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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDDIE TURNER, Petitioner-Appellant, v. RALPH M. DIAZ, Acting Secretary for the California Department of Corrections and Rehabilitation; et al., Respondents-Appellees.	No. 21-55710 D.C. No. 2:20-cv-00830-AB-KS Central District of California, Los Angeles ORDER

Before: GRABER and TALLMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 6) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

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Before: CANBY and OWENS, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 9).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDDIE TURNER, **Petitioner,** **v.** **RALPH M. DIAZ, Warden,** **Respondent.**	**NO. CV 20-0830-AB (KS)** **ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the operative Petition for Writ of Habeas Corpus (the "Petition"), all the records herein, and the Report and Recommendation of United States Magistrate Judge ("Report"). Further, the Court has engaged in a *de novo* review of those portions of the Report to which Petitioner has raised objections ("Objections") (Dkt. No. 54) as well as his renewed request for an evidentiary hearing (Dkt. No. 49).

Most significantly, Petitioner asserts that the Court "looked through" the California Supreme Court's decision to the wrong decision by the California Court of Appeal. (*See* Objections at 4-7.) Specifically, Petitioner contends that the Court should have "looked through" the California Supreme Court's decision to the California Court of Appeal's decision in *Turner v. Bank of Am. Corp.*, No. B247883, 2015 Cal. App. Unpub. LEXIS 5090 (Jul. 21,

2015) rather than to the California Court of Appeal's decision in *People v. Turner*, No. B272452, 2019 Cal. App. Unpub. LEXIS 4843 (Jul. 22, 2019). However, *Turner v. Bank of Am. Corp.*, No. B247883, was a *civil* case between Petitioner and Bank of America. Therefore, the Court finds no error. For the purposes of this habeas proceeding, the Court properly looked through the California Supreme Court's decision to the Court of Appeal's decision in case number B272452, which concerned the criminal conviction at issue.

The Court finds Petitioner's other objections equally unavailing. Further, it finds that Petitioner's renewed request for an evidentiary hearing should be denied for the reasons stated in the Report. Having completed its review, the Court accepts the findings and recommendations set forth in the Report.

Accordingly, IT IS ORDERED that: (1) the Petition is denied; and (2) Judgment shall be entered dismissing this action with prejudice.

DATED: June 15, 2021

ANDRÉ BIROTTE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDDIE TURNER, **Petitioner,** **v.** **RALPH M. DIAZ, Warden,** **Respondent.**	**NO. CV 20-0830-AB (KS)** **ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

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2015) rather than to the California Court of Appeal's decision in *People v. Turner*, No. B272452, 2019 Cal. App. Unpub. LEXIS 4843 (Jul. 22, 2019). However, *Turner v. Bank of Am. Corp.*, No. B247883, was a *civil* case between Petitioner and Bank of America. Therefore, the Court finds no error. For the purposes of this habeas proceeding, the Court properly looked through the California Supreme Court's decision to the Court of Appeal's decision in case number B272452, which concerned the criminal conviction at issue.

The Court finds Petitioner's other objections equally unavailing. Further, it finds that Petitioner's renewed request for an evidentiary hearing should be denied for the reasons stated in the Report. Having completed its review, the Court accepts the findings and recommendations set forth in the Report.

Accordingly, IT IS ORDERED that: (1) the Petition is denied; and (2) Judgment shall be entered dismissing this action with prejudice.

DATED: June 15, 2021

ANDRÉ BIROTTE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EDDIE TURNER, **Petitioner,** **v.** **RALPH M. DIAZ, Secretary of Corrections,** **Respondent.**	**NO. CV 20-830-AB (KS)** **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable André Birotte, Jr., 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.

INTRODUCTION

On January 27, 2020, Petitioner, a California state prisoner proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254. (Dkt. No. 1.) On July 6, 2020, Petitioner filed the operative Second Amended Petition ("SAP") with a Memorandum of Points and Authorities. (Dkt. Nos. 13-14.) On December

17, 2020, Respondent filed an Answer to the SAP and lodged the relevant state court records. (Dkt. Nos. 32-33.) On February 19, 2021, Petitioner filed a Reply. (Dkt. No. 44.) Briefing on this matter is now complete, and the matter is under submission to the Court for decision.

PRIOR PROCEEDINGS

On March 23, 2016, a Los Angeles County Superior Court jury convicted Petitioner of four counts of grand theft of personal property (California Penal Code ("Penal Code") § 487(a)), five counts of procuring and offering a false or forged instrument (Penal Code § 115(a)), and one count of perjury by declaration (Penal Code § 118(a)). (8 Reporter's Transcript ("RT") 3002-09; 2 Clerk's Transcript ("CT") 368-81.) The jury found true the allegations that Petitioner took, damaged, or destroyed property of a value exceeding $150,000 (Penal Code § 12022.6(a)(2)); that he took, damaged, or destroyed property of a value exceeding $1,000,000 (Penal Code § 12022.6(a)(3)); that he engaged in a pattern of related felony conduct and a pattern of related felony conduct involving the taking of more than $500,000 (Penal Code § 186.11(a)(2)); and that the violations were not discovered until July 27, 2012 by Detective Christopher Derry (Penal Code § 803(c)). (*Id.*) On April 5, 2016, the trial court sentenced Petitioner to eight years and eight months in state prison. (8 RT 3347; 2 CT 457, 580.)

Petitioner appealed the judgment of conviction. (Lodged Document ("Lodg.") No. 5.) On July 22, 2019, the California Court of Appeal affirmed the judgment in an unpublished, reasoned opinion. (Lodg. No. 9.) On August 20, 2019, the California Court of Appeal denied a Petition for Rehearing. (Lodg. Nos. 10-11.) On November 20, 2019, the California Supreme Court summarily denied a Petition for Review. (Lodg. Nos. 12-13.)

On October 22, 2018, while his direct appeal was still pending, Petitioner filed a habeas petition in the California Court of Appeal. (Lodg. No. 7.) On May 22, 2019, the California

Court of Appeal summarily denied the habeas petition. (Lodg. No. 14.) On July 10, 2019, the California Supreme Court summarily denied a Petition for Review. (Lodg. Nos. 15-16.)

Petitioner initiated this action by filing a habeas petition in this Court on January 27, 2020. (Dkt. No. 1.) On February 3, 2020, the Court ordered Petitioner to show cause why the Petition should not be dismissed for failure to specify the grounds for habeas relief, failure to state specific facts in support of each ground, and failure to sign the Petition. (Dkt. No. 4.) On March 3, 2020, Petitioner filed a First Amended Petition. (Dkt. No. 7.) On March 12, 2020, the Court ordered Petitioner to show cause why the First Amended Petition should not be dismissed for failure to articulate the legal theories and specific facts underpinning the claims for habeas relief. (Dkt. No. 10.) On July 7, 2020, Petitioner filed the SAP and attached Memorandum of Points and Authorities. (Dkt. Nos. 13-14.)

SUMMARY OF THE EVIDENCE AT TRIAL

The following factual summary from the California Court of Appeal's unpublished decision on direct review is provided as background. *See also* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence).

> This criminal action was filed in 2014. At trial, the prosecution accused [Petitioner] of providing false employment and financial information to obtain real estate loans in 2005 and refinance loans in 2007. [Petitioner] contended his real estate broker, Allen Shay, filled out the 2005 loan applications for him and, without his knowledge, provided the false employment and financial information. He also contended Shay obtained two refinance loans in his name in 2007 without his knowledge or permission.

I. Prosecution Case

A. The 2005 real estate loans

In January 2005, [Petitioner] applied for a loan from Countrywide Home Loans (Countrywide) to purchase a residential property in Altadena, California. Jeffrey Gleason, who testified at trial, was the home loan consultant at Countrywide who originated [Petitioner's] loan, gathered the documentation necessary to process the loan, and forwarded the documentation to Countrywide's loan processors.

According to Gleason's testimony, and as indicated on the loan application admitted into evidence at trial, on January 18, 2005, Gleason conducted a telephone interview with [Petitioner] to obtain the personal, employment, and financial information included on the loan application. During the interview, [Petitioner] told Gleason he was employed as a senior computer consultant, earning $20,700 per month (gross salary plus bonus). [Petitioner] also provided information about his bank accounts, including a representation that he had a checking account at Washington Mutual with a balance of $164,050.79. Gleason testified that [Petitioner] signed the loan application.

On January 18, 2005, the date of the telephone interview, Countrywide sent [Petitioner] a form letter, requesting additional information supporting his loan application, including his two most recent bank statements and a letter explaining the variation between the employment information listed on the loan application and the employment information listed on his credit report.

As admitted into evidence at trial, the loan file includes two statements, faxed from Shay's office, indicating [Petitioner's] Washington Mutual checking account had a balance of $164,050.79 on December 2, 2004 and a balance of $164,183.56 on January 3, 2005.[1] The file also includes a January 24, 2005 letter from [Petitioner], stating he had been employed since June 2001 at a company called Computer Consulting and was then a Senior Financial Consultant. [Petitioner's] letter also explained the reasons he had listed various addresses for residential and business purposes.

[1] An employee of JPMorgan Chase, the bank that acquired Washington Mutual's assets, testified at trial that these purported bank statements were fake. On November 15, 2004 and December 14, 2004, [Petitioner's] Washington Mutual checking account had a balance of $101.

Relying on [Petitioner's] representations regarding his employment and finances, and believing them to be true, Countrywide funded the loan in the amount of $896,000, and [Petitioner] purchased the property in Altadena. In January 2005, [Petitioner] signed the deed of trust, which was notarized and recorded. The notary public who notarized the deed of trust, testified at trial that in addition to signing the deed of trust, [Petitioner] signed her notary journal and made a thumbprint impression in the journal.

In August 2005, [Petitioner] applied for a home equity line of credit (HELOC) from Countrywide on the Altadena property. Rebecca Woodall, who testified at trial, was the personal loan consultant at Countrywide who conducted a telephone interview with [Petitioner] to obtain the personal, employment, and financial information included on the loan application. The signed application stated he was employed as a computer consultant, listed the address of his

employer, and provided a business telephone number that was the same as [Petitioner's] home telephone number.

Julie Oleias, who testified at trial, was the loan processor at Countrywide who contacted [Petitioner] at the home/business phone number listed on the HELOC application to confirm the information provided in the application and to request a pay stub. The loan file includes an August 2005 pay stub for [Petitioner] from a company called "Computer Consulting Operations Specialist" with the same address as the employer listed on the application.[2]

> [2] A former employee of Computer Consulting Operations Specialist testified at trial that [Petitioner] never worked for the company and the pay stub in his HELOC loan file at Countrywide was fake.

Relying on [Petitioner's] representations regarding his employment and finances, and believing them to be true, Countrywide funded the HELOC loan in the amount of $250,000. In August 2005, [Petitioner] signed the deed of trust, which was notarized and recorded. The notary public who notarized the deed of trust, testified at trial that in addition to signing the deed of trust, [Petitioner] signed her notary journal and made a thumbprint impression in the journal.

B. The 2007 refinance loans

[Petitioner] was making interest-only monthly payments of $3,098.03 on the 2005 home purchase loan. On October 31, 2006, Countrywide mailed [Petitioner] a "Significant Payment Increase Alert," notifying him that his minimum monthly payment would increase to $8,238.84 if the principal balance

reached 115 percent of the original loan amount. At the time, the principal balance was 105.52 percent of the original amount.

[Petitioner] continued making interest-only payments. On February 18, 2007, Countrywide mailed [Petitioner] another notice, informing him that his principal balance was 106.77 percent of the original loan amount, and his minimum monthly payment could increase to $8,327.76 if his principal balance reached 115 percent of the original amount. Both notices invited [Petitioner] to "[e]xplore refinancing options" by contacting Countrywide at a telephone number provided.

[Petitioner] refinanced his home purchase loan. On February 20, 2007, Gleason conducted a telephone interview with [Petitioner] to obtain the personal, employment, and financial information included on the two refinance loan applications. [Petitioner] applied for a $1 million first mortgage and a $218,000 second mortgage on the Altadena property. Both applications include a borrower's signature.

During the telephone interview, [Petitioner] told Gleason he was a vice president at "Computer Consulting Operations," with a gross monthly income of $20,833.33.[3] He also provided information about his bank accounts, including a savings account at Farmers Insurance Group with a balance of $250,047.33. The loan file includes two statements, indicating [Petitioner's] Farmers Insurance Group Federal Credit Union savings account had a balance in excess of $250,000 in January and February 2007.[4]

[3] As set forth above, [Petitioner] was never employed at Computer Consulting Operations Specialist.

> [4] An employee of Farmers Credit Union testified at trial that these purported bank statements were fake. [Petitioner's] Farmers Credit Union savings account had a balance of $5.01 in January 2007 and $5.02 in February 2007.

Relying on [Petitioner's] representations regarding his employment and finances, and believing them to be true, Countrywide funded the first mortgage for $1 million and the second mortgage for $218,000. On March 23, 2007, [Petitioner] signed the deeds of trust for these loans, and the deeds were notarized. Marlene Stewart, the notary public who notarized the deeds of trusts, testified at trial that she checked [Petitioner's] driver's license to verify his identity and [Petitioner] made a thumbprint impression in her notary journal at the time he signed the deeds of trust.

After escrow closed, the deeds of trust on the two refinance loans were recorded. Also recorded were documents demonstrating that the 2005 purchase loan and the 2005 HELOC loan were fully repaid.[5] All of these recorded documents were mailed to [Petitioner] at the Altadena property address where he lived. In June 2007, a refund check from the escrow company made payable to [Petitioner] in the amount of $1,616.52 was deposited into [Petitioner's] bank account.

> [5] Shay, [Petitioner's] real estate broker, used his own line of credit to obtain a cashier's check in the amount of $29,916.43 to pay off the remaining balance on the 2005 loans to close the 2007 refinance loans.

Until December 2007, [Petitioner] made payments on the 2007 refinance loans using the online and telephone payment options, which both required him

to enter the specific loan account number to make a payment. Then he stopped making payments, and the Altadena property went into foreclosure.

C. The 2009 bankruptcy petition

In May 2009, [Petitioner] filed a bankruptcy petition. Therein, he listed the amount of the secured claim on the Altadena property as $1,231,000. He also listed the account numbers for the March 2007 refinance loans, and stated the amounts owed as $1,014,000 and $217,000.

D. [Petitioner's] 2012 report of identity theft/forgery to law enforcement

In March 2012, [Petitioner] reported to the Los Angeles County Sheriff's Department that he was a victim of identity theft or forgery. He told a deputy he learned about the 2007 refinance loans in December 2011 when he attempted to modify his home loan on the Altadena property (after he was discharged from bankruptcy). He denied participating in the 2007 refinance.

E. [Petitioner's] 2012 civil lawsuit alleging fraudulent refinancing loans

In April 2012, [Petitioner] filed a verified complaint against Countrywide, Bank of America (which acquired Countrywide), Gleason, (the home loan consultant), Stewart (the notary public for the 2007 refinance loans), and other parties, alleging he did not participate in obtaining the 2007 loans, and the notarization for these loans was fraudulent. He asserted the defendants'

fraudulent actions resulted in the foreclosure of the Altadena property. [Petitioner] did not name Shay, his real estate broker, as a defendant.

F. [Petitioner's] interview with detectives

On August 6, 2012, Detective Christopher Derry and his partner, who were part of the sheriff's department's real estate fraud team, interviewed [Petitioner] at the Altadena property. A recording of the interview was played for the jury. Derry testified at trial.

During the interview, [Petitioner] confirmed he signed the verification attached to his April 2012 complaint against Countrywide, Bank of America, Gleason, Stewart, and other defendants. He denied signing the deeds of trust on the 2007 refinance loans, and stated he never received any telephone calls from Countrywide regarding these loans. He confirmed his telephone number was listed correctly on the 2007 refinance loan applications (as were his Social Security number and date of birth).

[Petitioner] also told the detectives he had never met Stewart or appeared before her to have a document notarized. He acted surprised when they told him they had verified the thumbprint in Stewart's notary journal for the 2007 refinance matched his thumbprint. [Petitioner] stated Shay "must be involved somehow." He also stated he had been "duped." He acknowledged the driver's license number listed in Stewart's notary journal was his.

[Petitioner] posited he might have mistakenly signed documents related to the 2007 refinance loans, believing he was signing documents related to a Long Beach property he was selling around the same time. Although he had earlier

denied meeting Stewart, he told the detectives Stewart was the escrow officer for the Long Beach property sale.[6] He also stated he did not notice he made payments on the 2007 refinance loans because the lender on the 2005 loans was the same and the payments were automatically deducted from his bank account. He explained he stopped making payments on the Altadena property when he "fell behind" and could no longer afford it.

> [6] Stewart testified at trial that, as reflected in her files, the escrow on the Long Beach property transaction was canceled. No deed was signed and no documents were notarized regarding the Long Beach property. Thus, [Petitioner's] thumbprint in her notary journal could only have related to the 2007 refinance loans.

The day after the interview, [Petitioner] sent an email to the detectives. As summarized by Detective Derry at trial, [Petitioner] indicated in the email that he believed "he had somehow been tricked into putting his thumbprint into Marlene Stewart's journal by thinking that he was there to sign something related to the sale of the Brenner property in Long Beach instead of the 2007 refinance loans on his property on Altadena Drive."

II. Defense Case

[Petitioner] testified in his defense. He stated that although he wanted to obtain the 2005 loans, it was Shay, his real estate broker, who filled out the loan applications and provided Countrywide with the false employment and financial information for the loans. He denied knowing about the false information, including the bank statements and the January 24, 2005 letter clarifying his employment information. He also denied participating in any telephone calls

with Countrywide employees regarding these loans. He did not recall if he signed the 2005 loan applications.

[Petitioner] stated he had no reason to refinance his loans in 2007 and did not participate in the refinance. He denied having knowledge of the refinance loans at the time he filed his bankruptcy petition in May 2009, although he correctly listed the account numbers of the 2007 loans on his petition. He stated he copied the account numbers from his credit report.

[Petitioner] testified he did not learn about the 2007 refinance loans until he attempted to modify his home loan in 2011. Thereafter, he reported the fraudulent loans to the sheriff's department and filed the civil fraud action.

III. Prosecution Rebuttal

A forensic document examiner with the sheriff's department compared [Petitioner's] signature on the bankruptcy petition and checks he wrote with the signature on the identity affidavit for the $1 million refinance loan and opined "it was probably the same person" who signed these documents.

Shay did not testify at trial. During deliberations, the jury submitted a written request, stating: "Why is Alan [sic] Shay not present as a witness or to defend himself? Having his testimony can add to our evidence."[7]

[7] The trial court's response to the jury's request is not at issue on appeal.

(Lodg. No. 9 at 2-11.)

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PETITIONER'S HABEAS CLAIMS

Petitioner presents the following grounds for federal habeas relief:

Ground One: Principles of res judicata barred the prosecution of this matter by the People. (Dkt. No. 14 at 14-16; Dkt. No. 44 at 15-21.)[1]

Ground Two: The trial court lacked personal and subject matter jurisdiction over Petitioner. (Dkt. No. 14 at 16-19; Dkt. No. 44 at 21-33.) Specifically, (a) the prosecution was barred by the statute of limitations, and (b) the jury was given an erroneous instruction and erroneous verdict sheet on the statute of limitations. (*Id.*)

Ground Three: Petitioner's due process rights were violated repeatedly. (Dkt. No. 14 at 19-30; Dkt. No. 44 at 33-55.) Specifically, (a) the government engaged in misconduct by making misstatements in its appellate brief; (b) Petitioner is factually innocent and the evidence was insufficient; (c) Petitioner's real property should be returned to him; (d) the prosecutor violated Petitioner's equal protection rights by charging him with grand theft; (e) the jury was instructed erroneously on grand theft; and (f) Petitioner's sentence increase was unconstitutional and based on an abuse of authority. (*Id.*)

Ground Four: Trial and appellate counsel were ineffective. (Dkt. No. 14 at 31-39; Dkt. No. 44 at 55.) Specifically, trial counsel (a) failed to ensure the correct written instructions and verdict forms on the statute of limitations; (b) failed to present evidence of defenses other than the statute of limitations, such as Shay's and Gleason's immunity agreements; and (c) failed to introduce substantial evidence of innocence. (Dkt. No. 14 at 33-37.) Moreover,

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[1] The page numbers cited from the parties' pleadings were automatically generated by the Court's electronic filing system.

appellate counsel (d) was disciplined during the pendency of Petitioner's appeal; (e) failed to raise the issues that Petitioner raised; and (f) waived oral argument. (*Id.* at 37-39.)

Ground Five: Cumulative error urges federal habeas corpus relief. (Dkt. No. 14 at 39-40; Dkt. No. 44 at 55-56.)

MOOTNESS ISSUE

Mootness is evaluated on a claim-by-claim basis. *See Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999). During the pendency of this action, Petitioner was released from custody and successfully completed his probation program. (Dkt. No. 32 at 73.) Petitioner's claims challenging his conviction are not moot because there is an irrebuttable presumption that collateral consequences result from a conviction. *See Chaker v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005) (citing *Wood v. Hall*, 130 F.3d 373, 376 (9th Cir. 1997)). However, Petitioner's claim in Ground Three (f), challenging his alleged sentence increase, is moot because Petitioner has served that sentence and is free of supervision. *See Lane v. Williams*, 455 U.S. 624, 631-33 (1982) (challenge to sentence is moot once the sentence has been served); *Aaron v. Pepperas*, 790 F.2d 1360, 1362 (9th Cir. 1986) (same). Accordingly, the Court lacks jurisdiction to consider Ground Three (f), but has jurisdiction to review the remaining claims challenging Petitioner's conviction.

STANDARD OF REVIEW

I. The Antiterrorism And Effective Death Penalty Act.

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless that adjudication: (1) 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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

For the purposes of Section 2254(d), "clearly established Federal law" refers to the Supreme Court holdings in existence at the time of the state court decision in issue. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011); *see also Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017) (*per curiam*) ("circuit precedent does not constitute clearly established federal law. . . . [n]or, of course, do state-court decisions, treatises, or law review articles") (internal quotation marks and citations omitted). A Supreme Court precedent is not clearly established law under § 2254(d)(1) unless it "squarely addresses the issue" in the case before the state court or establishes a legal principle that "clearly extends" to the case before the state court. *Moses v. Payne*, 555 F.3d 742, 760 (9th Cir. 2009); *see also Harrington v. Richter*, 562 U.S. 86, 101 (2011) (it "'is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by'" the Supreme Court) (citation omitted).

A state court decision is "contrary to" clearly established federal law under § 2254(d)(1) only if there is "a direct and irreconcilable conflict," which occurs when the state court either (1) arrived at a conclusion opposite to the one reached by the Supreme Court on a question of law or (2) confronted a set of facts materially indistinguishable from a relevant Supreme Court decision but reached an opposite result. *Murray v. Schriro*, 745 F.3d 984, 997 (9th Cir. 2014) (citing *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). A state court decision is an "unreasonable application" of clearly established federal law under § 2254(d)(1) if the state court's application of Supreme Court precedent was "objectively unreasonable, not merely wrong." *White v. Woodall*, 572 U.S. 415, 419 (2014). The petitioner must establish that "there [can] be no 'fairminded disagreement'" that the clearly established rule at issue applies to the

facts of the case. *See id.* at 1706-07 (internal citation omitted). Finally, a state court's decision is based on an unreasonable determination of the facts within the meaning of § 2254(d)(2) when the federal court is "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record before the state court." *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir.) (internal quotation marks omitted), *cert. denied*, 135 S. Ct. 710 (2014). So long as "'[r]easonable minds reviewing the record might disagree,'" the state court's determination of the facts is not unreasonable. *See Brumfield v. Cain*, 576 U.S. 305, 314 (2015).

AEDPA thus "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *White v. Wheeler*, 577 U.S. 73, 77 (2015) (*per curiam*) (internal quotation marks and citation omitted). Petitioner carries the burden of proof. *See Pinholster*, 563 U.S. at 181.

II. The State Court Decisions On Petitioner's Claims In Grounds One, Two, A Portion of Ground Three, And A Portion of Ground Four Are Entitled To AEDPA Deference.

Petitioner presented his claims in Grounds One [res judicata], Ground Two (b) [erroneous instruction and verdict sheet on the statute of limitations], and Ground Four (e) [appellate counsel's failure to raise issues] in his habeas petition in the California Court of Appeal. (Lodg. No. 7 at 13-16 [Ground One]; 16-17 [Ground Two (b)]; 20-21, 22 [Ground Four (e)].) The California Court of Appeal summarily denied the habeas petition on the merits. (Lodg. No. 14.) Petitioner then presented the claims in his Petition for Review. (Lodg. No. 15 at 3-6 [Ground One]; 7-8 [Ground Two (b)]; 28 [Ground Four (e)].) The California Supreme Court summarily denied the Petition for Review. (Lodg. No. 16.) "Section 2254(d) applies even where there has been a summary denial." *Pinholster*, 563 U.S. at 187. Thus, to the extent these claims raise federal questions, the Court "must determine what arguments or

theories . . . could have supported the state-court's determination[.]" *Shinn v. Kayer*, 141 S. Ct. 517, 524 (2020) (*per curiam*) (*ellipsis in original*) (quoting *Richter*, 562 U.S. at 102). Then the Court "must assess whether fairminded jurists could disagree on the correctness of the state court's decision if based on one of those arguments or theories." *Id.* (quoting *Richter*, 562 U.S. at 101) (internal quotation marks omitted).

Petitioner presented his claims in Grounds Two (a) [statute of limitations] and Ground Three (b) [insufficiency of evidence] on direct review in the California Court of Appeal. (Lodg. No. 5 at 17-20 [Ground Two (a)]; 21-27 [Ground Three (b)].) The California Court of Appeal denied the claims with a reasoned decision. (Lodg. No. 9 at 12-15 [Ground Two (a)], 15-18 [Ground Three (b)].) Petitioner then presented these claims in his Petition for Review in the California Supreme Court. (Lodg. No. 12 at 9-10 [Ground Two (a)]; 5, 15, 23-24 [Ground Three (b)].) The California Supreme Court summarily denied the Petition for Review. (Lodg. No. 13.) Thus, § 2254(d) applies, and the Court looks through the California Supreme Court's summary denial to the last reasoned decision – the decision of the California Court of Appeal on direct review – to determine whether the state court's adjudication of Petitioner's claim is unreasonable or contrary to clearly established federal law. *See Johnson v. Williams*, 568 U.S. 289, 297 n.1 (2013) ("Consistent with our decision in *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991), the Ninth Circuit 'look[ed] through' the California Supreme Court's summary denial of [the petitioner's] petition for review and examined the California Court of Appeal's opinion."); *see also, e.g.*, *Jones v. Harrington*, 829 F.3d 1128, 1136 (9th Cir. 2016) (looking through California Supreme Court's summary denial of a petition for review to the California Court of Appeal's decision on direct review).

III. Petitioner's Remaining Claims May Be Resolved On The Merits.

Petitioner did not fairly present to the California Supreme Court his remaining claims in Ground Three (a) [government misstatements in appellate brief], Ground Three (c) [request

for return of real property], Ground Three (d) [misconduct in prosecutor's charging decision], Ground Three (e) [erroneous instruction on grand theft], most of Ground Four [ineffective assistance by trial counsel and appellate counsel's disciplinary status and waiver of oral argument], and Ground Five [cumulative error]. Despite this failure to exhaust, they may be resolved on the merits. *See* 28 U.S.C. § 2254(b)(2); *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005). In particular, Petitioner's claims of ineffective assistance of trial counsel may be resolved without reaching the exhaustion issue because the California courts reasonably rejected the underlying arguments that Petitioner claims his trial counsel should have raised. *See Cheney v. Washington*, 614 F.3d 987, 998 n.5 (9th Cir. 2010).

DISCUSSION

I. Habeas Relief Is Not Warranted For Petitioner's Claim Of Res Judicata (Ground One).

In Ground One, Petitioner claims principles of res judicata barred the prosecution of this matter by the People. (Dkt. No. 14 at 14-16; Dkt. No. 44 at 15-21.) Petitioner's civil lawsuit against multiple private parties, in which he alleged that the 2007 refinancing loans were fraudulent, was dismissed on statute of limitations grounds. (6 RT 1895-97.) And as part of the civil lawsuit, Petitioner allegedly declared that "he did not forge any signatures on any deeds of trust," which he argues went unchallenged and was "properly plead and admitted." (Dkt. No. 14 at 14.) Petitioner claims that the findings on issues from the civil lawsuit, involving the statute of limitations and Petitioner's denial of the forgery, should have had res judicata effect for his criminal trial, meaning it "should have ended all further pending criminal matters" against him. (*Id.* at 15; Dkt. No. 44 at 18.)

Federal habeas relief does not lie for errors in state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1992). To the extent that Petitioner's allegations "amount to an assertion that

the state court erred in applying state res judicata law," the Court has no authority to correct the alleged error. *See Wright v. Allenby*, 527 F. App'x 649, 651 (9th Cir. 2013). Relatedly, Petitioner points to no clearly established federal law that holds a state criminal defendant has a federal constitutional right to the application of res judicata. Accordingly, the California courts' rejection of this claim could not have 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. *See Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

Even assuming arguendo that a state criminal defendant has a clearly established constitutional right to res judicata, the California Court of Appeal's rejection of this claim was not objectively unreasonable. Under California law, res judicata had no application here because the prosecutor was not a party to Petitioner's prior civil lawsuit or in privity with a party. *See People v. Meredith*, 11 Cal. App. 4th 1548, 1559 (1992) ("The People are bound by the prior determination only if state prosecutors actively participated in the prior litigation."); *see also United States v. Bhatia*, 545 F.3d 757, 760 (9th Cir. 2008) (dismissal of civil lawsuit did not bar a subsequent criminal prosecution where "nothing in the record supports the claim that the government controlled or influenced the civil litigation"). Moreover, a legal proceeding does not have res judicata effect on a subsequent proceeding with a higher standard of proof. *See The Grubb Co., Inc. v. Dep't of Real Estate*, 194 Cal. App. 4th 1494, 1503 (2011) (issue preclusion "does not apply when the factual finding in the prior proceeding was arrived at based on a lower standard of proof than the one required in the subsequent proceeding") (citations omitted); *see also United States v. Rylander*, 714 F.2d 996, 1002 (9th Cir. 1983) ("It is an elementary principle of issue preclusion that it may only be asserted where the burden of proof as to that issue is no greater than it was in the prior proceeding where the issue was decided."). In sum, habeas relief is unwarranted for this claim.

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II. Habeas Relief Is Not Warranted For Petitioner's Claims Regarding The Statute Of Limitations And The Related Instruction And Verdict Form (Ground Two).

In Ground Two, Petitioner claims that the trial court lacked personal and subject matter jurisdiction over him because (a) the prosecution was barred by the statute of limitations and (b) the jury was given an erroneous instruction and an erroneous verdict form on the matter. (Dkt. No. 14 at 16-19; Dkt. No. 44 at 21-33.)

A. Statute of Limitations (Ground Two (a)).

California law established a four-year statute of limitations for the crimes prosecuted in this case. *See* Penal Code § 801.5. This case was prosecuted in 2014 (1 CT 136), more than four years after the 2005 and 2007 loans. But the trial court denied Petitioner's motions to dismiss on statute of limitations grounds. (6 RT 1608; 7 RT 2245.) Moreover, the jury subsequently found that the crimes arising from the 2005 and 2007 loans were not discovered until July 27, 2012, by Detective Derry. (8 RT 3002-08; 2 CT 368-79.) The California Court of Appeal rejected Petitioner's claim that the prosecution was barred by the statute of limitations:

> [Petitioner] contends counts 1 through 8 (for grand theft and procuring and offering a false or forged instrument) are barred by the four-year statute of limitations set forth in section 801.5, and the trial court erred in denying his section 1118.1 motion to dismiss made on this ground.[10] As set forth above, the jury found true the special allegation that the offenses alleged in counts 1-8 were not discovered until July 27, 2012. This criminal action was filed in 2014.
>
> [10] In his appellate briefing, [Petitioner] argues the entire action is barred by the four-year statute of limitations. He does not tailor his argument to any individual count. Clearly, counts 9 and 10, related

> to the filing of the verified complaint in April 2012 — about two and a half years before the Information was filed — are not barred by the four-year statute of limitations, which [Petitioner] agrees applies to this action.

A prosecution for grand theft or any felony offense in which fraud is a material element "shall be commenced within four years after discovery of the commission of the offense, or within four years after the completion of the offense, whichever is later." (§§ 803, subd. (c) & 801.5.) This limitations and tolling provision applies to the crime of procuring or offering a false or forged instrument under section 115. (*People v. Soni* (2005) 134 Cal.App.4th 1510, 1518-1519.)

An "offense is discovered when either the victim or law enforcement learns of facts which, when investigated with reasonable diligence, would make the person aware a crime had occurred." (*People v. Bell* (1996) 45 Cal.App.4th 1030, 1061.) "The crucial determination is whether law enforcement authorities or the victim had actual notice of circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud." (*People v. Zamora* (1976) 18 Cal.3d 538, 571-572, italics omitted.)

The prosecution has the burden of proving by a preponderance of the evidence that a "criminal action was commenced within the applicable limitations period." (*People v. Castillo* (2008) 168 Cal.App.4th 364, 369.) "When an issue involving the statute of limitations has been tried, we review the record to determine whether substantial evidence supports the findings of the trier of fact." (*Ibid.*) Similarly, we review a trial court's denial of a section 1118.1 motion to dismiss under the substantial evidence standard applicable to review of evidence

supporting a conviction, considering the sufficiency of the evidence at the time the motion was made. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value. . . ." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility.'" (*People v. Houston*, *supra*, 54 Cal.4th at p. 1215.)

Substantial evidence supports the trial court's denial of [Petitioner's] section 1118.1 motion to dismiss and the jury's finding that the prosecution brought counts 1-8 within the four-year limitations period. As explained below, based on the evidence presented at trial, it was reasonable for the jury to find neither Countrywide nor law enforcement had actual notice of circumstances sufficient to make them suspicious of [Petitioner's] fraud prior to the time Detective Derry began investigating the matter in July 2012.

[Petitioner] argues Gleason (the home loan consultant on the 2005 home purchase loan and the 2007 refinance loans) and Stewart (the notary public for the 2007 refinance) should have taken "steps to verify" his employment. Viewing the evidence in a light most favorable to the judgment, as we must, we reject this argument.

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> Gleason testified he conducted telephone interviews with [Petitioner] to gather employment and financial information for the 2005 home purchase loan and the 2007 refinance loans. Rebecca Woodall, a loan consultant, and Julie Oleias, a loan processor, contacted [Petitioner] by telephone to gather employment and financial information for the 2005 HELOC loan. They telephoned [Petitioner] at the number listed on his loan applications, which he confirmed to detectives was in fact his telephone number. During her call to [Petitioner], Oleias requested a pay stub, which she later received. [Petitioner] cites no authority indicating Countrywide was precluded from relying on his representations and the documents submitted in support of his loan applications regarding his employment and finances.
>
> Substantial evidence supports the trial court's and jury's determinations Countrywide and law enforcement discovered [Petitioner's] fraud within the four years before this criminal action was commenced. It was reasonable for the jury to conclude that Countrywide reasonably believed the employment and financial information [Petitioner] provided was true and correct until law enforcement notified it otherwise in 2012.

(Lodg. No. 9 at 12-15.)

The California Court of Appeal's rejection of this part of Petitioner's claim was not objectively unreasonable. Because the statute of limitations is not an element of an offense, it need not be proven beyond a reasonable doubt. *See Renderos v. Ryan*, 469 F.3d 788, 796 (9th Cir. 2006) (noting the absence of "any Supreme Court precedent clearly establishing that statutes of limitations must be proven beyond a reasonable doubt" and holding that a preponderance of the evidence standard comports with due process) (citing *United States v. Gonsalves*, 675 F.2d 1050, 1054 (9th Cir. 1982)). Here, the evidence showed that investigators

first became suspicious after March 2012, when Petitioner filed a police report alleging that the 2007 refinance loans were obtained without his knowledge. (4 RT 963-64, 992; 5 RT 1216.) A few months later, Detective Derry learned of Petitioner's thumbprint in the notary journal entry for those loans (5 RT 1218-19) and then asked Petitioner in August 2012 to explain it (5 RT 1243). A rational jury could have found that this evidence satisfied the prosecutor's burden of showing by a preponderance of the evidence that the crimes arising from the 2005 and 2007 loans were not discovered until July 2012.

No evidence suggested that anyone, from either Countrywide or the government, had actual notice that the loans were based on fraudulent information any earlier than July 2012, when Detective Derry learned of the thumbprint. Instead, Petitioner's claim is premised on the victim's lack of diligence in failing to investigate and discover the "abnormalities" in the loan process. (Dkt. No. 14 at 18; Dkt. No. 44 at 23.) But as the California Court of Appeal concluded, no state law authority indicated that the victim "was precluded from relying on [Petitioner's] representations and the documents submitted in support of his loan applications regarding his employment and finances." (Lodg. No. 9 at 15.) The California Court of Appeal's interpretation of what state law required of the victim, for purposes of determining when the statute of limitations began to run, is binding on the Court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *see also Smith v. Ryan*, 220 F. App'x 563, 564 (9th Cir. 2007) (state court's interpretation of its own statute of limitations is binding on a federal habeas court). Even if the California Court of Appeal was wrong about the statute of limitations, the Court would have no authority to correct the error. *See Medley v. Runnels*, 506 F.3d 857, 862 (9th Cir. 2007) ("[A] federal court may not overturn a conviction simply because the state court misinterprets state law."). Accordingly, habeas relief is unwarranted for this part of Petitioner's claim arising from the statute of limitations.

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B. Written Jury Instruction and Verdict Form on the Statute of Limitations (Ground Two (b)).

Petitioner further claims in Ground Two that the instruction and verdict form given to the jury on the issue of the statute of limitations were erroneous. (Dkt. No. 14 at 17-19; Dkt. No. 44 at 27.)

1. Written instruction on the statute of limitations.

The instruction relevant to the statute of limitations was CALCRIM No. 3410. (6 RT 1608-09.) The prosecutor argued that the jury should be instructed that the statute of limitations began to run only after law enforcement officers (and nobody else) were aware of the facts. (7 RT 2410.) The trial court disagreed and ruled that it would instruct the jury that the statute of limitations runs "when the victim or law enforcement is aware of facts." (7 RT 2411.) Petitioner does not dispute the accuracy of the oral version of CALCRIM No. 3410 that the trial court later gave to the jury, but rather takes issue with the written version, which he argues, in essence, was incomplete. (Dkt. No. 14 at 17; Dkt. No. 44 at 28.) The oral version was consistent with the trial court's ruling, by using the word "victim" twice:

> A crime should have been discovered when the *victim* or law enforcement officer was aware of facts that would have alerted a reasonable — reasonably diligent law enforcement officer or *victim* in the same circumstances to the fact that a crime may have been committed.

(7 RT 2442-43 (emphasis added).)

However, the written version omitted the second use of the word "victim" in the latter part of the sentence:

> A crime *should have been discovered* when the victim or law enforcement officer was aware of facts that would have alerted a reasonably diligent law enforcement officer in the same circumstances to the fact that a crime may have been committed.

(2 CT 358 (emphasis in original).)

During deliberations, the jurors asked the trial court, "What do the statute of limitations entail?" (Augmented CT 13; *see also* 8 RT 2719-20.) The trial court responded, "Please review all jury instructions, and #3410 in particular." (*Id.*) Both attorneys agreed with the trial court's response. (8 RT 2720.) Petitioner claims that the incomplete written version of CALCRIM No. 3410 was an error of constitutional magnitude. (Dkt. No. 14 at 17.)

As an initial matter, Petitioner's claim that he was entitled to a written version of CALCRIM No. 3410 is not rooted in a federal constitutional right. "[T]he State is free to require that all instructions be in writing." *James v. Kentucky*, 466 U.S. 341, 350 (1984). In California, however, the omission of an oral instruction from the written instructions provided to the jury "does not vitiate the oral instructions. Neither the United States Supreme Court nor we have ever held that oral jury instructions are ineffectual unless augmented by written copies of the same instructions; to the contrary, we have established that neither the state nor the federal Constitution guarantees a criminal defendant the delivery of written instructions in addition to oral ones." *People v. Trinh*, 59 Cal. 4th 216, 234 (2014) (citations omitted); *see also United States v. Jones*, 353 F.3d 816, 819 (9th Cir. 2003) (the provision of written instructions is a matter of the trial court's discretion). Thus, Petitioner had no federal constitutional right to have the jury given a written version of CALCRIM No. 3410.

To the extent that Petitioner is arguing that the written instruction, once it was provided, misled the jury because it was defective, he still is not entitled to relief. Petitioner must show

that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *See Cupp v. Naughten*, 414 U.S. 141, 147 (1973). "Even if there is some 'ambiguity, inconsistency, or deficiency' in the instruction, such an error does not necessarily constitute a due process violation." *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (*per curiam*)). "An omission, or incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). "In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would — with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson v. Texas*, 509 U.S. 350, 368 (1993) (quoting *Boyde v. California*, 494 U.S. 370, 381 (1990)).

To be sure, the jury asked a question about the statute of limitations, to which the trial court responded by drawing particular attention to the written version of CALCRIM No. 3410 (Augmented CT 13; 8 RT 2719-20), which Petitioner challenges as constitutionally inadequate in describing the victim's awareness. Nonetheless, given all that took place at the trial, it is not reasonably likely that the jury was confused or misled about the relevance of the victim's awareness. The parties did not object when the trial court responded to the jury's question with a reference to the allegedly improper written instruction. (8 RT 2720.) "It is a rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson*, 431 U.S. at 154.

Other circumstances further show that the written instruction's omission of the second use of the word "victim" did not rise to the level of a federal constitutional violation. The jurors were told repeatedly that the victim's awareness was a relevant consideration for the issue they were to decide. *See Henderson*, 431 U.S. at 153 (omission of a jury instruction on causation was not a due process violation where "[t]here can be no question about the fact that the jurors were informed that the case included a causation issue that they had to decide").

Even the written instruction that Petitioner challenges here contained a reference to the victim's awareness (2 CT 358), such that a second use of the word "victim" arguably was unnecessary. The oral instruction to the jury correctly stressed the relevance of the victim's awareness. (7 RT 2442-43.) And although the attorneys did not directly address the alleged defect in the written instruction, they did emphasize the relevance of the awareness of the victim in closing arguments. (7 RT 2484, 2702 [prosecutor's argument]; 7 RT 2495-97 [defense counsel's argument].) Such arguments, particularly that of a prosecutor, may help resolve an alleged ambiguity in an instruction. *See Middleton*, 541 U.S. at 438 (rejecting instructional error claim in part "when it is the *prosecutor*'s argument that resolved an ambiguity in favor of the *defendant*") (emphasis in original); *see also United States v. Park*, 421 U.S. 658, 675 & n.16 (1975) (rejecting claim that an instruction was inadequate to convey the issue of defendant's accountability, highlighting the prosecutor's summation on the issue). Finally, even if the written instruction had been drafted in the manner Petitioner argues was required, it is unlikely that he would have prevailed on the statute of limitations issue, given that there was no evidence that the victim had actual notice of circumstances sufficient to make it suspicious of fraud. *See Henderson*, 431 U.S. at 156 (no due process violation from the omission of a more complete instruction where it is "logical to conclude that such an instruction would not have affected [the jury's] verdict").

In sum, it was not reasonably likely that the jury was misled by an alleged ambiguity in the written version of CALCRIM No. 3410 into thinking that only the discovery by law enforcement officers mattered for the purpose of the statute of limitations. A commonsense understanding of the written instruction, in light of all that took place at the trial, was that the statute of limitations ran when either the victim or law enforcement officers became aware of the facts. Accordingly, the California Court of Appeal's rejection of this part of Petitioner's claim was not objectively unreasonable.

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2. Verdict forms on the statute of limitations.

The relevant verdict forms asked the jury to find "true" or "not true" the allegation that the crimes arising from the fraudulently-obtained loans were "not discovered until July 27, 2012 by Detective Christopher Derry, within the meaning of Penal Code Section 803(c)[.]" (2 CT 369-70, 372, 373, 375-76, 378-79.) Petitioner claims that this verdict form was erroneous because the jury was not given an instruction on Section 803(c). (Dkt. No. 14 at 18.) Section 803(c) states, in pertinent part, that "[a] limitation of time prescribed in this chapter does not commence to run until the discovery of an offense described in this subdivision."

"[I]t is entirely appropriate to consider the verdict form in conjunction with the jury instructions and the trial record as a whole." *Pulido v. Chrones*, 629 F.3d 1007, 1016 (9th Cir. 2010) (citing *Cupp*, 414 U.S. at 147). Here, although the verdict form included a citation to Penal Code § 803(c) without the accompanying statutory language, it is not reasonably likely that this omission caused the jury to fail to understand the statute of limitations, given the trial record as a whole. The verdict form in its full context made clear that the jury was being asked to make a finding on the statute of limitations, specifically, whether it was true or not true that the crimes were not discovered until July 27, 2012 by Detective Derry. Moreover, the trial court correctly instructed the jury on the applicable statute of limitations, by instructing that Petitioner could not be convicted of any crime in this case unless the prosecution began within four years of the date the crimes should have been discovered, and that it was the prosecutor's burden to show timeliness by a preponderance of the evidence. (7 RT 2442-43; 2 CT 358.) And although the jury did ask a question about the statute of limitations (Augmented CT 13; 8 RT 2719-20), the jury did not specifically ask for a clarification of Penal Code § 803(a). It therefore was implausible that the jury was incapable of assessing the statute of limitations without such a clarification. *See Weeks v. Angelone*, 528 U.S. 225, 235-35 (2000) ("This

particular jury demonstrated that it was not too shy to ask questions, suggesting that it would have asked another if it felt the judge's response was unsatisfactory.").

In sum, given the evidence that the jury was adequately apprised of and understood the issue of the statute of limitations, the omission of the statutory language of Penal Code § 803(a) from the verdict form did not violate Petitioner's due process rights. *See Jones v. United States*, 527 U.S. 373, 393 (1999) (omission of the phrase "by unanimous vote" in a jury's verdict form on punishment did not likely confuse the jury in light of the instructions to the jury regarding unanimity and discussion of punishment); *see also Moody v. United States*, 958 F.3d 485, 491 (6th Cir. 2020) (no constitutional error from a verdict form that failed to mention the statute of limitations where the instructions adequately conveyed the statute of limitations). Accordingly, the California Court of Appeal's rejection of this part of Petitioner's claim was not objectively unreasonable.

III. Habeas Relief Is Not Warranted For Petitioner's Claims Of Due Process Violations (Ground Three).

In Ground Three, Petitioner claims that his due process rights were violated repeatedly. (Dkt. No. 14 at 19-30; Dkt. No. 44 at 33-55.) Specifically, (a) the government engaged in misconduct by making misstatements in its appellate brief; (b) Petitioner is factually innocent of the crimes and the evidence was insufficient; (c) Petitioner's real property should be returned to him; (d) the prosecutor violated Petitioner's equal protection rights by charging him with grand theft; and (e) the jury was instructed erroneously on grand theft. (*Id.*)

A. Government Misconduct (Ground Three (a)).

Petitioner claims that the government's attorney committed misconduct during the appellate stage by misstating or "swapping" the evidence in her appellate brief. (Dkt. No. 14

at 20-21.) Specifically, the government's brief allegedly misstated that Petitioner, rather than Shay's company, submitted false information to Countrywide; and the brief also allegedly swapped an exhibit that was relevant to the issue of Petitioner's fingerprint. (*Id.* at 20.)

Federal habeas relief does not lie for errors in state law. *See Estelle*, 502 U.S. at 67-68. Petitioner's allegations, even if true, do not rise to the level of a federal due process violation, but amount at most to violations of California's rules of appellate briefing. *See Corbray v. Miller-Stout*, 469 F. App'x 558, 559-60 (9th Cir. 2012) (in the context of procedural default, a finding that a defective brief violated a state's briefing rules is independent of federal law). Petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due process." *See Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996).

In any event, no violation of California's briefing rules is apparent from the record. The government properly stated in its appellate brief that Petitioner had submitted false financial information to Countrywide (Lodg. No. 6 at 10-11), which was a fair inference from the evidence in the light most favorable to the judgment. *See People ex rel. Reisig v. Acuna*, 9 Cal. App. 5th 1, 10 (2017) (appellate briefs must state the evidence fairly, in the light most favorable to the trial court's ruling); California Rule of Court 8.360(a) (briefs in criminal appeals must comply as nearly as possible with rules for civil appeals). The government's appellate brief also accurately cited the exhibit, consisting of three types of fingerprint evidence analyzed by the expert, that was used during the expert's testimony about Petitioner's fingerprint. (Lodg. No. 6 at 24 (citing Exhibit 68 and 7 RT 2215-25).) Thus, habeas relief is unwarranted for this claim.

B. Factual Innocence and Insufficiency of the Evidence (Ground Three (b)).

Petitioner claims that he is innocent of the crimes because the evidence was insufficient to convict him. (Dkt. No. 14 at 21-24; Dkt. No. 44 at 34-47.)

1. Legal Standard.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). When a habeas petitioner challenges the sufficiency of the evidence supporting the jury's verdict, "the relevant 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). *Jackson* does not require that the prosecutor affirmatively "'rule out every hypothesis except that of guilt.'" *Wright v. West*, 505 U.S. 277, 296 (1992) (citation omitted). Further, "'[c]ircumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction.'" *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted). When the factual record supports conflicting inferences, the federal court must presume – even if it does not affirmatively appear on the record – that the trier of fact resolved any such conflicts in favor of the prosecution and defer to that resolution. *Jackson*, 443 U.S. at 326; *McDaniel v. Brown*, 558 U.S. 120, 133 (2010) (*per curiam*). Ultimately, for Petitioner's claim to be successful, the jury's finding must be "so insupportable as to fall below the threshold of bare rationality." *Coleman v. Johnson*, 566 U.S. 650, 656 (2012) (*per curiam*).

When, as here, both *Jackson* and AEDPA apply to the same claim, the claim is reviewed under a "twice-deferential standard." *Parker v. Matthews*, 567 U.S. 37, 43 (2012) (*per curiam*). Accordingly, this Court's inquiry is limited to whether the California courts' rejection of Petitioner's insufficiency of the evidence claims was an objectively unreasonable application of *Jackson*. *See Emery v. Clark*, 643 F.3d 1210, 1213-14 (9th Cir. 2011); *Juan H. v. Allen*, 408 F.3d 1262, 1275 n.13 (9th Cir. 2005).

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2. Analysis.

a. Sufficiency of evidence for grand theft.

The California Court of Appeal concluded that the evidence was sufficient to support Petitioner's convictions for grand theft:

> Under section 487, a defendant commits grand theft when he takes money, labor, or real or personal property of a value exceeding $950. To prove grand theft in this case, the prosecution had to show "'(1) that the defendant made a false pretense or representation, (2) that the representation was made with intent to defraud the owner of his property, and (3) that the owner was in fact defrauded in that he parted with his property in reliance upon the representation.'" (*People v. Whight* (1995) 36 Cal.App.4th 1143, 1151.)
>
> [Petitioner] argues the evidence does not show he made a false pretense or representation to Countrywide. In support of this argument, he asks this court to credit his testimony that it was Shay, and Shay alone, who made the false representations regarding his employment and finances without his knowledge or permission. He further asks us to ignore the evidence discussed above that loan consultants spoke with [Petitioner] on the telephone, and he personally provided them with false employment and financial information. We may not ignore evidence favorable to the judgment or make credibility determinations.
>
> Substantial evidence also supports the second element of the crime — that [Petitioner] made the false representations with the intent to defraud Countrywide. A reasonable inference from the evidence is that [Petitioner] knew he would not

> qualify for the loans if he did not lie about his salary and bank account balances, so he submitted false information to gain access to funds.
>
> Finally, substantial evidence demonstrates Countrywide funded the loans because it believed [Petitioner's] false representations about his employment and finances were true. Countrywide's employees testified Countrywide would not have approved the loans if they believed the information [Petitioner] provided was false.

(Lodg. No. 9 at 15-16.)

The California Court of Appeal's rejection of this part of Petitioner's claim was not objectively unreasonable. The evidence was sufficient for a rational jury to find that Petitioner had committed grand theft for purposes of the four counts of conviction: the home purchase loan in 2005 (Count One), the HELOC loan in 2005 (Count Three), and the two refinance loans in 2007 (Counts Five and Seven).

As to the first element of grand theft, the evidence permitted a rational jury to find that Petitioner had made a false pretense or representation for each of the four loans. For the purchase loan in 2005, Petitioner falsely stated that he was senior computer consultant earning $20,700 per month (3 RT 632) and submitted false bank account information that he had a balance of $164,050.79 (3 RT 634). For the HELOC in 2005, Petitioner falsely stated that he was employed as a computer consultant (2 RT 399; 4 RT 919) and submitted a false pay stub (3 RT 708). For the two refinance loans in 2007, Petitioner falsely stated that he was a vice president at "Computer Consulting Operations" with a monthly income of $20,888.33 (3 RT 644, 646) and submitted false bank account information stating that he had a balance of $250,047.33 (3 RT 645).

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As to the second element, the evidence permitted a rational jury to find that Petitioner made these false representations with the intent to defraud Countrywide. Around the time of the 2005 home purchase loan and the 2005 HELOC loan, Petitioner's checking account balance was $101. (5 RT 1207.) Around the time of the two refinance loans in 2007, Petitioner's savings account balance was $5.01 (4 RT 940), and his checking account balance was $4,069.75 (4 RT 942). A rational jury could infer that Petitioner knew he would not qualify for any of the loans unless he made false statements that inflated his salary and bank account balances.

As to the third element, the evidence permitted a rational jury to find that Countrywide was in fact defrauded in that it parted with its property in reliance upon the false representation. Countrywide employees testified that the company relies on information provided by borrowers (3 RT 629) and that they would not have accepted the loan applications if they believed the information that Petitioner provided was false (2 RT 349-350 [2005 HELOC], 400 [2005 HELOC]; 3 RT 635-36 [2005 purchase loan], 647-48 [2007 refinance loans]).

In sum, it was not objectively unreasonable for the California Court of Appeal to conclude that a rational jury could find each of the elements of grand theft was proven beyond a reasonable doubt. Although Petitioner vigorously challenges this evidence and asserts that another person made the false representations without Petitioner's knowledge, the Court "must respect the province of the jury to determine the credibility of the witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." *See Walters*, 45 F.3d at 1358. Accordingly, habeas relief is unwarranted for this part of Petitioner's claim.

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b. Sufficiency of evidence for procuring and offering a false or forged instrument.

The California Court of Appeal concluded that the evidence was sufficient to support Petitioner's convictions for procuring and offering a false or forged instrument:

> Under section 115, subdivision (a), "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony."
>
> In support of his argument that he did not procure or offer a deed of trust based on false information in connection with the 2005 or 2007 loans, [Petitioner] again relies on his theory of the case that Shay made the false representations without his knowledge or permission. [Petitioner] ignores the evidence favorable to the judgment that he personally made false representations.[11]
>
> [11] Substantial evidence demonstrates [Petitioner] appeared before a notary when he signed each deed of trust, including those for the 2007 refinance loans he denied participating in.
>
> In his appellate briefing, although [Petitioner] argues all his convictions must be reversed, he omits any discussion of count 10 related to his filing of a verified complaint alleging he did not participate in obtaining the 2007 refinance loans and did not know about them until December 2011. Substantial evidence demonstrates his verified complaint was false — he participated in a telephone interview with a Countrywide loan consultant for purposes of filling out the applications, his thumbprint appears in the notary's journal entry for the

> transaction, he made payments on the 2007 refinance loans using the specific account numbers, and he listed the account numbers and balances of the 2007 refinance loans on his 2009 bankruptcy petition.

(Lodg. No. 9 at 16-17.)

The California Court of Appeal's rejection of this part of Petitioner's claim was not objectively unreasonable. The evidence was sufficient for a rational jury to find that Petitioner had procured or offered a false or forged instrument in relation to the five counts of conviction: the deed of trust for the home purchase loan in 2005 (Count Two), the deed of trust for the HELOC in 2005 (Count Four), the deeds of trust for the two refinance loans in 2007 (Counts Six and Eight), and the verified civil complaint in 2012 (Count Ten).

As to the four counts involving the real estate loans, the evidence permitted a rational inference that Petitioner signed a recorded instrument for each loan that was based on false financial information. Petitioner signed the recorded deed of trust for each loan. (2 RT 451 [2005 purchase loan]; 2 RT 429 [2005 HELOC]; 5 RT 1240-41 [2007 refinance loans].) Petitioner also placed his thumbprint in the notary's book for each loan. (2 RT 451-52 [2005 purchase loan]; 2 RT 430 [2005 HELOC]; 3 RT 716 [2007 refinance loans].) The evidence showed, as detailed above, that Petitioner had made false statements about his job and bank account balances in order to obtain each of the four loans. Thus, the evidence supported the prosecutor's theory that the recorded deeds of trust were false because they were securing debts that Petitioner had obtained with false information. (7 RT 2450.)

As to the filed civil complaint, in which Petitioner alleged that the 2007 refinance loans were obtained without his participation (5 RT 1235-36), a rational jury could find that Petitioner filed this instrument while knowing it was false. The prosecutor showed that the allegations in the filed civil complaint were false by presenting evidence that Petitioner

participated in the 2007 refinance loans by applying for them (3 RT 678, 694), signing the deeds of trust (5 RT 1240-41), providing his thumbprint (3 RT 716), making payments on them (4 RT 1034), and listing them his bankruptcy petition (5 RT 1230-33).

c. Sufficiency of evidence for perjury.

The California Court of Appeal concluded that the evidence was sufficient to support Petitioner's conviction for perjury:

> [Petitioner] was convicted of perjury based on the verification attached to the 2012 complaint, in which he declared under penalty of perjury that the information in the complaint was true. Substantial evidence demonstrates [Petitioner] knew the allegations in the complaint were false at the time he signed the verification, as set forth in the preceding paragraph of this opinion.

(Lodg. No. 9 at 17-18.)

The California Court of Appeal's rejection of this part of Petitioner's claim was not objectively unreasonable. Petitioner admitted that he verified the civil complaint. (5 RT 1239.) The evidence showed, as discussed above, that the allegations in the civil complaint were false, in light of the evidence that Petitioner had participated in obtaining the 2007 refinance loans.

C. Return of Property (Ground Three (c)).

Petitioner claims that he is entitled to have the Altadena property returned to him because it was taken from him in violation of his due process rights. (Dkt. No. 14 at 24-26; Dkt. No. 44 at 47-53.)

The writ of habeas corpus "is in no wise concerned with the property rights of anybody." *See Sisquoc Ranch Co. v. Roth*, 153 F.2d 437, 440 (9th Cir. 1946); *see also Katz v. King*, 627 F.2d 568, 577 (1st Cir. 1980) (real property owner's claim that property was taken without due process of law "cannot be considered by us in a habeas proceeding which is bottomed on a bodily restriction of one's freedom"), *disagreed with on other ground by Rose v. Lundy*, 455 U.S. 509, 514 n.5 (1982). Petitioner's claim that the Altadena property was taken from him without due process is not properly raised in habeas corpus.

D. Equal Protection Claim Arising from the Charge (Ground Three (d)).

Petitioner claims that the prosecutor violated Petitioner's equal protection rights by charging him with grand theft, even though "the elements do not coincide with the facts." (Dkt. No. 14 at 26-27; Dkt. No. 44 at 53.)

"In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). The prosecutor had probable cause to believe that Petitioner had committed grand theft, in violation of Penal Code § 487(a), based on evidence of the false representations and documentation Petitioner offered in obtaining the 2005 and 2007 loans.

Petitioner appears to contend that grand theft was not possible because "real property could not have been carried away" and because his loan payments were current. (Dkt. No. 14 at 26.) Petitioner is incorrect in both respects. The statute clearly states that grand theft may involve the taking of money, not only real property. *See* Penal Code § 487(a) (grand theft is committed when "the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950)[.]"). Moreover, Petitioner's assertion that his loan payments

were current makes no difference to grand theft. *See People v. Cuccia*, 97 Cal. App. 4th 785, 797 (2002) (defendant's repayment of some investors was irrelevant to his grand theft conviction because "[a]n intent to deprive the rightful owner of possession even temporarily is sufficient and it is no defense that the perpetrator intended to restore the property") (citation omitted). Thus, habeas relief is unwarranted for this claim.

E. Jury Instruction on Grand Theft (Ground Three (e)).

The jury was instructed with CALCRIM No. 1804 (Theft by False Pretense (Pen. Code § 484)) for the grand theft offenses charged in Counts One, Three, Five, and Seven. (7 RT 2434-36; 2 CT 346-47.) Petitioner claims that this instruction was erroneously given and that CALCRIM No. 1801 (Grand and Petty Theft) should have been given instead. (Dkt. No. 14 at 27-28.) CALCRIM No. 1801 states, in pertinent part, that "[i]f you conclude that the defendant committed a theft, you must decide whether the crime was grand theft or petty theft," based on a property value set at $950.

"Failure to give an instruction which might be proper as a matter of state law does not amount to a federal constitutional violation." *Miller v. Stagner*, 757 F.2d 988, 993 (9th Cir. 1985) (citing *Engle v. Isaac*, 456 U.S. 107, 119 (1982)). Petitioner's claim concerns a matter of state law and does not raise a federal constitutional question. In any event, Petitioner's claim is incorrect as to which instruction correctly set out the elements of the charged offense of grand theft. The instruction that was given, CALCRIM No. 1804, was proper because it accurately stated the elements of grand theft as charged in Counts One, Three, Five, and Seven. (7 RT 2434-36; 2 CT 346-47.) Petitioner's proposed instruction, CALCRIM No. 1801, does not state the elements of grand theft but rather instructs the jury on how to distinguish between grand and petty theft, based on a property value of $950. This case raised no issue of petty theft. If the jury found Petitioner guilty of theft, it could only have been grand theft, particularly in light of the jury's findings that Petitioner took property of a value exceeding

one million dollars. (8 RT 3002, 3004, 3006, 3007; 2 CT 368, 370, 374, 377.) Thus, no evidence supported an instruction to the jury on the difference between grand and petty theft. *See Miller*, 757 F.2d at 993 ("Due process does not require that an instruction be given unless the evidence supports it.") (citing *Hopper v. Evans*, 456 U.S. 605, 611 (1982)). Accordingly, habeas relief is unwarranted for this claim.

IV. Habeas Relief Is Not Warranted For Petitioner's Claims Of Ineffective Assistance Of Trial And Appellate Counsel (Ground Four).

In Ground Four, Petitioner claims that his trial counsel and appellate counsel were ineffective in multiple respects. (Dkt. No. 14 at 31-39; Dkt. No. 44 at 55.)

A. Legal Standard.

To succeed on his ineffective assistance of counsel claims, Petitioner must demonstrate that counsel's performance was both deficient and prejudicial to the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because both prongs of the *Strickland* test must be satisfied to establish a constitutional violation, a petitioner's failure to satisfy either prong requires the denial of the ineffectiveness claim. *See id.* at 697 (no need to address deficiency of performance if prejudice is examined first and found lacking); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("[f]ailure to satisfy either prong of the *Strickland* test obviates the need to consider the other").

"To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Richter*, 562 U.S. at 104 (citation omitted). However, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690; *see also Pinholster*, 563 U.S. at 196. "The question is whether an attorney's

representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Richter*, 562 U.S. at 105. Notably, the failure to take a futile action or make a meritless argument can never constitute deficient performance. *See Rupe v. Wood*, 93 F.3d 1434, 1444-45 (9th Cir. 1996); *see also Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994) (counsel is not obligated to raise frivolous motions, and failure to do so cannot constitute ineffective assistance of counsel); *Boag v. Raines*, 769 F.2d 1341, 1344 (9th Cir. 1985) ("Failure to raise a meritless argument does not constitute ineffective assistance.").

To establish prejudice, a habeas petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. The court must consider the totality of the evidence before the jury in determining whether a petitioner satisfied this standard. *Strickland*, 466 U.S. at 695.

The *Strickland* standard also applies to claims of ineffective assistance of appellate counsel. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). Thus, a habeas petitioner first must show that appellate counsel's failure to discover and raise an issue fell below an objective standard of reasonableness, and next must show that, but for appellate counsel's failure to raise the issue, there is a reasonable probability that petitioner would have prevailed on appeal. *See Moormann v. Ryan*, 628 F.3d 1102, 1106 (9th Cir. 2010). Neither requirement is satisfied if appellate counsel declines to raise "a weak issue" with "little or no likelihood of success." *See Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) ("Appellate counsel will therefore remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason — because she declined to raise a weak issue.").

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B. Analysis.

Petitioner claims that his trial counsel was ineffective because he (a) failed to ensure the correct written instructions and verdict forms on the statute of limitations; (b) failed to present evidence of defenses other than the statute of limitations, specifically, Shay's and Gleason's immunity agreements; and (c) failed to introduce substantial evidence of innocence. (Dkt. No. 14 at 33-37.) Petitioner further claims that his appellate counsel was ineffective because he (d) was disciplined during the pendency of Petitioner's appeal; (e) failed to raise the issues that Petitioner raised; and (f) waived oral argument. (*Id.* at 37-39.) Each claim is addressed in turn.

1. Trial counsel's alleged failure to ensure correct instructions and verdict forms on the statute of limitations (Ground Four (a)).

Petitioner claims that his trial counsel was ineffective for failing to ensure that the jury received a correct written jury instruction and verdict forms on the issue of the statute of limitations. (Dkt. No. 14 at 33-34.)

The background for this claim was summarized above for Ground Two (b). As to the jury instruction, the trial court ruled that the statute of limitations would begin to run "when the victim or law enforcement is aware of facts." (7 RT 2411.) Although the oral jury instruction accurately reflected this ruling by using the word "victim" twice (7 RT 2442-43), the written jury instruction was missing the second use of the word "victim" (2 CT 358). During deliberations, the jury asked the trial court a question about the statute of limitations, to which the trial court responded, "Please review all jury instructions, and #3410 in particular." (Augmented CT 13; *see also* 8 RT 2719-20.) As to the verdict forms, they asked the jury to find "true" or "not true" the allegation that the crimes arising from the fraudulently-obtained loans were "not discovered until July 27, 2012 by Detective Christopher Derry,

within the meaning of Penal Code Section 803(c)[.]" (2 CT 369-70, 372, 373, 375-76, 378-79.) However, the jury was not given an instruction on Section 803(c). Petitioner claims that his trial counsel should have pointed out the omissions in the written instruction and verdict forms. (Dkt. No. 14 at 33-34.)

For reasons similar to the reasons stated above as to why these omissions did not deprive Petitioner of a fundamentally fair trial, Petitioner was not prejudiced by his trial counsel's failure to object to these two omissions. First, as to the omission of the second use of the word "victim" in the written instruction on the statute of limitations, it was not reasonably likely that the jury interpreted that omission, if it noticed it at all, in a way contrary to a commonsense understanding that the victim's awareness of the facts was a relevant consideration, given all that took place at the trial. During trial, the jury was apprised accurately of the relevance of the victim's awareness of the facts. Second, as to the omission of the statutory language of Penal Code § 803(a) from the verdict forms, such forms made clear that the jury was being asked to make a finding on the statute of limitations, and the jury expressed no confusion about the omission of such language. Finally, both counsel placed the statute of limitations, particularly the victim's awareness, squarely before the jury. (7 RT 2484, 2495.) Under these circumstances, it is not reasonably probable that, but for trial counsel's failure to ensure more complete versions of the written instruction and verdicts forms on the issue of the statute of limitations, the result of the trial would have been different. *See Weighall v. Middle*, 215 F.3d 1058, 1063 (9th Cir. 2000) (trial counsel was not ineffective for failing to request additional instructions on an issue that he placed "squarely before the jury").

2. Trial counsel's alleged failure to present immunity agreements (Ground Four (b)).

The prosecutor did not believe that Gleason, the Countrywide loan consultant, was involved in the crimes. (2 RT 369.) Nonetheless, the trial court ruled that Gleason had a Fifth

Amendment right to remain silent (3 RT 618), so the prosecutor granted Gleason use immunity for his testimony (3 RT 620). Shay, Petitioner's real estate broker, had the charges against him dismissed at the preliminary hearing (1 CT 131; 3 RT 612) and did not testify at Petitioner's trial. Petitioner claims that his trial counsel was ineffective for failing to present evidence of Gleason's and Shay's immunity agreements and "their level of cooperation with the People and the benefits received by them in exchange for testimony." (Dkt. No. 14 at 35.)

Petitioner's allegations are contrary to the record. Petitioner's trial counsel did confront Gleason about receiving use immunity. (3 RT 657.) No evidence suggested that Shay was granted immunity and, in any event, Shay did not testify at Petitioner's trial. Accordingly, trial counsel raised the immunity issue to the extent it was possible, and habeas relief is unwarranted for this part of Petitioner's claim.

3. Trial counsel's alleged failure to present substantial evidence of innocence (Ground Four (c)).

Petitioner claims that his trial counsel was ineffective for failing to present "substantial evidence of Petitioner's innocence," consisting of a police report and the resolution of his civil lawsuit, which "would have been clear and unambiguous evidence that Petitioner did not commit the crimes for which he was charged." (Dkt. No. 14 at 36.)

Petitioner's allegations about trial counsel's performance with respect to both the police report and the civil lawsuit are meritless. *See Boag*, 769 F.2d at 1344 ("Failure to raise a meritless argument does not constitute ineffective assistance."). The substance of the police report, which apparently would have shown that the false loan information was submitted by someone other than Petitioner, was presented exhaustively by Petitioner's trial counsel. Indeed, trial counsel raised the possibility, with several prosecution witnesses, that it was Shay alone who had presented the false loan information. (*See, e.g.*, 2 RT 402, 420; 3 RT 670; 4

RT 909, 956, 1038; 5 RT 1212, 1547, 1551.) The civil lawsuit, as discussed above, had no res judicata effect. Accordingly, habeas relief is unwarranted for this part of Petitioner's claim.

4. Appellate counsel's disciplinary status (Ground Four (d)).

On direct review, in its order denying a Petition for Review, the California Supreme Court stated the following:

> The petition for review is denied without prejudice to the filing of a petition for a writ of habeas corpus alleging ineffective assistance of appellate counsel. [Appellate counsel] is hereby referred to the State Bar of California to investigate whether he was engaged in the unauthorized practice of law during the periods of time that counsel was suspended from the active practice of law through the pendency of this appeal.

(Lodg. No. 13.)

Petitioner claims that this circumstance constitutes ineffective assistance. (Dkt. No. 14 at 37-38.) To the contrary, "the fact that an attorney is suspended or disbarred does not, without more, rise to the constitutional significance of ineffective counsel under the Sixth Amendment. Rather, a defendant must ordinarily point to specific conduct which prejudiced him in order to raise the constitutional claim." *United States v. Mouzin*, 785 F.2d 682, 696-97 (9th Cir. 1986) (discussing *United States v. Hoffman*, 733 F.2d 596, 601, 603 (9th Cir. 1984)). "[A] lawyer can be disciplined for a variety of reasons — merely because he is subject to disciplinary proceedings while representing a client does not mean that he is presumptively incapable of providing effective assistance." *Young v. Runnels*, 435 F.3d 1038, 1043 (9th Cir. 2006).

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Here, the only specific conduct to which Petitioner points is appellate counsel's alleged failure to inform Petitioner about the discipline and alleged avoidance of the topic by labeling Petitioner's mail as "return to sender." (Dkt. No. 14 at 38.) Even assuming these allegations are true, they are insufficient to show prejudice. *See Mouzin*, 785 F.2d at 698 (no prejudice resulted from counsel's "failure to communicate the fact of disbarment to the client and to discuss the implications, if any, that may ensue" where it was not shown how such a failure affected or impaired counsel's performance). Because Petitioner has not specified how appellate counsel's performance was affected or impaired by the discipline, habeas relief is unwarranted for this part of Petitioner's claim.

5. Appellate counsel's alleged failure to raise issues (Ground Four (e)).

Petitioner claims that his appellate counsel was ineffective for failing to raise the issues that Petitioner himself raised. (Dkt. No. 14 at 38.) Those issues, as discussed above, were res judicata, erroneous instruction on the statute of limitations, prosecutorial misconduct in charging Petitioner with grand theft, "restitution issues," and failure to present a complete defense, "among a long list of issues in this matter." (*Id.*)

These issues would not have led to reversal on appeal. The civil lawsuit had no res judicata effect. It was not reasonably likely that the written instruction on the statute of limitations misled the jury. The prosecutor had probable cause to believe Petitioner had committed grand theft. The "restitution issues" are vague and conclusory. Trial counsel vigorously presented a defense that someone other than Petitioner submitted the false information to obtain the loans. In sum, appellate counsel was not ineffective for failing to raise these issues. *See Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001) (appellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal) (citing *Boag*, 769 F.2d at 344).

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6. Appellate counsel's waiver of oral argument (Ground Four (f)).

Petitioner claims that his appellate counsel was ineffective for waiving oral argument without Petitioner's consent. (Dkt. No. 14 at 38.)

"[U]nder current California law a party has the right to present oral argument on direct appeal." *People v. Pena*, 32 Cal. 4th 389, 398 n.5 (2004). But "litigants may, and often do, waive oral argument." *See id.* at 402. The California Court of Appeal's public docket shows that Petitioner's appellate counsel waived oral argument for this case (Case No. B272452) on July 12, 2019, shortly before the California Court of Appeal issued its decision affirming the judgment of conviction on July 22, 2019. However, "[t]he failure of counsel to appear at oral argument or to file a reply brief is not so essential to the fundamental fairness of the appellate process as to warrant application of a per se rule of prejudice." *United States v. Birtle*, 792 F.2d 846, 848 (9th Cir. 1986) (citations omitted). Accordingly, Petitioner must show how he was prejudiced by appellate counsel's waiver of oral argument, by showing "a reasonable probability 'sufficient to undermine confidence in the outcome.'" *Id.* at 849 (quoting *Strickland*, 466 U.S. at 694-95).

Petitioner has not made this showing. Appellate counsel filed a 29-page brief raising three separate issues (Lodg. No. 5), each of which the California Court of Appeal addressed in a 21-page opinion (Lodg. No. 9). *See Birtle*, 792 F.2d at 849 (no prejudice was shown by appellate counsel's failure to appear at oral argument where appellate counsel filed a brief and the court of appeals addressed the issues raised). Moreover, appellate counsel's failure to raise additional issues, such as the issues Petitioner raises here, was not prejudicial because the issues are not meritorious. Thus, because Petitioner "has not demonstrated how oral argument . . . would have resulted in a reasonable probability of a different outcome," *see id.*, habeas relief is unwarranted for this part of Petitioner's claim.

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V. Habeas Relief Is Not Warranted For Petitioner's Claim Of Cumulative Error (Ground Five).

Petitioner claims that the cumulative effect of repeated errors requires federal habeas corpus relief. (Dkt. No. 14 at 39-40.)

"The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973)). Habeas relief for cumulative error is warranted "when there is a 'unique symmetry' of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case." *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011) (quoting *Parle*, 505 F.3d at 933).

However, where no single error of constitutional magnitude occurred, "no cumulative prejudice is possible." *See Hayes v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011); *Fairbank v. Ayers*, 650 F.3d 1243, 1257 (9th Cir. 2011) (when none of the claims rises to the level of constitutional error, "there is nothing to accumulate to a level of a constitutional violation") (quoting *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002)). Here, no claim raised in the SAP has been shown to result in an error that rose to the level of constitutional magnitude. Accordingly, habeas relief for this claim is unwarranted.

VI. Petitioner's Request For An Evidentiary Hearing Should Be Denied.

Finally, Petitioner requests an evidentiary hearing. (Dkt. No. 14 at 10-11.) However, an evidentiary hearing is unwarranted because Petitioner has failed to demonstrate that the state courts' rejection of his claims was objectively unreasonable pursuant to 28 U.S.C. § 2254(d). *See Pinholster*, 563 U.S. at 183 (the practical effect of the AEDPA's deferential

standard "means that when the state-court record 'precludes habeas relief' under the limitations of § 2254(d), a district court is 'not required to hold an evidentiary hearing.'") (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)); *see also Sully v. Ayers*, 725 F.3d 1057, 1075-76 (9th Cir. 2013) ("Here, [Petitioner] failed to surmount § 2254(d)'s limitation on habeas relief, so he was not entitled to an evidentiary hearing."). Moreover, for the claims not subject to the AEDPA, the existing record precludes habeas relief. *See Schriro*, 550 U.S. at 474 ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.") (citing *Totten v. Merkle*, 137 F.3d 1172, 1176 (1998) (holding that "an evidentiary hearing is not required on issues that can be resolved by reference to the state court record.") (emphasis deleted)). Accordingly, Petitioner's request for an evidentiary hearing should be denied.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the District Judge issue an Order: (1) accepting the Report and Recommendation; (2) denying Petitioner's request for an evidentiary hearing; (3) denying the Second Amended Petition; and (4) directing that Judgment be entered dismissing this action with prejudice.

DATED: April 1, 2021

Karen L. Stevenson

KAREN L. STEVENSON
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 Governing the Duties of Magistrate Judges 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.

Additional material from this filing is available in the Clerk's Office.