UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 26 2022

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

JAMES DUANE GRZESLO,

Petitioner-Appellant,

v.

RAYTHEL FISHER, Warden,

Respondent-Appellee.

No. 21-55372

D.C. No. 2:19-cv-09049-MCS-AGR
Central District of California,
Los Angeles

ORDER

Before: SILVERMAN and M. SMITH, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 12) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

APPENDIX "A"
9TH CIR: APPELLANT'S
MOTION FOR RECONSIDERATION
AUGUST 26, 2022 DENIED

RCVD 3:08 p.m.

FILED

JUL 26 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES DUANE GRZESLO, Petitioner-Appellant, v. RAYTHEL FISHER, Warden, Respondent-Appellee.	No. 21-55372 D.C. No. 2:19-cv-09049-MCS-AGR Central District of California, Los Angeles ORDER

Before: IKUTA and LEE, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

All pending motions are denied as moot.

DENIED.

APPENDIX "B"

"APPELLANT'S REQUEST FOR COA FROM 9TH CIR DENIED JULY 26, 2022

APPENDIX "C"

APPELLANT'S REQUEST TO U.S. DISTRICT COURT, CENTRAL DISTRICT. DENIED MARCH 29, 2021

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES DUANE GRZESLO,

Petitioner,

v.

RAYTHEL FISHER, Warden,

Respondent.

NO. CV 19-9049-MCS (AGR)

ORDER DENYING CERTIFICATE OF APPEALABILITY

The Court has reviewed the Report and Recommendation of United States magistrate judge and the other papers on record in these proceedings. For the reasons set forth in the magistrate judge's Report and Recommendation, filed February 26, 2021, and the Order Accepting Findings and Recommendation of United States Magistrate Judge filed concurrently herewith, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *see also Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Lozada v. Deeds*, 498 U.S. 430 (1991); *Gardner v. Pogue*, 558 F.2d 548 (9th Cir. 1977).

IT IS ORDERED that the Certificate of Appealability is denied.

DATED: March 29, 2021

Mark C. Scarsi

MARK C. SCARSI
United States District Judge

FILED

AUG 21 2019

Jorge Navarrete Clerk

Deputy

S255866

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JAMES DUANE GRZESLO on Habeas Corpus.

The petition for writ of habeas corpus is denied.

APPENDIX "E"

PETITIONERS WRIT FOR HABEAS CORPUS DENIED AUGUST 21ST 2019. EXHAUSTION OF STATE REMEDIES FULFILLED.

CANTIL-SAKAUYE

Chief Justice

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES DUANE GRZESLO, Petitioner, v. RAYTHEL FISHER, Warden, Respondent.	No. CV 19-9049-MCS (AGR) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable Mark C. Scarsi, United States District Court Judge, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends that the Petition for Writ of Habeas Corpus be denied.

APPENDIX "D"
FEBRUARY 26, 2021

EXHIBIT "B"

I.

SUMMARY OF PROCEEDINGS

On August 10, 2016, a Los Angeles County Superior Court jury found Petitioner guilty of first degree murder (Cal. Penal Code § 187(a)) and found that Petitioner personally used a deadly weapon, a knife, that caused great bodily injury/death to the victim (Cal. Penal Code § 12022(b)(1)). (Lodged Document ("LD") 1, 5 Clerk's Transcript ("CT") 1005, 1009-10.) On September 19, 2016, the trial court sentenced Petitioner to 26 years to life in state prison. (5 CT 1059-60.)

On March 13, 2018, the California Court of Appeal issued an unpublished decision affirming the judgment. (LD 6.) On April 2, 2018, the Court of Appeal denied Petitioner's petition for rehearing. (LD 7-8.) On June 13, 2018, the California Supreme Court denied review. (LD 9-10.)

On March 1, 2019, the Superior Court denied a state habeas petition in a reasoned decision. (LD 12.) The California Court of Appeal summarily denied a state habeas petition on March 28, 2019. (LD 13-14.) Petitioner filed a "notice of appeal" in the Superior Court, which was denied on the ground that no appeal lies from an order of the Superior Court denying a habeas petition. (LD 15-16.) The California Supreme Court summarily denied a state habeas petition on August 21, 2019. (LD 17-18.)

On October 21, 2019, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Respondent filed an Answer and Petitioner filed a Traverse. The matter was taken under submission.

II.

STATEMENT OF FACTS

The California Court of Appeal set forth the following facts on direct appeal. To the extent that an evaluation of Petitioner's individual claims depends on an examination of the record, the court has made an independent evaluation of the record specific to Petitioner's claims.

> Cathy [Carrasco-Zanini] began dating [Petitioner] in 2010. In the

spring or summer of 2011, [Petitioner] began visiting anger management counselor Martin Brenner (Brenner). At some point, Cathy[1] accompanied [Petitioner] at these counseling sessions. Brenner described the relationship between the couple as "volatile." He explained they both "said derogatory stuff to each other." Brenner described Cathy as "very verbal and aggressive" in his office. Brenner also said [Petitioner] had a history of verbally and sometimes physically attacking Cathy and that was why [Petitioner] had come to see Brenner.

[Petitioner] told co-worker Michelle Dorch Carte (Carte) that he went to a counselor for anger management and that Cathy wanted to go to counseling with him before they would move in together. According to Carte, [Petitioner] moved out of his apartment, expecting to live with Cathy. He gave much of the furniture in his apartment to coworkers because "[h]e didn't want to take anything with him." After [Petitioner] moved out of his apartment, Cathy refused to live with him because "she wanted a ring first and wanted to get married." [Petitioner] was angry and upset. Carte believed this happened in September or October of 2011.

In the early evening of October 25, 2011, Cathy met her girlfriend Jamie Grauman (Grauman) to work out, as was their habit on Tuesdays. As usual, they had dinner together afterward. Unusually, Cathy was not wearing makeup. She looked tired and drawn. She did not want to discuss what she and [Petitioner] had done the previous weekend. Grauman thought Cathy seemed depressed.

At about 9:00 p.m., Cathy called her long-time friend Linda Cherry (Cherry). Cherry said Cathy sounded very tired and a little depressed. The two women spoke for about two hours, which was an unusually long

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[1] The Court of Appeal referred to the victim, Petitioner's brother Thomas Grzeslo and Petitioner's son Travis Grzeslo by their first names.

conversation. Cathy was sad and very concerned about her relationship with [Petitioner].

On October 26, 2011, about 8:18 a.m., video from a security camera in a building near Cathy's apartment recorded a car driving past the building in the direction of Cathy's apartment. Although the video did not show the car's license plates, the car had many of the same distinctive features as [Petitioner]'s car. At about 8:33 a.m., the camera showed the same car driving past the building and away from Cathy's apartment.

Although the video did not show any details of the car's driver, cell phone data placed [Petitioner] in the vicinity of Cathy's apartment at that time. Those records showed [Petitioner] called his brother, Thomas Grzeslo (Thomas), at 8:33 a.m.; [Petitioner]'s cell phone used a tower near Cathy's apartment. Thomas testified that [Petitioner] said, "I need help," and then, "I just killed somebody." Thomas asked [Petitioner], "What do you mean you just killed somebody?" [Petitioner] replied, "I just broke it off with Cathy for good." [Petitioner] then said, "I killed her." Thomas replied, "I couldn't deal with that" and hung up the phone.

Thomas soon called [Petitioner] back and tried to convince [Petitioner] to turn himself in to the police. [Petitioner] replied, "No, they are going to kill me." Thomas asked [Petitioner] what he had done. [Petitioner]'s response was garbled. Thomas heard "I" then the consonant "t" and then "her head off." Thomas "assumed" that [Petitioner] had shot Cathy. The conversation ended.

Several hours later, Thomas called [Petitioner] back and again tried to convince him to turn himself in to the police. [Petitioner] replied that he was going to see his therapist.

[Petitioner] also called his sixteen-year-old son, Travis Grzeslo (Travis), who lived in North Carolina. They spoke sometime between 11:00

a.m. and 1:00 p.m. [Petitioner] sounded "distressed." He said that he had been relieved from his job and his relationship with Cathy was over. [Petitioner] said "[t]here was no fixing things and that . . . he had made a mistake he couldn't go back on." [Petitioner] also said, "Let's put it this way, it's eternal." Travis was confused, but [Petitioner] said they would talk about it later. That was the end of their conversation.

In between speaking with Thomas and Travis, [Petitioner] called his counselor Brenner. They spoke at about 9:00 a.m. [Petitioner] said, "'I did something bad. I had a dream. I think I hurt my girlfriend or fiancé at the time." [Petitioner] added, "I think I killed her, and I just thought it was just a dream." Brenner agreed to see [Petitioner] at 1:45 p.m.

When [Petitioner] arrived for his appointment with Brenner, he "[h]ad no affect. He was white. He looked like he just saw a ghost." Brenner testified [Petitioner] said, "I think I did a bad thing" and asked Brenner to call his girlfriend. Brenner asked, "Why?" [Petitioner] replied, "I had a dream. I think I killed her." Brenner called Cathy but there was no answer. Brenner then asked [Petitioner] to take everything out of his pockets. [Petitioner] complied. One of the items [Petitioner] took out was a pocket knife. He also removed some keys from his pocket.

Brenner called the police because he wanted [Petitioner] to be placed on "a psychiatric holding, 5150, based on his demeanor." Brenner testified that he did not believe "something was wrong in terms of a criminal act." He was concerned about [Petitioner]'s mental health. Brenner gave police Cathy's address. Police arrived at Brenner's office within 15 minutes.

Beverly Hills Police Department (BHPD) Officer Gary Castaldo was among the officers who went to Brenner's office. Officer Castaldo handcuffed [Petitioner] and patted him down. A small pocket knife fell out of [Petitioner]'s pocket. Officer Castaldo sat down next to [Petitioner] and

conversed with him for about 11 minutes to build rapport.

[Petitioner] told the officer that he had a girlfriend but they were having relationship problems. He used to live with her, but no longer did. The past weekend had been good between them. On Tuesday night, she went out with some girlfriends and [Petitioner] became upset. She "berated" [Petitioner] because he did not have any friends to go out with and that caused a little fight. Sometime around 8:00 a.m. the next morning (October 26), [Petitioner] used his key to enter her apartment. They got into an argument and "she threw some items at him, a vase and some photos." [Petitioner] said, "I think I killed my girlfriend." He then added, "I think I cut my girlfriend's throat with a knife." [Petitioner] also said it was like a nightmare and it was foggy. He was not sure what happened.

[Petitioner] was taken to the Beverly Hills jail. There, BHPD forensic specialist Segalit Oz (Oz) photographed [Petitioner]. The photographs showed fresh cuts on the index finger and thumb of [Petitioner]'s right hand, a scratch and a red mark on his left hand, and a fresh scratch on his right forearm. Oz testified that the cuts appeared to have been "sliced open."

BHPD Officer Eric Olson obtained the keys that [Petitioner] had surrendered in Brenner's office and went to Cathy's apartment. Officer Olson used one of the keys to unlock one of the doors of the apartment. He immediately saw Cathy lying face down in the kitchen. There was a large pool of blood around her upper torso. Officer Olson summoned paramedics, who entered the apartment and pronounced Cathy dead.

Officer Olson then conducted an inspection of the apartment to make sure no one else was inside. There was no one. Officer Olson did not see any signs of forced entry into the apartment. He did not see any obvious disturbance. When Officer Olson entered the hallway, he saw large smears of blood on the floor, and some blood on the wall as well. The blood went

about halfway down the hallway, a distance of 10 to 12 feet.

BHPD forensic specialist Jeannine Cascadden (Cascadden) soon arrived at the apartment. She took numerous photographs to document the condition of the interior of the apartment. There was no sign that the apartment had been ransacked.

In the bedroom, Cascadden observed that one side of the bed appeared to have been slept in. She did not see any blood in the bedroom, living room, or family room. Cascadden did observe blood on the threshold between the bathroom and the hallway and drops of blood inside the bathroom. She found a broken toothbrush in the bathroom wastebasket.

Cascadden saw a pool of blood in the hallway with a trail of blood leading to the kitchen. She characterized the trail of blood as a "smear" from something blood-soaked being dragged along the floor. Cascadden opined that Cathy dragged herself down the hall, but then acknowledged on cross-examination that she could not tell whether Cathy's body was pulled or whether she pulled herself.

Cascadden saw blood on the wall between the kitchen doorway and the hall closet doorway. At trial, [Petitioner] showed Cascadden the photograph Cascadden took of the wall and asked if the blood looked like it spelled out the initials "JG." Cascadden responded, "At the time I took the picture, I did not notice, but this depicts what was there. If you're asking me here and now what I see, I do see a possib[ility] that there's a 'J' and a 'G'."

Cathy's body was still in the kitchen when Cascadden was performing her photographic documentation of the scene. A phone cord was intertwined in her left fist. She had a shoe on her left foot but not her right foot. Cascadden found the right shoe in the hallway towards the bathroom. The kitchen area itself contained a lot of blood. Cascadden observed a knife, spoon, colander, and soap in the kitchen sink. On cross-examination, she

acknowledged that she did not see any water or debris on the knife, or any light red or pink liquid around or under the knife.

BHPD Detective Christopher Coulter went to [Petitioner]'s apartment that afternoon and searched it. He found a still-warm dishwasher with two knives in it. No blood was found on the knives. Detective Coulter found a few items of damp clothing and a towel in [Petitioner]'s washer and more clothing and a towel in his dryer. These items tested negative for blood. On cross-examination, Detective Coulter acknowledged that he had never been involved in a case in which a criminal left his clothes in the washer and dryer.

Detective Coulter found band-aids and two towels on a counter in the bathroom. One towel had red stains; the stains were tested and determined to be [Petitioner]'s blood.

HOW ABOUT A GIFT FROM KIM GOLDMAN IF I DID IT?

Detective Coulter found a variety of books in [Petitioner]'s apartment, including a book titled *I Did It* about the O.J. Simpson trial. The detective also found a composition book in the apartment. The book contained handwritten entries dated between July 28, 2011 and September 21, 2011. The entries were mainly about jealousy and control issues in [Petitioner]'s relationship with Cathy. In a September 13 entry, [Petitioner] wrote, "Get out of this relationship. I'm being used." In a September 17 entry, [Petitioner] wrote, "Legend has it to dig two graves. One for your enemy, one for yourself. Well, I'm not ready to dig mine." In an entry dated September 21, [Petitioner] wrote that Cathy yelled at him over the phone and was verbally and emotionally abusive.

DIDN'T PUBLISH UNTIL 2014 - AFTER O.J.'S RELEASE READ.

Sergeant Marcia Deanda worked in the Twin Correctional facility that housed [Petitioner]. She testified that Detective Coulter asked her to locate and review video of [Petitioner] working out at that correctional facility. She testified that the video depicted [Petitioner]'s "holding on to a towel wrapped around the top rail [of his cell] and using his body weight to exercise up and

?

down." The video was played to the jury. Upon [Petitioner]'s cross-examination, Sergeant Deanda admitted that she saw [Petitioner] use only his left arm to wrap the towel around the bar. She also admitted seeing him walk with a "very slight limp."

Los Angeles County Coroner's Office pathologist Dr. Job Augustine performed an autopsy on Cathy. He observed two superficial incised wounds to her neck and one 7.25–inch-long incised wound that went from left to right across her neck. The wound included a cut to her jugular vein, which was the cause of death. The wounds were consistent with a right-handed person cutting Cathy's neck from behind. Cathy had only minor defensive wounds on her hands and arms, which made it more likely that she was attacked from behind rather than from the front. In the pathologist's experience, a person who is attacked from the front typically has "larger, more extensive areas of injuries to the forearms, large gashes to the wrists. . . . with . . . cuts to the palms and multiple fingers.

At trial, three of [Petitioner]'s coworkers testified about his behavior in the months before Cathy's murder. All three gave similar accounts of working with [Petitioner]. Marcia Lang was a registered nurse at Los Robles Hospital in 2010 and 2011. She worked with [Petitioner], who was a contract nurse in the hospital's cardiac catheter lab. Zandra Miller (Miller) and Carte were registered nurses who worked at West Hills Hospital in 2011. They worked with [Petitioner] in the cardiac catheter lab while he was a contract nurse at that hospital in 2011. His duties included sedating patients, administering medications, and making sure patients were stable during cardiac procedures.

[Petitioner] told all three coworkers that he had had a stroke. None of the women noticed [Petitioner] having any difficulty performing his job duties. Miller noticed [Petitioner] slightly dragging one of his feet, but this did not

affect his ability to perform his job duties.

[Petitioner] told Lang that he had a second occupation doing "something forensic—like law." He told Carte that he had a Ph.D. in forensic accounting and had a business that did audits of hospitals and doctors. [Petitioner] said he "helped to bring down Bernie Madoff."

[Petitioner] also told all three coworkers that he had been in a special forces unit in Vietnam. Lang and Miller saw a "Recon" skull and crossbones tattoo on [Petitioner]'s arm. [Petitioner] told Lang the teeth in the skull represented the people he had killed. When Lang asked [Petitioner] if he had shot the people with a gun, [Petitioner] replied that he snuck up behind them and slit their throat with a knife." After Miller noticed [Petitioner]'s tattoo, [Petitioner] told her that he was in the special forces in Vietnam and that "he would hide behind the bush or brush and he would turn the enemy to Pez dispensers." When [Petitioner] said this, he moved his thumb across his throat and then moved his "head up and down, . . . like a Pez dispenser would open and close, the candy dispenser." [Petitioner] also told Carte that when he was in Vietnam, he "made people into Pez dispensers." He illustrated this statement by drawing his index finger across his throat and flipping his head back. At trial, the prosecutor asked Carte whether she thought [Petitioner] was joking or serious when he talked about killing people. Carte replied, "I really don't know. I had no reason to not believe him."

All three coworkers described instances when [Petitioner] had displayed jealousy related to Cathy. Lang testified [Petitioner] was upset that Cathy displayed photos of her ex-husband and her children. Miller stated [Petitioner] did not like it when Cathy went out dancing with her friends. [Petitioner] also mentioned that Cathy had a homosexual friend, and [Petitioner] said he would not have any trouble killing him. Carte testified

[Petitioner] told her that Cathy had a client who was "pretending to be gay but was not and was trying to get close to" Cathy. [Petitioner] stated he would kill the man if he did not leave Cathy alone. [Petitioner] also said that someone had flirted with Cathy at a family event and that he would have no problem killing him.

Charles Yancy (Yancy) testified that he was Cathy's personal trainer at a gym at which [Petitioner] worked out occasionally. Cathy and he were friends and were in contact even after Cathy stopped training with him. Yancy testified that he had opportunity to observe [Petitioner] using weight machines at the gym and that [Petitioner] "definitely appeared to be fine." He elaborated that [Petitioner] was able to use both his arms without favoring one over the other, and was of "moderate" fitness.

Upon cross-examination, Yancy testified that he had not observed [Petitioner] using all the available machines and weights, but eschewed seeing [Petitioner] "limping or dragging one side of [his] body such as a foot." He also described a meeting at a downtown hotel to have drinks after working out at which he, Cathy and [Petitioner] were present. He admitted that he was "more or less there to see Cathy." He denied that Cathy was sitting on his lap. He also admitted being Facebook friends with Cathy. He denied ever stating in an email to Cathy on Facebook that he was "'unable to keep [his] hands off [her].'"

Cathy had a gay male friend named Tarpon London who worked at a gym Cathy frequented. [Petitioner] also used this gym. London saw [Petitioner] working out, and it did not appear to London that [Petitioner] had any physical problems preventing him from using the machines or working out.

At some point, London and his partner David went out for dinner with Cathy and [Petitioner]. London observed that [Petitioner] was not

comfortable when the maître 'd started to pull out Cathy's chair and that [Petitioner] blocked the man's attempt to assist Cathy.

On another occasion, [Petitioner] told London he was a surgeon, but he had injured his hand and was no longer practicing medicine. [Petitioner] showed London a cellular phone photograph of a man dressed in scrubs and a surgical mask standing in a surgical environment. [Petitioner] said he was the man in the photograph and told London, "I know exactly where to cut." [Petitioner] made this statement quietly and in a low tone. London told [Petitioner] not to talk to him like that ever again.

The prosecution's final witness at trial was Paul Delhauer, a crime scene reconstruction expert. Delhauer offered opinions in several different areas. First, he opined that Cathy was killed in a "blitz" attack—an attack so rapid and violent that that the victim had little chance to resist. Delhauer opined that the attacker slit Cathy's throat from behind.

Delhauer also opined that the blood evidence in the apartment hallway showed that Cathy survived the attack and dragged herself into the kitchen. On the way, Cathy wrote "JG" on the wall in her own blood. In the kitchen, Cathy tried to pull the telephone down to her, but inadvertently pulled the phone out of the wall jack. Delhauer testified that blood stains in the bathroom indicated that blood was washed off someone or something in that room.

Delhauer further opined that [Petitioner]'s thumb injury was consistent with [Petitioner] being the assailant in a knife attack, and that the knife used to kill Cathy had a serrated edge. The knife found in Cathy's sink was consistent with its being the murder weapon. He elaborated that the knife "cannot be excluded as the murder weapon," but that he could not "definitively" state that "it is the murder weapon." Delhauer testified that the killer washed the knife to remove the killer's DNA.

[Petitioner] called two forensic experts in his defense. The first expert, David Sugiyama, was a forensic specialist with expertise in physical evidence and interpreting DNA and other laboratory reports. His testimony focused on the absence of [Petitioner]'s DNA on Cathy's body and the absence of Cathy's blood on [Petitioner]'s clothing or car. Sugiyama explained there could be a number of reasons for these absences: the DNA/blood was never deposited, the DNA/blood was removed, or the DNA/blood was in quantities too small to be detected or to be useful. Sugiyama also discussed the absence of fingerprint evidence at the crime scene. Sugiyama agreed that in the reports and documents he reviewed, there was no physical evidence linking [Petitioner] to the crime scene.

[Petitioner]'s second expert was Marc Taylor, a forensic specialist with expertise in DNA analysis. In arriving at his opinions, Taylor primarily reviewed testing reports from other agencies. Taylor testified that the reports demonstrated that no blood was observed on the floor mats or steering wheel of [Petitioner]'s car. The steering wheel did test "presumptively" FN 6 positive for blood.

> FN 6: Taylor explained that a " 'presumptive test for blood' ... relies on certain characteristics of the hemoglobin molecule that's in blood to give us a reaction." The test is "not terribly specific for blood; it's a very fast sensitive test, but it will react with other things." The presence of other chemicals "can end up causing . . . a 'false positive.'"

Taylor testified that cars are known to produce a lot of false positives on "presumptive" blood tests. The false positives come from the driver touching batteries, oxidizing agents and other chemical agents associated with motor vehicles. Taylor also testified that the faucet in Cathy's kitchen

tested presumptively positive for the presence of blood, but that too could be a false positive result. He explained that a false positive result could come from copper salt, bacteria or similar materials.

Taylor examined a report showing that [Petitioner]'s DNA was found on a faucet handle in Cathy's apartment. The report characterized the DNA as "touch DNA." Taylor opined that based on the amount of that DNA, it was unlikely to be DNA from blood. Taylor also reviewed a report showing that male DNA found under the fingernails on Cathy's right hand was "very likely" from [Petitioner], but that the level of DNA was low. Taylor elaborated that people who cohabit are known to get each other's DNA under their fingernails just from household interactions. He testified 12 to 15 percent of office workers were found to have another worker's DNA under their fingernails. On cross-examination, Taylor explained that it would be unusual to get a piece of skin that one could identify as skin under a person's fingernail, as opposed DNA from "pok[ing]" a finger in a victim's nose, mouth, or eye. No skin was found under Cathy's fingernails.

Taylor opined that none of the DNA test results in the reports he reviewed provided insight into whether [Petitioner] was involved in Cathy's death. Taylor also opined that "no weapon that was found could be identified as the murder weapon."

(LD 6 at 3-15) (some footnotes omitted).)

III.

STANDARD OF REVIEW

A federal court may not grant a petition for writ of habeas corpus by a person in state custody with respect to any claim that was adjudicated on the merits in state court unless it (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." 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 100 (2011).

"'[C]learly established Federal law' . . . is the governing legal principle or principles set forth by the Supreme Court at the time the state court rendered its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *see Greene v. Fisher*, 565 U.S. 34, 40 (2011) (examining Supreme Court precedent as of the date of the last state court decision on the merits of the claim). Clearly established federal law includes only the holdings, as opposed to the dicta, of Supreme Court decisions. *White v. Woodall*, 572 U.S. 415, 419 (2014).

A state court's decision is "contrary to" clearly established Federal law if (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "'confronts a set of facts . . . materially indistinguishable'" from a decision of the Supreme Court but reaches a different result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (citation omitted). A state court's decision cannot be contrary to clearly established Federal law if there is a "lack of holdings from" the Supreme Court on a particular issue. *Carey v. Musladin*, 549 U.S. 70, 77 (2006).

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Andrade*, 538 U.S. at 76; *see also Rompilla v. Beard*, 545 U.S. 374, 380 (2005) ("An 'unreasonable application' occurs when a state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of petitioner's case.") (citation and some quotation marks omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). "The state court's application must have been 'objectively unreasonable.'" *Id.* at 520-21 (citation omitted).

"Under § 2254(d), a habeas court must determine what arguments or theories

supported or, [in the case of an unexplained denial on the merits], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this [Supreme] Court." *Richter*, 562 U.S. at 102. "[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

In applying these standards, this court looks to the last reasoned state court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *see also Wilson v. Sellers*, 138 S .Ct. 1188, 1192 (2018). To the extent no such reasoned opinion exists, as when a state court rejected a claim without explanation, this court must conduct an independent review to determine whether the decisions were contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. *Walker v. Martel*, 709 F.3d 925, 939 (9th Cir. 2013); *Haney v. Adams*, 641 F.3d 1168, 1171 (9th Cir. 2011). If the state court declined to decide a federal constitutional claim on the merits, this court must consider that claim under a *de novo* standard of review rather than the more deferential "independent review" of unexplained decisions on the merits. *Cone v. Bell*, 556 U.S. 449, 472 (2009); *see also Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir. 2004) (standard of *de novo* review applicable to claim state court did not reach on the merits).

IV.

DISCUSSION

A. GROUND ONE: Ineffective Assistance of Appellate Counsel

Petitioner contends that his appellate counsel rendered ineffective assistance.

(Pet. at 10, 14-15.)[2] Petitioner presented this claim to the California Supreme Court by habeas petition, which was summarily denied. (LD 17-18.) In the absence of a reasoned decision, this court will independently review the record to determine whether the state court's denial of Ground One was objectively unreasonable. *See Walker*, 709 F.3d at 939; *Haney*, 641 F.3d at 1171.

1. Applicable Federal Law

To succeed on a Sixth Amendment claim of ineffective assistance of counsel, Petitioner must demonstrate that his attorney's performance was deficient and that the deficiency prejudiced the defense. *Wiggins*, 539 U.S. at 521; *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner bears the burden of establishing both components. *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000); *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). The standards for assessing the performance of trial and appellate counsel are the same. *Evitts v. Lucey*, 469 U.S. 387, 395–99 (1985).

"'Judicial scrutiny of counsel's performance must be highly deferential,' and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (citation omitted). A petitioner "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). "'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Knowles*, 566 U.S. at 124 (citation omitted). *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Richter*, 562 U.S. at 110.

Appointed appellate counsel is not required "to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). "There can hardly be any

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[2] The court will cite to the page numbers assigned by the CM/ECF system.

question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Id.* at 752.

To establish prejudice, a petitioner must establish 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.* To establish prejudice from deficient performance of appellate counsel, a petitioner "must show a reasonable probability that, but for his counsel's [error], he would have prevailed on his appeal." *Smith*, 528 U.S. at 285.

A court need not address both deficiency and prejudice if a petitioner makes an insufficient showing on one. *Strickland*, 466 U.S. at 697.

2. Analysis

Petitioner contends that his appellate counsel was ineffective because he knew who "the real murderer" was, but refused to investigate and instead submitted briefs containing perjured testimony and meritless arguments regarding Petitioner's mental competence. (Petition at 10, 15-17.) Petitioner also complains that appellate counsel was habitually late and required extensions of time for personal reasons. (*Id.* at 16.)

Evidence was presented at trial that blood spots on the sidewalk near the victim's apartment were tested and found to belong to Jesus Montez, a tree trimmer who said he injured himself there. (LD 2, 6 Reporter's Transcript ("RT") 8217-18; 7 RT 9061-62.) No evidence was presented linking Montez to the victim or placing him in her apartment. If Petitioner is suggesting appellate counsel should have undertaken an independent investigation to unearth such evidence, on direct appeal the reviewing court is limited to evidence in the trial record. *See People v. Rinegold*, 13 Cal. App. 3d 711, 717 (1970) ("it is well settled in California that on direct appeal from a judgment, a reviewing court will not consider matters outside the record"); *see generally In re Carpenter*, 9 Cal. 4th 634, 646 (1995) ("Appellate jurisdiction is limited to the four corners of the record on appeal").

Moreover, Petitioner has not identified any meritorious argument that appellate

counsel could have raised based on Montez's alleged culpability. The Court of Appeal "cannot reweigh the evidence on appeal." *People v. Davis*, 220 Cal. App. 2d 49, 53 (1963). Appellate counsel reasonably decided not to raise a sufficiency of the evidence argument because there was overwhelming evidence of Petitioner's guilt. A surveillance video showed a car going to and from the block containing the victim's apartment on the morning of the murder. (5 RT 7837-46, 7848-54.) While driving away, Petitioner had cell phone conversations with his brother and his therapist, during which he admitted cutting the victim's throat. (4 RT 7271-72, 7291; 5 RT 7622-24, 7924-27.) Petitioner later made incriminating statements to his son and to Officer Castaldo, and admitted using his key to enter the victim's apartment that morning. (4 RT 7300-01; 5 RT 7609-11.) The police used the key Petitioner gave them to enter the victim's apartment and found her dead, with her throat cut. (4 RT 7302, 7322-23, 7325, 7329; 5 RT 7879-80.) The victim had written Petitioner's initials in blood on a wall. (5 RT 7567-68, 7594; 6 RT 8465-74.) Petitioner had earlier boasted to fellow nurses (apparently falsely) that he had slit enemy soldiers' throats from behind with a knife (6 RT 8111, 8131-32, 8134, 8150-51), and he had told a friend of the victim that he knew "where to cut" (6 RT 8180-81). Petitioner had fresh cuts and scratches on his hands and forearm that were consistent with the victim fighting back. (5 RT 7818-20, 7822, 7829.) He had expressed his jealousy of the victim and his frustration that she had changed her mind about allowing him to move in with her. (6 RT 8148-49, 8209-16, 8218.)

Petitioner, therefore, has not shown a reasonable likelihood that he would have prevailed on appeal if appellate counsel had raised the issue of Montez's culpability for the murder. *See Smith*, 528 U.S. at 285; *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").

To the extent Petitioner suggests appellate counsel should have presented new evidence about Montez by habeas petition, the Sixth Amendment right to effective assistance of counsel does not extend to collateral proceedings. *See Pennsylvania v.*

Finley, 481 U.S. 551, 555 (1987) (right to counsel extends only to first appeal by right and does not extend to collateral attacks on conviction); *Bonin v. Vasquez*, 999 F.2d 425, 429–31 (9th Cir. 1993) (no Sixth Amendment right to counsel on habeas even when claims cannot be raised on direct appeal); *see also Thompson v. Woodford*, 619 F. Supp. 2d 1028, 1045 (S.D. Cal. 2007) ("Petitioner did not have a Sixth Amendment right to the assistance of counsel with respect to those issues which he sought to have appellate counsel raise which were premised on matters outside the record.").

As for Petitioner's complaints that appellate counsel was "late" and improperly sought extensions of time, the docket shows that appellate counsel was appointed on January 6, 2017, filed a motion for augmentation of the record a week later, sought and received two 30-day extensions of time, filed a timely opening brief on May 1, 2017, and filed a timely reply brief without requesting an extension of time. *See* https://appellatecases.courtinfo.ca.gov/search/case/dockets [search for case B278205].. Counsel's requests for extension of time were not an indication of deficient performance and Petitioner has not shown any prejudice.

Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law and was not an unreasonable determination of the facts. Ground One does not warrant federal habeas relief.

B. GROUND TWO: Withholding Exculpatory Evidence; False Evidence

Petitioner contends that the state withheld exculpatory evidence regarding the identity of the real murderer and used falsified evidence to convict him. (Pet. at 10-11, 19-22.) Petitioner also asserts a Confrontation Clause claim (*id.* at 20), but the Court will discuss that claim in conjunction with the confrontation claims in Ground Four.

The court looks through the silent denials of this claim by the California Supreme Court (LD 18) and the California Court of Appeal (LD 14) to the reasoned decision of the Superior Court, which denied the claim for procedural reasons (LD 12). *See Wilson*, 138 S. Ct. 1192; *Ylst*, 501 U.S. at 803. In the interests of judicial economy, the court will reach the merits without addressing Respondent's argument that the claim is procedurally

defaulted. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002). It is unnecessary to determine whether the state courts denied any part of Ground Two silently on the merits because the entire claim fails on *de novo* review. *See Berghuis v. Thompkins*, 560 U.S. 370, 388 (2010) (courts can "deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is uncertain whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review.") (citing 28 U.S.C. § 2254(a)).

1. Applicable Federal Law

In *Brady v. Maryland*, the Supreme Court held that the prosecution's suppression of evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). A petitioner must show that (1) the evidence was favorable to him, either because it was exculpatory or impeaching; (2) the prosecution suppressed the evidence, willfully or inadvertently; and (3) prejudice. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Cone v. Bell*, 556 U.S. 449, 469–70 (2009) (citation omitted).

A prosecutor's knowing use of false testimony to obtain a conviction violates due process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* To prevail on a *Napue* claim, a petitioner must show that (1) the testimony or evidence was actually false; (2) the prosecution knew or should have known that the testimony or evidence was actually false; and (3) the false testimony was "material." *Sanders v. Cullen*, 873 F.3d 778, 794 (9th Cir. 2017) (citations omitted).

2. Analysis

Petitioner contends that the state withheld and concealed the identity of the real murderer, Montez. (Pet. at 19.) Detective Coulter testified at trial that Montez was "a tree-trimmer person who got cut and his blood was located on the sidewalk." (6 RT 8217-18.) Defense witness Taylor testified that, according to lab reports he had reviewed, the blood stains on the sidewalk were tested for DNA and found to belong to Montez, and the blood sample was accompanied by a statement that Montez was a tree trimmer who cut himself. (7 RT 9061-62.) Thus, Petitioner knew before trial that Montez's blood was found on the sidewalk outside the victim's apartment. Nothing before the court suggests that any evidence placing Montez inside the victim's apartment or otherwise linking him to the crime existed and was withheld from Petitioner. Petitioner cannot base a *Brady* claim on mere speculation. *See Runningeagle v. Ryan*, 686 F.3d 758, 769 (9th Cir. 2012) (petitioner must do more than "merely speculate" about existence of favorable evidence).

As for his *Napue* claims, Petitioner contends that officer Billingsley testified to evidence tampering, the police planted false evidence regarding the murder weapon, prosecution expert Dr. Augustine tampered with the evidence and lacked credentials, prosecution expert Delhauer was unqualified, and anger management counselor Brenner was unqualified and misrepresented his professional and educational credentials. (Pet. at 19-21.)

Petitioner contends that officer Billingsley testified that he ordered the assistant building manager to change the date and time of the security camera footage showing a car corresponding to Petitioner's so that it would match the date and time of the murder. (Pet. at 20.) Petitioner does not cite to the Reporter's Transcript and the Court has not found any such testimony. (5 RT 7518-29.) Nor does any evidence support Petitioner's contention that the police planted murder weapons. *See James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.") The prosecutor conceded during her

rebuttal argument that she could not prove beyond a reasonable doubt which knife was used to kill the victim – the knife in the victim's sink or the knife in Petitioner's dishwasher --and argued that she could meet the prosecution's burden without proving which knife Petitioner used. (7 RT 9342.)

Similarly, the record does not support Petitioner's contention that Dr. Augustine testified that he tampered with the evidence. (5 RT 7872-7913.) Nor is there any merit to his argument that Dr. Augustine was not qualified to testify as an expert in forensic pathology. Dr. Augustine testified regarding his medical degree, residency in pathology, on-the-job training fellowship at the Los Angeles County Coroner's office, and board certifications. He testified that he had performed between 1500 and 2000 autopsies. (5 RT 7874.) Dr. Augustine did not claim to have participated in the International Criminal Investigative Analysis Fellowship ("ICIAF") program, and Petitioner's contention that he would not have qualified is irrelevant. Petitioner's unsupported assertion that Dr. Augustine purchased credentials from a website is sheer speculation.

Petitioner contends that Delhauer, who testified as a crime scene reconstruction expert, lacked credentials and misrepresented his qualifications. (Pet. at 22.) Delhauer testified about his educational qualifications, training, work background, and experience in crime scene reconstruction (6 RT 8413-18), and Petitioner cross-examined him regarding his qualifications (6 RT 8489-94). Petitioner has not shown that Delhauer was unqualified or lied about his credentials. Delhauer did not claim to have participated in the ICIAF program. He testified that he was certified in bloodstain pattern analysis and crime scene reconstruction based on having taken classes given by the California Department of Justice, and explained that he had not undergone a certification process such as a criminalist does. (6 RT 8490-92.) Petitioner has not shown that this testimony was false and that the prosecutor knew it was false. *See Sanders*, 873 F.3d at 794.

Petitioner contends that Brenner misrepresented his qualifications. (Pet. at 22.) He has attached a page of a report by a Public Defender's Office investigator stating that she could not substantiate that Brenner had certain bar memberships or licenses. (*Id.* at

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39.) Since Brenner did not testify as an expert but as a fact witness, his credentials were irrelevant except insofar as any misrepresentations were relevant to his credibility. In fact, Petitioner vigorously attacked Brenner's credentials and credibility during closing argument. (7 RT 9327.) Moreover, Brenner did not testify to the challenged qualifications; he testified only that he was a certified addiction and anger management specialist with a master's degree in addiction from Crescent College, and belonged to the National Anger Management Association. (4 RT 7269-70.) Petitioner has not shown that this testimony was false and that the prosecutor knew it was false. *See Sanders*, 873 F.3d at 794.

Accordingly, Petitioner has not established the elements of either his *Brady* claim or his *Napue* claims. Ground Two does not warrant habeas relief.

C. GROUND THREE: *Miranda*

Petitioner contends that admission of his incriminating statements to the police violated his constitutional rights because he was not given the advisements required by *Miranda v. Arizona*, 384 U.S. 436 (1996), and his requests for counsel were ignored. (Pet at 11, 23-25.) Petitioner also contends that videos of his interrogation at the Beverly Hills Police Station were destroyed. (*Id.* at 24-25.)

The court looks through the silent denials of this claim by the California Supreme Court (LD 18) and the California Court of Appeal (LD 14) to the reasoned decision of the Superior Court, which denied the claim for procedural reasons (LD 12). In the interests of judicial economy, the court will proceed to the merits on *de novo* review without addressing Respondent's argument that a portion of the claim is procedurally defaulted. *See Lambrix*, 520 U.S. at 525; *Franklin*, 290 F.3d at 1232. It is unnecessary to determine whether the state courts denied part of Ground Three silently on the merits because the entire claim fails on *de novo* review. *See Berghuis*, 560 U.S. at 390 (courts can engage in *de novo* review when it is unclear whether AEDPA deference applies but claim fails on *de novo* review).

1. Applicable Federal Law

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. The person "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479.

An officer's obligation to administer *Miranda* warnings attaches only when the person questioned is in "custody." *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam). "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *Id.* at 322 (citation omitted). The determination "depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* at 323. "Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Howes v. Fields*, 565 U.S. 499, 509 (2012). Determining whether an individual's freedom of movement was curtailed is simply the first step; the court must also determine "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.*

In contrast to custodial interrogation, "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process" does not trigger the need for *Miranda* warnings. *Miranda*, 384 U.S. at 477–78. When a law enforcement officer briefly detains a person to investigate the circumstances that provoke a reasonable suspicion that a crime has been or is about to be committed, the officer "may ask the detainee a moderate number of questions . . . to try to obtain

information confirming or dispelling the officer's suspicions" without triggering *Miranda*. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

When statements obtained in violation of *Miranda* are introduced at trial, habeas relief is not available if the error was harmless. *See Ghent v. Woodford*, 279 F.3d 1121, 1126 (9th Cir. 2002). A habeas petitioner is not entitled to habeas relief unless the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993).

2. Background

a. Petitioner's Statements in Brenner's Office

The prosecution filed a motion to admit Petitioner's statements to Officer Castaldo. Petitioner opposed it. (4 CT 899-909, 914-20.). The prosecution argued that *Miranda* advisements were not required because the officers were merely trying to determine whether a crime had been committed or whether Petitioner needed to be detained based on a "5150 hold."[3] (4 RT 6934-35.) The trial court decided that it needed to hear from Officer Castaldo. (4 RT 6937.) READ 911 TRANSCRIPT !

Castaldo testified that on October 26, 2011, around 1:35 p.m., he "received a radio call regarding a subject claiming to his anger management person that he may have killed someone." (4 RT 7204.) He arrived at Brenner's officer with another officer and a third officer arrived later. (4 RT 7204-05.) Castaldo approached Petitioner with the intention of performing a mental health evaluation. (4 RT 7205.) He patted Petitioner down for weapons, handcuffed him, and sat down next to him to have a conversation. (4 RT 7205.) The conversation lasted between 11 and 15 minutes. (4 RT 7207.) Petitioner was crying but answered questions. (4 RT 7207.) He was not threatened at any point and was offered water. (4 RT 7208.) He gave Castaldo the victim's address, and Castaldo sent the police, fire department and paramedics to the location. (4 RT 7207.) After Castaldo was informed that a murder had been committed, he ceased questioning

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[3] A "5150 hold" refers to a detention upon probable cause to believe that a person is a danger to himself or others. Cal. Welf. & Inst. Code § 5150.

Petitioner. (4 RT 7207.)

On cross-examination, Castaldo testified that he always handcuffs the subjects of a mental health evaluation and that Petitioner was handcuffed the entire time. (4 RT 7210.) Castaldo denied groping Petitioner's genitals during the pat-down. (4 RT 7212-13.) He testified that Petitioner was not free to leave and that he would have stopped him if Petitioner had tried. (4 RT 7219.)

After hearing argument from the prosecutor and Petitioner (4 RT 7220-24), the trial court ruled that *Miranda* advisements were not required and Petitioner's statements to Castaldo would be admitted. Although Petitioner was detained, there was no interrogation regarding a known crime; rather, the officer was trying to determine whether a crime had been committed. (4 RT 7224-27.)

Castaldo testified before the jury that Petitioner told him that he used his key to the victim's apartment to let himself in that morning, and that he and the victim argued. (4 RT 7300-01.) Petitioner said, "I think I killed my girlfriend" and "I think I cut my girlfriend's throat with a knife." (4 RT 7301.) Petitioner gave the police his key to the victim's apartment and they used the key to enter. (4 RT 7302.) After Castaldo learned that a dead body was found in the apartment, he did not ask further questions. (4 RT 7302.)

There was no testimony that Petitioner ever requested to have counsel present. Petitioner did not question Castaldo about a request for counsel and he did not argue to the trial court at the *Miranda* hearing that he had requested counsel.

b. Petitioner's Statements in Beverly Hills Police Station

Officer Daniel Chilson testified at the preliminary hearing that Petitioner was given *Miranda* warnings by Detective Elwell before he was questioned at the Beverly Hills police station. (1 CT 180-81.) Petitioner's statements to Detective Elwell were not introduced at trial. (4 RT 6909-10.) Neither Elwell nor Chilson testified at trial.

3. Analysis

Castaldo questioned Petitioner in Brenner's office after Brenner informed the police that Petitioner had said that he may have killed someone. (4 RT 7204.) The purpose of

the questioning was to determine whether Petitioner was suffering a mental breakdown and posed a danger to himself or others, or whether a murder had actually occurred. (4 RT 7204, 7206-07.) Although Petitioner was handcuffed and was not free to leave (4 RT 7210, 7219), these factors are not determinative. *See Howes*, 565 U.S. at 509; *United States v. Butler*, 249 F.3d 1094, 1098 (9th Cir. 2001) ("The case books are full of scenarios in which a person is detained by law enforcement officers, is not free to go, but is not 'in custody' for *Miranda* purposes."); *United States v. Booth,* 669 F.2d 1231, 1236 (9th Cir. 1981) ("Handcuffing a suspect does not necessarily dictate a finding of custody.") The questioning lasted less than 15 minutes. (4 RT 7207.) It took place in the office of Petitioner's therapist, who was present. (4 RT 7206.) Petitioner was offered water and was not threatened. (4 RT 7207-08.) Petitioner was crying and Castaldo tried to calm him. (4 RT 7207.) After Castaldo learned that there had in fact been a murder at the address given by Petitioner, he did not question Petitioner further. (4 RT 7207.)

Viewed in their entirety, the circumstances surrounding the questioning were not sufficiently coercive to trigger *Miranda*. *See Berkemer*, 468 U.S. at 439-40. Rather, the encounter was akin to an investigatory stop in which an officer asks "a moderate number" of questions to determine whether a crime occurred. *Id.*; *see also Miranda*, 384 U.S. at 477–78.

Furthermore, even assuming a *Miranda* violation, it was harmless. As discussed in connection with Ground One, there was overwhelming evidence of Petitioner's guilt in addition to his statements to Castaldo. This evidence included Petitioner's incriminating statements to his brother, his son, and his therapist, the proximity of his car and cellphone to the crime scene at the time of the crime, and prior statements made by him to coworkers and in his journal. There is no reasonable likelihood that the jury would have returned a more favorable verdict if Petitioner's statements to Castaldo had been excluded. *Brecht*, 507 U.S. at 637.

As for Petitioner's contention that Officer Elwell failed to give *Miranda* warnings before interrogating him and refused his requests for counsel, Petitioner's post-arrest

statements were not introduced at trial. (*See* 4 RT 6910.) Moreover, Officer Chilson testified at the preliminary hearing that Petitioner was given his *Miranda* advisements and agreed to speak to the officers. (1 CT 180-81.)

Petitioner contends that videos of his interrogation at the police station were destroyed to conceal *Miranda* violations and abusive conduct by Elwell, but he has not come forward with evidence that any such video existed.[4] *See James*, 24 F.3d at 26 (conclusory allegations unsupported by facts insufficient). Moreover, Petitioner has not shown that video (if it existed) had exculpatory value that he could not present by other means. *See California v. Trombetta*, 467 U.S. 479, 489 (1984) (government's failure to preserve evidence violates due process if unavailable evidence possessed "exculpatory value that was apparent before the evidence was destroyed, and [was] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means").

Accordingly, Ground Three does not warrant federal habeas relief.

D. GROUND FOUR: Impeachment of Witnesses; Trial Court's Comments

Petitioner contends that the trial court denied his Sixth and Fourteenth Amendment right to impeach six prosecution witnesses. (Pet. at 11, 27-28.) Petitioner also contends the trial judge falsely told the jury that he needed to finish the trial before his son's wedding when he was actually planning to retire. (*Id.* at 28.)

The court looks through the silent denials of this claim by the California Supreme Court (LD 18) and the California Court of Appeal (LD 14) to the reasoned decision of the Superior Court, which denied it for procedural reasons (LD 12). In the interests of judicial economy, the court will proceed to the merits without addressing Respondent's argument that the claim is in part procedurally defaulted. *See Lambrix*, 520 U.S. at 525; *Franklin*,

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[4] Petitioner contends that prosecutor Amy Carter "testified" to the existence of the videos at the "October 2013 hearing." (Pet. at 24.) Carter was the prosecutor at the preliminary hearing, which took place on November 5 and 6, 2013, but there is no reference to videos of the interrogation in the preliminary hearing transcript. (1 CT 33-211; 2 CT 212-355.) There is some indication that there was an audio recording; Chilson referred to the transcript during the preliminary hearing. (*See, e.g.*, 1 CT 183-84, 193.)

290 F.3d at 1232. Because the Superior Court did not reach the merits, the court applies *de novo* review. *See Cone*, 556 U.S. at 472; *Lewis*, 391 F.3d at 996.

1. Applicable Federal Law

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. "Confrontation means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Id.* at 315-16 (internal quotation marks and citation omitted). On the other hand, the Confrontation Clause does not prevent a trial judge from imposing "reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

A defendant bears the burden of showing that "he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness," and that "[a] reasonable jury might have received a significantly different impression of [the witness]'s credibility had [defendant]'s counsel been permitted to pursue his proposed line of cross-examination." *Id.* at 680. Improper denial of the opportunity to impeach a witness is subject to harmless error analysis. *Id.* at 684.

2. Analysis

Petitioner contends that his confrontation rights were violated because he was denied the right to impeach six prosecution witnesses "for giving perjured testimony; falsifying credentials; tampering with evidence; utilizing a deceased person to be solicited as a witness."[5] (Pet. at 27.) Petitioner claims the trial court told him that he could not

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[5] As previously noted, Ground Two includes a confrontation claim. Petitioner contends that his confrontation rights were violated because he did not have an opportunity to confront Montez and expose him as the real murderer. (Pet. at 20.) Petitioner did not have a right to confront Montez because Montez was not a witness against him. *See* U.S. Const. amend. VI.

impeach the state's witnesses because they were not his witnesses. (*Id.*)

Petitioner does not identify the six prosecution witnesses at issue. The record shows that Petitioner had an opportunity to cross-examine each prosecution witness: Jamie Grauman (4 RT 7262-67); Martin Brenner (4 RT 7277-93); Officer Gary Castaldo (4 RT 7302-13, 7317-18); Officer Eric Olson (4 RT 7332-47); Dennis DeFrange (5 RT 7510-16); Officer Richard Billingsley (5 RT 7521-28); Jeannine Cascadden (5 RT 7574-7604); Travis Grzeslo (5 RT 7613-14); Thomas Grzeslo (5 RT 7625-35); Linda Cherry (5 RT 7805 [Petitioner said he had no questions]); Sergeant Marcia De Anda (5 RT 7812-14); Segalit Oz (5 RT 7822-26); Detective Eric Hyon (5 RT 7855-71); Dr. Job Augustine (5 RT 7895-7913); Detective Ryan Thompson (5 RT 7933); Marcia Lang (6 RT 8112-25); Zandra Miller (6 RT 8134-38); Michelle Carte (6 RT 8152-62); Charles Yancy (6 RT 8169-74); Tarpon London (6 RT 8181-95); Detective Christopher Coulter (6 RT 8218-31, 8406-12); and Paul Delhauer (6 RT 8489-8537). During Petitioner's cross-examination, the trial court sustained some objections by the prosecutor and overruled others. Petitioner does not identify any specific line of cross-examination he wished to pursue that the trial court prevented him from pursuing. *See Van Arsdall*, 475 U.S. at 680. The record does not substantiate his contention that the trial court told him that he could not impeach prosecution witnesses.[6] On the contrary, the record shows that the trial court allowed Petitioner considerable latitude in cross-examination. Petitioner has not shown any confrontation violation.

Petitioner also contends that the trial judge lied about needing time off for his son's wedding when he was actually retiring. (Pet. at 28.) The record shows that before jury selection started, the trial judge told Petitioner and the prosecutor that the court might be dark for four days in August because his son was getting married. (3 RT 5756.) Shortly

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[6] At the hearing on his motion for a new trial, Petitioner contended that he was prevented from impeaching Brenner, Castaldo, Delhauer and Coulter, but he was unable to explain how. (7 RT 9614-21.) The trial judge expressed disbelief that after 25 years on the bench he would have made a statement such as "you can't impeach a witness because he's not your witness." (7 RT 9620-21.)

afterwards, the trial judge made a joking reference to his retirement date. (3 RT 5757.) In his comments to the prospective jurors, the judge mentioned that he would soon be retired. (4 RT 6340.) When asked whether not having the court in session on certain dates made it more likely that the trial would continue into September, the trial judge said that it had "better not" because he would be retired, and explained that the days off were due to his son getting married (4 RT 6342-43). In his concluding remarks to the jury, the trial judge said that he was retiring as of September 2. (7 RT 9387.) At sentencing, the trial judge told Petitioner that he had retired on September 2 and was handling the matter on special assignment. (7 RT 9641.) Nothing in the record suggests that the trial judge made false statements about his son's wedding or concealed his impending retirement, nor has Petitioner explained how he was prejudiced.

Accordingly, Ground Four does not warrant federal habeas relief.

E. Evidentiary Hearing

Petitioner requests an evidentiary hearing. "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing would enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Petitioner has not alleged facts that, if true, would entitle him to federal habeas relief. For the claims that are subject to AEDPA deference, habeas review "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). As to all claims, an evidentiary hearing is not required when, as here, the issues can be resolved by reference to the state record. *Schriro*, 550 U.S. at 474 ("if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing").

V.

RECOMMENDATION

The Magistrate Judge therefore recommends that the Court issue an order: (1)

approving and adopting this Report and Recommendation; and (2) directing that judgment be entered denying the Petition on the merits with prejudice.

DATED: February 26, 2021

Alicia G. Rosenberg

ALICIA G. ROSENBERG
United States Magistrate Judge