No.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN RUSSELL,

Petitioner

v.

PATRICK COVELLO, Warden,

Respondent

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

APPENDIX

STEPHANIE ADRAKTAS
Attorney for Petitioner
2625 Alcatraz Avenue, #233
Berkeley, CA 94705
(415) 699-1507
CJA Appointed Counsel for Petitioner

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN C. RUSSELL, Petitioner-Appellant, v. PATRICK COVELLO, Respondent-Appellee.	No. 21-55992 D.C. No. 2:19-cv-01838-DSF-ADS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted March 17, 2023
Pasadena, California

Before: LEE, BRESS, and MENDOZA, Circuit Judges.

In 2014, Petitioner John C. Russell was found guilty, in California state court, of the cold-case murder of Alma Zuniga, who was raped and killed in 1979. Russell appeals the district court's order denying his petition for habeas corpus brought pursuant to 28 U.S.C. § 2254. The district court issued a certificate of appealability on four issues. We have jurisdiction pursuant to 28 U.S.C. §§ 1291

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

and 2253, and we affirm.

We review de novo a district court's denial of a § 2254 petition. *Balbuena v. Sullivan*, 980 F.3d 619, 628 (9th Cir. 2020). We review a § 2254 habeas petition under the "highly deferential standard for evaluating state-court rulings." *Id.* (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). A federal court may only grant habeas relief if the state court's ruling was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). Where, as here, the state supreme court decision summarily denies the petition for review, we "look through" the unexplained decision to the last reasoned state court decision. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

1. First, Russell argues his right to due process was violated when the trial court failed to properly determine the admissibility of certain scientific evidence. In *People v. Kelly*, 549 P.2d 1240 (Cal. 1976), the California Supreme Court set forth the three-prong test California trial courts use to analyze the admissibility of new scientific techniques, sometimes referred to as the *Kelly-Frye* formulation. *People v. Smith*, 132 Cal. Rptr. 2d 230, 233–34 (Ct. App. 2003) (quotation omitted). In his petition, Russell argues the state trial court erred when it failed to

conduct a pre-trial *Kelly-Frye* hearing as to (1) whether the DNA testing methods were generally accepted in the scientific community under prong one of *Kelly*, and (2) whether correct scientific procedures were used to apply a valid scientific technique under prong three of *Kelly*.

Russell has failed to establish he is entitled to federal habeas relief on either ground. The *Kelly-Frye* test is a California state law standard. *See People v. Leahy*, 882 P.2d 321, 323 (Cal. 1994). Under California law, "[e]vidence obtained by use of a new scientific technique is admissible only if the proponent of the evidence establishes at a hearing (sometimes called a first prong *Kelly* hearing) that the relevant scientific community generally accepts the technique as reliable." *People v. Cordova*, 358 P.3d 518, 536 (Cal. 2015). "However, proof of such acceptance is not necessary if a published appellate opinion affirms a trial court ruling admitting evidence obtained through use of that technique . . . ." *Id.*

The state court determined the technique Russell challenged was not the proper subject of a first-prong *Kelly* hearing because the PCR-STR technology at issue had already been approved in *People v. Henderson*, 132 Cal. Rptr. 2d 255, 268 (Ct. App. 2003). Thus, habeas relief is inappropriate because this court is bound by the state court's holding. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam) ("[A] state court's interpretation of state law . . . binds a federal court sitting in habeas corpus."). Although Russell argues the state court erred in relying

upon *Henderson*, "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quotation omitted). Moreover, Russell failed to identify any clearly established federal law, as determined by the Supreme Court, that the state court acted "contrary to" or "unreasonab[ly] appli[ed]." 28 U.S.C. § 2254(d)(1); *see Wright v. Van Patten*, 552 U.S. 120, 125–26 (2008) (per curiam) (where no decision of the Supreme Court "squarely addresses" an issue or provides a "categorical answer" to the question before the state court, AEDPA bars relief).

Russell's argument also fails as to *Kelly*'s third prong, which "inquires into the matter of whether *the procedures actually utilized in the case* were in compliance with that methodology and technique, as generally accepted by the scientific community." *People v. Venegas*, 954 P.2d 525, 545 (Cal. 1998). "The third-prong inquiry is thus case specific; it cannot be satisfied by relying on a published appellate decision." *Id.* (citations and internal quotation marks omitted).

Here, the trial court made a case-specific inquiry, and the state appellate court affirmed the denial of the motion for the third-prong *Kelly* hearing. As in prong one inquiries, this court must give deference to the state court's determination of state law. *Richey*, 546 U.S. at 76. This court is bound by the state court's conclusion that the trial court was entitled to credit the prosecution's expert's declaration, and that admission of the DNA evidence was permissible

under state law, even if the appellate court misapplied its own laws. *See id.*; *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam). Moreover, a petitioner cannot simply append "due process" to the end of what is otherwise a challenge to a state law ruling to federalize the error. *See McGuire*, 502 U.S. at 67–68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Russell failed to establish that his due process rights were violated, and habeas relief is inappropriate. That is especially so considering that Russell had ample opportunity to question the reliability of the prosecutions' expert evidence and introduce his own competing expert at trial.

2. Next, Russell argues the California Court of Appeal unreasonably applied federal constitutional law and unreasonably determined the facts when it held that the trial court properly excluded evidence that, according to Russell, suggests that Zuniga was murdered by a third party. Again, Russell's argument fails.

The exclusion of certain types of critical evidence may violate a defendant's due process rights if it deprives the defendant of "a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). States, however, "have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (per curiam) (quotation omitted).

Assuming Russell's challenge to the state courts' application of state

evidentiary rules implicates the U.S. Constitution, he still failed to demonstrate that the state court unreasonably applied clearly established law, as determined by the Supreme Court. *Id.* at 509. At trial, Russell did not have an automatic, guaranteed right to present all possible evidence, however speculative, accusing someone else of the crime. *Lunbery v. Hornbeak*, 605 F.3d 754, 762 (9th Cir. 2010) (recognizing that a defendant "does not have an 'unfettered right' to present any evidence he or she wishes" (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1988))).

And as both the district court and state appellate court noted, the trial court's denial of certain evidence implicating a third party did not completely preclude Russell from offering evidence that a third party killed Zuniga. It is not a question of whether we would have allowed the disputed evidence to be admitted. Instead, the state court's thorough analysis, as a matter of both California law and on the facts, was not an unreasonable application of *Chambers v. Mississippi*.

Moreover, even if a state court's evidentiary decision is contrary to or an unreasonable application of clearly established federal law, habeas relief is not automatic. Rather, the claim is still reviewed under a harmless error standard, where "an error is harmless on collateral review unless it results in 'actual prejudice,'" that is, if it has a "substantial and injurious" effect on the verdict. *Mays v. Clark*, 807 F.3d 968, 980 (9th Cir. 2015) (quoting *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015)); *see also Brecht v. Abrahamson*, 507 U.S. 619, 637

(1993). Habeas relief is proper when "the record is so evenly balanced that a 'conscientious judge is in grave doubt as to the harmlessness of an error.'" *Gautt v. Lewis*, 489 F.3d 993, 1016 (9th Cir. 2007) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 438 (1995).

Here, Russell was able to introduce certain evidence implicating a third party, including testimony that on the night of the crimes, (1) Zuniga and a man had an argument about the man's smoking at the café counter, (2) the man was "kind of aggressive," (3) when the man got up, a gun fell out of his boot, and (4) the man resembled a person known to have known Zuniga. From this testimony, Russell's counsel argued to the jury that on the night she was killed, Zuniga had a hostile encounter with a man she knew, a man who was armed with a gun. Applying *Brecht*'s harmless error standard, Russell's third-party culpability evidence, in contrast with the other significant evidence of his guilt, does not raise "grave doubt[s]" about his conviction. *Id.* at 1016.

3. Finally, Russell argues cumulative error warrants granting the writ of habeas corpus. Russell's individual allegations of error, however, are unmeritorious, and therefore his cumulative error argument necessarily fails. *United States v. Jeremiah*, 493 F.3d 1042, 1047 (9th Cir. 2007).

4. Russell's request for judicial notice (Dkt. No. 36) is denied as moot.

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN C. RUSSELL, Petitioner, v. PATRICK COVELLO, Warden, Respondent.	Case No. 2:19-01838 DSF (ADS) JUDGMENT

Pursuant to the Court's Order Accepting Report and Recommendation of United States Magistrate Judge and Dismissing Case, IT IS HEREBY ADJUDGED that the above-captioned case is dismissed with prejudice.

DATED: August 24, 2021

Honorable Dale S. Fischer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN C. RUSSELL, Petitioner, v. PATRICK COVELLO, Warden, Respondent.	Case No. 2:19-01838 DSF (ADS) ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE AND DISMISSING CASE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, Respondent's Answer, Petitioner's Traverse, and all related filings, along with the Report and Recommendation of the assigned United States Magistrate Judge dated April 29, 2021 [Dkt. No. 16], and Petitioner's Objections to Magistrate's Report and Recommendation ("Objections") [Dkt. Nos. 19 and 20]. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made.

Petitioner's objections are overruled. Accordingly, IT IS HEREBY ORDERED:

1. The United States Magistrate Judge's Report and Recommendation [Dkt. No. 16] is accepted;
2. The request for an evidentiary hearing [Dkt. No. 20, p. 1] is denied;
3. The Petition is denied and this action dismissed with prejudice; and
4. Judgment is to be entered accordingly.

DATED: August 24, 2021

Honorable Dale S. Fischer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN C. RUSSELL, Petitioner, v. PATRICK COVELLO, Warden, Respondent.[1]	Case No. 2:19-01838 DSF (ADS) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dale S. Fischer, 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. For the reasons

[1] Since the filing of the Petition, which alleged Felix Vasquez as Petitioner's custodian at Mule Creek State Prison, Patrick Covello became the Warden of that institution. [Dkt. No. 14, p. 1]. Accordingly, the Court directs the Clerk of the Court to update the case caption to reflect Covello as the correct Respondent. See Fed. R. Civ. P. 25(d); R. 2, Rs. Governing § 2254 Cases in U.S. Dist. Cts.; Rumsfeld v. Padilla, 542 U.S. 426, 435-36 (2004).

discussed below, the Petition for Writ of Habeas Corpus should be denied and the action dismissed with prejudice.

I. INTRODUCTION

On March 13, 2019, John C. Russell ("Petitioner"), a prisoner in state custody, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition"), alleging three evidentiary claims and cumulative prejudice regarding his conviction for a cold-case murder, and a fifth claim challenging a restitution order. [Dkt. No.[2] 1]. On October 10, 2019, the Court granted Petitioner's request to dismiss his fifth claim as moot. [Dkt. Nos. 6, 7]. On November 20, 2019, Respondent filed an Answer to the Petition along with a Memorandum of Points and Authorities, and lodged relevant portions of the state court record. [Dkt. Nos. 11, 12]. On December 6, 2019, Petitioner filed a "Declaration and Response to Respondent's Answer," which the Court deems as his Reply. [Dkt. No. 14]. Thus, the matter is ready for decision.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

After an independent review of the record, the Court adopts and restates here the factual background from the California Court of Appeal's ("Court of Appeal") opinion. [Dkt. No. 12-19, Lodged Document ("LD") 9, pp. 2-7; Dkt. No. 12-21, LD 11.][3]; People v. Russell, No. B262474, 2017 WL 2333983, *1-3 (Cal. Ct. App. May 30, 2017) (as modified June 28, 2017).[4]

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[2] All citations to electronically filed documents refer to the CM/ECF pagination.

[3] See Crittenden v. Chappell, 804 F.3d 998, 1011 (9th Cir. 2015) (finding that a state court's factual findings are presumed correct unless "overcome . . . by clear and convincing evidence"); 28 U.S.C. § 2254(e)(1).

[4] For ease of reference, the Court cites to the Court of Appeal's opinion found at Russell, 2017 WL 2333983, which incorporates the appellate court's modifications upon denial of

I.
Prosecution

A. The Murder

On the night of March 10, 1979, 23-year-old Alma Zuniga ["Zuniga" or "the victim"] went to a nightclub in Oxnard with her friends Christine Oregon and Sergio Valdez. At about 2:00 a.m., they left the club and went to the Army Navy Café on Fifth Street. At about 2:30 a.m., Oregon and Valdez walked Zuniga to her car and watched her drive away and turn left on Oxnard Boulevard at its intersection with Fifth Street.

Shortly before 3:00 a.m., Zuniga stopped at a phone booth and called her ex-husband Enrique Zuniga at his home in Oklahoma. During the conversation, Enrique heard the phone booth door open and Zuniga scream and yell that someone was hitting her. Enrique also heard Zuniga say "that guy came back," then heard the phone booth door close. Enrique immediately reported the incident to the Oxnard Police Department.

Bonnie Winters lived by a lemon orchard in the area of Rose Avenue and Simon Way in Oxnard. Sometime between 2:00 and 3:30 a.m. that morning, Winters was awakened by the sound of a car engine idling in the orchard. An hour or so later, she heard two "pops" in quick succession.

At about 10:00 a.m. that morning, a man who lived on the lemon orchard notified the police he had discovered a dead body. The burial site was approximately 83 feet from the road and was partially obscured by an old bed spring and a corrugated metal water tank. The body was buried but a hand was protruding from the ground. Zuniga was subsequently identified as the victim. Her bra, blouse, and jacket were pulled above her chest and she was nude from the waist down except for stockings and shoes. Her pants, a beer bottle, and a coin purse containing $99 were buried next to her. Her underwear was found on top of the water tank and a receipt bearing her name was found nearby.

Two expended .22-caliber casings and one unexpended .22-caliber bullet were found a short distance away and there were drag marks from that location to the burial site. It was subsequently determined that the casings and bullet came from the same gun. The condition of the front outer portion of Zuniga's underwear was consistent with her having been dragged on the front of her body. Cast impressions were made of shoeprints found near the burial site.

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rehearing, through the remainder of this Report. See [Dkt. No. 12-21, LD 11].

Zuniga had gunshot wounds to her right temple and her jaw and had a stab wound in her lower back that penetrated about nine inches into her liver. The gunshot wounds were consistent with wounds that would be inflicted by a .22-caliber firearm. There were also abrasions on Zuniga's face and the front and back of her body. A rape kit was prepared during the autopsy and was booked into evidence.

Zuniga's car was found parked in front of a business on the 700 block of South Oxnard Boulevard. There was blood on the passenger seat and passenger side of the car. Part of an expended .22-caliber bullet was found on the rear floorboard.

B. [Deoxyribonucleic acid ("DNA")] Evidence

In September 2004, an attorney informed the Ventura County Sheriff's Department that his client had information about an unsolved homicide of a prostitute who had been buried in the area of Rose Avenue in Oxnard 25 to 30 years earlier.[5] Based on that information, Zuniga's rape kit was submitted for DNA analysis. The Ventura County Sheriff's Department Forensic Sciences Laboratory (the crime lab) analyzed the rape kit and obtained a single-source male DNA profile from the sperm fraction of a vaginal swab. The profile was entered into the Combined DNA Index System (CODIS), a national database that allows users to match an unknown profile with the profile of individuals in the system. The CODIS search identified a match with [Petitioner]'s DNA profile. The crime lab subsequently used an "IdentiFiler" DNA testing kit, which uses a polymerase chain reaction/short term tandem repeat (PCR-STR) testing methodology, to verify the match.

The crime lab also used the IdentiFiler DNA testing kit to analyze a cutting taken from the crotch of Zuniga's underwear. The lab obtained a partial DNA mixture profile from at least four donors, but the sperm fraction of the mixture was so low that only part of the DNA was observable. Male DNA was also found in the non-sperm fraction, but the mixture was of such a low level that the results were otherwise inconclusive.

The vaginal swab, the cutting from Zuniga's underwear, and the crotch of Zuniga's pants were subsequently tested by Emily Jeskie of Sorenson Forensics (Sorenson), a private laboratory in Utah. Jeskie used the "MiniFiler," a DNA testing kit that is more sensitive than the IndentiFiler kit used by the crime lab. Jeskie determined that the sperm fraction obtained from the vaginal swab contained at least three contributors and that the major DNA profile matched [Petitioner]. Of the two donors of the

[5] Zuniga told Oregon she engaged in prostitution.

epithelial fraction obtained from the vaginal swab, [Petitioner] matched the male donor profile and Zuniga matched the female donor profile.

In analyzing the crotch of Zuniga's pants and the cutting taken from her underwear, Jeskie found that both samples had a mixture of DNA from a minimum of three donors. [Petitioner]'s profile was excluded as being one of the donor profiles from both the epithelial and sperm fractions of the samples. Jeskie subsequently analyzed another cutting taken from the crotch of Zuniga's underwear. The epithelial fraction obtained from this sample had a mixture of DNA profiles from at least three donors, at least one of which was genetically typed as a male. [Petitioner] was excluded as a donor. The sperm fraction had a mixture of DNA profiles from at least two donors, at least one of which was male. The results were otherwise inconclusive.

C. [Petitioner]'s Statements and the Investigation

On July 26, 2012, two investigators from the Ventura County Sheriff's Department contacted [Petitioner] in Bakersfield. [Petitioner] admitted (and records verified) that at the time of the murder he lived in Oxnard on Dallas Drive, just off of Rose Avenue. When shown photographs of Zuniga, [Petitioner] denied knowing her and denied that he ever had any sexual contact with her. He refused to provide a DNA sample and was arrested.

[Petitioner] was subsequently interviewed at the Ventura County Jail. A video recording of the interview was played at trial. One of the investigators began by telling [Petitioner] Zuniga had been abducted from a phone booth in downtown Oxnard at 3:00 a.m. and taken to Rose Avenue, where she was raped, murdered, and buried. [Petitioner] was also told his DNA had been found in Zuniga's body. [Petitioner] again denied knowing Zuniga and said he had nothing to do with her murder. He stated, "if you're telling me my DNA is, is in this woman and I never seen [sic] this woman before, never met this woman before, never buried her in some shallow grave before, never took her from J Street[.]" After one of the investigators pointed out that no one had said Zuniga was taken from J Street, [Petitioner] continued, "Wherever you said she was from, taking her—I'd remember that[.] I'd know I did that. Ain't none [sic] of that happened and so for you to tell me my DNA is in her, a setup is jumping off here."

[Petitioner]'s residence was also searched the day of his arrest. The police seized three pairs of men's shoes and compared them with the casts of the shoeprints found at the crime scene. Two pairs of the shoes, sized 12 and 13, were very similar in size to the cast impressions.

II.
Defense

> [Petitioner] did not testify. His primary defense was that he had consensual sex with Zuniga but that someone else stabbed, kidnapped, raped, and murdered her. In support of that defense, he offered his post-arrest statements along with expert testimony disputing the prosecution's expert testimony that [Petitioner]'s DNA was not found on the crotch of Zuniga's pants or the first cutting from her underwear.
>
> Mark Taylor, the president and director of Technical Associates, a private DNA testing laboratory, opined that the results of the subject tests should have been deemed inconclusive given the complexity and degraded quality of the samples. Taylor performed his own tests on the samples and found the results to be inconclusive. He did not, however, disagree with the results that included [Petitioner] as a major contributor of the DNA found on the vaginal swab.

Russell, 2017 WL 2333983 at *1-3.

A jury convicted Petitioner of first-degree murder (Cal. Penal Code §§ 187, 189), and found true allegations that he (1) personally used a firearm and a dangerous and deadly weapon in committing the offense (id., §§ 12022(b), 12022.5(a)(1) & (2)), and (2) the murder was willful, deliberate, and premeditated and was committed during the commission of a kidnapping (id., former § 190.2(c)(3)(ii) and rape (id., former § 190.2(c)(3)(iii). [Dkt. No. 12-5, LD 1, pp. 25-26, 29]; Russell, 2017 WL 2333983 at *1. The court sentenced Petitioner to prison for a term of life without the possibility of parole, plus three years. [Id., pp. 52-53, 55-56].

Petitioner appealed to the California Court of Appeal. [Id., p. 57; Dkt. No. 12-15, LD 5; Dkt. No. 12-16, LD 6; Dkt. No. 12-18, LD 8]. The appellate court ordered Petitioner's restitution fine stricken, corrected the abstract of judgment to impose a court facilities fee, but otherwise affirmed the judgment of conviction. Russell, 2017 WL 2333983 at *1, *11. Petitioner petitioned the California Supreme Court for review. [Dkt.

No. 12-22, LD 12]. On September 13, 2017, that court summarily denied review. [Dkt. No. 12-23, LD 13].

On August 22, 2018, Petitioner filed a habeas petition in the Ventura County Superior Court challenging his underlying conviction. [Dkt. No. 12-24, LD 14, p. 69; Dkt. No. 12-25, LD 15]. On August 24, 2018, the superior court denied the petition in a reasoned order explaining: (1) nearly every argument presented had been previously raised and rejected on direct appeal, citing In re Waltreus, 62 Cal. 2d 218, 225 (1965); (2) those arguments not made on appeal could have been, citing In re Dixon, 41 Cal. 2d 756, 759 (1953); (3) to the extent Petitioner challenged the sufficiency of the evidence, such a claim was not permitted on state habeas corpus, citing id.; and (4) on the merits of his ineffective-assistance-of counsel claims, Petitioner failed to allege a prima facie showing of either deficient performance or prejudice, citing People v. Duvall, 9 Cal. 4th 464, 474 (1995), Strickland v. Washington, 466 U.S. 668, 684 (1984), and related cases. [Dkt. No. 12-26, LD 16].

On September 10, 2018, Petitioner filed in the California Court of Appeal a habeas petition realleging substantially similar grounds he raised in the superior court petition. [Dkt. No. 12-27, LD 17]. On September 19, 2018, the state appellate court denied the petition without comment or citation to authority. [Dkt. No. 12-28, LD 18].

On October 15, 2018, Petitioner filed in the California Supreme Court a habeas petition realleging substantially similar grounds he raised in the prior habeas petitions. [Dkt. No. 12-29, LD 19]. On March 13, 2019, the state supreme court denied the petition with citations and parentheticals explaining (1) Petitioner failed to include copies of reasonably available documentary evidence, citing Duvall, 9 Cal. 4th at 474; (2) courts will not entertain habeas claims that could have, but were not, raised on appeal, citing Dixon,

41 Cal. 2d at 759; (3) courts will not entertain habeas claims attacking the sufficiency of the evidence, citing In re Lindley, 29 Cal. 2d 709, 723 (1947). [Dkt. 12-30, LD 20].

Meanwhile, somewhat concurrently with his unsuccessful pursuit of state habeas relief, Petitioner sought DNA testing under California Penal Code §§ 1405, 1405.1. First, on July 16, 2018, he moved for DNA testing in the Ventura County Superior Court. [Dkt. No. 12-31, LD 21]. On August 1, 2018, the superior court denied the motion in a reasoned order on grounds that: (1) it was missing information; (2) it was not properly verified or served on the proper entities; (3) Petitioner made an insufficient attempt to meet the statutory requirements, including identifying the evidence to be tested, articulating the specific type of DNA testing sought, or explain how the requested testing would raise a reasonable probability that his verdict or sentence would have been more favorable if the results had been available at the time of conviction, among other criteria. [Dkt. No. 12-32, LD 22].

On September 12, 2018, Petitioner filed in the superior court a motion for reconsideration of the denial of his motion for DNA testing. [Dkt. No. 12-33, LD 23, 7-20]. On September 19, 2018, the superior court denied the motion for reconsideration in a reasoned order, noting that extensive DNA testing had already been conducted in Petitioner's case, and his arguments regarding third-party culpability had already been rejected at trial and on appeal. [Id., p. 20].

On October 24, 2018, Petitioner filed a habeas petition in the California Court of Appeal challenging the superior court's denial of his motion for reconsideration of the denial of his motion for DNA testing. [Dkt. No. 12-33, LD 23]. On November 9, 2018, the state appellate court treated the filing as a petition for writ of mandate and denied it. [Dkt. No. 12-34, LD 24].

On November 19, 2018, Petitioner filed in the California Supreme Court a petition for review challenging the Court of Appeal's denial of his petition for writ of mandate.[6] On January 2, 2019, the state supreme court denied review without comment. [Dkt. No. 12-35, LD 25].

III. PETITIONER'S GROUNDS FOR RELIEF

The Petition raises the following grounds for relief[7]:

1. The trial court prejudicially erred in violation of state law by allowing admission of DNA testing evidence without holding a required Kelly[8] prong-one hearing, which violated Petitioner's due process rights because the testing methods were not approved by the DNA scientific community;

2. The trial court prejudicially erred in violation of state law by allowing admission of DNA testing evidence without holding a required Kelly prong-three hearing, which violated Petitioner's due process rights because the DNA evidence was not reliable according to the DNA scientific community;

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[6] Neither party was able to provide the Court with this petition. [Dkt. No. 11, p. 12 n.3]. The Court takes judicial notice of the state supreme court's docket at https://appellatecases.courtinfo.ca.gov/, to ascertain the petition's filing date and underlying challenged decision. See Fed. R. Evid. 201(b)(2); United States v. Raygoza-Garcia, 902 F.3d 994, 999 n.2, 1001 (9th Cir. 2018) (a court may take judicial notice of undisputed matters of public record, which may include court records and dockets available online).

[7] The Petition provides minimal argument and explanation regarding the claims Petitioner intends to raise. [Dkt. No. 1, pp. 5-6]. As Respondent has done, to which Petitioner accepts in the Reply [Dkt. No. 11, p. 18 n.6; Dkt. No. 14, p. 1], the Court considers Petitioner's claims to be those presented on direct appeal because he attaches his opening brief and the opinion on appeal. [Id., pp. 10-117]; cf. Ross v. Williams, 950 F.3d 1160, 1173 n.19 (9th Cir.) (noting that, under liberal construction of federal habeas petition, petitioner attempted to set out factual background of his claims by attaching state court order), cert. denied, 2020 WL 6551908 (U.S. Nov. 9, 2020).

[8] People v. Kelly, 17 Cal. 3d 24 (1976).

3. The trial court abused its discretion by excluding evidence that circumstantially linked a third-party to the murder and raised a reasonable doubt about Petitioner's guilt;

4. The cumulative prejudice from the trial court's errors violated Petitioner's rights under state law and the due process clause of the Fourteenth Amendment; and

5. [voluntarily dismissed].

[Dkt. No. 1, pp. 5-7; Dkt. No. 14, pp. 1-3].

IV. STANDARD OF REVIEW

The Court applies AEDPA in its review of this action because this Petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320, 336 (1997) (holding that amendments to AEDPA apply only to cases filed after AEDPA became effective). Under AEDPA, a federal court may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if 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.

28 U.S.C. § 2254(d). Overall, AEDPA presents "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, 571 U.S. 12, 19 (2013). AEDPA imposes a "'difficult to meet' and 'highly deferential' standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (internal citations omitted).

The petitioner bears the burden to show that the state court's decision "was so

lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). In other words, "a state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness" of that ruling. Id. at 101 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). Federal habeas corpus review therefore serves as a "guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Richter, 562 U.S. at 102-03 (internal quotations omitted).

In applying the foregoing AEDPA standards, federal courts look to the last reasoned state court decision and evaluate it based upon an independent review of the relevant portions of the state court record. Nasby v. McDaniel, 853 F.3d 1049 (9th Cir. 2017). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

Here, Petitioner's claims were denied on the merits by the California Court of Appeal in a reasoned opinion. The California Supreme Court later summarily denied relief. Therefore, the Court looks through the silent denial and applies the AEDPA standard to the Court of Appeal's decision as to his claims. See Ylst, 501 U.S at 804.

V. DISCUSSION

A. DNA Evidence (Grounds 1 & 2)

In Grounds 1 and 2, Petitioner claims the trial court prejudicially erred in violation of state law by allowing admission of DNA testing evidence without holding Kelly prong-one and -three hearings, which violated his due process rights because the testing methods were not approved by, or reliable according to, the DNA scientific community.

[Dkt. No. 1, pp. 5-6; Dkt. No. 14, pp. 1-2]. These claims are subject to a similar analysis under the same relevant law.

1. *Kelly* Hearings & Related State Law Provisions

The California Supreme Court in Kelly set forth the following "general principles of admissibility" for opinion testimony based on new scientific techniques:

> (1) [T]he reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case.

People v. Smith, 107 Cal. App. 4th 646, 652 (2003) (citations omitted).

"Evidence obtained by use of a new scientific technique is admissible only if the proponent of the evidence establishes at a hearing (sometimes called a first prong Kelly hearing) that the relevant scientific community generally accepts the technique as reliable." People v. Cordova, 62 Cal. 4th 104, 127 (2015). "However, proof of such acceptance is not necessary if a published appellate opinion affirms a trial court ruling admitting evidence obtained through use of that technique, at least until new evidence is admitted showing the scientific community has changed its attitude." Id.

The third prong of the Kelly test "assumes the methodology and technique in question has already met th[e general acceptance] requirement. Instead, it inquires into the matter of whether the procedures actually utilized in the case were in compliance with that methodology and technique, as generally accepted by the scientific community. People v. Venegas, 18 Cal. 4th 47, 78 (1998). "The third-prong inquiry is thus case specific; it cannot be satisfied by relying on a published appellate decision." Id. (citations and internal quotation marks omitted). Unlike the independent state appellate court review of a determination of general scientific acceptance under Kelly's first prong,

"review of a third prong determination on the use of correct scientific procedures in the particular case requires deference to the determinations of the trial court." Venegas, 18 Cal. 4th at 91.

2. Federal Law

The exclusion or admission of evidence under state evidentiary rules generally does not present a federal question. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (state evidentiary ruling does not give rise to a cognizable federal habeas claim unless the ruling violated a petitioner's due process right to a fair trial); Rhoades v. Henry, 638 F.3d 1027, 1034 n.5 (9th Cir. 2011) (same).

"[T]he Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process[,] and it has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009) (citation omitted). The Ninth Circuit has stated that "[a]bsent such 'clearly established Federal law,' we cannot conclude that [a] state court's ruling [on admission of evidence] was an 'unreasonable application.'" Id. (bracketed material added) (citing Carey v. Musladin, 549 U.S. 70, 77 (2006)). Consequently, where AEDPA's deferential standard applies to an admission-of-evidence claim, such a claim generally must fail because the state court's reasoning cannot be contrary to, nor an unreasonable application of, such nonexistent and un-established Supreme Court precedent. See, e.g., Spencer v. California, 512 F. App'x 682, 684-85 (9th Cir. 2013) (even if trial court admitted irrelevant or prejudicial evidence, federal habeas relief not warranted because as no Supreme Court authority has clearly established that the admission of such evidence violates due process).

Even assuming a cognizable evidentiary claim could be established, evidence introduced by the prosecution will often raise more than one inference, some permissible, some not; in such cases, a reviewing court must rely on the jury to properly apply inferences in light of the court's jury instructions. See Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005) (citing Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991)). "Admission of evidence violates due process '[o]nly if there are no permissible inferences the jury may draw' from it." Id. (quoting Jammal) (emphasis in original). Stated another way, "[t]he admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995) (citing McGuire).

Finally, even if a petitioner demonstrates error, habeas relief is only available where it had a "substantial and injurious effect or influence in determining the jury's verdict" and resulted in "actual prejudice." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Plascencia v. Alameida, 467 F.3d 1190, 1203 (9th Cir. 2006) (applying Brecht harmless error analysis to claim that admission of evidence was improper).

3. *Kelly* prong-one challenge (Ground 1)

(a). State Court Decision

In Petitioner's Kelly first-prong challenge, the state appellate court noted that he acknowledged "there is ample authority" to support the conclusion that the testing methodology used in his case (PCR-STR) had been generally accepted by the scientific community. Russell, 2017 WL 2333983 at *4 (citing Cordova, 62 Cal. 4th at 128; Smith, 107 Cal. App. 4th at 665). The state court further noted that Petitioner claimed, however, that none of that authority is relevant to his case "because none squarely addresses whether there is a generally accepted procedure for interpreting data produced by the

application of PCR-STR technology to degraded, low-level, complex mixtures." Russell, 2017 WL 2333983 at *4; [Dkt. No. 12-15, LD 5, p. 28]. The appellate court then rejected the claim as follows:

> But the referenced authority is both relevant and dispositive of [Petitioner]'s claim. It is well-settled that the use of PCR-STR technology "on a particular type of DNA sample does not constitute a different scientific technique. Rather, it involves a technique, which has gained general acceptance, as applied to particular set of circumstances." (People v. Henderson (2003) 107 Cal.App.4th 769, 786 (Henderson).) The inquiry thus "is not whether the procedure is generally accepted within the scientific community, but whether the approved procedure was followed correctly in this instance." (Ibid.)
>
> The defendant in Henderson sought a first-prong Kelly hearing to challenge the use of the capillary electrophoresis technique of DNA testing on a sample containing a mixture of DNA from two or more individuals. In concluding that no such hearing was required, the court reasoned that "[a]lthough capillary electrophoresis is a new technique for which first prong analysis is appropriate, capillary electrophoresis on a particular type of DNA sample does not constitute a different scientific technique. Rather, it involves a technique, which has gained general acceptance, as applied to a particular set of circumstances. DNA analysis of a mixed sample is more akin to the testing of a degraded or compromised sample. [[Emphasis] added, fn. omitted.] Under such circumstances, the relevant inquiry is not whether the procedure is generally accepted within the scientific community, but whether the approved procedure was followed correctly in this instance." (Henderson, supra, 107 Cal.App.4th at p. 786.) Other cases are in accord. (E.g., People v. Stevey (2012) 209 Cal.App.4th 1400, 1411; Smith, supra, 107 Cal.App.4th at p. 665.)
>
> [Petitioner]'s attempt to distinguish this line of authority is unavailing. As that authority makes clear, the application of a scientific technique to a particular type of sample is not the proper subject of a first-prong Kelly hearing. Rather, the inquiry is whether the proper procedure was followed, an inquiry that arises under the third prong of Kelly.

Russell, 2017 WL 2333983 at *4-5.

Finally, the state appellate court concluded that, as to both his Kelly-prong claims, any error was harmless:

> Moreover, [Petitioner] merely challenged the results of the prosecution's DNA testing on Zuniga's pants and the first cutting of her underwear. He did not challenge the results of the tests on the vaginal swab, which identified him as the major contributor. Other evidence indicated that [Petitioner] lived in the vicinity of the murder at the time it was committed, and his statements to the police contradicted his defense at trial. In light of the independent evidence of [Petitioner]'s guilt, any error in admitting the challenged DNA evidence was harmless. (People v. Venegas, supra, 18 Cal.4th at p. 93 [erroneous admission of DNA evidence is viewed under the harmless error standard set forth in People v. Watson (1956) 46 Cal.2d 818, 836].)

Id., at *6.

(b). Analysis

Petitioner has failed to establish he is entitled to federal habeas relief for at least five reasons.

First, Petitioner's claim is not cognizable because it fails to present a federal question. McGuire, 502 U.S. 62, 67-68; Rhoades, 638 F.3d at 1034 n.5; Eleby v. Price, 2017 WL 581352, at *4 (C.D. Cal. Feb. 13, 2017) (claim that trial court erred by allowing evidence into trial without holding Kelly hearing not cognizable on federal habeas "because it turns on state, not federal, law and the Court is only empowered to resolve issues of federal law"). Indeed, Petitioner mostly frames his issue as whether the trial court erred "in violation of state law," and the state appellate court was able to resolve his claim solely under state-law authorities. [Dkt. No. 1, p. 5]; Russell, 2017 WL 2333983 at *5. His attempt to tack-on a generic reference to "due process" at the end of his claim [Dkt. No. 1, p. 5; Dkt. No. 14, p. 2], does not convert it into a federal issue. Little v. Crawford, 449 F.3d 1075, 1083 n.6 (9th Cir. 2006) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.") (quotation

omitted); Johnson v. Rosemeyer, 117 F.3d 104, 110 (3rd Cir. 1997) ("[E]rrors of state law cannot be repackaged as federal error simply by citing the Due Process Clause.").

Second, this Court is bound by the state appellate court's conclusion that Petitioner's challenge was not the proper subject of a first-prong Kelly hearing and thus there was no error under state law. See Russell, 2017 WL 2333983 at *5; 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"); Gonzalez v. Gonzalez, 394 F. App'x 415, 415-16 (9th Cir. 2010) ("The California Court of Appeal's conclusion that there was no . . . error is a binding interpretation of state law."). Even if the appellate court misapplied its own laws, it would not provide Petitioner a cognizable avenue for federal habeas relief. See Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (noting that the United States Supreme Court has repeatedly held that "federal habeas corpus relief does not lie for errors of state law"); McGuire, 502 U.S. at 67-68.

Third, Petitioner has not pointed to any Supreme Court law governing his claim. Accordingly, he cannot demonstrate that the state appellate court unreasonably applied federal law in ruling the evidence was properly admitted. See Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (per curiam) (where no decision of the Supreme Court "squarely addresses" an issue or provides a "categorical answer" to the question before the state court, AEDPA bars relief; the state court's adjudication of the issue cannot be contrary to, or an unreasonable application of, Supreme Court law); McGuire, 502 U.S. at 75 n.5; Holley, 568 F.3d at 1101; Pattison v. Morrow, 699 F. App'x 772, 773 (9th Cir. 2017) (claim of constitutional error based on "excessively prejudicial" evidence "is foreclosed" by Holley decision).

Fourth, even if Petitioner could somehow establish a cognizable claim, he has still failed to show he is entitled to habeas relief. Specifically, he has not demonstrated there were "no permissible inferences" the jury could draw from the evidence. See Boyde, 404 F.3d at 1172; Jammal, 926 F.2d at 920. Here, as noted by the appellate court, counsel on direct appeal admitted that there was "there is ample authority" to support the conclusion that PCR-STR testing had been generally accepted by the scientific community. [Dkt. No. 12-15, LD 5, p. 28]; Russell, 2017 WL 2333983 at *4 (citing Cordova, 62 Cal. 4th at 128; Smith, 107 Cal. App. 4th at 665). Indeed, in Cordova the California Supreme Court stated that "[n]either the use of PCR . . . nor STR technology to analyze mixed-source forensic samples is a new scientific technique." 62 Cal. 4th at 128. As further explained in the state supreme court's decision in Cordova, by the time of its 2015 decision "[i]t has now been . . . about 24 years . . . since DNA evidence was first approved by a California appellate court to prove identity in a criminal case." Id. (internal quotation marks, alteration, and citations omitted). Because the testing Petitioner challenged was generally accepted and the jury could reasonably infer from the evidence the identity of the person who raped and killed the victim, there can be no due process violation. See Jammal, 926 F.2d at 920; Cordova, 62 Cal. 4th at 128; Watts v. Johnson, 2020 WL 6472682, at *9 (C.D. Cal. Aug. 19, 2020) (DNA evidence connecting petitioner permitted reasonable inference that he was one of the participants in the crime). Further, given this permissible inference, there was no fundamental unfairness in admitting the evidence. Johnson, 63 F.3d at 930.

Fifth, even if Petitioner could establish error, the Court has conducted its own harmless error analysis, and reaches the same conclusion as the appellate court for similar reasons. See Bains v. Cambra, 204 F.3d 964, 971 n.2 (9th Cir.) (Watson

harmlessness standard under California state law "equivalent of the Brecht standard under federal law"); Carter v. Robertson, 2020 WL 5983935, at *11 (C.D. Cal. Aug. 17, 2020) (same). As mentioned by the appellate court, Petitioner did not challenge the results on the vaginal swab evidence. [Dkt. No. 12-13, LD 4, p. 147]. That evidence showed Petitioner matched the: (1) male donor profile and the victim matched the female donor profile of the two donors of the epithelial fraction obtained from the vaginal swab [Id., pp. 48-49]; and (2) major DNA profile obtained from the sperm fraction of the vaginal swab and the frequency of the occurrence of Petitioner's profile among unrelated individuals was one in 205 billion African-Americans. [Id., pp. 35-36, 46-47, 50, 61-62, 69].

In addition to the DNA evidence, other physical evidence and Petitioner's admissions connected him to the crime. Petitioner lived in the area near the burial site during the time of the crimes. [Dkt. No. 12-12, LD 4, pp. 104-06; Dkt. 12-7, LD 2, pp. 140-41]. He admitted that at times, he worked late at night and he had driven around Oxnard in the late 1970's. [Dkt. No. 12-7, LD 2, 167-68]. Two pairs of shoes taken from Petitioner's home in 2012 were very similar in size to the cast impressions made at the burial site. [Dkt. No. 12-11, LD 4, pp. 109-16]. Finally, Petitioner categorically denied, multiple times, knowing the victim or having sexual intercourse with her. [Dkt. No. 12-7, LD 2, pp. 139-43, 149-50, 152-53, 157, 163-64, 171-72]. This was at odds with his defense at trial, which was that he had consensual sex with the victim but someone else stabbed, kidnapped, raped, and murdered her. [Dkt. No. 12-14, LD 4, pp. 83, 112, 115-16, 118-19]; Russell, 2017 WL 2333983 at *3, *6.

Accordingly, Petitioner has not shown "actual prejudice" resulted from admission of the challenged evidence. See Brecht, 507 U.S. at 639 (finding harmless error in part

because "the State's evidence of guilt was, if not overwhelming, certainly weighty"); Parle v. Runnels, 387 F.3d 1030, 1044 (9th Cir. 2004) (concluding that error was harmless where "the prosecution had overwhelming evidence[,]" including [p]etitioner's own words to the police" and other physical evidence); Rea v. Gower, 47 F. Supp. 3d 1026, 1043 (C.D. Cal. 2014) (even if trial court improperly admitted DNA evidence, any such error did not have a substantial and injurious effect on the verdicts under Brecht considering other evidence admitted against petitioner at trial). He is not entitled to relief on this claim.

4. *Kelly* prong-three challenge (Ground 2)

(a). Background & State Court Decision

Petitioner raised his evidentiary claim in Ground 2 on direct appeal, summarized by the appellate court as follows:

> [Petitioner] claims he presented substantial evidence that Sorenson did not apply the proper procedure in analyzing the samples derived from Zuniga's pants and the first cutting from her underwear. Specifically, he complains that Sorenson did not establish a "stochastic threshold"[9] and claims that the alternative procedure it employed to validate its results was contrary not only to generally accepted scientific principles, but also to Sorenson's own standard operating procedures.

Russell, 2017 WL 2333983 at *5.

The state appellate court then rejected Petitioner's claim:

> The court, however, credited the prosecution's expert declaration indicating that the correct scientific procedures were used here. Ryan Buchanan, Sorenson's technical leader, stated that the laboratory's protocol was in full compliance with the relevant guideline established by the Scientific Working Group on DNA Analysis Methods (SWGDAM) regarding

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9 The stochastic threshold has been described as "a laboratory-set number used to assess whether a sample contains sufficient DNA to obtain reliable results." (People v. Lazarus (2015) 238 Cal.App.4th 734, 781, fn. 49, citing U.S. v. McCluskey (2013) 954 F.Supp.2d 1224, 1276–1277.)

> stochastic thresholds.[10] Buchanan declared that Sorenson "performed an internal validation study" for Minifiler typing of degraded samples based upon empirical data. As an alternative to establish a stochastic threshold for its 10-second injection procedure, Sorenson performed replicate or multiple amplifications to obtain a confirmatory profile from which it could be determined whether there had been any allelic drop-in or drop-out events.[11] Buchanan stated that this procedure was agreed to be generally reliable by the scientific community. He also stated that the procedure is "viewed as a significant improvement in the ability to separate and interpret individual profiles in mixed sample" and was "developed specifically to account for the stochastic [e]ffects that can occur during the PCR process when testing low template or degraded DNA samples such as those tested in this case."
>
> The court was entitled to credit this evidence and conclude that [Petitioner]'s criticisms of the procedures employed by Sorenson went to weight rather than admissibility. (People v. Lucas (2014) 60 Cal.4th 153, 246, disapproved on other grounds in People v. Romero (2015) 62 Cal.4th 52, 53; People v. Hill (2001) 89 Cal.App.4th 48, 58 ["General acceptance in the scientific community may be established by the testimony of a director or supervisor of a DNA forensic lab"]; People v. Morganti (1996) 43 Cal.App.4th 643, 661-662 [trial court did not abuse its discretion in finding the prosecution made the necessary foundational showing that correct scientific procedures were followed where expert testified he followed established procedures or protocol]; see also United States v. Trala (D. Del.

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[10] The guideline states: "If a stochastic threshold based on peak height is not used in the evaluation of DNA typing results, the laboratory must establish alternative criteria (e.g., quantitation values or use of a probalistic genotype approach) for addressing potential stochastic amplification. The criteria must be supported by empirical data and internal validation and must be documented in the standard operating procedures." (SWGDAM Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories (2010), ¶ 3.2.2, pp. 6-7.)

[11] "Allelic drop-in" is a common scholastic effect that "refers to the phenomenon that occurs when alleles [genes or segments of DNA material that produce traits] not originating from the principal DNA donors show up in a DNA profile." (United States v. Morgan (S.D.N.Y. 2014) 53 F.Supp.3d 732, 736.) Allelic drop-out "occurs when alleles from the principal DNA donors fail to appear in the DNA profile[.]" (Ibid.) The stochastic threshold, as defined by Buchanan, is "the value above which it is reasonable to assume that allelic dropout has not occurred within a single-source sample." (SWGDAM Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories, supra, ¶ 3.2, p. 6.)

> 2001) 162 F.Supp.2d 336, 349 [defense claim that allelic drop-out may have rendered PCR-STR typing unreliable went to weight rather than admissibility of the evidence].) [Petitioner]'s claim that the court abused its discretion in failing to hold a third-prong Kelly hearing thus fails.

Russell, 2017 WL 2333983 at *5-6.

(b). Analysis

Petitioner has failed to establish he is entitled to relief for similar reasons discussed in the last ground.

First, Petitioner's claim faces the same cognizability concerns, and Petitioner's attempt to federalize Ground 2 with references to "due process," [Dkt. No. 1, p. 6; Dkt. No. 14, p. 2], is insufficient to repackage the issue as federal error. See McGuire, 502 U.S. 62, 67-68; Rhoades, 638 F.3d at 1034 n.5; Little, 449 F.3d at 1083 n.6; Johnson, 117 F.3d at 110. Second, this Court is bound by the state court's conclusion that the trial court was entitled to credit the prosecution's expert's declaration, and that admission of the DNA evidence was permissible under state law, even if the appellate court misapplied its own laws. See Richey, 546 U.S. at 76; Corcoran, 562 U.S. at 5; McGuire, 502 U.S. at 67-68; Gonzalez, 394 F. App'x at 415-16. Third, any claim that the evidence was excessively prejudicial is foreclosed by Holley. See 568 F.3d at 1101; Pattison, 699 F. App'x at 773; Van Patten, 552 U.S. at 125-26 (2008); McGuire, 502 U.S. at 75 n.5.

Fourth, even if Petitioner could establish a cognizable claim, he has failed to demonstrate there were "no permissible inferences" the jury could draw from the evidence. See Boyde, 404 F.3d at 1172; Jammal, 926 F.2d at 920; Johnson, 63 F.3d at 930. As mentioned, DNA evidence has been accepted in California for many decades to

prove identity. The jury in this case could properly consider it for that reason. See Jammal, 926 F.2d at 920; Cordova, 62 Cal. 4th at 128; Watts, 2020 WL 6472682 at *9.

Fifth, even if Petitioner could establish error, he has not shown prejudice given the other evidence of guilt admitted at trial, summarized above. As mentioned, unchallenged DNA evidence matched Petitioner and connected him to the victim. [Dkt. No. 12-13, LD 4, pp. 35-36, 46-47, 50, 61-62, 69, 147]. Indeed, Petitioner's argument before the jury admitted "the prosecution has done a very, very, very good job of proving to you one fact, that [Petitioner] deposited semen into [the victim]'s vagina within 36 hours of her death." [Dkt. No. 12-14, LD 4, pp. 83; see also id., 112, 115-16, 118-19]. The jury could consider his defense in light of his repeated statements to officers denying he knew or had any sexual contact with the victim, including "I don't forget a face or . . . a name" and "I remember who I had sex with." [Dkt. No. 12-7, LD 2, pp. 140-41]. The jury could properly consider the unchallenged DNA evidence, his statements, and the other physical evidence discussed above, in finding guilt, regardless of whether the trial court improperly erred in admitting the challenged evidence. See Brecht, 507 U.S. at 639; Parle, 387 F.3d at 1044; Rea, 47 F. Supp. 3d at 1043; Williams v. California, 2012 WL 7997586, at *12 (C.D. Cal. Dec. 21, 2012) (although certain testimony was erroneously admitted under California law, no prejudice in light of strong identity evidence against petitioner, including his admissions at trial that he had sex with the victim and DNA evidence establishing that he had).

Accordingly, Petitioner has not shown that the challenged DNA evidence had a substantial and injurious effect or influence in determining the jury's verdict. Brecht, 507 U.S. at 637-38. He is not entitled to relief on this claim.

B. Third-Party Culpability Evidence (Ground 3)

In Ground 3, Petitioner claims the trial court abused its discretion by excluding evidence that circumstantially linked a third-party, Sebastian Carrillo, to the murder and raised a reasonable doubt about Petitioner's guilt. [Dkt. No. 1, p. 6; Dkt. No. 14, p. 2].

1. Federal Law

As mentioned, the exclusion or admission of evidence under state evidentiary rules generally does not present a federal question. McGuire, 502 U.S. at 67-68; Rhoades, 638 F.3d at 1034 n.5.

However, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986). The exclusion of certain types of critical evidence may violate a defendant's due process rights if it deprives the defendant of "a fair opportunity to defend against a state's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

But a defendant "does not have an unfettered right to present any evidence he or she wishes." Lunbery v. Hornbeak, 605 F.3d 754, 762 (9th Cir. 2010) (quotation omitted). Rather, a criminal defendant must "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." United States v. Waters, 627 F.3d 345, 354 (9th Cir. 2010). State rulemakers "have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." Nevada v. Jackson, 569 U.S. 505, 509 (2013). Those rules must not "be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. at 302. Instead, on habeas review, the question is whether the application of those rules violates a party's "right to present a defense and receive a fair trial." Lunbery, 605 F.3d at 761 n.1; see also; Aguilar v. Cate, 585 F. App'x 450, 451 (9th Cir. 2014).

Moreover, even if a state court's evidentiary decision constitutes error under the federal constitution, habeas relief is not automatic. Rather, the claim is reviewed under a harmless error standard. Mays v. Clark, 807 F.3d 968, 979-81 (9th Cir. 2015). As mentioned, an error cannot lead to habeas relief "unless it results in 'actual prejudice'" that had a "substantial and injurious effect or influence in determining the jury's verdict" under Brecht, 507 U.S. at 637. Mays, 807 F.3d at 980. Habeas relief is required when "the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error." Gautt v. Lewis, 489 F.3d 993, 1016 (9th Cir. 2007).

2. Background and State Court Decision

In addressing Petitioner's claim on direct appeal, the state appellate court summarized the relevant state-law provisions, including that an offer of proof relating to third-party culpability evidence is evaluated in California Evidence Code § 352: the trial court "must decide whether the evidence could raise a reasonable doubt as to the defendant's guilt and whether it is substantially more prejudicial than probative." Russell, 2017 WL 2333983 at *6. The state court then provided the following background:

> Prior to trial, [Petitioner] moved in limine to present evidence that Carrillo was Zuniga's killer. His proffered evidence included the transcript of Enrique Zuniga's 911 call, in which Enrique recounted hearing Zuniga state "that guy came back" shortly before the phone line went dead. [Petitioner] also offered the conditional examination testimony of Oregon, who recalled that a Hispanic man sat near Zuniga at the Army Navy Café on the night of her murder. Oregon thought the man was Carrillo, who had dated her cousin Nancy Valenzuela, but she was not certain. The man argued with Zuniga after she asked him to put out his cigarette. When the man stood up, a gun fell from his person. Valdez, who was with Oregon and Zuniga that night, told the police that the gun was a .22 or .25 caliber.
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> [Petitioner] also offered the preliminary hearing testimony of one of the police officers who investigated the murder. That testimony indicated that Zuniga's car was registered to a motel room where Carrillo was staying on

the night of the murder. When first questioned by the police, Carrillo denied that he and Zuniga were romantically involved or had lived together. He also claimed that he and a friend were watching television on the night of the murder. The police later discovered that Carrillo was involved in a car accident in Oxnard at about 1:30 a.m. that morning. Carrillo subsequently admitted that he was involved with Zuniga and had previously lived with her for about two weeks in an apartment in Oxnard. He also admitted (but had previously denied) seeing her around the time of his car accident. Carrillo also admitted giving Zuniga the ring she was wearing at the time of her murder.

[Petitioner] also offered the conditional examination testimony of Pauline Smith, who was Carrillo's wife at the time of the murder. A few days after the murder, Smith received an anonymous phone call warning that she was "next." About two months prior to the murder, she found a note threatening to kill the recipient if he or she did not leave the author's family alone. The note was written in Spanish, but someone translated it for her. She hid the note under her mattress but it vanished. She did not tell the police about the note when she was interviewed shortly after the murder because she was afraid of Carrillo.

Finally, [Petitioner] offered two reports from an investigator for the Ventura County Public Defender's Office. The first report summarized an August 2013 telephone interview of Valenzuela. Valenzuela said that she and Zuniga were both romantically involved with Carrillo at the time of Zuniga's death, although Valenzuela only saw Carrillo "a few times." Carrillo "took" a high school ring in her possession and later "showed her the ring and he had engraved something on [it.]" After Zuniga's murder, Oregon told Valenzuela that Carrillo committed the crime and had placed the ring on the hand that was left unburied, which Valenzuela "took . . . as a sign that it could have been her." The second report summarized an April 2014 interview of Carrillo's half-brother Juan. Juan said Carrillo only lived in Oxnard for a few years and had made his living picking lemons. Carrillo had returned to Mexico at least 30 years earlier and died from an intestinal illness within a few weeks of his return.

In opposing [Petitioner]'s motion, the prosecution argued that the proffered evidence was unreliable hearsay and insufficient to raise a reasonable doubt whether [Petitioner] had committed the crime. After hearing extensive argument from counsel, the court denied the motion. The court reasoned, "[t]he fact that [Carrillo] under the best analysis of the evidence may have been in the Army Navy Café around that time and had a weapon, that doesn't connect him to this crime[.]" The court continued: "So my analysis is that there's not enough to get to the threshold that there's actually some evidence that connects [Carrillo] to this event as opposed to putting [him] in the galaxy of people who may have a reason to want to inflict violence on

> her. But that's not enough. [¶] So at this point I don't think that the threshold's been met for the third-party culpability evidence[.]

Russell, 2017 WL 2333983 at *6-7.

The appellate court then rejected Petitioner's claim:

> The court did not abuse its discretion in excluding the proffered evidence of third party culpability. Much of the evidence was inadmissible hearsay. (See People v. Hall (1986) 41 Cal.3d 826, 833 (Hall) [third party culpability evidence is subject to state evidentiary rules and cannot be premised upon inadmissible hearsay].) In any event, the court did not err in finding the proffered evidence failed to create a reasonable doubt as to [Petitioner]'s guilt. There was no evidence to support a finding that Carrillo stabbed, abducted, raped, or murdered Zuniga. Moreover, that Carrillo may have argued with Zuniga over a cigarette does not demonstrate an intent to rape and murder her. (See, e.g., People v. Adams (2004) 115 Cal.App.4th 243, 254 [third party's expressions of anger and frustration with the victim were not evidence of intent to murder her].) Whether the evidence might indicate Carrillo had the opportunity to commit the crime is insufficient to compel its admission. (People v. Geier (2007) 41 Cal.4th 555, 582 ["[E]vidence of mere opportunity without further evidence linking the third party to the actual perpetration of the offense is inadmissible as third party culpability evidence"], overruled on other grounds in Melendez–Diaz v. Massachusetts (2009) 557 U.S. 305, 345.)
>
> As the People note, evidence of Carrillo's domestic violence toward Smith and/or Valenzuela was inadmissible propensity evidence. (People v. Whorter (2009) 47 Cal.4th 318, 372.) We reject [Petitioner]'s assertion that Evidence Code section 1101, which prohibits such evidence, "should have given way to [his] federal rights because the evidence had 'significant probative value' (People v. Babbitt (1988) 45 Cal.3d 660, 684) and 'persuasive assurances of trustworthiness' (Chambers v. Mississippi (1973) 410 U.S. 284, 302)." Even assuming that such an exception can apply in a given case, it plainly does not apply here. [Petitioner] "fails to establish how, apart from suggesting [Carrillo's] 'criminal disposition,' [Carrillo's] prior acts of violence connected him to the present crimes. [Citation.]" (People v. Lewis (2001) 26 Cal.4th 334, 373.) The claimed connection between Carrillo and Zuniga's murder is "speculative with no evidence, either direct or circumstantial, in support." (People v. Lucas, supra, 60 Cal.4th at p. 280.) "In short, none of [[Petitioner]'s proffered] evidence had a tendency in reason and logic to prove or disprove any disputed fact that was of consequence to the determination of the action. [Citation.]" (People v. Adams, supra, 115 Cal.App.4th at p. 255.).

Russell, 2017 WL 2333983 at *7-8.

Finally, the state appellate court addressed prejudice:

> Moreover, it is not reasonably probable that [Petitioner] would have achieved a more favorable result had the court admitted the proffered evidence. (See Hall, supra, 41 Cal.3d at p. 836 [exclusion of third party culpability evidence reviewed under the harmless error standard set forth in People v. Watson].)[12] The court's ruling did not completely preclude [Petitioner] from offering evidence that a third party killed Zuniga. (See People v. Jones (1998) 17 Cal.4th 279, 305 [exclusion of third party culpability evidence did not compel reversal where defendant had the opportunity to prove that a third party was the shooter, yet was merely precluded from doing so with inadmissible evidence].) Oregon was allowed to testify she had seen Zuniga arguing that night with a man who resembled Carrillo. Defense counsel relied on that testimony, coupled with the evidence of the 911 call on the night of the murder, in arguing that the man in the café was the killer. In addition, the evidence of [Petitioner]'s guilt was substantial. Any error in excluding the proffered evidence was thus harmless. (Hall, at p. 836.)

Russell, 2017 WL 2333983 at *8.

3. Analysis

The Court concludes that Petitioner is not entitled to habeas relief on this evidentiary claim. First, as with Petitioner's DNA evidence claims and as the state appellate court aptly noted, his claim challenging the application of third-party evidentiary rules does not implicate the federal Constitution. See McGuire, 502 U.S. at 67-68; Rhoades, 638 F.3d at 1034; Holley, 568 F.3d at 1101. The Petition itself frames the issue solely as whether the trial court erred under California Evidence Code § 352. [Dkt. No. 1 , p. 6; Dkt. No. 14, p. 2]; see Groen v. Busby, 886 F. Supp. 2d 1150, 1159 (C.D. Cal. 2012) ("Foremost, petitioner's contention that the trial court erred in failing to conduct a

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[12] We reject [Petitioner]'s claim that the alleged error violated his constitutional right to present a defense and his right to compulsory process. (See People v. Lawley (2002) 27 Cal.4th 102, 155 [application of the ordinary rules of evidence does not impermissibly infringe upon a defendant's constitutional rights].)

proper balancing analysis under California Evidence Code § 352 is not cognizable on federal habeas corpus review."). His glancing reference to "a fair and transparent trial" for the first time in the Reply is insufficient to convert the claim into a federal issue. Little, 449 F.3d at 1083 n.6; Johnson, 117 F.3d at 110; Blackledge v. Allison, 431 U.S. 63, 75 n.7 (1977) ("the petition is expected to state facts that point to a real possibility of constitutional error").

Moreover, even considering the appellate court's single citation to federal law related to this issue (Chambers), Petitioner fails to convincingly demonstrate here that the court unreasonably applied Supreme Court law. Jackson, 569 U.S. at 509. Petitioner did not have an automatic, guaranteed right to present evidence accusing someone else of the crime. Lunbery, 605 F.3d at 762. Rather, the state court adequately explained—both as a matter of fact and of state law—that Petitioner failed to proffer sufficient evidence to advance his defense that, although he had sex with the victim, someone else raped and killed her during the same timeframe. That analysis was not an unreasonable application of Chambers, or its progeny. On deferential AEDPA review, Petitioner has not demonstrated an "extreme malfunction" of the criminal justice system on his claim. Richter, 562 U.S. at 102.

In any event, even if the state court erred in excluding Petitioner's proffered evidence, the Court has no basis to conclude that he was unfairly prejudiced under Brecht. In addition to failing to overcome the substantial evidence connecting him to the crime already discussed, Petitioner has not shown he was completely precluded from suggesting someone else committed the crime. As noted by the appellate court, Oregon testified that on the night of the crimes, (1) the victim and a man had an argument about the man's smoking at the café counter, (2) the man was "kind of aggressive," (3) when the man got

up, a gun fell out of his boot, and (4) the man resembled a person Oregon knew named Sebastian Carrillo. [Dkt. No. 12-11, LD 4, pp. 21-22, 24-25].

Counsel was able to argue that when the victim was at the café, she got into a fight with man, the man had a gun, and within hours the victim died of gunshot wounds to the head. [Dkt. No. 12-14, LD 4, p. 92]. Counsel argued that when the victim told her husband, "He is back," she was referring to someone that she had an encounter with, which included the man in the café. [Id., p. 93]. Counsel further argued that the blood evidence from the telephone booth could have come from the man at the café. [Id., p. 96]. Accordingly, Petitioner was able to suggest a third party may have committed the crimes. That the jury didn't buy it is not a deprivation of his fair opportunity to defend against the charges.

Petitioner was convicted after a lengthy trial during which the prosecution presented compelling evidence of his guilt. On harmless error review, Petitioner's claim does not raise "grave doubts" about the verdict that require habeas relief. Gautt, 489 F.3d at 1016; Brecht, 507 U.S. at 637

C. Cumulative Prejudice (Ground 4)

In Ground 4, Petitioner contends the cumulative prejudice from the trial court's alleged errors violated his rights. [Dkt. No. 1, p. 6]. "The cumulative error doctrine in habeas recognizes that, even if no single error were prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal." Parle, 387 F.3d at 1045 (internal quotation marks and citation omitted). Here, as discussed, Petitioner has not demonstrated any of his claims warrant federal habeas relief. That is dispositive of his cumulative error claim. See Fairbank v. Ayers, 650 F.3d 1243, 1257 (9th Cir. 2011) ("[B]ecause we hold that none of Fairbank's claims rise to the

level of constitutional error, 'there is nothing to accumulate to a level of a constitutional violation.'") (citation omitted); Hayes, 632 F.3d at 524 ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible.") (citation omitted). Petitioner is not entitled to federal habeas relief on this ground.

VI. EVIDENTIARY HEARING

Petitioner does not appear to directly request an evidentiary hearing. However, in light of his Kelly claims, and because he states at one point in the Petition, in articulating his underlying state habeas claim supporting Ground 2, that a Kelly "evidentiary hearing" was necessary, [see, e.g., Dkt. No. 1, p. 3], the Court liberally construes Petitioner's claims to include a request for an evidentiary hearing. See Ross, 950 F.3d at 1173 n.19. Because he has failed to demonstrate the state record received and reviewed by the Court is insufficient to resolve the claims, the request, so construed, should be denied. Pinholster, 563 U.S. 170 (federal court's habeas review ordinarily "is limited to the record that was before the state court that adjudicated the claim on the merits"); Schrirro v. Landrigan, 550 U.S. 465, 474 (2007).

VII. RECOMMENDATION

Therefore, it is recommended that the District Judge issue an Order, as follows: (1) accepting this Report and Recommendation; (2) denying any request for an evidentiary hearing; and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: April 29, 2021

/s/ Autumn D. Spaeth
THE HONORABLE AUTUMN D. SPAETH
United States Magistrate Judge

Court of Appeal, Second Appellate District, Division Six - No. B262474

S243004

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOHN CLARK RUSSELL, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN CLARK RUSSELL,

Defendant and Appellant.

2d. Crim. No. B262474
(Super. Ct. No. 2012027191)
(Ventura County)

In 1979, Alma Zuniga was stabbed, raped and shot to death then buried in a shallow grave. Her assailant remained unknown until 2012, when police received information that caused the "cold case" to be reopened and DNA specimens examined. John Clark Russell was identified as the perpetrator through a DNA match. He appeals after a jury convicted him of first degree murder (Pen. Code,[1] §§ 187, 189). The jury also found true allegations that (1) appellant personally used a firearm and a dangerous and deadly weapon in committing the offense (§§ 12022, subd. (b), 12022.5, subd. (a)(1)); and (2) the

[1] All statutory references are to the Penal Code unless otherwise stated.

murder was willful, deliberate, and premeditated and was committed during the commission of a kidnapping (§ 190.2, former subd. (c)(3)(ii), now subd. (a)(17)(B)) and rape (*id.*, former subd. (c)(3)(iii), now. subd. (a)(17)(C)). The trial court sentenced him to life without the possibility of parole plus three years. The court also ordered him to pay, among other things, a $10,000 restitution fine pursuant to section 1202.4 and a $35 court facilities fee pursuant to Government Code section 70373, subdivision (a)(1).

Appellant contends (1) the court erred in denying his motion for a *Kelly*[2] hearing; (2) the court erred in excluding third party culpability evidence; (3) instructional error compels reversal of the kidnapping-murder special circumstance allegation; (4) cumulative error compels reversal of his conviction; (5) the restitution fine is unauthorized; and (6) the judgment should be corrected to reflect the imposition of a $30 court facilities fee, rather than a $35 fee. The last two contentions have merit and we shall accordingly (1) order that the restitution fine be stricken; and (2) order the judgment corrected to reflect the imposition of a $30 court facilities fee. Otherwise, we affirm.

STATEMENT OF FACTS

I.

Prosecution

A. *The Murder*

On the night of March 10, 1979, 23-year-old Alma Zuniga went to a nightclub in Oxnard with her friends Christine Oregon and Sergio Valdez. At about 2:00 a.m., they left the club and went to the Army Navy Café on Fifth Street. At about 3:00 a.m., Oregon and Valdez walked Zuniga to her car and watched her

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[2] *People v. Kelly* (1976) 17 Cal.3d 24.

drive away and turn left on Oxnard Boulevard at its intersection with Fifth Street.

A short time later, Zuniga stopped at a phone booth and called her ex-husband Enrique Zuniga at his home in Oklahoma. During the conversation, Enrique heard the phone booth door open and Zuniga scream and yell that someone was hitting her. Enrique also heard Zuniga say "that guy came back," then heard the phone booth door close. Enrique immediately reported the incident to the Oxnard Police Department.

Bonnie Winters lived by a lemon orchard in the area of Rose Avenue and Simon Way in Oxnard. Sometime between 2:00 and 3:30 a.m. that morning, Winters was awakened by the sound of a car engine idling in the orchard. An hour or so later, she heard two "pops" in quick succession.

At about 10:00 a.m. that morning, a man who lived on the lemon orchard notified the police he had discovered a dead body. The burial site was approximately 83 feet from the road and was partially obscured by an old bed spring and a corrugated metal water tank. The body was buried but a hand was protruding from the ground. Zuniga was subsequently identified as the victim. Her bra, blouse, and jacket were pulled above her chest and she was nude from the waist down except for stockings and shoes. Her pants, a beer bottle, and a coin purse containing $99 were buried next to her. Her underwear was found on top of the water tank and a receipt bearing her name was found nearby.

Two expended .22-caliber casings and one unexpended .22-caliber bullet were found a short distance away and there were drag marks from that location to the burial site. It was subsequently determined that the casings and bullet came from the same gun. The condition of the front outer portion of Zuniga's

underwear was consistent with her having been dragged on the front of her body. Cast impressions were made of shoeprints found near the burial site.

Zuniga had gunshot wounds to her right temple and her jaw and had a stab wound in her lower back that penetrated about nine inches into her liver. The gunshot wounds were consistent with wounds that would be inflicted by a .22-caliber firearm. There were also abrasions on Zuniga's face and the front and back of her body. A rape kit was prepared during the autopsy and was booked into evidence.

Zuniga's car was found parked in front of a business on the 700 block of South Oxnard Boulevard. There was blood on the passenger seat and passenger side of the car. Part of an expended .22-caliber bullet was found on the rear floorboard.

B. *DNA Evidence*

In September 2004, an attorney informed the Ventura County Sheriff's Department that his client had information about an unsolved homicide of a prostitute who had been buried in the area of Rose Avenue in Oxnard 25 to 30 years earlier.[3] Based on that information, Zuniga's rape kit was submitted for DNA analysis. The Ventura County Sheriff's Department Forensic Sciences Laboratory (the crime lab) analyzed the rape kit and obtained a single-source male DNA profile from the sperm fraction of a vaginal swab. The profile was entered into the Combined DNA Index System (CODIS), a national database that allows users to match an unknown profile with the profile of individuals in the system. The CODIS search identified a match with appellant's DNA profile. The crime lab subsequently used an "IdentiFiler" DNA testing kit, which uses a polymerase chain

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[3] Zuniga told Oregon she engaged in prostitution.

reaction/short term tandem repeat (PCR-STR) testing methodology, to verify the match.

The crime lab also used the IdentiFiler DNA testing kit to analyze a cutting taken from the crotch of Zuniga's underwear. The lab obtained a partial DNA mixture profile from at least four donors, but the sperm fraction of the mixture was so low that only part of the DNA was observable. Male DNA was also found in the non-sperm fraction, but the mixture was of such a low level that the results were otherwise inconclusive.

The vaginal swab, the cutting from Zuniga's underwear, and the crotch of Zuniga's pants were subsequently tested by Emily Jeskie of Sorenson Forensics (Sorenson), a private laboratory in Utah. Jeskie used the "MiniFiler," a DNA testing kit that is more sensitive than the IndentiFiler kit used by the crime lab. Jeskie determined that the sperm fraction obtained from the vaginal swab contained at least three contributors and that the major DNA profile matched appellant. Of the two donors of the epithelial fraction obtained from the vaginal swab, appellant matched the male donor profile and Zuniga matched the female donor profile.

In analyzing the crotch of Zuniga's pants and the cutting taken from her underwear, Jeskie found that both samples had a mixture of DNA from a minimum of three donors. Appellant's profile was excluded as being one of the donor profiles from both the epithelial and sperm fractions of the samples. Jeskie subsequently analyzed another cutting taken from the crotch of Zuniga's underwear. The epithelial fraction obtained from this sample had a mixture of DNA profiles from at least three donors, at least one of which was genetically typed as a male. Appellant was excluded as a donor. The sperm fraction had a mixture of

DNA profiles from at least two donors, at least one of which was male. The results were otherwise inconclusive.

C. *Appellant's Statements and the Investigation*

On July 26, 2012, two investigators from the Ventura County Sheriff's Department contacted appellant in Bakersfield. Appellant admitted (and records verified) that at the time of the murder he lived in Oxnard on Dallas Drive, just off of Rose Avenue. When shown photographs of Zuniga, appellant denied knowing her and denied that he ever had any sexual contact with her. He refused to provide a DNA sample and was arrested.

Appellant was subsequently interviewed at the Ventura County Jail. A video recording of the interview was played at trial. One of the investigators began by telling appellant Zuniga had been abducted from a phone booth in downtown Oxnard at 3:00 a.m. and taken to Rose Avenue, where she was raped, murdered, and buried. Appellant was also told his DNA had been found in Zuniga's body. Appellant again denied knowing Zuniga and said he had nothing to do with her murder. He stated, "if you're telling me my DNA is, is in this woman and I never seen [*sic*] this woman before, never met this woman before, never buried her in some shallow grave before, never took her from J Street[.]" After one of the investigators pointed out that no one had said Zuniga was taken from J Street, appellant continued, "Wherever you said she was from, taking her—I'd remember that[.] I'd know I did that. Ain't none [*sic*] of that happened and so for you to tell me my DNA is in her, a setup is jumping off here."

Appellant's residence was also searched the day of his arrest. The police seized three pairs of men's shoes and compared them with the casts of the shoeprints found at the crime scene.

Two pairs of the shoes, sized 12 and 13, were very similar in size to the cast impressions.

II.

Defense

Appellant did not testify. His primary defense was that he had consensual sex with Zuniga but that someone else stabbed, kidnapped, raped, and murdered her. In support of that defense, he offered his post-arrest statements along with expert testimony disputing the prosecution's expert testimony that appellant's DNA was not found on the crotch of Zuniga's pants or the first cutting from her underwear.

Mark Taylor, the president and director of Technical Associates, a private DNA testing laboratory, opined that the results of the subject tests should have been deemed inconclusive given the complexity and degraded quality of the samples. Taylor performed his own tests on the samples and found the results to be inconclusive. He did not, however, disagree with the results that included appellant as a major contributor of the DNA found on the vaginal swab.

DISCUSSION

I.

DNA Evidence

Appellant contends the court erred in violation of state law and his due process rights by denying his motion for a *Kelly* hearing. He claims the court was required to hold a "first-prong" *Kelly* hearing because "there was no generally accepted procedure to interpret the data . . . produced from samples consisting of degraded, low-level, complex mixtures." He claims the court was also required to hold a "third-prong" *Kelly* hearing because he presented substantial evidence that Sorenson did not use the

correct scientific procedures in testing the samples obtained from Zuniga's pants and the first cutting of her underwear. Neither claim has merit.

"In *Kelly*, the California Supreme Court set forth the following 'general principles of admissibility' for opinion testimony based on new scientific techniques: '(1) [T]he *reliability of the method* must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]' [Citations.]" (*People v. Smith* (2003) 107 Cal.App.4th 646, 652 (*Smith*).)

"Evidence obtained by use of a new scientific technique is admissible only if the proponent of the evidence establishes at a hearing (sometimes called a first prong *Kelly* hearing) that the relevant scientific community generally accepts the technique as reliable. However, proof of such acceptance is not necessary if a published appellate opinion affirms a trial court ruling admitting evidence obtained through use of that technique, at least until new evidence is admitted showing the scientific community has changed its attitude. [Citations.]" (*People v. Cordova* (2015) 62 Cal.4th 104, 127.)

"On appeal, '"general acceptance"' is considered 'a mixed question of law and fact subject to limited de novo review.' [Citation.] Thus, 'we review the trial court's determination with deference to any and all supportable findings of "historical" fact or credibility, and then decide as a matter of law, based on those assumptions, whether there has been general acceptance.' [Citation.]" (*People v. Reeves* (2001) 91 Cal.App.4th 14, 38.)

The third prong of the *Kelly* test "assumes the methodology and technique in question has already met th[e general acceptance] requirement. Instead, it inquires into the matter of whether *the procedures actually utilized in the case* were in compliance with that methodology and technique, as generally accepted by the scientific community. [Citation.] The third-prong inquiry is thus case specific; 'it cannot be satisfied by relying on a published appellate decision.' [Citation.]" (*People v. Venegas* (1998) 18 Cal.4th 47, 78.) "Unlike the independent appellate review of a determination of general scientific acceptance under *Kelly*'s first prong, review of a third prong determination on the use of correct scientific procedures in the particular case requires deference to the determinations of the trial court. [Citation.]" (*Id.* at p. 91.) We must "accept the trial court's resolutions of credibility, choices of reasonable inferences, and factual determinations from conflicting substantial evidence. [Citation.]" (*Ibid.*)

In his first-prong challenge, appellant acknowledges "there is ample authority" to support the conclusion that the testing methodology used here (PCR-STR) has been generally accepted by the scientific community. (See, e.g., *People v. Cordova*, *supra*, at p. 128; *Smith*, *supra*, 107 Cal.App.4th at p. 665.) He claims, however, that none of this authority is relevant here "because none squarely addresses whether there is a generally accepted procedure for interpreting data produced by the application of PCR-STR technology to degraded, low-level, complex mixtures."

But the referenced authority is both relevant and dispositive of appellant's claim. It is well-settled that the use of PCR-STR technology "on a particular type of DNA sample does not constitute a different scientific technique. Rather, it involves

a technique, which has gained general acceptance, as applied to particular set of circumstances." (*People v. Henderson* (2003) 107 Cal.App.4th 769, 786 (*Henderson*).) The inquiry thus "is not whether the procedure is generally accepted within the scientific community, but whether the approved procedure was followed correctly in this instance." (*Ibid.*)

The defendant in *Henderson* sought a first-prong *Kelly* hearing to challenge the use of the capillary electrophoresis technique of DNA testing on a sample containing a mixture of DNA from two or more individuals. In concluding that no such hearing was required, the court reasoned that "[a]lthough capillary electrophoresis is a new technique for which first prong analysis is appropriate, capillary electrophoresis on a particular type of DNA sample does not constitute a different scientific technique. Rather, it involves a technique, which has gained general acceptance, as applied to a particular set of circumstances. *DNA analysis of a mixed sample is more akin to the testing of a degraded or compromised sample.* [Italics added, fn. omitted.] Under such circumstances, the relevant inquiry is not whether the procedure is generally accepted within the scientific community, but whether the approved procedure was followed correctly in this instance." (*Henderson*, *supra*, 107 Cal.App.4th at p. 786.) Other cases are in accord. (E.g., *People v. Stevey* (2012) 209 Cal.App.4th 1400, 1411; *Smith*, *supra*, 107 Cal.App.4th at p. 665.)

Appellant's attempt to distinguish this line of authority is unavailing. As that authority makes clear, the application of a scientific technique to a particular type of sample is not the proper subject of a first-prong *Kelly* hearing. Rather, the inquiry

is whether the proper procedure was followed, an inquiry that arises under the third prong of *Kelly*.

Appellant, however, fares no better in claiming that the court was required to hold a third-prong *Kelly* hearing. He claims he presented substantial evidence that Sorenson did not apply the proper procedure in analyzing the samples derived from Zuniga's pants and the first cutting from her underwear. Specifically, he complains that Sorenson did not establish a "stochastic threshold"[4] and claims that the alternative procedure it employed to validate its results was contrary not only to generally accepted scientific principles, but also to Sorenson's own standard operating procedures.

The court, however, credited the prosecution's expert declaration indicating that the correct scientific procedures were used here. Ryan Buchanan, Sorenson's technical leader, stated that the laboratory's protocol was in full compliance with the relevant guideline established by the Scientific Working Group on DNA Analysis Methods (SWGDAM) regarding stochastic thresholds.[5] Buchanan declared that Sorenson "performed an

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[4] The stochastic threshold has been described as "a laboratory-set number used to assess whether a sample contains sufficient DNA to obtain reliable results." (*People v. Lazarus* (2015) 238 Cal.App.4th 734, 781, fn. 49, citing *U.S. v. McCluskey* (2013) 954 F.Supp.2d 1224, 1276-1277.)

[5] The guideline states: "If a stochastic threshold based on peak height is not used in the evaluation of DNA typing results, the laboratory must establish alternative criteria (e.g., quantitation values or use of a probalistic genotype approach) for addressing potential stochastic amplification. The criteria must be supported by empirical data and internal validation and must be documented in the standard operating procedures."

internal validation study" for Minifiler typing of degraded samples based upon empirical data. As an alternative to establish a stochastic threshold for its 10-second injection procedure, Sorenson performed replicate or multiple amplifications to obtain a confirmatory profile from which it could be determined whether there had been any allelic drop-in or drop-out events.[6] Buchanan stated that this procedure was agreed to be generally reliable by the scientific community. He also stated that the procedure is "viewed as a significant improvement in the ability to separate and interpret individual profiles in mixed sample" and was "developed specifically to account for the stochastic [e]ffects that can occur during the PCR process when testing low template or degraded DNA samples such as those tested in this case."

The court was entitled to credit this evidence and conclude that appellant's criticisms of the procedures employed by Sorenson went to weight rather than admissibility. (*People v. Lucas* (2014) 60 Cal.4th 153, 246, disapproved on other grounds

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(SWGDAM Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories (2010), ¶ 3.2.2, pp. 6-7.)

[6] "Allelic drop-in" is a common scholastic effect that "refers to the phenomenon that occurs when alleles [genes or segments of DNA material that produce traits] not originating from the principal DNA donors show up in a DNA profile." (*United States v. Morgan* (S.D.N.Y. 2014) 53 F.Supp.3d 732, 736.) Allelic drop-out "occurs when alleles from the principal DNA donors fail to appear in the DNA profile[.]" (*Ibid.*) The stochastic threshold, as defined by Buchanan, is "the value above which it is reasonable to assume that allelic dropout has not occurred within a single-source sample." (SWGDAM Interpretation Guidelines for Autosomal STR Typing by Forensic DNA Testing Laboratories, *supra*, ¶ 3.2, p. 6.)

in *People v. Romero* (2015) 62 Cal.4th 52, 53; *People v. Hill* (2001) 89 Cal.App.4th 48, 58 ["General acceptance in the scientific community may be established by the testimony of a director or supervisor of a DNA forensic lab"]; *People v. Morganti* (1996) 43 Cal.App.4th 643, 661-662 [trial court did not abuse its discretion in finding the prosecution made the necessary foundational showing that correct scientific procedures were followed where expert testified he followed established procedures or protocol]; see also *United States v. Trala* (D. Del. 2001) 162 F.Supp.2d 336, 349 [defense claim that allelic drop-out may have rendered PCR-STR typing unreliable went to weight rather than admissibility of the evidence].) Appellant's claim that the court abused its discretion in failing to hold a third-prong *Kelly* hearing thus fails.

Because appellant had the opportunity to challenge the evidence at trial, his claim that evidence was admitted in violation of his due process rights also fails. (*People v. Lucas*, *supra*, 60 Cal.4th at p. 247.) Moreover, appellant merely challenged the results of the prosecution's DNA testing on Zuniga's pants and the first cutting of her underwear. He did not challenge the results of the tests on the vaginal swab, which identified him as the major contributor. Other evidence indicated that appellant lived in the vicinity of the murder at the time it was committed, and his statements to the police contradicted his defense at trial. In light of the independent evidence of appellant's guilt, any error in admitting the challenged DNA evidence was harmless. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 93 [erroneous admission of DNA evidence is viewed under the harmless error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

II.

Third Party Culpability Evidence

Appellant contends the court erred in precluding him from presenting evidence that a third party, Sebastian Carrillo, had committed the crime.[7] We are not persuaded.

"An accused may defend against criminal charges by showing that a third person, not the defendant, committed the crime charged. He has a right to present evidence of third party culpability where such evidence is capable of raising a reasonable doubt as to his guilt of the charged crime. But evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice; there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime. [Citations.]" (*People v. Mackey* (2015) 233 Cal.App.4th 32, 110-111.)

In assessing an offer of proof relating to evidence of a third party's culpability, the court must decide whether the evidence could raise a reasonable doubt as to the defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) A trial court's ruling excluding third party culpability evidence is reviewed for abuse of discretion. (*People v. Brady* (2010) 50 Cal.4th 547, 558.)

Prior to trial, appellant moved in limine to present evidence that Carrillo was Zuniga's killer. His proffered evidence included the transcript of Enrique Zuniga's 911 call, in which Enrique recounted hearing Zuniga state "that guy came back" shortly

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[7] Appellant does not challenge the ruling precluding him from presenting evidence that a man named Artemio Lopez was the killer.

before the phone line went dead. Appellant also offered the conditional examination testimony of Oregon, who recalled that a Hispanic man sat near Zuniga at the Army Navy Café on the night of her murder. Oregon thought the man was Carrillo, who had dated her cousin Nancy Valenzuela, but she was not certain. The man argued with Zuniga after she asked him to put out his cigarette. When the man stood up, a gun fell from his person. Valdez, who was with Oregon and Zuniga that night, told the police that the gun was a .22 or .25 caliber.

Appellant also offered the preliminary hearing testimony of one of the police officers who investigated the murder. That testimony indicated that Zuniga's car was registered to a motel room where Carrillo was staying on the night of the murder. When first questioned by the police, Carrillo denied that he and Zuniga were romantically involved or had lived together. He also claimed that he and a friend were watching television on the night of the murder. The police later discovered that Carrillo was involved in a car accident in Oxnard at about 1:30 a.m. that morning. Carrillo subsequently admitted that he was involved with Zuniga and had previously lived with her for about two weeks in an apartment in Oxnard. He also admitted (but had previously denied) seeing her around the time of his car accident. Carrillo also admitted giving Zuniga the ring she was wearing at the time of her murder.

Appellant also offered the conditional examination testimony of Pauline Smith, who was Carrillo's wife at the time of the murder. A few days after the murder, Smith received an anonymous phone call warning that she was "next." About two months prior to the murder, she found a note threatening to kill the recipient if he or she did not leave the author's family alone.

The note was written in Spanish, but someone translated it for her. She hid the note under her mattress but it vanished. She did not tell the police about the note when she was interviewed shortly after the murder because she was afraid of Carrillo.

Finally, appellant offered two reports from an investigator for the Ventura County Public Defender's Office. The first report summarized an August 2013 telephone interview of Valenzuela. Valenzuela said that she and Zuniga were both romantically involved with Carrillo at the time of Zuniga's death, although Valenzuela only saw Carrillo "a few times." Carrillo "took" a high school ring in her possession and later "showed her the ring and he had engraved something on [it.]" After Zuniga's murder, Oregon told Valenzuela that Carrillo committed the crime and had placed the ring on the hand that was left unburied, which Valenzuela "took . . . as a sign that it could have been her." The second report summarized an April 2014 interview of Carrillo's half-brother Juan. Juan said Carrillo only lived in Oxnard for a few years and had made his living picking lemons. Carrillo had returned to Mexico at least 30 years earlier and died from an intestinal illness within a few weeks of his return.

In opposing appellant's motion, the prosecution argued that the proffered evidence was unreliable hearsay and insufficient to raise a reasonable doubt whether appellant had committed the crime. After hearing extensive argument from counsel, the court denied the motion. The court reasoned, "[t]he fact that [Carrillo] under the best analysis of the evidence may have been in the Army Navy Café around that time and had a weapon, that doesn't connect him to this crime[.]" The court continued: "So my analysis is that there's not enough to get to the threshold that there's actually some evidence that connects [Carrillo] to this

event as opposed to putting [him] in the galaxy of people who may have a reason to want to inflict violence on her. But that's not enough. [¶] So at this point I don't think that the threshold's been met for the third-party culpability evidence[.]"

The court did not abuse its discretion in excluding the proffered evidence of third party culpability. Much of the evidence was inadmissible hearsay. (See *People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*) [third party culpability evidence is subject to state evidentiary rules and cannot be premised upon inadmissible hearsay].) In any event, the court did not err in finding the proffered evidence failed to create a reasonable doubt as to appellant's guilt. There was no evidence to support a finding that Carrillo stabbed, abducted, raped, or murdered Zuniga. Moreover, that Carrillo may have argued with Zuniga over a cigarette does not demonstrate an intent to rape and murder her. (See, e.g., *People v. Adams* (2004) 115 Cal.App.4th 243, 254 [third party's expressions of anger and frustration with the victim were not evidence of intent to murder her].) Whether the evidence might indicate Carrillo had the opportunity to commit the crime is insufficient to compel its admission. (*People v. Geier* (2007) 41 Cal.4th 555, 582 ["[E]vidence of mere opportunity without further evidence linking the third party to the actual perpetration of the offense is inadmissible as third party culpability evidence"], overruled on other grounds in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 345.)

As the People note, evidence of Carrillo's domestic violence toward Smith and/or Valenzuela was inadmissible propensity evidence. (*People v. Whorter* (2009) 47 Cal.4th 318, 372.) We reject appellant's assertion that Evidence Code section 1101, which prohibits such evidence, "should have given way to [his]

federal rights because the evidence had 'significant probative value' (*People v. Babbitt* (1988) 45 Cal.3d 660, 684) and 'persuasive assurances of trustworthiness' (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302)." Even assuming that such an exception can apply in a given case, it plainly does not apply here. Appellant "fails to establish how, apart from suggesting [Carrillo's] 'criminal disposition,' [Carrillo's] prior acts of violence connected him to the present crimes. [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 373.) The claimed connection between Carrillo and Zuniga's murder is "speculative with no evidence, either direct or circumstantial, in support." (*People v. Lucas*, *supra*, 60 Cal.4th at p. 280.) "In short, none of [appellant's proffered] evidence had a tendency in reason and logic to prove or disprove any disputed fact that was of consequence to the determination of the action. [Citation.]" (*People v. Adams*, *supra*, 115 Cal.App.4th at p. 255.)

Moreover, it is not reasonably probable that appellant would have achieved a more favorable result had the court admitted the proffered evidence. (See *Hall*, *supra*, 41 Cal.3d at p. 836 [exclusion of third party culpability evidence reviewed under the harmless error standard set forth in *People v. Watson*].)[8] The court's ruling did not completely preclude appellant from offering evidence that a third party killed Zuniga. (See *People v. Jones* (1998) 17 Cal.4th 279, 305 [exclusion of third party culpability evidence did not compel reversal where defendant had the

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[8] We reject appellant's claim that the alleged error violated his constitutional right to present a defense and his right to compulsory process. (See *People v. Lawley* (2002) 27 Cal.4th 102, 155 [application of the ordinary rules of evidence does not impermissibly infringe upon a defendant's constitutional rights].)

opportunity to prove that a third party was the shooter, yet was merely precluded from doing so with inadmissible evidence].) Oregon was allowed to testify she had seen Zuniga arguing that night with a man who resembled Carrillo. Defense counsel relied on that testimony, coupled with the evidence of the 911 call on the night of the murder, in arguing that the man in the café was the killer. In addition, the evidence of appellant's guilt was substantial. Any error in excluding the proffered evidence was thus harmless. (*Hall*, at p. 836.)

III.

Instructional Error

Appellant contends that the kidnapping-murder special circumstance finding (§ 190.2, subd. (a)(17)(B)) must be reversed due to instructional error. The People concede the court erred in instructing the jury with an expansive definition of kidnapping that did not exist when the crimes were committed, yet claim the error is harmless. We accept the People's concession of error and agree that the error does not affect the verdict.

To find the kidnapping-murder special circumstance allegation true, the jury had to find appellant committed the murder during the commission of a kidnapping. A person is guilty of simple kidnapping if he or she "forcibly . . . steals or takes, or holds, detains, or arrests any person in this state, and carries the person into . . . another part of the same county[.]" (§ 207, subd. (a).) The movement or asportation of the victim must be "substantial in character" rather than slight or trivial. (*People v. Stanworth* (1974) 11 Cal.3d 588, 601; see also *People v. Brooks* (2017) 2 Cal.5th 674, ___, 393 P.3d 1, 51 [quoting same].)

In 1978, our Supreme Court held that the determination whether an alleged kidnapping victim's asportation was

substantial in character depended solely upon the actual distance involved. (*People v. Caudillo* (1978) 21 Cal.3d 562, 572-573 (*Caudillo*).) The pattern jury instruction on simple kidnapping (CALJIC No. 9.50) thus provided that the crime of simple kidnapping was committed if, among other things, the defendant's movement of the victim was "for a substantial distance, that is, more than slight or trivial." (*Id.* at p. 650.)

In 1999, the court overruled *Caudillo* to the extent it prohibited consideration of factors other than actual distance. (*People v. Martinez* (1999) 20 Cal.4th 225, 237, fn. 6, 239 (*Martinez*).) The court concluded that in determining whether an alleged victim's movement was substantial, "the jury should consider the totality of the circumstances. Thus, in a case where the evidence permitted, the jury might properly consider not only the actual distance the victim is moved, but also such factors as whether that movement increased the risk of harm above that which existed prior to the asportation, decreased the likelihood of detection, and increased both the danger inherent in a victim's foreseeable attempts to escape and the attacker's enhanced opportunity to commit additional crimes. [Fn. omitted.]" (*Id.* at p. 237.) The court made clear, however, that "[w]hile the jury may consider a victim's increased risk of harm, it may convict of simple kidnapping without finding an increase in harm, or any other contextual factors. Instead, as before, the jury need only find that the victim was moved a distance that was 'substantial in character.' [Citations.] To permit consideration of 'the totality of the circumstances' is intended simply to direct attention to the evidence presented in the case, rather than to abstract concepts of distance. At the same time, we emphasize that contextual factors, whether singly or in combination, will not suffice to

establish asportation if the movement is only a very short distance." (*Ibid.*)

In light of *Martinez*, jurors are now instructed to "consider all the circumstances relating to the movement" in deciding whether a person was moved a substantial distance such that the defendant is guilty of simple kidnapping. (CALCRIM No. 1215.) Appellant's jury was so instructed.[9] In *Martinez*, however, the court made clear that its decision did not apply retroactively because it enlarged the definition of kidnapping. (*Martinez*, *supra*, 20 Cal.4th at pp. 238-241; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1319.) The trial court in this case thus erred in instructing the jury pursuant to CALCRIM No. 1215 rather than the 1979 version of CALJIC No. 9.50.

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[9] The jury was instructed pursuant to CALCRIM No. 1215 as follows: "To prove kidnapping, the People must prove that: [¶] 1. The defendant took, held, or detained another person by using force or by instilling reasonable fear; [¶] 2. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance; [¶] AND 3. The other person did not consent to the movement. [¶] Substantial distance means more than a slight or trivial distance. In deciding whether the distance was substantial, you must consider all the circumstances relating to the movement. Thus, in addition to considering the actual distance moved, you may also consider other factors such as whether the distance the other person was moved was beyond that merely incidental to the commission of rape or murder, whether the movement increased the risk of physical or psychological harm, increased the danger of a foreseeable escape attempt, or gave the attacker a greater opportunity to commit additional crimes, or decreased the likelihood of detection."

The error, however, is harmless.[10] Under pre-*Martinez* law, a movement of an actual distance of 200 feet was found to be sufficient to establish the asportation element of simple kidnapping (*People v. Stender* (1975) 47 Cal.App.3d 413, 421-423), while distances of 75 feet and 95 feet were deemed insufficient (*People v. Brown* (1974) 11 Cal.3d 784, 788-789 [75 feet]; *People v. Green* (1980) 27 Cal.3d 1, 67 [90 feet]). Here, there was evidence that (1) Zuniga was abducted from a phone booth somewhere in Oxnard; (2) her body was found in an agricultural area of town in which no phone booths were nearby; (3) the distance from the road to the burial site was about 83 feet; and (4) Zuniga was shot to death with a .22-caliber gun, and expended .22-caliber casings were found a short distance from the burial site. The only reasonable inferences to be drawn from this evidence are that Zuniga was abducted somewhere in the city, driven to a remote location, and taken into an orchard, where she was raped and murdered. Moreover, it was essentially undisputed that Zuniga was moved at least two hundred feet.[11]

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[10] The People ask us to take judicial notice of documents purporting to demonstrate that the burial site is three miles from the location where Zuniga's car was found. Appellant opposes the request. Because the documents were not before the trial court, the request for judicial notice is denied. (*People v. Sanders* (2003) 31 Cal.4th 318, 323, fn. 1.)

[11] Appellant notes the prosecutor argued in closing that the remote location of the burial site increased the risk of danger to Zuniga. The prosecutor made this point, however, in attempting to establish the remote location evinced an intent to commit rape. He did not assert that the remoteness of the location supported a finding that appellant had moved Zuniga a substantial distance, such that he was guilty of kidnapping.

Appellant did not assert otherwise, but rather claimed he was not the perpetrator. (See *People v. Miller* (1999) 69 Cal.App.4th 190, 209 ["'Although a defendant's tactical decision not to 'contest' an essential element of the offense does not dispense with the requirement that the jury consider whether the prosecution has proved every element of the crime,' . . . [a] defendant's failure to contest [is] tantamount to a concession of the element at issue"].) Because the evidence supported an inference that Zuniga was moved at least 200 feet after she was apprehended and no reasonable juror would have found otherwise, the error in instructing pursuant to CALCRIM No. 1215 was harmless beyond a reasonable doubt.

IV.

Alleged Cumulative Error

Appellant contends that the cumulative effect of the alleged errors compels reversal of the judgment. Although we have concluded that the court committed instructional error, we deemed that error to be harmless. Moreover, there is no other error to cumulate. Appellant's claim of cumulative error thus fails. (*People v. Panah* (2005) 35 Cal.4th 395, 479-480.)

V.

Restitution Fine (§ 1202.4)

The trial court imposed a $10,000 restitution fine at sentencing pursuant to section 1202.4. As appellant correctly notes, section 1202.4 was enacted in 1983, over three years after he committed his crime in 1979. In 1979, restitution fines of up to $10,000 were statutorily authorized by former Government Code section 13967, but could be imposed only if the court found (1) the defendant had the present ability to pay the fine; and (2) the economic impact of the fine would not cause the

defendant's dependents to be on public welfare.[12] (See *People v. Downing* (1985) 174 Cal.App.3d 667, 672.) Neither finding was made here.

Appellant contends the fine was imposed against him in violation of ex post facto principles. Assuming that the issue is forfeited, he further claims that counsel's failure to object to the fine amounts to ineffective assistance.

We conclude that the ex post facto claim is not forfeited. Although the rule of forfeiture can apply to ex post facto claims (see, e.g., *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189), the fine imposed here under section 1202.4 amounts to an unauthorized sentence because it could not have been lawfully imposed under any circumstances. (*People v. Zito* (1992) 8 Cal.App.4th 736, 741-742.) Accordingly, the order was a void judgment subject to correction at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

Because section 1202.4 was not in effect when appellant committed his crime, the restitution fine imposed under that

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[12] The statute provided in pertinent part: "Upon a person being convicted of a crime of violence committed in the State of California resulting in the injury or death of another person, if the court finds that the defendant has the present ability to pay a fine and finds that the economic impact of the fine upon the defendant's dependents will not cause such dependents to be dependent on public welfare the court shall, in addition to any other penalty, order the defendant to pay a fine commensurate with the offense committed, and with the probable economic impact upon the victim, of at least ten dollars ($10), but not to exceed ten thousand dollars ($10,000)[.]" (Former Gov. Code, § 13967, added by Stats. 1973, ch. 1144, § 2, p. 2351, and repealed by Stats. 2003, ch. 230 (A.B. 1762), § 2, eff. August 11, 2003.)

section must be stricken unless there was another statute in effect at the time that would support it. As we have noted, the relevant statute in effect at the time of the offense required the court to make findings that were not made here. We shall accordingly order that the fine be stricken.

VI.

Abstract of Judgment

Appellant asserts that the abstract of judgment should be corrected to reflect the imposition of a $30 court facilities fee (Gov. Code, § 70373), rather than a $35 fee. The People agree, and we shall order the judgment corrected accordingly.

DISPOSITION

The $10,000 restitution fine imposed under section 1202.4 is stricken. The judgment is also modified to reflect the imposition of a $30 court facilities fee under Government Code section 70373, rather than a $35 fee. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Charles W. Campbell, Judge
Superior Court County of Ventura

Dwyer + Kim LLP, Jin H. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

SUPREME COURT OF THE UNITED STATES

JOHN RUSSELL	)	
Petitioner,	)	NO._____
	)	CERTIFICATE OF SERVICE
v.	)	
	)	
PATRICK COVELLO,	)	
Warden	)	
Respondent.	)	
_____	)	

I hereby certify that I was appointed to represent the petitioner under the Criminal Justice Act, 18 U.S.C. 3006A and that I have on this date served copies of the petitioner's Petition for Writ of Certiorari by depositing them in the U.S. Mail, first class postage prepaid, at Oakland, California and addressed to:

Attn: Ms. Ana R. Duarte
Office of the California Attorney General
300 S. Sprint Street, No. 1702
Los Angeles CA
90013-1230
COUNSEL FOR RESPONDENT

Mr. John Russell
AV7870
Mule Creek State Prison
P.O. Box 409099
Ione, CA 95640

Dated: _____, 2023.

_____
Stephanie M. Adraktas
Attorney for Petitioner