the covert discussions between Cuevas and Duran. The OCDA hid material exculpatory *Brady* evidence, consisting of the illegal informant scheme used to extract Duran's confession and implicate Begaren. (3-ER-427)

The Ninth Circuit Memorandum finds that the CSC "could have reasonably determined that no prejudice resulted from the ruling." (Memo at 3) Begaren disagrees because the CSC unreasonably applied federal law and decided the case on an unreasonable fact determination by summarily denying Begaren's

claims. *Brady v. Maryland*, 373 U.S. 83; see also *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (coerced confession); see *Payne v. Arkansas,* 356 U.S. 560, 564-65, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958) (coerced confession); *Arizona v. Fulminante*, 499 U.S. 279, 287, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (A confession is coerced when obtained through a credible threat of violence from confidential informants operating at law enforcement's direction)

B. The Memorandum Overlooks that Courts Have Reversed Cases Because of the OCSD's Informant Scandal

Sometime before 2011, OCSD deputies began the unlawful informant program at the OC jail. *United States v. Govey*, 284 F. Supp. 3d 1054, 1057 (C.D. Cal. 2018) The OCSD engaged in a systematic practice of surreptitious monitoring, recording, and illegally using inmate informants to elicit incriminating statements from represented defendants, in violation of their Sixth Amendment rights. See *People v. Dekraai,* 5 Cal. App. 5th 1110, 1141 (2016), as modified (Dec. 14, 2016) ("[I]t is clear [OCSD] deputy sheriffs operated a well-established program whereby they placed [inmate informants] next to targeted

defendants who they knew were represented by counsel to obtain statements.").

The OCSD's illegal inmate informant program surfaced in recent years through evidence obtained by criminal defendants who were the targets of the program. ".... [A] very public scandal resulted when the program was exposed. Because of the constitutional violations that inured from the illegal use of inmate informants, the Orange County District Attorney's Office, and individual deputies have all been criticized, and in some instances vilified, by the media, politicians, the legal community, and members of the public. In addition, numerous investigations and prosecutions, including several serious murder cases, have been compromised and the charges dismissed." *United States v. Govey,* 284 F.Supp.3d at 1057.

The OCSD's improper practices led a California trial court to recuse the entire OCDA's office in *People v. Dekraai,* a mass murder case involving eight victims, seven of whom died. After extensive evidentiary rulings, the trial court found that the deputies had violated the defendant's constitutional rights by planting an inmate informant to elicit a confession. *Dekraai*, 5

Cal. App. 5th at 1137. The trial court also found that the deputies then either intentionally lied or willfully withheld material evidence about the informant program from the trial court. *Id.*

Further, the trial court found that the deputies' conduct created a conflict of interest for the District Attorney's Office, which "failed its responsibility to resolve the conflict of interest by protecting the rule of law and instead ignored OCSD's attempt to compromise [the defendant's] constitutional and statutory rights." *Id.* at 1138.

The CCA affirmed the trial court's recusal of the entire OCDA's office in November 2016. *Id.* The CCA found that the OCDA's office not only knew about the OCSD's grave misconduct, but also failed to produce information to defendants about the informant program. *Id.* at 1146. Because the OCDA's office was complicit in the OCSD's wrongdoing, the CCA found that the OCDA's office had violated the defendant's due process rights and could not fairly prosecute the case. *Id.*

Similarly, in June 2016, in a defendant's conviction in a fatal shooting case, *People v. Ortiz*, Case No. 11CF0862, the OCDA failed to disclose material evidence regarding the inmate

informant program to the defense. See *United States v. Govey,* 284 F. Supp. 3d at 1059. The conviction was overturned and a new trial was granted after four OCSD deputies, who were called by the defendant to testify about the inmate informant program, invoked the Fifth Amendment and refused to testify. See *Id.*; see also *People v. Smith (Paul Gentile)* Case No. G044672 https://www.latimes.com/socal/daily-pilot/entertainment/story/2021-08-12/sunset-beach. (OC Superior Court Judge granted a new trial to Smith, a man convicted in 2010 of stabbing a Sunset Beach man to death after sheriff's deputies declined to testify in court about their alleged misuse of illegal informants to obtain incriminating information from accused defendants).

C. The Prosecutor's Failure to Timely Disclose the Material Exculpatory Evidence Prejudiced Begaren

The Memorandum finds that "the California Supreme Court could have reasonably determined that the failure to disclose this evidence did not prejudice Petitioner. The jury was already given ample reason to distrust Duran; during cross-examination, Duran admitted that he expected favorable treatment from the state for his testimony and that his trial

testimony contradicted his prior statements to police. Moreover, Duran's statement to the informant was consistent with Duran's testimony at trial. Finally, Duran's testimony was corroborated by the phone bill Petitioner threw out in 1998." (Memo at 3)

Begaren vehemently disagrees. Cuevas' coerced conversation shows that Duran, under threat of death, fabricated his account of the killing. The suppressed evidence would have negatively impacted Duran's and Wyatt's testimony because the jury would have learned that Wyatt brought Cuevas from state prison, placed him with Duran to extract Duran's confession and implicate Begaren. If so, then the jury would have distrusted Duran's and Wyatt's testimony.

The Memorandum finds that Duran's statement to the police was consistent with what he later told the police and his trial testimony. (Memo at 3) But Duran's "consistent" statement at trial made no difference. Duran had to testify consistently with his coerced statement to Cuevas because Cuevas threatened to kill Duran. Duran feared for his life.

The Memorandum finds Begaren's 1998 phone bill corroborated Duran's testimony. (Memo at 3) Begaren disagrees.

Duran would never have implicated Begaren but for Cuevas' death threats. And a telephone call from Elizabeth's calling card had no context without Duran's testimony.

The Memorandum finds that the jury had "ample reasons to distrust Duran because Duran "expected favorable treatment from the state for his testimony and that his trial testimony contradicted his prior statements to police." (Memo at 3)

Begaren disagrees because, if the OCDA had sufficient evidence, it would not have resorted to such extraordinary illegal tactics to implicate Begaren. And, the memorandum overlooks that the prosecutor used Duran's criminal history to argue that Begaren picked Duran because he needed a criminal to kill Elizabeth. (2-ER-136) The prosecutor used Duran's criminal history to explain why Begaren solicited him to kill Elizabeth.

The prosecutor also used Wyatt's testimony to corroborate Duran's testimony. The prosecutor argued, "And what you learned, not just from Duran, but from Detective Wyatt, is that he wasn't given a police report, not a single page of evidence shown to him in this case when he gets interviewed or prior to testifying. He wasn't prepped or scripted. Nothing." (2-ER-137)

The prosecutor denied that Duran had been coached:

> THE PROSECUTOR: Rudy Duran didn't look at a thing. Take that back. Eventually he did look at one document, didn't he? Not one police report, not one piece of evidence that said the suspect's name is Tony. Not one piece of evidence that said when the car was. Not one piece of evidence said this is Sandoval told us last month. Nothing. (2-ER- 137)

The prosecutor told the jury to trust Wyatt because "He's the one that testified that care he took to keep them separate, the care he took to make sure that Duran didn't have any info. Could he lie? Yes. Did he lie? Huh-uh. No, he didn't." (2-ER- 137)

The Memorandum overlooks that, in the undisclosed audio recordings, Duran confessed to his involvement in Elizabeth's murder but implicated Begaren as the mastermind behind the 1998 murder plot. The covert tape recordings would have shown that, but for Duran's testimony, Begaren had no involvement with Elizabeth's killing and that Duran implicated Begaren to save his own life. The covert tape recordings would have shown that Wyatt brought Cuevas to the OC jail and placed him with Duran as part of an ongoing informant scheme.

If trial counsel knew about Duran's confession and how Duran implicated Begaren, trial counsel could have suppressed

Duran's statement as an illegal coerced confession. See *Arizona v. Fulminante*, 499 U.S. 279. And, if the court did not bar the confession, the jury would have heard how Cuevas threatened and tricked Duran.

The OCDA's failure to disclose the *Brady* evidence compromised Begaren's right to present his defense to the jury. Begaren could present his defense after a meaningful review of the evidence produced by the OCDA. Because the OCDA failed to timely notify Begaren about Wyatt's coordinated a scheme, the OCDA deprived Begaren of his right to present a defense.

The requested impeachment evidence had material value and raised a reasonable probability that the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Good faith is irrelevant to a *Brady* violation. *Arizona v. Youngblood,* 488 U.S. 51, 57, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988).

The prosecution prejudicially violated *Brady* by failing to timely disclose the evidence. The prosecution deprived Begaren of his Sixth Amendment rights to confrontation, compulsory process, and effective assistance of counsel. This Court should

grant Certiorari because the CSC had no reasonable basis to deny relief. See *Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

CONCLUSION

Mr. Begaren respectfully requests that this Court grant Certiorari.

DATED: August 4, 2022

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

Fay Arfa, Attorney for Appellant

APPENDIX

NOT FOR PUBLICATION

FILED

JUN 6 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NUZZIO BEGAREN, Petitioner-Appellant, v. SECRETARY OF CORRECTIONS, (CDCR), Respondent-Appellee.	No. 20-55949 D.C. No. 8:17-cv-02178-DMG-SHK MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted April 15, 2022
Pasadena, California

Before: SMITH,** BADE, and LEE, Circuit Judges.

Petitioner Nuzzio Begaren was convicted in California state court of conspiracy to commit murder and the first-degree murder of his wife, Elizabeth Begaren. Petitioner unsuccessfully pursued direct and collateral relief in the

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

** The Honorable D. Brooks Smith, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

APPENDIX A

California courts. Pursuant to 28 U.S.C. § 2254, he filed a petition for habeas relief in District Court. The District Court denied his petition, and he appealed. For the reasons stated below, we affirm the District Court's denial of habeas relief.

We review the District Court's decision de novo. *Noguera v. Davis*, 5 F.4th 1020, 1034 (9th Cir. 2021). Our review is constrained by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* 28 U.S.C. § 2254(d). Under AEDPA, we defer to a state court's decision on any claim that was adjudicated on the merits unless the decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* When, as here, a state court has ruled on the claims presented in the petition without issuing a reasoned opinion, the petitioner satisfies the "unreasonable application prong" of § 2254(d)(1) by demonstrating that there was "no reasonable basis" for the state court's decision. *Noguera*, 5 F.4th at 1034 (internal quotation marks omitted) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 187–88 (2011)). In other words, we "must determine what arguments or theories . . . could have supported[] the state court's decision; and then [we] must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* (alterations in original) (quoting

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Harrington v. Richter, 562 U.S. 86, 102 (2011)).

1. To establish a violation under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), a petitioner must demonstrate that the prosecution or its agents suppressed evidence favorable to the petitioner, and the suppression of that evidence must have prejudiced the petitioner's case. *Comstock v. Humphries*, 786 F.3d 701, 708 (9th Cir. 2015). To determine whether the suppression of favorable evidence was prejudicial, we consider "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (internal quotation marks omitted) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

Petitioner asserted a *Brady* violation based on the state's failure to disclose the use of an informant to interview Rudy Duran. But the California Supreme Court could have reasonably determined that the failure to disclose this evidence did not prejudice Petitioner. The jury was already given ample reason to distrust Duran; during cross-examination, Duran admitted that he expected favorable treatment from the state for his testimony and that his trial testimony contradicted his prior statements to police. Moreover, Duran's statement to the informant was consistent with Duran's testimony at trial. Finally, Duran's testimony was corroborated by the phone bill Petitioner threw out in 1998.

Additionally, the state court could have reasonably determined that no *Brady*

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violation occurred when the state failed to provide the defense with the plea deals entered by Duran, Jose Sandoval, and Guillermo Espinoza. Those deals were completed after trial, so they could not have been suppressed and do not undermine our confidence in the verdict. *See Strickler*, 527 U.S. at 282–83, 290.

2. For Petitioner to prevail on his claims of ineffective assistance of counsel, his counsel must have performed "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). Further, that failure must have prejudiced Petitioner. *Id.* at 691–92.

The California Supreme Court could have reasonably concluded that Petitioner's trial counsel was not ineffective for failing to cross-examine Detective Wyatt about the circumstances of Raphael Miranda's confession, in particular Miranda's allegation that it was coerced. There is no indication that trial counsel was, or should have been, aware of Miranda's allegations, or that counsel had any reason to investigate Miranda's confession. *Langford v. Day*, 110 F.3d 1380, 1387 (9th Cir. 1996). Even if counsel had attempted to introduce this evidence, the California Supreme Court could have reasonably concluded that the trial court would have excluded the evidence as improper character evidence or for creating a "substantial danger of . . . confusing the issues." *See* Cal. Evid. Code §§ 352, 1101(b). Thus, the state court could have reasonably concluded that, even if trial counsel performed deficiently, Petitioner was not prejudiced.

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The California Supreme Court could also have reasonably held that Petitioner's trial counsel was not ineffective for not objecting to the admission of Angelica Begaren's statements to the police. It appears that counsel made a strategic decision to allow her statements into evidence, and we will not second-guess trial counsel's decision. *Matylinsky v. Budge*, 577 F.3d 1083, 1091 (9th Cir. 2009). Furthermore, the admission of her statements did not prejudice Petitioner. They actually corroborated his version of events and contradicted Sandoval's and Duran's testimony—the prosecution's "star" witnesses.

Finally, because Petitioner's claims all fail, appellate counsel's decision not to raise them on direct appeal was not ineffective. *See Bailey v. Newland*, 263 F.3d 1022, 1033–34 (9th Cir. 2001) (holding appellate counsel is ineffective only if they fail to raise a "winning issue" on direct appeal). As such, the California Supreme Court reasonably rejected Petitioner's claims of ineffective assistance of counsel.

AFFIRMED.

APPENDIX A

FILED

JUN 30 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NUZZIO BEGAREN, Petitioner-Appellant, v. SECRETARY OF CORRECTIONS, (CDCR), Respondent-Appellee.	No. 20-55949 D.C. No. 8:17-cv-02178-DMG-SHK Central District of California, Santa Ana ORDER

Before: SMITH,* BADE, and LEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judge Smith has recommended denying the petition for rehearing en banc, and Judges Bade and Lee have voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable D. Brooks Smith, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

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JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NUZZIO BEGAREN, Petitioner, v. SECRETARY OF CORRECTIONS, Respondent.	Case No. CV 17-02178 DMG (SHK) **JUDGMENT**

Pursuant to the Order Accepting Findings and Recommendation of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is DISMISSED with prejudice.

DATED: August 19, 2020

DOLLY M. GEE
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NUZZIO BEGAREN, Petitioner, v. SECRETARY OF CORRECTIONS, Respondent.	Case No. CV 17-02178 DMG (SHK) **ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the relevant records on file, the Report and Recommendation ("R&R") of the United States Magistrate Judge. The Court has engaged in a *de novo* review of those portions of the R&R to which Petitioner has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that the Petition be DENIED and that Judgment be entered dismissing this action with prejudice.

DATED: August 19, 2020

DOLLY M. GEE
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NUZZIO BEGAREN, Petitioner, v. SECRETARY OF CORRECTIONS, Respondent.	Case No. SA CV 17-02178 DMG (SHK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation ("R&R") is submitted to the Honorable Dolly M. Gee, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY OF RECOMMENDATION

On December 2, 2017, Petitioner Nuzzio Begaren ("Petitioner"), proceeding pro se, signed and subsequently filed a Petition for Writ of Habeas Corpus ("Petition" or "Pet.") pursuant to 28 U.S.C. § 2254, challenging his 2014 California state conviction for conspiracy to commit murder and murder in the first degree of Petitioner's wife, Elizabeth Begaren. Because Petitioner has failed to demonstrate that the California state courts unreasonably denied any of the three

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claims raised herein, the undersigned Magistrate Judge recommends that the District Judge deny Petitioner's request for habeas relief on the merits, in its entirety, and dismiss the Petition with prejudice.

II. PROCEDURAL HISTORY

On September 6, 2013, a jury in the Orange County Superior Court convicted Petitioner of conspiracy to commit murder and murder in the first degree. Electronic Case Filing Number ("ECF No.") 16-2, 2 Clerk's Transcript ("CT") at 359-61.[1] The trial court sentenced Petitioner to 25 years to life in prison. ECF No. 16-4, 4 CT at 721-22.

Petitioner appealed to the California Court of Appeal, raising a single claim of state evidentiary error, related to the admission of phone records. ECF Nos. 16-11 through 16-13. The state appellate court rejected the claim and affirmed the judgment in a reasoned decision. ECF No. 16-14. Petitioner then filed a Petition for Review in the California Supreme Court, which was denied summarily. ECF Nos. 16-15 & 16-16.

In May 2017, Petitioner filed a habeas corpus petition in the California Supreme Court, raising the claims corresponding to the three claims raised in the Petition herein. ECF Nos. 16-17 & 16-18. The Supreme Court denied the petition summarily and without a detailed explanation. ECF No. 16-19.

In response to the Petition filed in this Court, Respondent filed an Answer and a supporting memorandum ("Answer"), arguing that the claims in the Petition should be denied on the merits, and lodged the various related transcripts and state court filings and opinions. ECF Nos. 15 & 16. Thereafter, Petitioner filed a

[1] The referenced page number for the Clerk's Transcript (four volumes), the Reporter's Transcript (five volumes), and the state court filings and opinions lodged by Respondent will be the number assigned in those documents and not the page number associated with the document through the ECF system. With respect to the Petition and attachments to it, the referenced page numbers will be those assigned by the Court's ECF system.

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Traverse. ECF No. 22.

III. PETITIONER'S CLAIMS

The Petition raises the following three grounds for relief:

1. Petitioner was convicted due to ineffective assistance of trial counsel.

2. Petitioner was convicted due to prosecutorial misconduct.

3. Petitioner was convicted due to ineffective assistance of appellate counsel.

ECF No. 1, Pet. at 5-6.

IV. FACTUAL SUMMARY

Because Petitioner has not rebutted the correctness of the findings of fact made by the California Court of Appeal regarding Petitioner's appeal in state court by clear and convincing evidence, the Court adopts the factual summary set forth in the California Court of Appeal's opinion affirming Petitioner's conviction. Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1). To the extent that an evaluation of Petitioner's individual claims depends on an examination of the trial record, the Court has made an independent evaluation of the record specific to those claims. The California Court of Appeal's Opinion on direct appeal is attached as Exhibit A to this R&R and the factual summary at pages 2 through 3 is incorporated and adopted in this R&R. Exhibit A, California Court of Appeal's Opinion in The People v. Begaren, Case No. G050177 ("Cal. CoA Op.").

V. STANDARD OF REVIEW

The standards in the Anti-Terrorism and Effective Death Penalty Act of 1996 and 28 U.S.C. § 2254 govern this Court's review of Petitioner's grounds. Because the California Supreme Court summarily denied all the claims in the instant Petition on collateral review, the Court will conduct an independent review of the record to determine whether the decision was objectively reasonable. In doing so, the Court will uphold the state court's decision so long as there is any reasonable basis in the record to support it. See Harrington v. Richter, 562 U.S. 86, 102 (2011) (holding

that reviewing court "must determine what arguments or theories supported or . . . could have supported[ ] the state court's decision" and "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" existing Supreme Court precedent).

VI. DISCUSSION

A. Habeas Relief Is Not Warranted With Respect To Petitioner's Prosecutorial Misconduct Claim.

In Ground Two, Petitioner contends that the prosecution unlawfully withheld evidence that its main witness, Rudy Duran, was coerced by physical threats into confessing that Petitioner hired Duran to murder Elizabeth Begaren. ECF No. 1, Pet., Addendum at 38-53. Petitioner claims that the investigating officer, Sergeant Daron Wyatt, used a prison informant, Randy Cuevas, to coerce a confession from Duran by having Cuevas threaten Duran that if Duran did not cooperate with law enforcement and admit to being involved in the killing of Elizabeth Begaren, Duran would be killed by the Mexican Mafia. Id. at 44. Petitioner argues that this information, which was not disclosed until after trial, was relevant to the impeachment of both Duran and Sergeant Wyatt and had it been turned over to the defense prior to trial he would have been acquitted. Id. at 52. Finally, Petitioner claims that the prosecution failed to disclose a plea bargain that the prosecution struck with Duran to get him to testify at trial against Petitioner. Id. at 52-53.

1. Background

The prosecution's case centered around the testimony of Jose Sandoval and Duran, both of whom participated in the murder of Elizabeth Begaren and later cooperated with authorities in testifying against Petitioner. Sandoval testified that, in January 1998, he drove Guillermo Espinoza and Duran into downtown Los Angeles. ECF No. 16-8, 3 Reporter's Transcript ("RT") at 488-89. Duran directed him to a gas station, where they waited until Duran told Sandoval to follow

a small SUV that had just driven by. Id. at 490-92. They followed the SUV until it pulled off on the side of a freeway on-ramp. Id. at 494-95. The driver of the SUV and a young girl got out of the car and walked past Sandoval's car without saying anything. Id. at 497-99. Espinoza and Duran got out of Sandoval's car and walked toward the SUV. Id. at 500. A woman got out of the SUV and began running when Sandoval heard two gunshots. Id. at 501. Espinoza and Duran then got back in Sandoval's car and they drove away. Id. at 502-04. Sandoval believed Espinoza shot the woman. Id. at 505.

Sandoval told the jury that he had been charged with murder. Id. at 512. Although he had not been "promised anything" for his testimony against Petitioner, he was expecting "something . . . beneficial." Id. On cross-examination, Sandoval admitted that after being charged with murder he knew he would "never get out of prison" if he did not make a deal with the prosecution. Id. at 525. He admitted he was testifying because he was "expecting some sort of a deal." Id. at 546.

Duran testified that, at a meeting with Petitioner in 1997, Petitioner asked him if he would kill (or find someone to kill) Petitioner's wife for $6,000. Id. at 610. Petitioner discussed how he wanted the killing to "seem like a robbery" and told Duran he would leave the money in the center console of his car in a woman's purse. Id. at 611-15. Duran hired Guillermo Espinoza to do the job. Id. at 615-16. Thereafter, Duran testified to the circumstances of the freeway killing of Elizabeth Begaren, corroborating Sandoval's testimony. Id. at 620-35. Hours after the killing, Petitioner called Duran and told him to never contact him again. Id. at 637-38; ECF No. 16-9, 4 RT at 697-700.

On cross-examination, Duran admitted he was currently incarcerated and serving a six-year sentence for a drug case. ECF No. 16-8, 3 RT at 639. Duran said that he had not been charged in the shooting death of Elizabeth Begaren, but he knew he still could be charged. Id. at 642. Duran said he was told he could either be

a witness or a defendant in this case. Id. He testified that he had not received a "deal" from the prosecution and was simply "trusting" that his testimony would be helpful. Id. at 643-44. Duran was hoping that he could "see daylight one day" after this case was over, but no agreement had been reached on what would happen to him after his testimony. Id. at 645, 683. He was told that he would not be "getting life" if he cooperated at trial. Id. at 683-84. Additionally, Sergeant Wyatt testified that he told Duran, if he cooperated, he could be "walking out of . . . prison . . . in 2013," or, if they had to prosecute him for murder, he could "be spending the rest of his life in prison." ECF No. 16-9, 4 RT at 707-09.

After Petitioner was convicted at trial, Sandoval, Duran, and Espinoza pled guilty to lesser crimes related to their roles in the killing. In October 2013, Sandoval pled guilty to voluntary manslaughter and was sentenced to probation for five years after serving one year in jail. ECF No. 16-20. In March 2015, pursuant to a plea agreement, Duran pled guilty to solicitation of murder and was sentenced to six years in prison, which he already served. ECF No. 16-21. Finally, in September 2016, Espinoza, who was not taken into custody until after Petitioner had been convicted, pled guilty to voluntary manslaughter with the use of a gun and received a sentence of 21 years in prison. ECF No. 16-22.

In November 2014, the Orange County District Attorney provided Petitioner's state appellate counsel with a recording of a jailhouse conversation between Duran and a jailhouse informant, Cuevas, regarding Duran's role in the murder of Elizabeth Begaren:

> My understanding is that the recording was made of [Duran] on May 23, 2012, while [Duran] was in custody, speaking to an informant posing as a fellow inmate, prior to [Duran] ever being charged with the homicide. This recording took place prior to [Duran] confessing on tape to Anaheim PD detectives.

ECF No. 4, Pet., Part 2 at 106. The District Attorney noted that Duran's statement to the informant was "consistent" with his subsequent confession but,

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nevertheless, should have been disclosed prior to trial. Id.

In June 2016, Petitioner's state appellate counsel informed Petitioner about the prosecution's use of the informant and the failure to disclose that information before trial. See Id., Pet., Part 1 at 239 & Part 2 at 1-2. Appellate counsel described the contents of the recordings, as follows:

> After Rudy Duran was moved from his prison to Orange County jail, he was placed in a cell with confidential informant Cuevas. Their conversation was recorded. A transcript of the conversation is enclosed for your information. Although much of the conversation is not very clear, it seems that Cuevas tells Duran he is part of the la Eme gang. There is an implication the gang is feeling heat about the killing of Elizabeth Begaren, because she was a correctional officer. Duran tells Cuevas someone, some Italian, "Bogart," gave him $6,000 to do the job. There is talk about "Creature" and whether he is a snitch. It appears Cuevas tells Duran that his explanation is acceptable as far as the gang is concerned: Duran was just "misled," which is a good thing, because now Cuevas will not have to kill Duran.

Id., Pet., Part 2 at 1.

Appellate counsel told Petitioner that, although the conversation "could be considered exculpatory" as it could be used to "cross-examine Duran," it did not suggest that Petitioner was innocent and was consistent with Duran's testimony at trial. Id., Pet., Part 2 at 2. Therefore, appellate counsel concluded that there was not a "reasonable probability the result of the trial would have been different" even had the evidence been disclosed prior to trial. Id.

2. Applicable Federal Law and Anlysis

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." To constitute a Brady violation, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully

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or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

Evidence is material "only if there is a reasonable probability that had the evidence been disclosed the result at trial would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). There is a "reasonable probability" of prejudice when the suppression of evidence "undermines confidence in the outcome of the trial." Kyles v. Whitley, 514 U.S. 419, 434 (1995); see also Killian v. Poole, 282 F.3d 1204, 1210 (9th Cir. 2002) ("If exculpatory or impeachment evidence is not disclosed by the prosecution and prejudice ensues, a defendant is deprived of due process. Prejudice is determined by looking at the cumulative effect of the withheld evidence and asking whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (internal quotation marks and citations omitted)).

There is no question that the Orange County District Attorney's Office failed in its duty to timely disclose evidence of the recorded conversation between one of its primary witnesses at Petitioner's trial and a confidential informant. Moreover, the circumstances of the conversation—in which Cuevas apparently threatened Duran to explain why he killed Elizabeth Bergaren or Duran himself would be killed by the la Eme gang—could arguably have been used to impeach either Duran or Sergeant Wyatt, who arranged the jailhouse meeting between Duran and Cuevas. "[W]hile potentially impeaching evidence may be 'exculpatory' for Brady purposes, it is not automatically so." United States v. Hearst, 424 F. Supp. 307, 313 (N.D. Cal. 1976). Petitioner must show that the withheld evidence was material to the outcome of his case. United States v. Si, 343 F.3d 1116, 1122 (9th Cir. 2003). In this case, Petitioner has failed to do so.

Petitioner argues that the recorded conversation could have been used to impeach Duran by showing that his confession was not truthful because it was made under threat of gang reprisal. However, as noted by Petitioner's state appellate

counsel, nothing in the recorded conversation pointed to Petitioner's innocence or suggested that Duran was fabricating the account of the killing. Moreover, Petitioner does not dispute that Duran's statement to Cuevas was entirely consistent with what he later told the police , outside the presence of Cuevas, and what he testified to at trial. Finally, and importantly, there was considerable evidence to corroborate Duran's testimony, including the testimony of Sandoval, another participant in the murder, as well as evidence that Petitioner called Duran shortly after the murder—a fact for which Petitioner has never provided an innocent explanation.

Petitioner also contends that the recorded conversation would have impeached Duran's credibility by showing his connection to the Mexican Mafia. The jury, however, was aware of Duran's criminal background, as he testified that he had previously been convicted of drug and robbery offenses, that his life of crime extended more than a decade, and that he was willing to arrange the murder of Petitioner's wife for $6,000. ECF No. 16-8, RT at 600-02, 607, 615. Thus, as the prosecutor warned the jury, Duran was a "criminal" without "a lot of character," who was testifying because "he wants a deal" and who should not be believed without independent corroborating evidence. ECF No. 16-9, RT at 819-20, 824-25. Consequently, there is no reasonable probability that evidence of Duran's gang ties would have materially impacted the jury's view of him under these circumstances.

Petitioner's claim that evidence of the use of Cuevas as an informant could have been used to impeach Sergeant Wyatt, though troubling, is equally unavailing. Although Sergeant Wyatt likely have initiated the meeting between Cuevas and Duran, there is no evidence that Wyatt instructed Cuevas to threaten Duran or otherwise act unlawfully. Moreover, Sergeant Wyatt's credibility was not central to the case; rather, the outcome of the case hinged on the believability of the testimony of Duran and Sandoval in light of the accompanying corroborating evidence.

In short, Petitioner has not demonstrated that the prosecution's failure to

timely disclose Duran's recorded conversation with a jailhouse informant materially impacted the outcome of the trial. "If there is no reasonable doubt about [the defendant's] guilt whether or not the additional evidence is considered, there is no justification for a new trial." United States v. Agurs, 427 U.S. 97, 112-13 (1976); see also Giglio v. United States, 405 U.S. 150, 154 (1971) ("We do not, however, automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.") (internal quotations omitted). Furthermore, the Court finds that the untimely disclosure of the evidence does not "undermine[ ] confidence in the outcome of the trial." Bagley, 473 U.S. at 676.

Finally, Petitioner's claim that the prosecution failed to disclose a plea bargain that the prosecution struck with Rudy Duran to get him to testify at trial is without a factual basis. The record demonstrates that though Duran admitted he was seeking a benefit by testifying against Petitioner, he did not enter into a plea agreement regarding his involvement in the murder of Elizabeth Begaren until March 30, 2015, long after Petitioner's trial had ended. ECF No. 16-21. Petitioner has not put forth any credible evidence undermining this. Accordingly, the state court's rejection of this claim was objectively reasonable and, therefore, this claim fails to merit relief.

B. Habeas Relief Is Not Warranted With Respect To Petitioner's Ineffective Assistance Of Trial Counsel Claim.

In Ground One, Petitioner claims that trial counsel was ineffective in three instances: (1) failing to investigate and cross-examine Sergeant Wyatt regarding allegations that he attempted to coerce a confession from and frame another suspect in the murder of Elizabeth Begaren; (2) failing to investigate the mental health of witness Angelica Begaren and to have her statements to police excluded from trial based on her lack of mental competency; and (3) failing to inform Petitioner that his charges had been dismissed before being refiled, which would have allowed him to

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be released from custody. ECF No. 1, Pet., Addendum at 31-37. In Ground Three, Petitioner asserts that appellate counsel was ineffective for failing to investigate and present the prosecutorial misconduct claim and ineffective assistance of trial counsel claims presented herein. Id., Pet., Addendum at 38-41.

1. Applicable Federal Law

The Sixth Amendment right to counsel guarantees not only assistance, but effective assistance, of counsel. See Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail on a claim of ineffective assistance of counsel, Petitioner must establish two things: (1) counsel's performance fell below an "objective standard of reasonableness" under prevailing professional norms; and (2) the deficient performance prejudiced the defense, i.e., "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687-88, 694. A claim of ineffective assistance must be rejected upon finding either that counsel's performance was reasonable or that the alleged error was not prejudicial. Id. at 697; see also Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other."). The Strickland standard applies equally to claims of ineffective assistance of appellate counsel. Smith v. Robbins, 528 U.S. 259, 285 (2000) (requiring a defendant to prove but for counsel's deficient conduct "he would have prevailed on appeal").

Where the ineffective assistance of counsel claims have previously been adjudicated in state court, the Court's review is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009); see also Richter, 562 U.S. at 105 ("The standards created by Strickland and § 2254(d) are both 'highly deferential,' . . . and when the two apply in tandem, review is 'doubly' so." (quoting Knowles, 556 U.S. at 123)).

2. Failure To Investigate And Cross-examine Sergeant Wyatt

Prior to Petitioner being charged in the murder-for-hire plot to kill his wife,

Raphael Miranda was arrested based on admissions he made to police regarding his involvement in the shooting of Elizabeth Bergaren. See ECF No. 16-3, 3 CT at 687-97. Charges against Miranda were later dropped after the police determined that his confession was false. Id.

On September 24, 2013, Miranda filed a civil rights action alleging that Sergeant Wyatt used excessive force, threatened his family with physical violence, and told him his children would be taken from him if he did not confess to the murder of Elizabeth Bergaren. See Miranda v. City of Anaheim, Case No. CV 13-1826-JVS (DFM), United States District Court for the Central District of California (ECF No. 1). After a federal civil trial, a jury determined that Sergeant Wyatt did not violate Miranda's civil rights by coercing him to confess and did not batter or use excessive force against Miranda while interrogating him. Id. (ECF No. 116). The judgment against Miranda was later affirmed by the Ninth Circuit. Id. (ECF No. 139). Petitioner, however, faults trial counsel for failing to cross-examine Sergeant Wyatt at trial regarding the allegations of misconduct made by Miranda. The Court does not find, however, that counsel's actions were constitutionally deficient or prejudiced the outcome of Petitioner's case.

First, Petitioner has not demonstrated the trial counsel was aware of Miranda's allegations of abuse at the time of Petitioner's trial. Sergeant Wyatt testified at Petitioner's trial in August 2013, approximately one month *prior* to Miranda filing his civil suit against Sergeant Wyatt. ECF No. 16-8, 3 RT at 580. Petitioner points to several news articles detailing Miranda's claims of false arrest, excessive force, and a coerced confession, but they also post-date Wyatt's testimony as well as the jury's verdict against Petitioner. See ECF No. 16-3, 3 CT at 687-97. Thus, counsel was not deficient in failing to cross-examine the witness on this subject. See, e.g., Langford v. Day, 110 F.3d 1380, 1387 (9th Cir. 1996), (finding counsel was not ineffective for failing to pursue suppression motion where counsel "was unaware [defendant] had initially refused to waive his Miranda

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rights").

Petitioner argues that counsel should have been aware of the allegations against Sergeant Wyatt and would have discovered them with "minimal investigation." ECF No. 22, Traverse at 12-13. Even if counsel had been aware of the claims, Petitioner has not demonstrated that the trial court would have allowed the witness to be cross-examined on the allegations, much less that the revelation of Miranda's accusations would have affected the outcome of the case.

At trial, Sergeant Wyatt testified to his involvement in the case. He told the jury how he had reviewed evidence collected during the initial investigation into the murder, including watching a security videotape of the shooting. The jury also heard recorded interviews he conducted with Petitioner and two other suspects, Sandoval and Duran. ECF Nos. 16-8, 3 RT at 580-95 & 16-9, 4 RT at 689-720. There were no allegations at trial, however, that any evidence was fabricated by Sergeant Wyatt or that any of testimony by the witnesses was involuntary or coerced by Wyatt. Thus, Miranda's claims, which would have been relevant only to undermine Wyatt's credibility as a witness, were collateral to the jury's determination of Petitioner's guilt in the murder-for-hire scheme to kill his wife. For this reason, counsel's failure to impeach Wyatt did not amount to ineffective assistance. See Jaiceris v. Fairman, 290 F.Supp.2d 1069, 1081 (N.D. Cal. Nov. 5, 2003) (holding counsel was not ineffective for failing to impeach witness on "purely collateral matter").

Moreover, as discussed previously, the central pieces of evidence against Petitioner came from the testimony of Sandoval and Duran, who testified how Petitioner solicited them to kill his wife and planned the killing to look like a gang robbery. ECF No. 16-8, 3 RT at 481-549, 600-684. Their testimony, coupled with a telephone record that showed Petitioner called Duran only hours after the murder (ECF Nos. 16-8, 3 RT at 637-38 & 16-9, 4 RT at 697-700), provided substantial evidence of Petitioner's guilt regardless of Sergeant Wyatt's credibility as a witness.

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Additionally, even if cross-examined about Miranda's accusations, Sergeant Wyatt would have denied their veracity and Petitioner has offered no evidence to support Miranda's claims.[2] Therefore, counsel's actions in this instance did not prejudice the outcome of his case. See Strickland, 466 U.S. at 687-88 (holding that to obtain relief from a claim of ineffective assistance of counsel, a defendant must show that counsel's representation was objectively unreasonable and that the deficient performance prejudiced the defense).

3. Failure To Challenge Mental Competency Of Angelica Begaren

Angelica Begaren was a few days short of her eleventh birthday when her step-mother was murdered in 1998. She was in the car at the time of the alleged robbery and witnessed the shooting. Shortly thereafter, she was interviewed by the police, who recorded her statement. In 2013, at the time of trial, the prosecutor and defense stipulated that she was unavailable to testify. ECF No. 16-9, 4 RT at 688. The recording of her 1998 statement to police, however, was played for the jury. ECF No. 16-6, 1 RT at 236 & ECF No. 16-4, 4 CT at 807-55.

Petitioner contends that counsel should not have allowed the recording to be played at trial because Angelica was mentally incompetent. ECF No. 1, Pet., Addendum at 34-36. In support of his argument, Petitioner offers a 2016 letter from the Atlantic Pediatric Medical Clinic, stating that in 1989 Angelica was diagnosed with "speech problems and learning disability" and that sometime later (before 2004) she was diagnosed with "depression and schizophrenia." Id., Addendum, Exh. L at 222. He also provides a letter from Dr. Lana L. Milton stating that she has been treating Angelica for schizophrenia, PTSD, and intellectual development delay since 2004 and that, as of 2013, Angelica was "unable to testify regarding the

[2] In fact, at the civil trial, Wyatt testified that he did not threaten or assault Miranda during his interrogation of the suspect, and audio recordings of the interview corroborated his testimony. See Miranda v. Wyatt, 2016 WL 281341, at *4, 28-33 (9th Cir. 2016) (post-trial Appellees Answering Brief).

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incident of homicide involving her step mother." Id. at 223.

Here, counsel was not deficient in failing to object to the introduction of Angelica's statement to police made shortly after her step-mother's murder for several reasons. First, Petitioner has not demonstrated that any objection by counsel would have been successful. This is because under California law, "a witness must be allowed to testify unless he or she (1) cannot communicate intelligibly, (2) cannot understand the duty of truthful testimony, or (3) lacks personal knowledge of the events to be recounted." People v. Anderson, 25 Cal.4th 543, 574 (2001); Cal. Evid. Code § 701. Furthermore, the "[u]nsoundness of mind does not *per se* establish the incompetency of the witness." People v. Ives, 17 Cal.2d 459, 476 (1941).

Neither of the letters submitted by Petitioner prove that Angelica was incompetent to give a statement to police in 1998. Furthermore, an examination of Angelica's statement itself demonstrates that she was able to communicate intelligibly, understood the duty to be truthful, and had personal knowledge of the incident. Thus, any challenge to the admission of the statement would likely have been fruitless. See, e.g., People v. Dennis, 17 Cal.4th 468, 525 (1998) (rejecting claim that counsel was incompetent for failing to challenge eight-year-old child's competency to testify where the witness "established her ability to express herself in an understandable manner . . . [and] understood the difference between truth and falsehood"). Counsel's "failure to take a futile action can never be deficient performance." Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir. 1996).

Additionally, it is likely that in this instance, counsel wanted Angelica's statements to police to be admitted at trial. This is because Angelica's recollection of events that led up to her step-mother's killing was the primary corroboration of Petitioner's defense at trial—i.e., that the family was targeted by several gang members, who forced their car off the road and confronted them with guns in an attempted robbery. Angelica told the police that her parents were happily married

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and explained how the robbers saw them in the store while shopping, followed them in their car, eventually ramming it and forcing Petitioner to pull off the highway, and tried to take her step-mother's purse before shooting her. ECF No. 16-4, 4 CT at 810-35. She also stated that Petitioner told her to "tell the truth" of what happened that night. Id. at 819. Without Angelica's statement to police, Petitioner had almost no evidence to contradict the testimony of witnesses Sandoval and Duran, who detailed Petitioner's plan to have them stage a robbery to cover up the killing of his wife.

At a minimum, it was a reasonable tactical decision by trial counsel to allow Angelica's statements to be heard by the jury rather than challenging their admissibility based on mental incompetency. Reasonable tactical decisions, including decisions regarding the presentation of the case, are "virtually unchallengeable" on federal habeas review. Strickland, 466 U.S. at 687-90; see also Matylinsky v. Budge, 577 F.3d 1083, 1091 (9th Cir. 2009) (finding that a reviewing court may "neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight, but rather, will defer to counsel's sound trial strategy." (quoting Strickland, 466 U.S. at 689)). Accordingly, Petitioner has not demonstrated that counsel was constitutionally deficient in failing to object to the admission of Angelica's statement to police.

4. Failure To Inform Petitioner Of Dismissal Of Charges

Finally, Petitioner contends that trial counsel was ineffective for failing to tell him, while he was in custody, that the charges against him had been dismissed before being refiled four months later. ECF No. 1, Pet., Addendum at 36-37. He argues that he could have been released from jail on bail during this time and investigated the circumstances of his case. Id. at 37. Even if true, however, Petitioner's claims are entirely speculative.[3] He has not explained what evidence he

[3] In fact, it appears that Petitioner's charges were dismissed only because a new superseding indictment was issued that continued Petitioner's "no bail" status. ECF No. 16-1, 1 CT at 1-10.

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could have uncovered that would have affected the outcome of his case had he been released on bail prior to trial. Without such a showing, he is not entitled to habeas relief for this claim of attorney error. See Jones v. Gomez, 66 F. 3d 199, 204-05 (9th Cir. 1995) (finding cursory allegations that are purely speculative cannot support a claim of incompetency of counsel).

5. Ineffective Assistance Of Appellate Counsel

In Ground Three, Petitioner asserts that appellate counsel's failure to investigate and raise the claims of prosecutorial misconduct and ineffective assistance of counsel raised herein on direct appeal violated his constitutional rights. ECF No. 1, Pet., Addendum at 38-41.

To establish that appellate counsel was ineffective, a petitioner must demonstrate "a reasonable probability exists that he would have prevailed on appeal" absent counsel's errors. Hurles v. Ryan, 752 F.3d 768, 785 (9th Cir. 2014). Moreover, appellate counsel has no constitutional duty to raise every issue where, in the attorney's judgment, the issue has little or no likelihood of success. Jones v. Barnes, 463 U.S. 745, 751-53 (1983). In fact, "the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy." Bailey v. Newland, 263 F.3d 1022, 1028-29 (9th Cir. 2001) (internal quotations omitted). Consequently, a petitioner is entitled to relief only if counsel failed to raise a "winning issue" on appeal. Id. at 1033-34.

Here, after examining Petitioner's previously addressed claims in Grounds One and Two, this Court has determined that under the AEDPA standards, this Court has no basis to grant habeas relief on those two grounds. Because there was no reasonable likelihood that Petitioner's claims of prosecutorial misconduct and ineffective assistance of trial counsel would have prevailed on appeal in state court, Petitioner cannot show that appellate counsel was deficient in failing to raise these issues or that he suffered prejudice from appellate counsel's failure to do so. See Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) ("[A]ppellate counsel's

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failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal."); Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002) (holding that failure to raise "untenable issues" on appeal does not fall below Strickland standard).

For these reasons, the California Supreme Court's denial of Petitioner's claims of ineffective assistance of trial and appellate counsel was neither contrary to, nor an unreasonable application of, controlling Supreme Court authority. Accordingly, Petitioner is not entitled to habeas relief on Grounds One or Three.

VII. RECOMMENDATION

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

DATED: May 15, 2019

HON. SHASHI H. KEWALRAMANI
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

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EXHIBIT A

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COURT OF APPEAL - 4TH DIST DIV 3

FILED

May 25, 2016

Deputy Clerk: D. Johnson

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NUZZIO BEGAREN, Defendant and Appellant.	G050177 (Super. Ct. No. 12ZF0139) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

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I. INTRODUCTION

This appeal from a murder conviction has many of the usual elements of a television detective drama: A cold case reopened more than a decade later; the pursuit of a family by a menacing dark sedan; the killing of a wife by a hit man after her husband took out a million-dollar life insurance policy on her; a car chase that closes down a freeway; and a detective who finally breaks the case after spotting a connection between the husband and one of the associates of the hit man.

But the legal issue is a little more prosaic and doesn't require recitation of all those facts. The link connecting the husband, defendant Nuzzio Begaren, to an associate of the hit man was a phone bill from 1998 showing a one–minute call from Begaren to an associate of the hit man three days after the murder. On appeal, Begaren argues AT&T's custodian of records was insufficiently qualified to authenticate the 1998 bill as a business record because he was not familiar with, as trial counsel put it, "how things worked with telephones back then." As we explain below, the AT&T custodian of records was able to identify the bill as the same kind of phone bill AT&T was producing at the time of trial, using computers to automatically record calls, and that was enough to pass the reasonability test for laying a business record foundation. Accordingly we affirm the husband's judgment of conviction and his 25 years to life sentence.

II. FACTS

On January 17, 1988, Elizabeth Wheat Begaren was murdered. Her husband, Nuzzio Begaren, was a suspect, especially because he provided conflicting stories of the murder, acted suspiciously, and was the beneficiary of a million-dollar life insurance policy on his wife of six months. But the police couldn't put together more than suspicion and the case went cold.

In 2011 the Anaheim Police Department cold case unit assigned the case to Detective Daron Wyatt, who gathered enough evidence to convict Begaren. A key to the case was a phone bill Begaren had tried to destroy. The foundation for that phone bill –

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which connected Begaren to the hit man, a boyhood friend who had actually pulled the trigger at Begaren's behest – was laid by a clerk of records from AT&T.

Begaran's attorney objected to the testimony of the AT&T custodian of records, arguing there was no foundation he was "aware of how things were billed or how things worked with telephones back then." And when the court asked the custodian if he was "familiar with the procedures we used back in that time period," the custodian answered no. But then he added, looking at the bill, "based on how it looks, it's – not a whole lot has changed. It still shows the date and time where it was called from. It looks about the same as I am used to seeing."

The trial judge overruled the objection, reasoning the witness's not being familiar with "procedures" back in 1998 only went to the weight of his identification. The "foundation," declared the trial judge, was "sufficient." The prosecutor then went on to establish that the call connected Begaren to the admitted hit man.

The jury found Begaren guilty of murder and conspiracy to commit murder. It did not find him guilty of the special circumstance of committing murder for financial gain.[1] The court imposed a term of 25 years to life on the murder charge and imposed the same sentence for the conspiracy conviction but then stayed it. (See Pen. Code, § 654.) Begaren has appealed, confining his argument to the admission of the phone bill.

III. DISCUSSION

A. *Business Record Exception*

In California, the business records exception to the hearsay rule is codified in section 1271 of the Evidence Code.[2] The statute specifies the need for four elements to bring a writing within the exception.[3] Begaren challenges the presence of one of those

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[1] There is one obvious question that is not expressly dealt with in the briefing or the record: Did Begaren ever make a claim on the $1 million policy he took out on Elizabeth just after the marriage?

[2] All undesignated references to any statute are to the Evidence Code. All undesignated references to any subdivision of a statute are to section 1271 of that code.

[3] The statute is short, and provides in its entirety:

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elements, namely that the custodian or other qualified witness "testifies to its identity and the mode of its preparation." Begaren asserts the prosecution laid an insufficient foundation for admission of the phone bill because they did not provide adequate evidence the custodian of records knew what the mode of preparation was.

The standard of review testing a trial court's ruling on whether a proper foundation has been laid for the business records exception is abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011.) That is, we look to whether the decision was reasonable under the circumstances. (*People v. Dean* (2009) 174 Cal.App.4th 186, 193.)

Subdivision (d)'s element of testimony regarding identity and mode of preparation has been specifically held to be reviewed under a reasonableness standard. (See *Sierra Managed Asset Plan, LLC. v. Hale* (2015) 240 Cal.App.4th Supp. 1, 8, quoting *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 797, fn. 28 ["The trial court has wide discretion in determining whether a 'qualified witness' possesses sufficient personal knowledge of the '"identity and mode of preparation"' of documents for purposes of the business records exception."].) The reasonableness standard appears to be the federal rule as well. (See *United States v. Evans* (9th Cir. 2006) 178 Fed.Appx. 747, 750 [affirming trial court decision allowing local Verizon Wireless store manage to authenticate cellular phone bill and admit it under the business records exception]; *United States v. Wake* (5th Cir. 1991) 948 F.2d 1422, 1434-1435 [testing authentication under abuse of discretion standard].) We think the reasonableness standard particularly well suited to subdivision (d) authentication given the wide variety

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"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (§ 1271.)

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of businesses and the kinds of records they keep, as well as the circumstances under which they keep them.

Here, the trial court's determination that *this* custodian from AT&T had adequately testified to *this* phone bill's identity and mode of preparation was manifestly reasonable. It is important to recognize at this juncture that not all records generated by businesses are created equal. For example, handwritten purchase orders written by a chicken supplier (see *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 322 [upholding admission even though supplier did not witness "more than a few" of the transactions generating the orders]) are obviously more vulnerable to attack than machine-generated records (see *United States v. Lamons* (11th Cir. 2008) 532 F.3d 1251, 1263, fn. 23). And some business records don't qualify for exemption from the hearsay rule at all: Accident reports, for example, aren't generated in the usual course of a money-making business; they are typically generated for use in court. (See *Palmer v. Hoffman* (1943) 318 U.S. 109, 113-114.)

But in this regard, computer generated phone bills from large telecommunications companies fall on the gold standard side of the business record spectrum. For example, in *U.S. v. Guerena* (9th Cir. 1998) 142 F.3d 446 [1998 U.S.App. LEXIS 15548], the Ninth Circuit even upheld the authentication of cellular phone records from another country – the records were from "Baja Cellular" – even though the prosecutor was unable to authenticate the records through their custodian at Baja Cellular. The authentication was upheld because the prosecutor produced two American witnesses who "were able to testify that the records listed the dates, times, and numbers called in a pattern unique to cellular telephone bills and appeared authentic." (*Id.* at p. 8.) The court first noted that authentication can be accomplished through such things as internal patterns, contents, substance, appearance and other "'distinctive characteristics,

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taken in conjunction with circumstances.'" (*Id*. at p. 8, quoting Fed.R.Evid. 901(b)(4).[4]) The two American witnesses were able to identify "enough of the appearance, content, and internal patterns of the phone bills to create a prima facie case of authenticity." (*Ibid.*)

Likewise, here AT&T's custodial witness was able to identify the distinctive formatting, appearance, content and internal patterns of AT&T's phone bills to authenticate the January 1998 phone bill. As far as the identity part of subdivision (d) is concerned, the custodian's testimony that the bill from 1998 looked like the bills AT&T is still preparing ("It looks about the same as I am used to seeing") passes a reasonableness test.[5]

As to the "mode of preparation" part of subdivision (d), Begaren emphasizes the custodian's admission that he was not familiar with the "procedures" used to prepare bills back in 1998. On this point, however, it is enough that he testified AT&T *automatically* records calls made using a calling card, which is another way of describing the obvious: Phone bills are computer-generated. They were computer-generated in 1998, they're computer-generated now. That was enough. Such phone records carry particular force because they are less subject to human manipulation than typical business

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[4] Federal Rule of Evidence 901 sets standards for meeting requirements of "authenticating or identifying an item of evidence." (See Fed.R.Evid. § 901(a).) The federal rule can provide guidance for California courts because it identifies various factors bearing on proper authentication. California's own section 1400, also governing authentication, is pretty general, simply asking for "the introduction of evidence sufficient to sustain a finding" that a writing is what the "proponent of the evidence claims it is" or (b) the "establishment of such facts by any other means provided by law."

[5] It is true that the custodian in *People v. Zavala* (2013) 216 Cal.App.4th 242 (*Zavala*) [also upholding admission of phone records], was more articulate about how Sprint uses a computer than our custodian was about how AT&T went about collecting its data in 1998 here. Here is the relevant passage from *Zavala*: "Trawicki [the custodian] stated he had worked for Sprint for eight and a half years as a custodian of records and was familiar with the way Sprint maintains its cell phone records, cell cite information, and text messaging records. Sprint uses a computer system that generates records of each phone call at the time it is made and then transmits the data to a call detail record archive. Trawicki testified that Sprint collects and maintains the call detail records of all its customers for billing purposes and keeps those records in the regular course of business." (*Id*. at pp. 244-245.) But if one examines this passage critically, one finds that, at the end of the day, the custodian in *Zavala* didn't say anything more than would be obvious to anyone: Sprint uses computers to make up its phone bills. The AT&T custodian here said the same thing, but in fewer words.

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records. (See *United States v. Vela* (5th Cir. 1982) 673 F.2d 86, 90 [quoting district court's rationale for admitting phone records].)

Begaren's invocation of *Taggart v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697 (*Taggart*) is unavailing because in that case there wasn't even an attempt to identify the records or their mode of preparation. *Taggart* was a personal injury case against a helmet maker. The plaintiff wanted to introduce reports of tests on a slightly earlier version of the helmet at issue from an independent research institute. (*Id.* at p. 1702.) The institute's custodian of records responded to a subpoena for the records, but the custodian's accompanying declaration failed to identify the records or their mode of preparation. In upholding a defense judgment against the plaintiff's claim that the trial judge should have admitted the reports, the appellate court noted that the subpoena requiring the production of the records (§ 1561) doesn't require the custodian to state the identity or mode of preparation of subpoenaed records, so the reports could not qualify as business records. (*Taggart, supra*, 33 Cal.App.4th at p. 1706.) The appellate court bulwarked its ruling by noting the different dynamics applying to business records obtained by subpoena and those authenticated in open court: "The Legislature's wisdom is demonstrated by what occurred in this case: not only did plaintiffs fail to show that the records were trustworthy, but Super Seer had no opportunity to show that the records were untrustworthy, or unreliable. Normally, where the proponent of evidence invokes the business records exception, the opponent can test the applicability of the exception by cross-examining the custodian of the records. Here, however, Super Seer had no opportunity to depose and cross-examine either the custodian or the Southwest employees who actually prepared the reports." (*Id*. at p. 1708.) By contrast, in the case at hand the AT&T custodian *was* available for cross-examination and if there were any grounds to doubt the authenticity of the phone bill they could readily have been exposed to the jury.

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IV. DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

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Appellate Courts Case Information

Supreme Court

Change court

Disposition

PEOPLE v. BEGAREN
Division SF
Case Number S235466

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation:
none

Date	Description
08/10/2016	Petition for review denied

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Filed 5/25/16 P. v. Begaren CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NUZZIO BEGAREN, Defendant and Appellant.	G050177 (Super. Ct. No. 12ZF0139) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

APPENDIX C

I. INTRODUCTION

This appeal from a murder conviction has many of the usual elements of a television detective drama: A cold case reopened more than a decade later; the pursuit of a family by a menacing dark sedan; the killing of a wife by a hit man after her husband took out a million-dollar life insurance policy on her; a car chase that closes down a freeway; and a detective who finally breaks the case after spotting a connection between the husband and one of the associates of the hit man.

But the legal issue is a little more prosaic and doesn't require recitation of all those facts. The link connecting the husband, defendant Nuzzio Begaren, to an associate of the hit man was a phone bill from 1998 showing a one–minute call from Begaren to an associate of the hit man three days after the murder. On appeal, Begaren argues AT&T's custodian of records was insufficiently qualified to authenticate the 1998 bill as a business record because he was not familiar with, as trial counsel put it, "how things worked with telephones back then." As we explain below, the AT&T custodian of records was able to identify the bill as the same kind of phone bill AT&T was producing at the time of trial, using computers to automatically record calls, and that was enough to pass the reasonability test for laying a business record foundation. Accordingly we affirm the husband's judgment of conviction and his 25 years to life sentence.

II. FACTS

On January 17, 1988, Elizabeth Wheat Begaren was murdered. Her husband, Nuzzio Begaren, was a suspect, especially because he provided conflicting stories of the murder, acted suspiciously, and was the beneficiary of a million-dollar life insurance policy on his wife of six months. But the police couldn't put together more than suspicion and the case went cold.

In 2011 the Anaheim Police Department cold case unit assigned the case to Detective Daron Wyatt, who gathered enough evidence to convict Begaren. A key to the case was a phone bill Begaren had tried to destroy. The foundation for that phone bill –

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which connected Begaren to the hit man, a boyhood friend who had actually pulled the trigger at Begaren's behest – was laid by a clerk of records from AT&T.

Begaran's attorney objected to the testimony of the AT&T custodian of records, arguing there was no foundation he was "aware of how things were billed or how things worked with telephones back then." And when the court asked the custodian if he was "familiar with the procedures we used back in that time period," the custodian answered no. But then he added, looking at the bill, "based on how it looks, it's – not a whole lot has changed. It still shows the date and time where it was called from. It looks about the same as I am used to seeing."

The trial judge overruled the objection, reasoning the witness's not being familiar with "procedures" back in 1998 only went to the weight of his identification. The "foundation," declared the trial judge, was "sufficient." The prosecutor then went on to establish that the call connected Begaren to the admitted hit man.

The jury found Begaren guilty of murder and conspiracy to commit murder. It did not find him guilty of the special circumstance of committing murder for financial gain.[1] The court imposed a term of 25 years to life on the murder charge and imposed the same sentence for the conspiracy conviction but then stayed it. (See Pen. Code, § 654.) Begaren has appealed, confining his argument to the admission of the phone bill.

III. DISCUSSION

A. *Business Record Exception*

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IV. DISPOSITION

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