No.

In the
United States Supreme Court

Ronnie Y. Conrad,

Petitioner,

v.

Rob St. Andre, Warden,

Respondent.

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

Petitioner's Appendix

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Appendix

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NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONNIE Y. CONRAD, Petitioner-Appellant, v. T. FOSS, Warden, Respondent-Appellee.	No. 22-55083 D.C. No. 2:19-cv-07497-PSG-DFM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, Chief District Judge, Presiding

Argued and Submitted July 12, 2023
Pasadena, California

Before: SANCHEZ and MENDOZA, Circuit Judges, and DONATO,** District Judge.
Concurrence by Judge MENDOZA.

Ronnie Conrad appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We have jurisdiction under 28 U.S.C.

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

** The Honorable James Donato, United States District Judge for the Northern District of California, sitting by designation.

§§ 1291 & 2253. Reviewing the district court's order de novo, *Noguera v. Davis*, 5 F.4th 1020, 1034 (9th Cir. 2021), we affirm.

BACKGROUND

In December 2012, Conrad was arrested for torturing his girlfriend, Tania Garcia, for several hours in a motel room. After her rescue, Garcia told police officers that Conrad had subjected her to painful and prolonged torture. Garcia described Conrad holding her on the ground as he methodically seared her arms and inner thighs with a hot clothing iron. Garcia repeated her statements to medical professionals, who treated her for injuries consistent with her account.

While awaiting trial, Conrad professed his love for Garcia and urged her to recant her testimony. Garcia promised Conrad she would do so. After meeting with Conrad's lawyer, Chad Calabria, she retained Chad's father, Donald Calabria, who "promised to accompany her and stand by her if she were called to testify." Because Donald and Chad shared the same law firm, Chad Calabria owed a duty of loyalty to Garcia as well as to his own client, Conrad. *See United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003).

At the preliminary hearing, Garcia testified that the police officers fabricated her previous statements about Conrad's abuse. She denied having spoken with Conrad since his arrest, despite recorded phone calls proving otherwise. Garcia also attempted to take the blame for the narcotics and weapons charges that Conrad

was facing. On cross-examination, however, Garcia revealed that she lacked knowledge of many details concerning the drugs and firearms she claimed belonged to her. The trial court ordered Garcia to appear at a subsequent hearing, but she failed to do so. The court issued a bench warrant for Garcia at the prosecution's request. The prosecution enlisted an investigator who, in the weeks leading up to Conrad's trial, "searched multiple databases, visited several locations and spoke to eight individuals in search of information about Ms. Garcia and a means to contact her." Donald Calabria signed a declaration stating that he did not know of Garcia's whereabouts and "had not heard from her in a couple of months" by the time of Conrad's trial.

At Conrad's trial, the court determined that Garcia was unavailable to testify and allowed the prosecution to introduce her preliminary hearing testimony. The prosecution used Garcia's preliminary hearing testimony to argue that Conrad had "conditioned" and "coached" Garcia into taking the blame for Conrad's crimes. Based on Garcia's statements, photographs of her injuries, and the physical evidence, Conrad was convicted of torture, mayhem, corporal injury, and possession of narcotics and firearms.

On direct appeal, Conrad asserted that Chad Calabria's performance was adversely affected by Donald Calabria's representation of Garcia. In a reasoned decision, the California Court of Appeal rejected his claim. The court stated: "To

obtain reversal of a criminal verdict, the defendant must demonstrate that (1) counsel labored under an actual conflict of interest that adversely affected counsel's performance, and (2) absent counsel's deficiencies arising from the conflict, it is reasonably probable that the result of the proceeding would have been different." The state court determined that Donald Calabria's "representation of the victim [Garcia] was extremely limited," "[t]here was no evidence Donald's representation of Ms. Garcia threatened Mr. Calabria's loyalty to defendant," and that "[w]ith the exception of Ms. Garcia's statements in the immediate aftermath of the assault, the victim at all times aligned her interests with defendant."[1] The California Supreme Court summarily denied Conrad's claims on direct appeal and state habeas review.

The district court below denied habeas relief, finding that the state court's "decision was not contrary to clearly established federal law or based on an unreasonable determination of the facts because [Conrad's] trial counsel cannot be said to have 'actively represented conflicting interests.'"

[1] The second prong of the court's rule statement, requiring the defendant to show prejudice, is incorrect as a matter of law. Once an actual conflict affecting counsel's performance has been established, prejudice is presumed. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-350 (1980). As we discuss below, however, the court did not apply the erroneous second prong of its stated rule because it found no actual conflict of interest in Chad Calabria's dual representation.

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DISCUSSION

Conrad claims that his trial counsel, Chad Calabria, provided ineffective assistance because Calabria had conflicting interests that undermined his representation of Conrad. The Sixth Amendment guarantees criminal defendants "representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981). "To establish a Sixth Amendment violation based on a conflict of interest . . . , the defendant 'must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.'" *Noguera*, 5 F.4th at 1035 (quoting *Sullivan*, 446 U.S. at 348). "An 'actual conflict' means 'a conflict of interest that adversely affects counsel's performance,' not simply a 'theoretical division of loyalties.'" *Id.* (quoting *Mickens v. Taylor*, 535 U.S. 162, 171, 172 n.5 (2002)).

"To establish an 'adverse effect' a defendant must show 'that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.'" *United States v. Walter-Eze*, 869 F.3d 891, 901 (9th Cir. 2017) (citations omitted). "When faced with a defendant's claim that her counsel operated under an actual conflict, the central question that we consider in assessing a conflict's adverse effect is what the advocate found himself compelled to refrain from doing because of the conflict." *Id.* (cleaned up). Where there is an actual conflict of interest—*i.e.*, a conflict of interest that actually

affected counsel's performance—prejudice to the defendant is presumed. *Clark v. Chappell*, 936 F.3d 944, 985 (9th Cir. 2019).

Because a state court previously rejected Conrad's claims after adjudicating them on the merits, we review the state court's rulings under the "highly deferential" standard established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Noguera*, 5 F.4th at 1034 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). Under AEDPA, a federal court may grant Conrad's petition only if the state court's decision (1) "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) "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); *accord Noguera*, 5 F.4th at 1034.

Conrad's conflict-of-interest claim is primarily based on a declaration that Garcia made approximately two years after his conviction. In that declaration, Garcia described a never-before-mentioned, eve-of-trial meeting with Chad Calabria. Garcia stated she spoke with Chad because she "wanted to come to Court to testify that [Conrad] had not assaulted [her] in any manner." According to Garcia, "Calabria told [her] that he didn't think [she] should come to court" because "it wouldn't look good for [Conrad]." Further, Calabria "told [her] that if [she had] lied to the police when [Conrad] was arrested [she] could get in trouble."

Garcia said she did not go to court "because [she] thought that Chad Calabria [k]new what he was doing and he did not want [her] to come to Court."

We conclude that the state court decision was not contrary to clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). The California Court of Appeal properly determined that Chad Calabria did not labor under an actual conflict of interest that adversely affected his performance, and as such, any prejudice to Conrad could not be presumed. *See Mickens*, 535 U.S. at 171, 172 n.5; *Sullivan*, 446 U.S. at 348. Any division of loyalties that Chad faced as between Conrad and Garcia was "mere[ly] theoretical." *Mickens*, 535 U.S. at 171, 172 n.5.

Taking Garcia's declaration at face value,[2] it shows that Chad Calabria believed Conrad and Garcia's interests were aligned. Chad allegedly told Garcia that her additional testimony at trial would not help Conrad's defense. That was a reasonable assessment given Garcia's implausible and contradictory statements at the preliminary hearing. Indeed, the prosecution made extensive efforts to secure Garcia's appearance at trial, indicating it believed Garcia's testimony would help *convict* Conrad. And Calabria allegedly advised Garcia that testifying at trial

[2] Garcia made her declaration shortly after Chad Calabria died, leaving him unable to either confirm or dispute her account. Nevertheless, Garcia's account of the eve-of-trial meeting is in tension with Donald's sworn declaration that he "had not heard from her in a couple of months."

would put her in legal jeopardy. Such advice, if true, would have been sound because testifying at trial could have subjected Garcia to possible criminal charges for her inconsistent statements under oath. Thus, according to Garcia's own declaration, the same course of action, Garcia not testifying, served both Conrad and Garcia's interests.

Nor was the state court decision an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d)(2). The state court reasonably determined that there was no evidence Donald Calabria's limited representation of Garcia threatened Chad Calabria's loyalty to the defendant, and that Garcia's interests aligned with those of Conrad. Conrad has failed to identify any evidence that an actual conflict of interest adversely affected Chad Calabria's performance. As discussed above, Garcia and Conrad's interests were aligned because additional testimony from Garcia at trial was more likely to hurt Conrad's defense than help it.[3]

Finally, the anti-retroactivity rule bars Conrad's conflict-of-interest claim based on Chad Calabria's prosecution by the district attorney's office, which was also prosecuting his client. Generally, "federal habeas corpus petitioners may not

[3] Moreover, an unconflicted attorney representing Garcia might properly have advised her that she could be arrested for *not* appearing to testify as the court ordered her to. *See* Cal. Pen. Code § 978.5. Thus, even if Chad indeed told Garcia not to testify, he did so against *Garcia's* interest and to Conrad's *advantage*.

avail themselves of new rules of criminal procedure." *Beard v. Banks*, 542 U.S. 406, 408 (2004). A "new rule" is one which "breaks new ground," "imposes a new obligation on the States or the Federal Government," or "was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (emphasis omitted).

A finding of a conflict of interest based on an attorney's prosecution by the same agency prosecuting his client would create a new rule. Courts have not applied a presumption of prejudice from a conflict of interest outside the context of an attorney's concurrent representation of multiple clients with divergent interests. *See Noguera*, 5 F.4th at 1035-36; *see also Walter-Eze*, 869 F.3d at 905 (our circuit has "noted that *Mickens* explicitly concluded that *Sullivan*'s presumption of prejudice was limited to joint representation, and that any extension of *Sullivan* outside of the joint representation at trial context remained, as far as the jurisprudence of the Supreme Court was concerned, an open question") (cleaned up).

Conrad identifies no applicable exception to the anti-retroactivity rule. His claim is therefore barred.[4]

AFFIRMED.

[4] In his opening brief, Conrad raised two uncertified issues pursuant to Circuit Rule 22-1(e). This request to expand the certificate of appealability to include these two additional claims is denied.

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Conrad v. Foss, No. 22-55083

MENDOZA, Circuit Judge, concurring:

I agree that we must affirm the district court's denial of Ronnie Conrad's habeas petition under 28 U.S.C. § 2254. Unlike the majority, I do not think that it was "reasonable" for Mr. Conrad's counsel, Chad Calabria, to determine that Mr. Conrad's and his victim Tania Garcia's interests aligned. If this were, say, de novo review of a decision denying a motion brought under section 2255, I would hold that Mr. Conrad's and Ms. Garcia's interests conflicted, and that conflict adversely affected Mr. Calabria's performance, thus violating Mr. Conrad's Sixth Amendment rights. But the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") controls this appeal, so my hands are tied.

I

AEDPA "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *White v. Wheeler*, 577 U.S. 73, 77 (2015) (per curiam) (quoting *Burt v. Titlow*, 571 U.S. 12, 16 (2013)). Under AEDPA, we defer to a state court's denial of habeas relief on the merits unless it:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Mr. Conrad's appeal rests on the Supreme Court's decisions in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) and *Mickens v. Taylor*, 535 U.S. 162 (2002). In *Sullivan*, the Court held that a criminal defendant's Sixth Amendment rights are violated when "an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348. And in *Mickens*, the Court clarified that we presume prejudice when a defendant makes such a showing under *Sullivan*. *See* 535 U.S. at 166. In Mr. Conrad's case, the state court applied "a rule different from the governing law set forth in [*Sullivan* and *Mickens*]." *Bell v. Cone*, 535 U.S. 685, 694 (2002). It correctly required that Mr. Conrad demonstrate an actual conflict that adversely affected his counsel's performance, but it incorrectly placed the burden on Mr. Conrad to establish prejudice arising from that conflict. Despite this error, which might have rendered this a section 2254(d)(1) appeal, Mr. Conrad's habeas claim falls under section 2254(d)(2)'s "unreasonable determination of the facts" prong. The state court resolved *Sullivan*'s "actual conflict" requirement, which it recited correctly, determining that no "actual conflict" adversely affected Mr. Calabria's performance because, as a factual matter, Mr. Conrad's and Ms. Garcia's interests "aligned."

When "conducting the § 2254(d)(2) inquiry," "[w]e may not characterize the[] state-court factual determinations as unreasonable 'merely because [we] would have reached a different conclusion in the first instance.'" *Brumfield v.*

Cain, 576 U.S. 305, 313–14 (2015) (third alteration in original) (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). Section 2254(d)(2) "requires that we accord the state trial court substantial deference." *Id.* at 314. If "'reasonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's determination.'" *Wood*, 558 U.S. at 301 (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006)) (cleaned up). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

II

Mr. Conrad challenges the state court's determination under *Sullivan* that there was no conflict of interest between Mr. Conrad and Ms. Garcia, and thus, no Sixth Amendment violation by Mr. Calabria. "Multiple" or "joint representation" of a defendant and his victim can give rise to an "actual conflict of interest," in violation of the Sixth Amendment. *See Mickens*, 535 U.S. at 164, 166–69; *see also id.* at 168 ("[J]oint representation of conflicting interests is inherently suspect." (characterizing *Holloway v. Arkansas*, 435 U.S. 475, 483 (1978))). "There is an actual, relevant conflict of interests if, during the course of the representation, the [two parties'] interests do diverge with respect to a material factual or legal issue or to a course of action." *Sullivan*, 446 U.S. at 356 n.3 (Marshall, J., concurring). An "actual conflict," however, requires more than a "mere theoretical division of

loyalties." *Mickens*, 535 U.S. at 171. There must be a conflict that "affected counsel's performance," *id.*, or, put differently, a demonstration "that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests," *United States v. Walter-Eze*, 869 F.3d 891, 901 (9th Cir. 2017) (quoting *United States v. Wells*, 394 F.3d 725, 733 (9th Cir. 2005)). This inquiry is highly "fact specific," and "'defined by its impact' on counsel's representation." *Walter-Eze*, 869 F.3d at 901 (quoting *Hovey v. Ayers*, 458 F.3d 892, 908 (9th Cir. 2006)).

A

The facts in this case give rise to an actual conflict under *Sullivan* and *Mickens*. Mr. Calabria represented Mr. Conrad. And Mr. Calabria's law-firm associate and father, Donald, separately represented Ms. Garcia. Mr. Calabria also gave Ms. Garcia legal advice during trial. The "scope" of Mr. Calabria's duty to Ms. Garcia was therefore "equivalent to the duty of loyalty" he owed Mr. Conrad. *United States v. Rodrigues*, 347 F.3d 818, 824 (9th Cir. 2003) ("An attorney has a duty of loyalty not only to his own clients, but also to all of his firm's clients."). Ms. Garcia's statements to the police and subsequent testimony were at the heart of this case. Shortly after Mr. Conrad's arrest in a motel room littered with guns and drugs, Ms. Garcia told investigating officers and hospital staff that Mr. Conrad had

tortured her, burning her with a clothes iron and beating her repeatedly with a gun, hair-straightening iron, and toilet plunger, as well as his feet and fists. She later recanted. At Mr. Conrad's preliminary hearing, she denied having told police that Mr. Conrad tortured her, claimed that someone else had beaten her, and stated that she owned the guns and drugs recovered from their shared motel room. Ms. Garcia repeatedly tried to get the charges against Mr. Conrad dropped, going so far as to call the trial judge to "inform the court that everything that's being said is not true," "nothing happened," and "it's all a lie."

Mr. Conrad wanted Ms. Garcia to testify at trial. He maintained that Ms. Garcia's testimony would echo her testimony at the preliminary hearing, exonerating him of his crimes. The prosecution also wanted Ms. Garcia to testify. It hoped to capitalize on inconsistencies in her story, and to paint a portrait of a long-abused woman, coached into taking the fall for Mr. Conrad. For her part, Ms. Garcia seemed inclined to "testify at [Mr. Conrad's] trial consistent with her preliminary hearing testimony," and she asked Mr. Calabria for advice. Mr. Calabria, weighing these difficult considerations, counseled Ms. Garcia against testifying. He told her that, if she testified as expected, "she could be prosecuted for making false statements to law enforcement." And he concluded that "it wouldn't look good for [Mr. Conrad]" if she testified. She took his advice and didn't show.

In my opinion, Mr. Calabria "actively represented conflicting interests." *Hovey*, 458 F.3d at 908. Mr. Conrad had a strong and expressed interest in having Ms. Garcia testify on his behalf. By contrast, Ms. Garcia's interest lay in staying silent to avoid perjury and prosecution.[1] Mr. Calabria, confronted by these competing interests, "failed to put on" Ms. Garcia as a witness, *Walter-Eze*, 869 F.3d at 901–02, choosing a strategy that might accommodate *both* parties' interests, rather than solely pursuing the interests of his *actual* client, Mr. Conrad, *cf. Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948) ("[The] right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client."). This conflict is sufficient to demonstrate an adverse effect on Mr. Calabria's performance under our and other circuits' precedent. *See Walter-Eze*, 869 F.3d at 901–02; *Hovey*, 458 F.3d at 908; *United States v. Williams*, 902 F.3d 1328, 1334 (11th Cir. 2018) (reasoning that simultaneous representation of a defendant and prosecution witness posed an actual conflict because counsel was "placed in the equivocal position of having to cross-examine his own client as an adverse witness"); *Castillo v. Estelle*, 504 F.2d 1243, (5th Cir. 1974) (reasoning

[1] The majority underscores that it might have been in Ms. Garcia's interest to appear in court (given that the court ordered her to appear) and, thus, Mr. Calabria gave her advice against her own interest and to Mr. Conrad's advantage. Far from revealing an absence of conflict, however, this analysis only cements it: any decision that Mr. Calabria made by representing the accused and his exonerating witness inherently required him to weigh their interests against one another, and to make choices that only *partially* served both yet *completely* served neither.

similarly to the court in *Williams*, albeit in a pre-*Sullivan* case, that co-representation of a defendant and victim engenders a "risk" of "ambivalence" that "no attorney should accept and that no court should countenance"); *see also United States v. McClelland*, 223 F. App'x 742, 743 (9th Cir. 2007) (affirming a grant of habeas relief under section 2255 because an attorney, representing both an exonerating witness and defendant, engendered a conflict that impeded that witness from testifying). Indeed, my conclusion seems all the more appropriate given that it arises under *Sullivan*, where we presume prejudice because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir. 1989) (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984) and characterizing claims under *Sullivan*, 446 U.S. at 349–50). Had Mr. Calabria been solely devoted to Mr. Conrad's interests, and refrained from counseling Ms. Garcia not to testify, he would have made very different trial decisions.[2]

[2] Although it does not materially affect my analysis, Mr. Calabria's conduct throughout Mr. Conrad's trial was inappropriate, and any similarly situated attorney should re-consider his ability to represent a client ethically and fairly under such circumstances. Two months before entering an appearance on Mr. Conrad's behalf, Mr. Calabria, himself, had been arraigned on criminal forgery charges. Eight days before his appearance, Mr. Calabria was *convicted* in a separate criminal drug case. And after his appearance in Mr. Conrad's case, but before Mr. Conrad's trial, Mr. Calabria faced a civil complaint before the California State Bar and was criminally charged with violating his probation in his drug case. According to the bailiff at Mr. Conrad's trial, Mr. Calabria's behavior

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The state court and the majority disagree with my analysis. The state court dispensed with Mr. Conrad's arguments in short order, reasoning that:

> There was no evidence Donald's representation of Ms. Garcia threatened Mr. Calabria's loyalty to [Mr. Conrad]. With the exception of Ms. Garcia's statements in the immediate aftermath of the assault, the victim at all times aligned her interests with [Mr. Conrad].[4] Defendant has not shown a prejudicial conflict of interest.
>
> [fn.4] In a declaration submitted in support of defendant's motion to reopen . . . , Ms. Garcia stated: she had intended to testify at defendant's trial consistent with her preliminary hearing testimony; but Mr. Calabria told her if she so testified she could be prosecuted for making false statements to law enforcement officers; and as a result of Mr. Calabria's advice, she did not appear at trial; further, Donald, who knew how to contact her, never told her she was needed at trial. The trial court denied the motion to reopen the new trial hearing.

In turn, the majority holds that "Conrad has failed to identify any evidence that an actual conflict of interest adversely affected Chad Calabria's performance." After resurrecting the factual record to justify the state court's cursory holdings, the majority concludes that "Chad Calabria believed Conrad and Garcia's interests were aligned" and that any "division of loyalties that Chad faced as between Conrad and Garcia was 'merely theoretical.'" As discussed above, I disagree that those facts give rise to a finding that Ms. Garcia's and Mr. Conrad's interests

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was "strange," and he repeatedly appeared to fall asleep during it—his head making "a slow descent towards the counsel table" before "snap[ping] back up" when "a motion" or "an objection was made."

aligned, not least because those findings are not reflected in the "last reasoned opinion" on this issue from the California Court of Appeal. *See Wilson v. Sellers*, 584 U.S. --, 138 S. Ct. 1188, 1194 (2018); *see also id.* at 1192 ("[A] federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable.").

Under AEDPA, however, it appears that our disagreement over these facts is likely sufficient to require deference to the state court's determination. After all, here, "'reasonable minds reviewing the record [] disagree' about the finding in question," and therefore habeas review cannot "supersede" the state court's determination. *Wood*, 558 U.S. at 301 (cleaned up); *see also Harrington*, 562 U.S. at 664 ("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 the state court's decision."). It might be true that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). But cases like this—which hinge on detailed factual accounts, cursory state-court orders, and reconstructed hypotheses about counsel's litigation strategy—challenge the notion that a state criminal defendant can truly surmount AEDPA's "formidable barrier" to habeas relief. *White*, 577 U.S. at 77.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RONNIE Y. CONRAD, Petitioner, v. T. FOSS, Respondent.	Case No. CV 19-07497-PSG (DFM) JUDGMENT

Pursuant to the Court's Order Accepting the Report and Recommendation of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied, and this action dismissed with prejudice.

Date: 12/21/21

PHILIP S. GUTIERREZ
Chief United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RONNIE Y. CONRAD, Petitioner, v. T. FOSS, Respondent.	Case No. CV 19-07497-PSG (DFM) Order Accepting Report and Recommendation of United States Magistrate Judge

Under 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the report, findings, and recommendations of the Magistrate Judge.

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

Date: 12/21/21

PHILIP S. GUTIERREZ
Chief United States District Judge

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RONNIE Y. CONRAD, Petitioner, v. MATTHEW ATCHLEY, Respondent.[1]	No. CV 19-07497-PSG (DFM) Report and Recommendation of United States Magistrate Judge

This Report and Recommendation is submitted to the Honorable Philip S. Gutierrez, Chief United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

In December 2012, Petitioner Ronnie Conrad tortured his girlfriend, 19-year-old Tania Garcia, for 3 to 6 hours in a motel room. Police officers, alerted by an anonymous phone tip, entered the room, rescued her, and seized the items that Petitioner had used to burn and beat her. Based on her statements, photographs of her injuries, and the physical evidence, he was charged with

[1] Matthew Atchley is Acting Warden of the facility where Petitioner is currently incarcerated. Substitution of his name is automatic under Federal Rule of Civil Procedure 25(d).

and convicted of torture, mayhem, drug and firearm possession, and other crimes; he is serving a term of 14 years plus 16 years to life. He now asks this Court for a writ of habeas corpus, contending in seven subclaims that he was denied the effective assistance of counsel; in two other subclaims that the prosecution failed to disclose material evidence under Brady v. Maryland, 373 U.S. 83, 87 (1963); and in his final claim that cumulative error requires relief.

Having considered the submissions of the parties, the relevant law, and the underlying record, the Court recommends that the petition be DENIED.

II. FACTS

A. Anonymous Tip and Police Investigation

On December 28, 2012, law enforcement officers were alerted by an anonymous "WeTip" phone call that a person named "Ronnie Conrot" was holding a 17-year-old girl named "Tanya" against her will in room 108 of the Lucky Lodge Motel in Bellflower and was beating her. See Petitioner's Lodged Document ("PLD") 6, Supplemental Clerk's Transcript ("Supp. CT") 249, 261. Officers arrived shortly after 9 a.m. See PLD 2, Reporter's Transcript, Volume 2 ("2 RT") A-17 to A-18.[2] The caller said that Mr. Conrot drove a silver Chevrolet Camaro with license plate number 5JFB122. See PLD 6, Supp. CT 261. Upon arrival, an officer noticed a silver Ford Mustang with that license plate number parked in front of room 108. See PLD 6, Supp. CT 261. A records search revealed that the car was registered to "Ronnie Conrad." Respondent's LD ("RLD") 1, CT 28. Officers approached the room, observed condensation on the window, and concluded that someone was inside. See 2 RT 679. An officer knocked on the door two times and announced, "Sheriff's Department," but no response came. RLD 1, CT 27.

[2] All citations to state-court records are to the records' internal pagination. All citations to the parties' briefs are to the CM/ECF pagination.

An officer spoke to the motel manager, who said that the room was registered to Ronnie Conrad and that a young female was with him. See RLD 1, CT 27. The manager believed the two were still in the room. See RLD 1, CT 27-28. The officers formed a crisis entry team, knocked and announced several more times, but no response came. See RLD 1, CT 28.

They entered the room. See 2 RT 712. They found Petitioner and a young woman under the bedcovers and tied to each other, hand to hand, with a black shoestring. See 2 RT 680, 682, 707. They also found two loaded handguns, live ammunition, baggies containing methamphetamine and cocaine, digital scales, bent spoons with burnt residue, and $946 in cash. See 2 RT 713, 715-16, 721, 724, 726. The guns were on the nightstand closest to Petitioner. See 2 RT 908. One carried his fingerprints. See 2 RT 913-14, 919-23. Officers seized and photographed several items. See 2 RT 683-85, 704-07, 714-19, 721-24, 727. The young woman, who later identified herself as 19-year-old Tania Garcia, had visible injuries. See PLD 1, Reporter's Transcript of Preliminary Examination ("PE RT") 2-3; 2 RT 683.

B. Garcia Describes the Torture

Garcia initially blamed two "girls" for her injuries but eventually told Deputy Sheriff Shelby Martin that Petitioner had been extremely jealous because his uncle had been staring at her. See 2 RT 685, 689. Petitioner called the uncle over to the motel room and instructed her to tell him that she was not interested in him. See 2 RT 690. But when his uncle left the room before she had delivered the message, Petitioner directed all his anger toward her. See 2 RT 690. He threw her to the floor, hit and kicked her in the arms, legs, and head, and told her that she was getting what she deserved. See 2 RT 690-91. She said that he picked her up and sat her on the edge of the bed. See 2 RT 691.

Garcia told Deputy Martin that Petitioner then struck her on the left side of her face with a clothing iron, dizzying her, and causing her to fear that if she passed out, he would kill her. See 2 RT 691. She said that he then plugged in the iron and waited for it to get hot. See id. She said that he pressed it against her upper left arm and continued saying that she was getting what she deserved. See id. He dug its tip into her legs at least ten times, opening circular wounds, and pressed its side against the inside of her legs, causing long welts. See 2 RT 691-92. She said that Petitioner also struck her with a gun, a hair iron, a toilet plunger, and a long metal handle or pipe with jagged edges, cutting her skin. See 2 RT 692, 694, 705. She said that the beating lasted between 3 and 6 hours. See 2 RT 692.

C. Garcia Shifts from Accusing to Supporting Petitioner

That day, Garcia told four people that she had received her injuries from her boyfriend. She first told Deputy Martin and later Detective Michael Garfin. See 2 RT 688, 727-28. She also told an emergency room nurse and an emergency room nurse practitioner. See 2 RT 672, 676. She let Deputy Martin photograph her injuries, which appeared to worsen as the night went on. See 2 RT 684-85, 696.

However, she later stopped cooperating with the investigation. Within a few days, she and Petitioner spoke by telephone while he was in jail. See PLD 6, Supp. CT 14-30. They professed their love for each other and agreed to get married. See PLD 6, Supp. CT 29, 34, 60-62. He urged her to take responsibility for the weapons and drugs. See PLD 6, Supp. CT 36. She repeatedly requested that all charges against him be dropped. See FAP Exhs. 3-4. The last time she indicated that he had caused her injuries was in mid-January 2013. See 2 RT 729. Between then and the preliminary hearing in March 2013, she had the name "Ronnie" tattooed on her face. See 2 RT 656.

D. The Preliminary Hearing

Garcia testified at Petitioner's preliminary hearing but denied that he had harmed her. See PE RT 21-23. She said she had been in one fight with a girl who had given her a purple eye and was later jumped by multiple "girls." See PE RT 7-8. She repeatedly denied telling Deputy Martin that Petitioner had caused her injuries. See PE RT 21-23, 25-32. She claimed ownership of the guns, drugs, and paraphernalia. See PE RT 10-14.

E. Trial Evidence and Argument

At trial, the prosecutor introduced Garcia's preliminary hearing testimony to the jury. See 2 RT 618-61.[3] She then called Deputy Martin, Detective Garfin, and the nurse and nurse practitioner who had treated her. See 2 RT 661-62, 673, 677, 709-10. They testified about Garcia's earlier inconsistent statements; specifically, all four testified that Garcia said that she received her injuries from her boyfriend. See 2 RT 672, 676, 688, 728-29. The nurse described Garcia's injuries and circled on the photographs where he saw burn marks and scarring. See 2 RT 669. Deputy Martin recited Garcia's description of the torture and testified that the clothes iron, bloody metal pipe, hair iron, and toilet plunger in evidence were the same ones that Garcia identified in the motel room as the objects that Petitioner had beaten her with. See 2 RT 704-06. In the prosecutor's closing argument, she drew attention to photographs of the burn marks: "Look at the burn mark on her left arm. You can see the shape of this iron on her arm." 3 RT 1240. Referring to another picture, she observed: "All these little round marks here are him literally

[3] The trial court determined that Garcia was unavailable to testify after conducting a hearing and finding that the prosecution exercised due diligence attempting to locate her. See 2 RT A-4 to A-15.

pressing the tip of the iron into her skin while the flesh burns away." 3 RT 1241.

Detective Garfin testified that police had seized from the room two loaded semiautomatic pistols that Garcia said were Petitioner's, along with live ammunition, baggies containing what appeared to be narcotics, digital scales, spoons that were bent with burnt residue, and $946 in cash in various denominations. See 2 RT 713-16, 721, 724-27, 729. A narcotics officer opined that these and other items seized from the room indicated possession for the purposes of sales. See 2 RT 954-57. The prosecution also played recorded phone calls between Petitioner and Garcia. See 2 RT 932, 934, 935. In one of them, Petitioner states, "I need you to get these guns and these drugs off me, man, like you said you would." PLD 6, Supp. CT 36. In closing, the prosecutor argued that Garcia had lied about the guns and drugs being hers, because her testimony showed that she did not know what kind of guns and drugs had been seized from the motel room. See 3 RT 1253-54.

Petitioner did not submit any evidence in his defense. See 2 RT 957. His counsel emphasized Garcia's preliminary hearing testimony exculpating Petitioner and argued that her statements to police were unreliable because they were coerced under threat of her arrest and prosecution. See 3 RT 1257. His counsel described Garcia's many requests that the district attorney cease prosecuting Petitioner. See 2 RT 612; 3 RT 1258. And his counsel argued that it "ma[d]e no sense" for Garcia to speak with him in jail hundreds of times, discussing their future lives together, if he had in fact beaten and tortured her. 3 RT 1260.

III. PROCEDURAL HISTORY

A. Conviction and Sentence

The jury convicted Petitioner of torture, mayhem, corporal injury, possession for sale of methamphetamine and cocaine base, and firearm and

ammunition possession by a felon. The jury also found that he personally used a deadly or dangerous weapon, personally used a firearm, and personally inflicted great bodily injury on Garcia under circumstances involving domestic violence. Petitioner admitted four prior convictions. See 3 RT 1804-06. The trial court sentenced him to two life terms plus 20 years.

B. Post-Conviction Trial Court Proceedings

After his conviction, Petitioner moved for a new trial, arguing that he had been denied the effective assistance of counsel and that the prosecution had failed to disclose his trial counsel's possible inebriation. See PLD 5, CT 68-84. The trial court granted the motion on the basis that Petitioner's trial counsel was ineffective due to a presumptively prejudicial conflict of interest. See 3 RT 2136.

C. First Appeal

The People appealed. The California Court of Appeal reversed on the grounds that prejudice could not be presumed and remanded for the trial court to assess whether the conflict of interest resulted in actual prejudice. See PLD 11 at 3-7. On remand, the trial court found no actual prejudice, rejected Petitioner's other arguments, and denied the new trial motion. See 3 RT 3045, 3608. It again sentenced Petitioner to two life terms plus 20 years. See 3 RT 3610.

D. Second Appeal

Petitioner then appealed from the order denying his new trial motion and from the judgment on several grounds, including ineffective assistance of counsel (which the Court occasionally refers to herein as "IAC"). See PLD 12. The Court of Appeal conditionally reversed and remanded, rejecting most of his arguments but remanding for the trial court to correct errors in sentencing and to consider whether trial counsel was ineffective in failing to file an evidence-suppression motion. See PLD 15 at 27-30. On remand, the trial court

corrected the sentence and found that trial counsel had not been ineffective because it would have denied the suppression motion even if it had been made. See PLD 3, RT 16, 26.

E. Third Appeal and Subsequent State-Court Proceedings

Petitioner appealed again. See PLD 16. This time, the Court of Appeal affirmed the trial court. See PLD 18 at 15. Petitioner sought review in the California Supreme Court, but his petition was summarily denied. See PLD 20. Petitioner then filed a petition for writ of habeas corpus in the California Supreme Court, but that petition was also summarily denied. See PLD 22.

F. Federal Proceedings

After his state-court proceedings ended, Petitioner filed in this Court a Petition for Writ of Habeas Corpus by a Person in State Custody. See Dkt. 1. He moved for appointment of counsel, see Dkt. 14, which the Court granted, see Dkt. 18. He filed a First Amended Petition, see Dkt. 28 ("FAP"), and an accompanying Memorandum of Points and Authorities, see Dkt. 28-1 ("MPA"). He contends that he was denied the effective assistance of counsel in violation of the Sixth Amendment and that the prosecution failed to disclose material evidence in violation of the Fourteenth Amendment. See MPA at 12-14, 44-46.[4] Respondent then filed an Answer, see Dkt. 43, and Petitioner a Reply, see Dkt. 55.

IV. STANDARD OF REVIEW

The FAP is subject to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which forecloses federal habeas relief for "any claim that was adjudicated on the merits in State court" unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly

[4] Citations to the parties' briefs follow the CM/ECF pagination, while citations to all other documents follow their internal pagination.

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).

A state-court decision is "contrary to" clearly established Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a [different] result." Price v. Vincent, 538 U.S. 634, 640 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 405-06 (2000)). A state-court decision "involve[s] an unreasonable application" of clearly established Supreme Court precedent if "it correctly identifies the governing legal rule," White v. Woodall, 572 U.S. 415, 426 (2014), but then applies that rule to the facts of a particular case in an "objectively unreasonable" way, id. at 419 (quoting Lockyer v. Andrade, 538 U .S. 63, 76 (2003)), such that "there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 420 (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).

A state court decision is "based on an unreasonable determination of the facts" if the federal court is "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." Murray v. Schriro, 745 F.3d 984, 999 (9th Cir. 2014) (quoting Taylor v. Maddox, 366 F.3d 992, 1000 (9th Cir. 2004), overruled on other grounds, Murray, 745 F.3d at 999-1000).

Here, the California Court of Appeal was presented with and rejected on the merits all except one of Petitioner's subclaims, and the California Supreme Court denied review. The Court reviews the Court of Appeal's decisions on those grounds as the last reasoned decision by California's courts. See Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). One of Petitioner's Brady subclaims

was raised in the first instance by habeas petition to the California Supreme Court, which denied relief without comment. See PLD 21, 22. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." Richter, 562 U.S. at 98.

V. DISCUSSION

A. IAC Subclaim One: Concurrent Representation

Petitioner contends that his trial counsel had a conflict of interest in concurrently representing Petitioner and Garcia, whose interests allegedly diverged at trial. He contends that the conflict adversely affected his counsel's performance when his counsel advised Garcia against testifying at trial, and that nothing further is required to prove a Sixth Amendment violation under Cuyler v. Sullivan, 446 U.S. 335 (1980). See MPA at 16-20.

1. Background

After the state appellate court remanded Petitioner's case, Petitioner argued that he was entitled to a new trial because his trial counsel's firm concurrently represented Petitioner and Garcia. See 3 RT 3032-34. Chad Calabria represented Petitioner at trial; Petitioner alleged that Chad's father Donald Calabria, a member of the same firm, concurrently represented Garcia. See 3 RT 3031-32.[5] Petitioner further claimed that his interests and Garcia's diverged over whether she should testify at trial. See 3 RT 3032. She had an interest in not testifying, Petitioner asserted, because she had already made inconsistent statements; if she testified, she would expose herself to criminal liability for either perjury at the preliminary hearing or giving false statements to police on the day she was taken from the motel room. See 3 RT 3032-33. He

[5] To avoid confusion, the Court will refer to the Calabrias by their first names in this portion of the report and recommendation.

had a conflicting interest in that he wanted her to testify to affirm the truth of her preliminary hearing testimony and explain why she had made inconsistent statements to the police. See 3 RT 3033-34.

In response, the prosecutor maintained that Petitioner and Garcia's interests were "very, very clearly aligned." 3 RT 3041. She argued that the jail calls between the two showed that he "talked her into recanting." 3 RT 3042. Further, she asserted that Garcia protected Petitioner's interests by not testifying, because to testify would have exposed her to cross-examination, and for her "to face admitting a lie would, in fact, prejudice [Petitioner]." Id.

The trial court denied the new trial motion. See 3 RT 3045. It ruled that the alleged conflict "one, did not affect [Chad Calabria's] performance at trial; two, did not result in actual prejudice to [Petitioner]." 3 RT 3045.

Shortly thereafter, Petitioner moved to reopen and submitted more evidence to show that the conflict had an adverse effect on Chad's performance. See 3 RT 3601-02. He submitted a declaration from Garcia stating that Chad had advised her against testifying at trial:

> Just before the trial Chad Calabria told me that he didn't think I should come to court. If I would come to court it wouldn't look good for Ronnie . . . . He told that if I lied to the police when Ronnie was arrested I could get into trouble. I wanted to come to court to testify that Ronnie had not assaulted me . . . I would have testified that I had [originally] told the female investigator . . . that Ronnie had assaulted me, because she told me that I was looking at 15 years in prison for the narcotics . . . . I did not come to Court because I thought that Chad Calabria knew what he was doing and he did not want me to come to Court.

FAP Exh. 7 at 26, Declaration of Tania Garcia ("Garcia Decl.") ¶ 8. Petitioner argued that Chad's advice to Garcia harmed him because it caused her not to

testify at trial; instead, the jury heard her preliminary hearing testimony through a reader employed by the district attorney's office and did not see Garcia on the witness stand, hear the inflection of her voice, or see how she would have handled the prosecutor's questions. See 3 RT 3605. The state responded that Garcia's declaration was untimely, added virtually no new information about the material issues in the case, and would not change the verdict on a retrial. See RLD 3, CT 25-29. The trial court denied Petitioner's motion without stating reasons. See 3 RT 3608.

Petitioner appealed. On appeal, the People argued that Petitioner had not shown concurrent representation because Donald had stated that he had no way of contacting Garcia before trial. See PLD 13 at 39-40. The People also continued to argue that Petitioner and Garcia's interests were aligned, noting that she had repeatedly asked for Petitioner not to be prosecuted and that she recanted at the preliminary hearing. See id. at 40.

The Court of Appeal affirmed, holding that the trial court did not abuse its discretion because Petitioner had not shown a "prejudicial conflict of interest." PLD 15 at 16. The Court of Appeal found that Donald's representation of Garcia was "extremely limited" and that there was "no evidence" that it threatened Chad's loyalty to Petitioner. Id. Further, even though it acknowledged Garcia's declaration that she did not appear at trial because of Chad's advice, it nonetheless found that she "at all times aligned her interests with [Petitioner]." Id.

Petitioner argues that the Court of Appeal's decision was contrary to clearly established federal law because it required him to show prejudice when prejudice should have been presumed. See MPA at 19; Reply at 16. He further argues that it was based on an unreasonable determination of the facts because Garcia's declaration makes clear that Chad told her not to testify, in violation of his duty of loyalty to Petitioner. See MPA at 19-20.

2. Applicable Federal Law

The Sixth Amendment right to counsel includes the right to representation "free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271 (1981). Ordinarily, a defendant alleging a Sixth Amendment violation based on ineffective assistance of counsel must show that the counsel's errors resulted in prejudice, defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). However, in Cuyler v. Sullivan, the Supreme Court held that prejudice is presumed if the defendant demonstrates that counsel "actively represented conflicting interests" and that the conflict "adversely affected his lawyer's performance." 446 U.S. 335, 348, 350 (1980); see also Mickens v. Taylor, 535 U.S. 162, 175-76 (2002) (discussing application of the Sullivan rule).

"A showing of 'adverse effect' is not the same as showing prejudice under the Strickland analysis." United States v. Walter-Eze, 869 F.3d 891, 901 (9th Cir. 2017). The strength of the prosecution's case is not relevant to the showing of "adverse effect." Id. Rather, the required showing is that "some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." Noguera v. Davis, 5 F.4th 1020, 1037 (9th Cir. 2021) (citation omitted)

3. Teague Bar

At the outset, Respondent argues that this subclaim is barred by the non-retroactivity doctrine set forth in Teague v. Lane, 489 U.S. 288 (1989). See Answer at 14, 31-35. Respondent contends that the Sullivan presumption-of-prejudice rule does not apply to conflicts that arise from the concurrent representation of a defendant and his alleged victim, as Petitioner alleges, but only to those arising from the concurrent representation of codefendants. See

id. at 31-32. Therefore, Respondent maintains, "granting relief on his claim would require that a new rule of constitutional law be announced, i.e., that the representation by two attorneys from the same law firm, one representing the defendant and the other representing the victim, constitutes concurrent representation within the meaning of . . . Sullivan." Id. at 34.

Petitioner counters that no new rule need be announced. Instead, he argues, habeas relief could be granted by application of general constitutional principles from analogous Supreme Court cases, an approach that would not run afoul of Teague. See Reply at 2, 13 (citing Burdine v. Johnson, 262 F.3d 336, 343 (5th Cir. 2001) (en banc)). He draws principles from six Supreme Court cases concerning attorney conflicts of interest. See Reply at 14.

This Court must address the Teague issue. See Horn v. Banks, 536 U.S. 266, 272 (2002) ("[A] federal court considering a habeas petition must conduct a threshold Teague analysis when the issue is properly raised by the state."). In Teague, the Supreme Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310. In general, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Id. at 301. In other words, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id.[6] The "rule" need not already have been announced by the United States Supreme Court or a circuit court. Where a habeas claim would require the announcement of a new rule, Teague applies. See Saffle v. Parks, 494 U.S. 484, 487-88 (1990) ("As [the

[6] In deciding whether a constitutional rule is "new" for Teague purposes, the Court is not limited to surveying Supreme Court precedent. It may also consider Circuit precedent. See Butler v. Curry, 528 F.3d 624, 635 n.10 (9th Cir. 2008).

petitioner] is before us on collateral review, we must first determine whether the relief sought would create a new rule [under Teague]").

Here, granting relief would not require announcing any new rule and would be dictated by well-established Sixth Amendment principles. In Holloway v. Arkansas, the Supreme Court explained that "in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to refrain from doing." 435 U.S. 475, 490 (1978). Where loyalty to one client causes evidence never to be developed, it becomes difficult to judge intelligently from the record the impact of the conflict on the representation, and a presumption of prejudice is appropriate. See id. at 490-91. Here, Petitioner alleges similar prejudice as a result of Chad advising Garcia not to testify at trial. See 3 RT 3605 (arguing that the jury was prevented from seeing how Garcia would have answered the prosecutor's questions). Accordingly, it does not appear that Teague bars this subclaim.

Relying on Mickens, Respondent argues that the Supreme Court has limited Sullivan to codefendants. See Answer at 34. Indeed, Mickens contains three long paragraphs in which the Supreme Court disapproves of decisions involving what it characterizes as the "expansive application" of Sullivan. See Mickens, 535 U.S. at 174-76. But what Mickens disapproved of was Sullivan's application to cases where counsel did not "actively represent[] conflicting interests." Id. at 175 (emphasis deleted). Further, after Mickens, at least one court has applied the Sullivan rule to an alleged conflict of interest arising from the concurrent representation of multiple clients who were not codefendants. See Hawkins v. Wong, No. 96-1155, 2010 WL 3516399, at *77 (E.D. Cal. Sept. 2, 2010), report and recommendation adopted, 2013 WL 3422701 (E.D. Cal. July 8, 2013).

4. Analysis

The Court of Appeal's decision was not contrary to clearly established federal law or based on an unreasonable determination of the facts because Petitioner's trial counsel cannot be said to have "actively represented conflicting interests." Sullivan, 446 U.S. at 350; Mickens, 535 U.S. at 166, 175.

The Court agrees with the Court of Appeal's finding that Garcia aligned her interests with Petitioner. The record suggests that Garcia promoted Petitioner's interests during the time Chad represented him. Garcia signed a refusal-to-prosecute form and requested that the district attorney stop prosecuting Petitioner because, as she explained, she was grateful to him for helping her overcome drug abuse and homelessness. See PE RT 42. She was willing to expose herself to criminal liability to help him, such as when she claimed that the illegal drugs and paraphernalia were hers, see PE RT 5, 11-15, and that she "had it packed up for sales," PE RT 15. She told Petitioner about her willingness to do this in a recorded phone call. See PLD 6, Supp. CT 20 ("Look, look, you don't have to worry . . . I'm not going against you, like no matter what, like, I'm gonna stick right there. . . . If I end up going down, like, I'm gonna go down, you know?").

Garcia's post-trial declaration does not undermine the Court of Appeal's finding. According to it, Chad told her that if she "c[a]me to court it wouldn't look good for Ronnie." Garcia Decl. ¶ 8. She also states that Chad told her twice—at the time Petitioner retained him and just before trial—that she could be in trouble for lying to the police. See id. ¶¶ 4, 8. In Chad's view, however, these two considerations supported the same course of action. See id. ¶ 8. Ultimately, she "did not come to [trial] because [she] thought that Chad Calabria [k]new what he was doing." Id. In other words, the record suggests that Garcia followed Chad's advice at least in part to strengthen Petitioner's case.

Petitioner has not made the contrary showing that his and Garcia's interests actually conflicted. He asserts what is plausible in a normal case: that it was in his interest that she testify "to her preliminary hearing testimony exonerating him and explain to the jury why her statements to the police inculpating him were false." MPA at 20. But the Court cannot say whether this is correct in this case. Specifically, the Court cannot say that Chad misjudged the optics of Garcia's potential trial testimony as not "look[ing] good" for Petitioner. Garcia Decl. ¶ 8. The prosecutor's questioning of Garcia at the preliminary hearing opened several holes in Petitioner's defense that became central to her closing argument: Garcia knew very little about the drugs that she claimed to sell from the motel. See 2 RT 621-22; 3 RT 1253-55. Garcia could describe only one of the two guns that she claimed were hers. See 2 RT 627; 3 RT 1253-54. And she had no credible explanation for her burns. See 2 RT 647-49; 3 RT 1254. If Garcia had tried to fill these holes at trial, she would have created yet another version of events, risked the introduction of inconsistencies, and opened new attacks on her credibility. Alternatively, if she had reaffirmed the dubious parts of her preliminary hearing testimony, the jury might have gathered from her body language and vocal inflection that she was lying to help Petitioner. Moreover, Garcia's face tattoo of Petitioner's name would have been a stark visual reminder to the jury of what the prosecutor framed as the "real crux of this case," the domestic violence that put Garcia "mentally . . . so under [Petitioner's] control that she d[id]n't even try" to resist. 3 RT 1268. Petitioner has not shown that his and Garcia's interests in whether she would testify at trial actually conflicted.[7] In the absence of that

[7] Petitioner argues that he needed Garcia to testify at trial to explain that deputies coerced and threatened her into accusing Petitioner. See Reply at 18 n.4. This argument is not persuasive because evidence raising this possibility was already before the jury. Garcia testified at the preliminary hearing that

showing, the Court "generally presume[s] that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client." Noguera, 5 F.4th at 1038 (quoting Burger v. Kemp, 483 U.S. 776, 784 (1987)).

Accordingly, the California Court of Appeal did not unreasonably apply clearly established federal law in declining to presume prejudice, because Chad did not "actively represent[] conflicting interests." Sullivan, 446 U.S. at 350; Mickens, 535 U.S. at 166, 175. Therefore, a Sixth Amendment violation does not result from Chad's advice to Garcia unless Petitioner shows deficient performance and prejudice under Strickland. See Sullivan, 446 U.S. at 348 ("[A] reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel."). Petitioner raises that subclaim separately; the Court addresses it below.

B. IAC Subclaim Two: Personal Interest Conflict

Petitioner also contends that Chad Calabria had a conflict of interest during trial because he was being prosecuted on forgery and drug charges by the same agency that was prosecuting Petitioner. See MPA at 21-25; Reply at 20-23. He contends that the conflict gave Calabria "an obvious self-serving bias in protecting his own liberty . . . and financial interests" at Petitioner's expense. MPA at 13, 21, 24 (quoting Rugiero v. United States, 330 F. Supp. 2d 900, 906 (E.D. Mich. 2004)). Because he has shown that this conflict adversely affected Calabria's performance, he asserts, he is entitled to a presumption of prejudice and habeas relief under Sullivan. See MPA at 24-25.

Deputy Martin kept telling her that she "was lying" when she did not accuse Petitioner of causing her injuries and told her that she was being taken to the police station where she would be arrested. 2 RT 634. Based on this testimony, Chad argued in closing that Deputy Martin refused to believe Garcia's initial explanation for the injuries and "threaten[ed]" to take Garcia to jail if she "d[id]n't say something else." 3 RT 1257.

1. Background

When Petitioner moved for a new trial, he argued that the prosecution violated his due process rights by failing to notify the trial court that Calabria had been prosecuted in two criminal cases and violated probation multiple times in 2013, including when Petitioner was tried. See PLD 5, CT 81-83. Petitioner subpoenaed Calabria to testify. See 3 RT 2101-03.

At the hearing, Calabria confirmed that he had two cases in drug court but declined to answer any questions about them. See 3 RT 2118. Petitioner offered to prove that Calabria had an open case against him during Petitioner's trial with a certified copy of the case's docket sheet. See 3 RT 2123. The trial court accepted Petitioner's offer and asked him to consider whether the situation resulted in a conflict of interest under Harris v. Superior Court, 225 Cal. App. 4th 1129 (2014). See 3 RT 2121.

After a recess, Petitioner's counsel read into the record certified minute orders from two cases that the Los Angeles District Attorney's Office had prosecuted against Calabria. See 3 RT 2125-26. According to these minute orders, Calabria had forgery charges pending against him during the entire time he represented Petitioner and to which he pleaded guilty 3 weeks after Petitioner's trial ended. See 3 RT 2126. He had also been convicted in a drug case shortly before he began representing Petitioner; a probation violation in that case was continued multiple times, including a week before the beginning of Petitioner's trial. See 3 RT 2126. Because of these open criminal matters, the trial court found that Calabria had a presumptively prejudicial conflict of interest like the one in Harris and granted Petitioner's motion for a new trial on that basis. See 3 RT 2135-36.

The People appealed. It argued that the trial court incorrectly read Harris as establishing a per se reversal rule and ignored the requirement that Petitioner show that the conflict "adversely affect[ed] counsel's performance."

PLD 7 at 2 (quoting Mickens, 535 U.S. at 171). Reversing, the Court of Appeal held that Petitioner needed to show that the alleged conflict affected Calabria's performance and resulted in actual prejudice before the new trial motion could be granted. See PLD 11 at 4-5. It distinguished Harris on the basis that the conflict in that case had come to light pre-trial, whereas the alleged conflict in Petitioner's case had come to light post-trial. See id. at 4. It noted that "[e]xcept in a concurrent representation case, there is no presumption of prejudice in the post-trial conflict of interest context." Id. It instructed the trial court to determine whether the conflict resulted in actual prejudice, noting that trial courts "are in the best position to evaluate . . . counsel's performance and its effect on a defendant's case." Id. at 5. Around this time, Calabria died. See 3 RT 3002.

At the hearing on the renewed new trial motion, Petitioner argued that Calabria's failure to file a motion to suppress evidence, to call a material witness, and to make numerous objections showed that the conflict adversely affected his performance and "possibly [caused] a different verdict or different outcome." 3 RT 3037. The trial court denied the new trial motion, ruling that the personal interest conflict "did not affect [Calabria's] performance in trial . . . [and] did not result in actual prejudice." 3 RT 3045. The Court of Appeal affirmed the trial court's rejection of the conflict-of-interest claims. See PLD 15 at 14-18.

Petitioner now argues that the Court of Appeal's decision was contrary to clearly established federal law because it required Petitioner "to prove prejudice in a situation where the Supreme Court has held that prejudice is presumed." MPA at 24. He cites Campbell v. Rice for the notion that clearly established federal law extends Sullivan's presumption of prejudice to conflicts where defense counsel faces charges from the same district attorney's office

prosecuting the defendant. See id. (citing Campbell, 408 F.3d 1166, 1168-70 (9th Cir. 2005) (en banc)); Reply at 21.

Respondent counters that Petitioner's claim is barred by Teague and states that the Court of Appeal properly relied on Strickland because the alleged conflict does not involve concurrent representation of codefendants. See Answer at 41-45. Respondent further argues that the Court of Appeal reasonably rejected Petitioner's claim because Petitioner failed to demonstrate prejudice given overwhelming evidence of his guilt. See id. at 45.

2. Teague Bar

The Court finds that this subclaim is barred by Teague, because applying Sullivan's presumption of prejudice outside the concurrent representation context would "break[] new ground." Teague, 489 U.S. at 301. The Supreme Court has observed that "the language of Sullivan itself does not clearly establish, or indeed even support" its "expansive application" to conflicts that implicate "counsel's personal or financial interests." Mickens, 535 U.S. at 174-75. In so observing, the Supreme Court "explicitly limited [the] presumption of prejudice for an actual conflict . . . to cases involving 'concurrent representation.'" Rowland v. Chappell, 876 F.3d 1174, 1192 (9th Cir. 2017) (citing Mickens, 535 U.S. at 175). For this reason, granting relief to him on this subclaim would break new ground.[8]

[8] See Jones v. Johnson, No. 15-1376, 2019 WL 6362473, at *9 (C.D. Cal. Aug. 22, 2019) (finding that it would be "contrary to Supreme Court law" to apply Sullivan to an ineffective assistance of counsel claim arising out of counsel's representation of a defendant at trial while being prosecuted by the same district attorney's office), report and recommendation adopted, 2020 WL 1692340 (C.D. Cal. Apr. 3, 2020). The trial counsel in that case was Chad Calabria; the charges against Calabria in that case were the same Petitioner references in this subclaim. See id. at *7.

Petitioner's reliance on Campbell is misplaced. See MPA at 24; Reply at 21. The petitioner in that case raised an ineffective assistance of counsel claim based on a conflict that arose when his counsel came under prosecution by the same district attorney's office that was prosecuting him. See Campbell, 408 F.3d at 1168. The California Court of Appeal rejected the claim after determining that there was no adverse effect on counsel's representation. See id. at 1170. The Ninth Circuit held that the state-court decision was not contrary to clearly established federal law. Id. Petitioner infers from this holding that the Sullivan presumption of prejudice applies whenever a defendant's counsel is prosecuted by the same district attorney's office that is prosecuting the defendant. See Reply at 21.

This inference is incorrect. The state court in Campbell could have properly rejected the petitioner's claim based on a failure to show either deficient performance or prejudice. Because the state court correctly determined that there was no adverse effect on the counsel's representation, it follows necessarily that the petitioner had not shown prejudice. See Stoia v. United States, 22 F.3d 766, 771 (7th Cir. 1994) ("[I]t is significantly easier to demonstrate an 'adverse effect' than to show 'prejudice.'"). Accordingly, in declining to disturb the decision of the California Court of Appeal, the Ninth Circuit needed to rely only on Strickland. It had no need to ignore the Supreme Court's analysis in Mickens and extend Sullivan's rule to personal interest conflicts. The Court does not discern in Campbell any such silent extension.

Finally, Petitioner argues that he prevails even under Strickland because he has shown that Calabria's unreasonable acts and omissions prejudiced him. See Reply at 23. However, he alleges no prejudicial acts or omissions uniquely arising from this conflict that are not set forth in separate subclaims. Habeas relief is therefore not warranted on this subclaim.

C. IAC Subclaim Three: Alleged Drug Intoxication and Sleeping

Petitioner contends that he was denied the right to counsel because Calabria was under the influence of drugs and fell asleep multiple times while evidence was being presented against Petitioner at trial. See MPA at 13, 25-28.

1. Background

When Petitioner moved for a new trial, he claimed that he would present evidence that Calabria "was under the influence of heroin, barbiturates and other mind-altering drugs." PLD 5, CT 72. He presented court records that showed Calabria had been convicted on drug charges shortly before Petitioner's trial and tested positive for opiates and barbiturates after it. See 3 RT 2126-27. The trial court granted the motion on other grounds.

By the time the case returned to the trial court, Calabria was dead. See 3 RT 3002. At the hearing on the renewed new trial motion, Petitioner called Deputy Nigsarian, the courtroom bailiff at Petitioner's trial, to testify as to Calabria's demeanor at trial. See 3 RT 3003-25. Nigsarian testified that he sat no more than 5 feet away from Calabria during trial and observed several strange events. See 3 RT 3005. When Calabria entered the courtroom, his gait was "slow and unsteady," his voice "weak," his speech pattern "delayed, somewhat strung out"; he seemed "extremely frail," as if he lacked balance and coordination. 3 RT 3008. On three or four occasions, during the time witnesses were on the stand, Nigsarian saw Calabria stop writing, close his eyes, drop his head slowly until it hung about 3 inches from the table, and remain in that position for 5 minutes at a time. See 3 RT 3005-07. However, Calabria still "ma[de] objections from that state," 3 RT 3006, and "respond[ed] to . . . objections from that state," 3 RT 3006-07.

On cross-examination, Nigsarian stated that Calabria snapped back to attention and responded to prosecution motions and objections every time they were raised, even when Calabria's eyes were closed and his head down. See 3

RT 3011-12. Nigsarian admitted that he did not have specialized training in narcotics and did not drug test Calabria, see him take drugs, or ask him about drug use. See 3 RT 3012-13, 3016-17, 3024. The trial court denied the new trial motion without addressing the alleged drug use or sleeping. See 3 RT 3045.

Petitioner raised Calabria's alleged failure to maintain sobriety on appeal. See PLD 12 at 49-50. He described Calabria's felony drug matters and stated that Calabria had later tested positive for several kinds of drugs. See id. He also reviewed Deputy Nigsarian's testimony and suggested that drug intoxication could explain why Calabria stood mute while objectionable evidence was introduced at trial. See id. The People argued that, even though Calabria may not have behaved normally, the evidence did not show that he was under the influence of a controlled substance during trial. See PLD 13 at 59-60. It emphasized that Calabria argued motions, engaged in effective cross-examination, and made reasonable objections. See id. at 60. Finally, it argued that even if Calabria had been under the influence of narcotics, Petitioner had failed to show that they impaired his performance or caused prejudice. See id. at 60-61.

Affirming, the Court of Appeal found "no substantial evidence Mr. Calabria was under the influence of narcotics during defendant's trial or that any drug use prejudicially affected his representation." PLD 15 at 18. It emphasized that Calabria made and responded to objections even with eyes closed and head down. See id. at 19. And it stated that it independently "reviewed the record of the trial and d[id] not find" any deficient performance or prejudice to Petiioner. Id.

Petitioner argues that the Court of Appeal's decision was contrary to clearly established federal law because it "required [him] to show prejudice" when prejudice must be presumed. MPA at 26. He argues that prejudice must be presumed under United States v. Cronic, 466 U.S. 648, 659-61 (1984),

because Calabria was intoxicated and unconscious during the prosecution's case. See id. at 27. Further, he argues that Calabria's "failure to remain sober and awake . . . constitutes deficient performance," that he has shown prejudice in his other subclaims, and therefore that the Court of Appeal's decision unreasonably applied Strickland and was based on an unreasonable determination of the facts. Id.

2. Applicable Federal Law

"While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." Cronic, 466 U.S. at 657 (citation omitted). If a criminal trial "loses its character as a confrontation between adversaries, the [Sixth Amendment] constitutional guarantee is violated." Id. at 656-57. Cronic identified "three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" Bell v. Cone, 535 U.S. 685, 695 (2002) (citing Cronic, 466 U.S. at 658-59). "First and '[m]ost obvious' was the 'complete denial of counsel.' . . . Second, . . . a similar presumption was warranted if 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' . . . Finally, . . . where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected." Id. at 695-96 (citations omitted).

3. Analysis

Petitioner's argument implicates the second scenario identified by Cronic: if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.

The Court of Appeal's decision was not contrary to or an unreasonable application of Cronic and was not based on an unreasonable determination of

the facts. The state appellate court cited testimony that Calabria was responsive to what was happening in the courtroom, that he "ma[de] objections from [an eyes-closed, head-down] state, and . . . respond[ed] to [the] [prosecutor]'s objections from that state." PLD 15 at 19. The record does not establish that he was unconscious during trial. His body language was consistent with drug intoxication and sleeping but equally so with other explanations, such as illness, stress, pain, or side effects from medication. See, e.g., PLD 5, CT 42 (conferring about scheduling accommodation as Calabria was "still ill"); 2 RT 301 (explaining that Calabria had a swollen hand due to dental medication); see also Torres v. Ducart, No. 14-2235, 2017 WL 2804030, at *18 (quoting state court's comment in 2010 that Calabria had represented that he had a medical condition that caused swelling), report and recommendation adopted, 2017 WL 2802716 (C.D. Cal. June 28, 2017).

The circumstances of Petitioner's trial do not otherwise trigger the presumption of prejudice under Cronic, because Calabria did not completely and entirely fail to subject the prosecution's case to meaningful adversarial testing. See Bell, 535 U.S. at 696-97 ("When we spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete."). The record reflects that Calabria made various pretrial objections, gave an opening statement, made objections to evidence at trial, moved for a mistrial, cross-examined witnesses, gave a closing argument, and requested and objected to certain jury instructions. See 2 RT A-12, A-13 to A-14, A-16, A-25 to A-26, 615, 617, 670-72, 676, 682, 704, 708-09, 730-31, 907, 910, 917, 924-26, 940; 3 RT 1201-03, 1256-63, 1264.

Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2011) (en banc), on which Petitioner relies, is distinguishable. Burdine held that defense counsel's "consistent unconsciousness" equated to counsel's "complete absence at

critical stages" under Cronic. Id. at 341. Burdine did not apply AEDPA, id. at 374, and so that circuit court never reached the issue of "clearly established federal law." Furthermore, Burdine "turn[ed] on the effect of state court findings that counsel repeatedly slept." 262 F.3d at 340. Here, no state court has made that finding.

Accordingly, Petitioner is not entitled to relief on this subclaim.

D. IAC Subclaim Four: Failure to File Motion to Suppress Evidence

Petitioner alleges that his trial counsel rendered ineffective assistance of counsel by failing to file a meritorious motion to suppress evidence gathered after police entered his motel room without a warrant. See MPA at 28-39.

1. Background

When Petitioner moved for a new trial, he argued that Calabria was ineffective in failing to file a motion to suppress evidence under California Penal Code § 1538.5. See PLD 5, CT 72-73.[9] According to the police reports, he argued, there was no evidence corroborating the anonymous tip: the motel manager said that the young woman did not appear to be in distress and there was "no burning building, hot pursuit . . . or screams for help," so the existence of exigent circumstances justifying warrantless entry was at best arguable. PLD 5, CT 73. The state responded that police were confronted with an emergency and did corroborate many of the tip's details, so it was within Calabria's reasonable discretion not to file a suppression motion. See PLD 6, Supp. CT 229-32.

Petitioner's replacement counsel questioned Calabria about the latter's reasons for not filing the motion. See 3 RT 2109-17. Calabria explained that, in

[9] That section provides: "A defendant may move . . . to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on . . . [the] ground [that] . . . [t]he search or seizure without a warrant was unreasonable." Cal. Penal Code § 1538.5(a)(1)(A).

his opinion, the police "had exigent circumstances" to search the motel room. 3 RT 2110. He did not recall whether the police reports mentioned an anonymous tip; he said he knew that it was one of Garcia's family members who called the police. See 3 RT 2111. He agreed that, had the tip been anonymous (a fact noted in the police reports), he would have "explored" filing the motion. 3 RT 2111. However, he "thought there were better grounds of fighting th[e] case." 3 RT 2113.

The trial court admitted the police reports as evidence that Calabria was unaware that the tip was anonymous. See 3 RT 3026. However, it denied the new trial motion without comment on the possible merit of a suppression motion. See 3 RT 3045. On appeal, Petitioner continued to argue that the anonymous tip was insufficiently corroborated. Citing Florida v. J.L., 529 U.S. 266 (2000), he argued that although the police corroborated that he was the person accused of illegal activity, nothing corroborated criminal activity, making the entry unreasonable. See PLD 12 at 39.

The Court of Appeal conditionally reversed the denial of the new trial motion, stating that on the record before it, it was unable to say whether the suppression motion would have been denied. See PLD 15 at 27. It remanded the case for the trial court to determine whether, "under the totality of the circumstances, an emergency situation existed sufficient to justify the deputies' warrantless entry into the motel room." Id.

On remand, the state submitted declarations from Deputy Martin and Detective Garfin. See RLD 1, CT 21-24, 26-29. Those declarations added two new facts: (1) in order to protect their abusers and avoid retaliation, domestic violence or kidnapping victims generally do not reveal their distress to strangers, and (2) the motel manager's office was some distance from Petitioner's motel room, so the manager would not have heard any commotion or cries for help. See RLD 1, CT 22, 27-28.

The trial court found that exigent circumstances justified the police's entry into Petitioner's motel room. See PLD 3, RT 16. It stated that it would have denied the suppression motion, and so "there [wa]s no ineffective assistance . . . and . . . no prejudice." PLD 3, RT 16. The Court of Appeal affirmed. It concluded that the tip was "sufficiently corroborated in significant innocent detail" and that "actual observation of illegal activity was not required." PLD 18 at 3. It noted that, although sufficient corroboration of an anonymous tip must go beyond the physical description and location of a suspect, it does not require that police necessarily observe illegal activity; rather, the degree of corroboration required depends on the totality of the circumstances. See id. at 7-8. Reviewing caselaw, it distinguished cases where the reported illegal activity was by its nature visible to the public. See id. at 8-9. It found most analogous a case where exigent circumstances existed after police received an anonymous report of a suicide/overdose and there was no response to their loud knocking and announcements. See id. at 10-11 (discussing Winchester v. Cosaineau, 404 F. Supp. 2d 1262 (D. Colo. 2005)). Finally, after reviewing the facts known to the police in Petitioner's case, it concluded that they "had an objectively reasonable basis for crediting the tipster's assertion of illegality and believing [a young woman] was seriously injured or threatened with imminent serious injury or death." Id. at 13.

Now, Petitioner argues that the Court of Appeal's decision was contrary to federal law because it did not require the state to prove that probable cause existed in addition to exigent circumstances. See MPA at 34. He also argues that the decision unreasonably applied federal law because "the facts here did not amount to probable cause and exigent circumstances." Id.

2. Applicable Federal Law

A petitioner claiming ineffective assistance of counsel resulting from a specified error must show that counsel's performance was deficient in that

specific instance and that the deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984). "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, the petitioner must overcome a strong presumption that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, Petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

AEDPA requires an additional level of deference to a state-court decision rejecting an ineffective assistance of counsel claim: "The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard." Harrington v. Richter, 562 U.S. 86, 101 (2011). The Supreme Court explained,

> The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is . . . whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Id. at 105 (citations omitted).

To show prejudice when a suppression issue underlies an ineffectiveness claim, a habeas petitioner must show (1) that he would have prevailed on the suppression motion and (2) that there was a reasonable probability that a successful motion would have affected the outcome of the trial. See Kimmelman v. Morrison, 477 U.S. 365, 374-75 (1986).

Warrantless entry into a home is the "chief evil" against which the Fourth Amendment protects. Payton v. New York, 445 U.S. 573, 585 (1980) (citation omitted).[10] Although such entry is "presumptively unreasonable, that presumption can be overcome. . . . [T]he exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." Michigan v. Fisher, 558 U.S. 45, 47 (2009) (citations omitted). "[O]ne such exigency [is] the need to assist persons who are seriously injured or threatened with such injury." Id. (citation omitted). "[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006). "This 'emergency aid exception' . . . requires only 'an objectively reasonable basis for believing'" that a person inside needs "immediate aid." Fisher, 558 U.S. at 47 (citations omitted).

3. Analysis

Because the Court of Appeal's application of Strickland to this subclaim was not unreasonable, habeas relief is foreclosed. See Richter, 562 U.S. at 105. The Court of Appeal determined that no prejudice resulted from Calabria's decision not to file a suppression motion, because Petitioner would not have prevailed on it. See PLD 18 at 14. It reached that conclusion after determining

[10] Respondent does not suggest that less protective rules should apply to motel rooms than to private homes. See Answer at 61-62.

that the police's entry was justified by exigent circumstances. See id. at 12-14. Petitioner has not shown that either determination was unreasonable.

The record confirms that police had an objectively reasonable basis to believe that a young woman inside the motel room needed immediate aid. The anonymous tip had some indicia of reliability by providing details that would be known only to those closely watching or receiving information from Petitioner or Garcia. See Alabama v. White, 496 U.S. 325, 332 (1990) ("When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop."). For example, it correctly predicted, prior to the police's entry, Petitioner's motel room number, exact license plate number, that he was with a young woman, and their names—slightly off, but close enough for police to corroborate that it was Petitioner's car parked outside his room. There was also some support for the tip's assertion of illegality: a hostage situation was a plausible explanation for why no answer came to two rounds of loud knocking and announcements during daylight hours when condensation on the windows suggested someone was inside. Cf. Winchester, 404 F. Supp. 2d at 1270 (holding that no answer to loud knocking and announcements gave "some corroboration" to the report of a possible suicide/overdose situation); Hopkins v. City of Sierra Vista, Ariz., 931 F.2d 524, 528 (9th Cir. 1991) ("Seemingly innocent conduct may become suspicious in light of the initial tip.").

Added to that was the gravity of the tipped crime—a teenager being beaten and held against her will. See Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) (observing that the gravity of the underlying offense is "an important factor . . . when determining whether any exigency exists."); Florida v. J.L., 529 U.S. 266, 273-74 (2000) (acknowledging that a tip of a highly dangerous situation like a person carrying a bomb might justify a search even without any

showing of the tip's reliability). Finally, the lack of witnesses to commotion or cries for help would not have dispelled an objectively reasonable officer's belief. The officers had experience with the trained silence of domestic violence and kidnapping victims. And even had the woman screamed, the motel manager may have been too far away to hear. See RLD 1, CT 22, 27. Petitioner has not identified any facts that undermine the objective reasonableness of the police's belief.

Because exigent circumstances existed, the police's entry was objectively reasonable. See Fisher, 558 U.S. at 47. Even if Calabria had made a motion to suppress, it would have been correctly denied. Accordingly, it was reasonable for the Court of Appeal to reject this subclaim on the basis that Petitioner was not prejudiced by Calabria's decision to fight the case against Petitioner on other grounds.

Petitioner also argues that the Court of Appeal's decision was contrary to federal law because it made no finding that the anonymous tip amounted to probable cause. See MPA at 30, 33-34; Reply at 26-27. His argument is unpersuasive; probable cause is not needed in cases of exigent circumstances. See Fisher, 558 U.S. at 49 ("It sufficed to invoke the emergency aid exception that it was reasonable to believe that [the defendant] had hurt himself . . . and needed treatment."); United States v. Quarterman, 877 F.3d 794, 800 (8th Cir. 2017). ("If officers have an objectively reasonable basis that some immediate act is required to preserve the safety of others or themselves, they do not also need probable cause.").

Habeas relief is foreclosed on this subclaim.

E. IAC Subclaim Five: Failure to Investigate and Present Garcia's Testimony

Petitioner contends that he was denied the effective assistance of counsel because his trial counsel failed to "investigate and present Garcia's testimony

exonerating [him]." MPA at 14. He argues that this evidence "would have raised a reasonable doubt of his guilt." Id. at 40.

1. Background

In the state courts, Petitioner raised this subclaim only in the alternative to his conflict-of-interest subclaim. See 3 RT 3605-06. At the hearing on Petitioner's motion to reopen the new trial motion, he argued that he should prevail even under Strickland. See 3 RT 3606. Since Garcia was "going to testify that [Petitioner] did not torture her, did not batter her, did not do any of these acts that he's accused of, there is no way . . . that there would not probably be a different verdict." 3 RT 3606. The trial court denied the motion, and the Court of Appeal affirmed. See 3 RT 3608; PLD 15 at 14.

2. Applicable Federal Law

Strickland, described above, governs this subclaim of actual ineffectiveness. When such a claim is based on not interviewing or calling a witness at trial, a petitioner must show that the witness was willing to testify, see United States v. Harden, 846 F.2d 1229, 1231-32 (9th Cir. 1988); would have testified, see Allen v. Woodford, 366 F.3d 823, 846 n.2 (9th Cir. 2004); what the testimony would have been, see United States v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987); and that it would have been sufficient to create a reasonable doubt as to guilt, see Tinsley v. Borg, 895 F.2d 520, 532 (9th Cir. 1990).

3. Analysis

This subclaim fails, because the Court of Appeal reasonably found that Petitioner had not shown that he was prejudiced by Garcia not testifying at his trial. See PLD 15 at 16. Garcia's testifying would not have created a reasonable doubt as to Petitioner's guilt. See Tinsley, 895 F.2d at 532. Petitioner's defense was based on favorable preliminary hearing testimony from Garcia, and the jury did not credit it. Respondent explains why it did not:

the burn marks on her skin were consistent with Petitioner having burned her with a clothes iron and not with a fight with a rival gang. See Answer at 72. The shape and length of the circular marks and long welts exactly matched the tip and sides of the clothes iron seized from room 108. Because Petitioner does not show that Garcia's trial testimony would have created a reasonable doubt as to his guilt, he cannot show that the Court of Appeal's decision was contrary to or an unreasonable application of Strickland. Accordingly, habeas relief is foreclosed on this subclaim.

F. IAC Subclaim Six: Failure to Investigate Potentially Exculpatory Witness

Petitioner alleges that his trial counsel was ineffective for failing to interview and call to testify a woman to show that she, not Petitioner, was responsible for Garcia's injuries. See MPA at 40-41.

1. Background

At the preliminary hearing, Garcia testified that her injuries came from fights with "girls" from a rival gang in late December 2012. See PE RT 7-8, 30-34. Calabria emphasized at trial that Garcia told police the same thing when they first found her. See 2 RT 611; 3 RT 1257. He also asserted that the same "girls" fought her twice after the preliminary hearing. See 2 RT 613; 3 RT 1259.

At a hearing shortly before trial, Carlos Barragan, an investigator with the Los Angeles County District Attorney's Office, testified that he "did a couple of door-knocks" on the block where Petitioner's father lived. 2 RT A-9. At one house, a female with facial tattoos answered and recognized a picture of Garcia. See 2 RT A-9. He testified that the female thought he was there to investigate a fight that she had with Garcia at a Food-for-Less "two months ago, roughly," i.e., sometime in May 2013. 2 RT A-9.

When Petitioner moved for a new trial, he argued that Calabria's failure to interview the female or call her as a witness "was clearly ineffective assistance of counsel." PLD 5, CT 75. He stressed that "the center of [his] defense" was that Garcia's injuries "were caused during a fight with other wom[e]n." PLD 5, CT 74. The state argued that "the female-on-female fight . . . was not in any way connected in time with the incident" in Petitioner's case. 3 RT 3040. The trial court denied the motion without stating reasons for rejecting this subclaim. See 3 RT 3045.

Affirming, the Court of Appeal found that Petitioner had not shown that "an outcome more favorable to him was reasonably probable had Mr. Calabria located and interviewed the unidentified woman." PLD 15 at 21. It observed that the gang fights Garcia described at the preliminary hearing would have occurred in December 2012, while the gang fight that the female mentioned likely occurred in May 2013; it reasoned that "the likelihood [the fights] were related was remote at best." Id. Further, it noted that Garcia's injuries included multiple burns and that there was no evidence that Garcia was ever burned during her fights with "girls." See id.

2. Analysis

The Court of Appeal reasonably determined the relevant facts and reasonably applied Strickland in rejecting this subclaim. The record supports its determination that, because approximately 5 months separated the alleged gang fights, they were unlikely to be related. Further, while the female said that the gang fight took place "at a Food-for-Less," Garcia testified that her gang fights occurred "in the street" and "in the alley." 2 RT A-9; PE RT 32.

Nothing links the female to Garcia when or where she might have obtained her injuries in December 2012.[11]

The record also supports the Court of Appeal's determination that there was no evidence that Garcia was ever burned during her fights with "girls." Garcia never claimed that she was, and Petitioner does not claim this now. When asked at the preliminary hearing how she received round injuries on her legs, Garcia said that she did not know: "When I was fighting with the girls . . . the second time . . . we were in the alley, and I had my shorts on . . . but I was on the floor, so I didn't even know how I got all this stuff." PE RT 32. She "guess[ed] like the rocks and stuff" caused her injuries. PE RT 33.

The Court of Appeal also reasonably applied Strickland, in that Petitioner did not show that an outcome more favorable to him was reasonably probable had Calabria interviewed the female. Deputy Martin testified that Garcia told her she received the round injuries when Petitioner burned her with the tip of the clothes iron. See 2 RT 691. The jury saw photographs of the injuries and had as an exhibit the clothes iron seized from the motel room. See 2 RT 668-69, 704-05. Because Garcia's injuries uniquely inculpated Petitioner, it was not reasonably probable that Petitioner would have obtained a more favorable outcome had Calabria interviewed the female. Habeas relief is foreclosed on this subclaim.

G. IAC Subclaim Seven: Failure to Object

Petitioner contends that his trial counsel was ineffective because he failed to object to 14 instances of inadmissible evidence or improper statements by the prosecution. See MPA at 41-44.

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[11] Petitioner only speculates that she could have been mistaken about the date or had a separate fight with Garcia in December. See Reply at 32.

1. Background

In his motion for a new trial, Petitioner listed 14 objections that he contended Calabria should have made during trial. See PLD 5, CT 76-78. At the hearing on remand, replacement counsel "d[id]n't want to repeat them all" and mentioned only in general terms Calabria's alleged failures to object to hearsay and to evidence of past acts of domestic violence. 3 RT 3037.[12] The trial court denied the new trial motion without addressing this subclaim. See 3 RT 3045.

On appeal, Petitioner again listed the 14 objections. The Court of Appeal affirmed but found the subclaim too cursory and therefore declined to address it. See PLD 15 at 21. However, it observed that "the record sheds no light on why Mr. Calabria chose to act or not to act in the challenged instances," and indicated that the subclaim would be "more appropriately raised, if at all, in a habeas corpus proceeding." Id. at 22. Later, Petitioner did raise the subclaim in a state habeas petition, but the petition was summarily denied. See PLD 21 Exh. D at 13-16; PLD 22.

Now, Petitioner presents the same list of 14 objections. Respondent argues that this subclaim is procedurally barred. See Answer at 79-81. Further, Respondent argues that the Court of Appeal reasonably rejected this subclaim because, in each instance, Petitioner fails to show deficient performance, fails to show prejudice, or states the objection so vaguely that Respondent cannot properly respond. See id. at 81-104.

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[12] Replacement counsel complained of "things that would have been 1109 evidence that was never objected to." 3 RT 3037. California Evidence Code § 1109 permits admitting evidence of a defendant's prior acts of domestic violence when he or she is accused of a domestic violence offense, absent a showing that its probative value is substantially outweighed by undue prejudice.

2. Procedural Default

Under the doctrine of procedural default, "a state prisoner's habeas claims may not be entertained by a federal court when (1) a state court [has] declined to address [those] claims because the prisoner had failed to meet a state procedural requirement, and (2) the state judgment rests on independent and adequate state procedural grounds." Maples v. Thomas, 565 U.S. 266, 280 (2012) (citation and internal quotation marks omitted). In those circumstances, federal habeas review "is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991).

The California Rules of Court require parties to "support each point by argument and, if possible, by citation of authority." Cal. R. Ct. 8.204. California law firmly establishes that its courts may deem arguments waived if unaccompanied by legal argument and citation to authority. See Regents of Univ. of Cal. v. Superior Ct., 29 Cal. App. 5th 890, 913 n.17 (2d Dist. 2018) (collecting cases).

Here, Petitioner procedurally defaulted this subclaim because he presented it to the Court of Appeal with insufficient argument and citation to authority, violating Rule 8.204 of the California Rules of Court and firmly established state procedural law. See Armenta v. Kernan, 735 F. App'x 255, 259 (9th Cir. 2018). California's inadequate briefing rule is an adequate and independent ground for the Court of Appeal to have rejected this subclaim. See id.; Patterson v. Beard, No. 13-1536, 2015 WL 412841, at *15 (S.D. Cal. Jan. 30, 2015). Petitioner does not attempt to demonstrate cause and prejudice or that this Court's failure to consider the claims would result in a fundamental miscarriage of justice. See Reply at 33-35. Accordingly, he does not overcome

his procedural default of this subclaim, and this Court may not entertain its merits.

3. Analysis

Even if Petitioner had not procedurally defaulted this subclaim, it would have been reasonably rejected on the merits. Because he had to choose among "countless" options in presenting Petitioner's defense, Calabria is entitled to a "strong presumption" that his decisions were reasonable. Dunn v. Reeves, No. 20-1084, 594 U.S. ___, slip op. at 7 (2021) (citations omitted). In each instance, Petitioner has failed to rebut this strong presumption.

First, Petitioner argues that Calabria was ineffective for failing to object to two instances of improper argument during the prosecutor's opening statement: when she said, "imagine how much that must have hurt her. But he didn't care. She was getting what she deserved"; and when she said, "Tania might not be here . . . . This woman was tortured, and the amount of pain that she had to go through for hours might not be important to her, she might not want to cooperate, she might not want to be in here, but we're going to proceed without her; okay?" MPA at 42 (quoting 2 RT 607, 609).

Petitioner has not shown that Calabria performed deficiently by not objecting to these remarks. Calabria could have reasonably concluded that objecting to the first instance would have drawn attention to Garcia's damaging statement that Petitioner had repeatedly said during the beating that she was getting what she deserved. See Gresser v. Franke, 628 F. App'x 960, 963 (9th Cir. 2015) ("[W]hether to object to damaging testimony at the risk of drawing the jury's attention to it is a tactical decision."). Further, he could have reasonably concluded that objecting to the second instance would have been futile because the prosecution would have been allowed to explain to the jury why it was not calling Garcia as a witness at trial.

Nor has Petitioner carried his burden to show that Calabria's silence on these occasions prejudiced Petitioner. Throughout the trial, the trial court informed the jury that attorney statements do not have evidentiary value. See, e.g., 2 RT 601-02 (prior to opening statements); 3 RT 1235 (during jury instructions), 1258 (during closing arguments). Even if Calabria had made and prevailed on both objections, the same evidence would have reached the jury. Accordingly, Petitioner has not shown that Calabria was ineffective in this instance.

Second, Petitioner argues that Calabria should have objected to the prosecutor's unsworn statement at the due diligence hearing that Donald Calabria had told her that he had no contact with Garcia for over 2 months. See MPA at 42. The Court disagrees. Petitioner does not show that the objection would have been sustained. Donald Calabria's statement was offered only to show the prosecution's diligence in trying to locate Garcia; its diligence did not turn on whether his statement was true or not. See Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) ("[T]rial counsel cannot have been ineffective for failing to raise a meritless objection."). Further, Petitioner has not shown how this omission resulted in prejudice; he does not suggest that Donald Calabria's statement about his lack of contact with Garcia was necessary to the trial court's due diligence finding. Accordingly, Petitioner has not shown that Chad Calabria was ineffective in this instance.

Third, Petitioner argues that Calabria was ineffective for failing to make a hearsay objection when Deputy Martin "testifie[d] that she took Garcia back to the motel where Garcia then pointed out weapons that were used to assault her." MPA at 42. But he made this objection before trial, and it was overruled. See 2 RT A-16 to A-27, 2. Petitioner cannot show his lawyer was ineffective in not making an objection that had already been considered and rejected. See Juan H., 408 F.3d at 1273.

Fourth, Petitioner argues that Calabria was ineffective for failing to object "at various points" when Deputy Martin testified "as to what she felt the victim's emotional state was, such as whether she was traumatized from the alleged assault." MPA at 43. Petitioner has not shown that Calabria performed deficiently or prejudiced Petitioner in this instance. Deputy Martin testified at a pretrial hearing that Garcia showed emotion to emergency room staff, specifically that "she was very, very tearful, crying, sobbing . . . covering her face a lot with her hands." 2 RT A-23. Further, she testified that when she took Garcia to be picked up by a domestic violence shelter, Garcia "began crying again, and grabbed me in a hug." 2 RT A-25. These facts about Garcia's actions and body language were within Deputy Martin's personal knowledge and admissible as evidence of Garcia's emotional state. Any testimony from Deputy Martin "as to what she felt [Garcia]'s emotional state was" was redundant. Thus, Calabria's not objecting to it did not result in prejudice under Strickland.

Fifth, Petitioner argues that Calabria was ineffective for failing to object to "statements inconsistent with preliminary hearing testimony, which were not contained in the transcripts of the preliminary hearing." MPA at 43. He does not specify which statements Calabria should have objected to, and so he has not carried his burden to show ineffectiveness.

Sixth, Petitioner argues that Calabria was ineffective for failing to object to testimony about Petitioner's past prison time. See MPA at 43. Specifically, Garcia was asked at the preliminary hearing whether Petitioner had a record of any kind, and she answered that he had been in prison before. See PE RT 37. At trial, the prosecution read this portion of Garcia's preliminary hearing testimony into the record. See 2 RT 653. California law permits objections in these procedural circumstances, Petitioner argues, and so Calabria was ineffective for failing to object to statements about prison time. See MPA at 43.

Calabria could have reasonably concluded that objecting would have drawn attention to the fact. Cf. Gresser, 628 F. App'x at 963. It was a foregone conclusion that the jury would learn that Petitioner had a criminal record, because the parties had stipulated to it. See 3 RT 1225 (instructing the jury that it "must accept as true the . . . felony conviction").

Alternatively, Calabria may have wanted the jury to hear about past prison time for a strategic reason. At the preliminary hearing, Garcia recanted prior statements to Deputy Martin that she started having sex with Petitioner when she was 14; she stated that she "didn't even know him when [she] was that age" and that "he was in prison at the time." 2 RT 634. Therefore, Calabria may have chosen not to object so that a potential alibi would be available were the jury to speculate about the crime of unlawful sexual intercourse.[13] For the same reasons, Petitioner has not shown that prejudice resulted from Calabria not objecting to this particular testimony.

Seventh, Petitioner argues that Calabria was ineffective for failing to object to a registered nurse's testimony as to medical records "on the grounds that no business record foundation was laid." MPA at 43. Petitioner has not shown that the nurse's testimony as to medical records—as distinct from his testimony as to Garcia's statements and his observation of her injuries—had any influence on the jury's determination of Petitioner's guilt. Thus, even had Calabria successfully objected to the nurse's testimony as to medical records, the jury would have been faced with the same strong photographic and testimonial evidence when determining Petitioner's guilt. Petitioner has not shown ineffectiveness in this instance.

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[13] The Information originally contained a count alleging that Petitioner had committed that crime, but it was removed from the First Amended Information. Compare PLD 5, CT 2, 6, with PLD 5, CT 26-27, 29-30.

Eighth, Petitioner argues that Calabria was ineffective for failing to object on the grounds of California Evidence Code § 801 when the registered nurse "was allowed to opine what kind of trauma would cause broken blood vessels in the victim's eye." MPA at 43.[14] Petitioner does not explain why the registered nurse would not be qualified to give this opinion or why his testimony might not comply with the California Evidence Code. Further, Petitioner does not show that prejudice resulted from the nurse's answer being admitted into evidence: the nurse answered only that the cause "could be anything . . . somebody's fist . . . an object of some type, kicked in the face would cause that kind of trauma." 2 RT 665. The nurse's answer that the cause "could be anything" was not damaging to Petitioner's defense; it was equally consistent with Garcia's alternative explanation that she received her injuries from a fight with "girls" from a rival gang. Therefore, Petitioner has not shown that Calabria was ineffective in this instance.

Ninth, Petitioner argues that Calabria was ineffective for failing to object on the basis of hearsay or lack of foundation when a nurse practitioner testified that a C.A.T. scan showed that Garcia had broken her nose. See MPA at 43. Petitioner has not shown deficient performance or prejudice in this instance. Garcia testified that she had a fractured nose when she was at the hospital. See 2 RT 650. And Petitioner does not explain why the nurse practitioner would not be qualified to interpret the results of a C.A.T. scan taken in the hospital where he works.

Tenth, Petitioner argues that Calabria was ineffective for failing to object on the grounds of California Evidence Code § 801 when the nurse practitioner opined that Garcia did not show signs of intoxication. See MPA at 43. Petitioner has not shown deficient performance in this instance. Calabria

[14] California Evidence Code § 801 governs expert opinion evidence.

himself had previously asked the triage nurse if Garcia "appear[ed] to be under the influence." 2 RT 671. In the absence of evidence to the contrary, the Court presumes that Calabria raised the issue as a calculated risk to find reasons for the jury to doubt the reliability of her statements at that time. Further, Petitioner does not explain how the nurse practitioner's statement runs afoul of § 801; it was not offered as an expert opinion but rather to explain why the nurse practitioner did not order a toxicology screening. See 2 RT 677. Finally, Petitioner has not shown that a different result was reasonably probable had Calabria objected; the triage nurse had already testified that Garcia did not show signs of intoxication. See 2 RT 671.

Eleventh, Petitioner argues that Calabria was ineffective for failing to make a hearsay objection to the nurse practitioner's statement that Garcia told him that her boyfriend assaulted her. See MPA at 43. Petitioner has not shown deficient performance or prejudice in this instance. Calabria made this hearsay objection before trial, and it was overruled. See 2 RT A-16 to A-27, 2. Petitioner cannot show ineffectiveness in not making an objection that the trial court had already considered and rejected.

Twelfth, Petitioner argues that Calabria was ineffective for failing to object on the grounds of California Evidence Code § 1109 when Detective Martin testified as to Garcia's statement that Petitioner had "in the past pushed her into a sink causing vaginal bleeding." MPA at 43.[15] Petitioner has not shown deficient performance or prejudice in this instance, because he has failed to show that the objection would have been successful. First, the testimony has substantial probative value. See People v. Megown, 28 Cal.

[15] As mentioned above, § 1109 permits the trial court to admit evidence of prior acts of domestic violence in such cases unless its probative value is substantially outweighed by undue prejudice.

App. 5th 157, 168 (4th Dist. 2018) (stating that § 1109 reflects the legislative judgment that, in domestic violence cases, similar prior offenses are uniquely probative of guilt in a later accusation). And the testimony was not substantially more prejudicial than the evidence of torture; indeed, it was less so. Therefore, Garcia's testimony would not have been made inadmissible by § 1109 and Calabria cannot have been ineffective for not raising this objection. See Juan H., 408 F.3d at 1273.

Thirteenth, Petitioner argues that Calabria was ineffective for failing to object "as to foundation" to testimony that "prints on [a] gun" matched Petitioner's. MPA at 44. Petitioner has not shown deficient performance or prejudice, because he has not shown that the objection had merit. The officer who lifted the prints from one of the guns testified that he had 8 years of experience lifting prints with the sheriff's department and personally traveled to the motel to lift the prints. See 2 RT 912. The officer who compared those prints to Petitioner's testified that he had at least 6 years of experience establishing identity through the comparison of prints and passed his annual proficiency examinations each year with no mistakes. See 2 RT 919. Calabria cannot have been ineffective for not raising a meritless objection. See Juan H., 408 F.3d at 1273.

Fourteenth, Petitioner argues that Calabria was ineffective for failing to object under § 1109 to the introduction of a tape-recorded interview with Garcia that mentions past domestic violence. See MPA at 44. The interview contained Garcia's statements to the emergency room nurse that Petitioner had previously pushed her into a counter in the motel room's bathroom. See PLD 6, Supp. CT 10-11. These statements concern the same incident of prior domestic violence that she told Deputy Martin about. Like her statements to Deputy Martin, these statements had significant probative value and were not

substantially more prejudicial than probative in the context of this case. Accordingly, § 1109 would not have made them inadmissible.

Finally, Petitioner asserts in a conclusory fashion that "[s]ubtracting the foregoing evidence and arguments from the prosecution case, there is a reasonable probability of a different outcome." MPA at 44. But Petitioner has not carried his burden to show that probability. The evidence against Petitioner was very strong and linked Garcia's injuries directly to items found inside the motel room. See, e.g., 2 RT 691-92 (burns on legs from clothing iron); 2 RT 694-95 (injury on hip from silver gun); 2 RT 692 (cuts on arms from metal pipe). Four individuals testified that Garcia told them that Petitioner caused her injuries; the jury also heard a recording of Garcia telling the emergency room nurse that Petitioner caused her injuries with an iron. See PLD 6, Supp. CT 6 ([Nurse:] "Who did it?" [Garcia:] "My boyfriend. With an iron.").

For the reasons discussed above, even had Petitioner not procedurally defaulted this subclaim, he would not be entitled to relief on it.

H. *Brady* Subclaim for Non-Disclosure of Information

Petitioner contends that his Fourteenth Amendment right to due process was violated by the State's non-disclosure of the fact that Calabria was being prosecuted by the same agency prosecuting Petitioner and was dependent on drugs. See MPA at 44.

1. Background

In his new trial motion, Petitioner argued that the prosecution failed to inform the trial court "of the strong possibility that Mr. Calabria . . . [had a] problem with mind-altering drugs." PLD 5, CT 83. He argued that the prosecution's failure to disclose it prevented the trial court from examining Calabria to ensure a fair trial. See PLD 5, CT 83. The prosecution responded that Petitioner had not shown that Calabria "was in fact under the influence of any substance during the hours [of] trial." PLD 6, CT 240. It argued that the

mere possibility of substance abuse does not constitute ineffective assistance, and that the trial court personally observed Calabria and saw no reason to inquire into it. See PLD 6, CT 241. The trial court denied the motion. See 3 RT 3045. Affirming, the Court of Appeal found that there had been "no showing the pending criminal charges adversely affected Mr. Calabria's representation of [Petitioner] or that Mr. Calabria was under the influence of drugs." PLD 15 at 28. Therefore, it found "no denial of [Petitioner's] fair trial right." Id.

Petitioner now argues that the Court of Appeal unreasonably applied federal law and based its decision on an unreasonable determination of the facts. See MPA at 46.

2. Applicable Federal Law

The state's suppression of evidence favorable to the accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. There are three essential components of a Brady violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). To establish prejudice under Brady, courts look to the materiality of the suppressed evidence. Id. at 282. "[E]vidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Cone v. Bell, 556 U.S. 449, 469-70 (2009) (citation omitted).

3. Analysis

Petitioner has not demonstrated that this information about Calabria was material under Brady; that is, he has not demonstrated a reasonable

probability that the outcome of the trial would have been different had the prosecution disclosed it. Petitioner's argument that "[r]easonable, sober, unconflicted counsel would not have committed the prejudicial errors detailed in the petition," Reply at 35, is conclusory and unpersuasive where the Court has considered each alleged instance of deficient performance and found that no prejudice resulted. And Petitioner cites no authority, let alone Supreme Court authority, that this kind of information about Calabria is material under Brady. Accordingly, Petitioner is not entitled to relief on this subclaim.

I. *Brady* Subclaim for Non-Production of Audio Recordings

Finally, Petitioner contends that his Fourteenth Amendment right to due process was violated by the prosecution's failure to produce before trial three audio recordings of telephone calls between Petitioner and Garcia, transcripts of which were introduced against him at trial. See MPA at 44-45.

Petitioner first raised this subclaim in his state habeas petition. See PLD 21 at 50. He stated that the prosecutor had previously referred to "three audio recordings of [Petitioner] telling the victim to deny that [he] assaulted her." Id. He argued that the prosecution violated Brady by never producing the recordings. See id. at 51. The California Supreme Court summarily denied his state petition. See PLD 22.

Petitioner has not demonstrated that the audio recordings were suppressed by the state. The record shows that they were produced. At a hearing in April 2013, Deputy District Attorney Jessica Tillson stated that she turned over four CDs, three of which contained audio recordings of telephone calls between Petitioner and Garcia. See PLD 4, 1 RT B-1. Calabria confirmed that he "need[ed] some time to listen to them." PLD 4, 1 RT B-2. Accordingly, there was a reasonable basis for the California Supreme Court to deny relief, and Petitioner is not entitled to relief on this subclaim.

J. Cumulative Prejudice

Petitioner argues at various points in the FAP that he is entitled to relief based on cumulative prejudice. MPA at 14, 16, 44. Petitioner has not established a single constitutional error and certainly not a cluster of otherwise harmless errors that amplify each other in relation to any key issue in the case. Therefore, "there is nothing to accumulate to a level of a constitutional violation." Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002).

VI. CONCLUSION

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

Date: September 27, 2021

DOUGLAS F. McCORMICK
United States Magistrate Judge

S253693

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re RONNIE Y. CONRAD on Habeas Corpus.

The petition for writ of habeas corpus is denied.

CANTIL-SAKAUYE

Chief Justice

Lodgment No. 20

SUPREME COURT
FILED

Court of Appeal, Second Appellate District, Division Five - No. B284790

AUG 08 2018

S249147

Jorge Navarrete Clerk

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

RONNIE YEARNELL CONRAD, Defendant and Appellant.

The petition for review is denied.
The request for an order directing publication of the opinion is denied.

CANTIL-SAKAUYE

Chief Justice

Filed 5/14/18 P. v. Conrad CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RONNIE YEARNELL CONRAD, Defendant and Appellant.	B284790 (Los Angeles County Super. Ct. No. VA128106)

APPEAL from an order and judgment of the Superior Court of Los Angeles County, Robert Higa, Judge. Affirmed.

H. Russell Halpern, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant Ronnie Yearnell Conrad of torture, mayhem, corporal injury, methamphetamine possession, possession of cocaine base for sale, firearm possession by a felon and ammunition possession. Defendant's torture, mayhem and corporal injury convictions rested on substantial evidence that in December 2012 he tortured his teenage girlfriend for several hours in a motel room. Law enforcement officers, acting on an anonymous phone tip, and without a warrant, entered the motel room, rescued the badly injured victim and seized multiple items of incriminating evidence. Defendant argues the unidentified informant's tip was insufficiently corroborated as to criminal activity.

This appeal is from a trial court order denying defendant a new trial on ineffective assistance of counsel grounds. This is the third appeal arising out of the trial court's rulings on defendant's new trial motion.[1] Defendant argues his trial attorney was

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[1] The first appeal was by the People from an order granting defendant a new trial. The trial court concluded defendant's prior attorney, Chad Calabria, had a conflict of interest that was *presumptively prejudicial*. On appeal, we reversed the new trial order and remanded for the trial court to assess whether the conflict of interest resulted in *actual prejudice* to defendant. (*People v. Conrad* (Feb. 6, 2015, B256866) [nonpub. opn.].) On remand, the trial court found no actual prejudice and denied defendant's new trial motion.

The second appeal was by defendant from the new trial denial order. We concluded there was "an arguable, unresolved question whether Mr. Calabria was prejudicially ineffective for failing to file a section 1538.5 evidence suppression motion."

ineffective in failing to file an evidence suppression motion; the motion would have been granted because the anonymous tip that led law enforcement officers to defendant's motel room was insufficiently corroborated as to illegal activity; and, as a result, the officers had no objectively reasonable belief exigent circumstances justified their entry. We conclude the unidentified informant's tip was sufficiently corroborated in significant innocent detail and actual observation of illegal activity was not required. Accordingly, we affirm the new trial denial order and the judgment.

(*People v. Conrad* (May 10, 2017, B266604) [nonpub. opn.] typed opn. at p. 14.) We conditionally reversed the new trial denial order and remanded for the trial court to consider whether "defendant may be able to prove his Fourth Amendment claim is meritorious, his attorney's performance was deficient, and it is reasonably probable the verdict would have been more favorable to [defendant] absent the [evidence seized from the motel room]." (*People v. Conrad, supra*, typed opn. at p. 27.) Based on this language, defendant argues that this court has already ruled it was reasonably probable the verdict would have been favorable to defendant. We disagree; we remanded for the trial court to consider the issue.

On remand, in addition to denying defendant's new trial motion, the court resentenced defendant consistent with our opinion in the second appeal. This third appeal is by defendant from the judgment and the new trial denial order.

II. THE EVIDENCE

There is no material dispute as to the underlying facts. Rather than restate them, we quote our prior opinion in this case: "[L]aw enforcement officers entered [defendant's] motel room after receiving an anonymous tip. [The] "'WeTip'" caller said a male Black named 'Ronnie Conrot' was holding a 17-year-old girl named 'Tanya' against her will at the Lucky Lodge Motel in Bellflower, room 108, and was beating her. The caller also said Mr. 'Conrot' drove a silver Chevrolet Camaro with the license plate 5JFB122. Upon arrival at the motel, Detective Michael Garfin noticed a silver Ford Mustang with license [plate] 5JFB122 parked in front of room 108. A Department of Motor Vehicles records search revealed the Ford was registered to 'Ronnie Conrod.' Detective Garfin and his partner, identified only as Deputy Meyers, approached the door to room 108. Both officers observed that the curtains were completely closed and there was condensation on the window. The condensation led Deputy Meyers to believe the room was occupied. The door was closed and locked. Deputy Meyers knocked on the door several times and announced, "Sheriff's Department." There was no response. Detective Garfin did not hear any movement inside the room. The officers requested back up.

"Deputy Martin responded to the back-up call. Deputy Meyers told her, '[T]here was possibly a barricaded suspect holding a 17[-]year[-]old hostage' in room 108. Deputy Martin observed the door to the motel room was shut, the blinds were closed, and there was condensation on the inside of the window. The condensation indicated the room was probably occupied.

"Detective Garfin contacted the motel manager, John Wu. Mr. Wu said the room was registered to Ronnie Conrad who drove the silver vehicle; further, there was a young female with Mr. [Conrad]. The girl had been staying with Mr. Conrad for two weeks. Mr. Wu did not believe the girl was in any distress or that she was being held against her will. Mr. Wu believed Mr. Conrad and the young female were in the room at that time because he had not seen them leave. After obtaining a room key from the manager, forming a 'crisis entry team to rescue the female,' knocking several more times, and listening but hearing no sound, the officers entered the room." (*People v. Conrad, supra*, B266604, typed opn. at pp. 23-24.)

In connection with the most recent new trial motion hearing, the People introduced additional evidence—declarations by Detectives Martin and Garfin.[2] The facts contained in each of those declarations are consistent with the evidence set forth above. But the detectives added two new pieces of information. First, based on the detectives' background, training and experience, they opined that domestic violence or kidnapping victims generally do not reveal their distress to strangers—the inference being that the motel manager would not necessarily have had reason to know whether the victim was being held against her will or otherwise in distress.[3] Second, the detectives

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[2] The detectives were present on the date of the new trial motion hearing. The prosecutor advised the trial court the detectives were available to testify. However, there was no request that they do so.

[3] Detective Martin: "Based on my background, training and expertise involving situations of domestic violence and

both observed that the manager's office was some distance from room 108 and, therefore, the manager would not have heard any commotion or cries for help. The manager's office did, however, have a view of the parking lot making it possible to see people coming and going.

III. DISCUSSION

A. *Standard of Review*

We review the new trial denial order for an abuse of discretion. (*People v. Homick* (2012) 55 Cal.4th 816, 894.) We find no abuse of discretion here.

B. *Anonymous Tip May be Corroborated by Innocent Details*

The parties agree that an anonymous phone tip must be corroborated. (*Florida v. J.L.* (2000) 529 U.S. 266, 270-272 (*J.L.*); *People v. Wells* (2006) 38 Cal.4th 1078, 1088.) Defendant contends, however, that the officers could not rely on the anonymous tip to conclude exigent circumstances were present

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kidnapping, I know it is common for victims of both crimes to keep silent despite their abuse in an effort to defend their significant others and to avoid retaliation. Victims often hide or cover any injuries, especially when in contact with the public." Detective Garfin similarly explained: "[O]ften times in cases of domestic violence or kidnapping of vulnerable victims, such as underage females, victims do not voice distress to strangers or even to known individuals out of fear of retaliation from their assailants."

because, although corroborated in its innocent details, the tip "did not corroborate any criminal activity;" it was not "reliable in its assertion of illegality."[4]

Defendant does not dispute that *if* the anonymous phone tip *was* sufficiently corroborated, exigent circumstances justified entry into the motel room. Defendant argues: "The police arrived at the Lucky Motel after receiving an anonymous tip. *If the tip had been corroborated[,] a[n] entry into the Defendant's room would have been justified,* or if upon arrival they observed or heard a woman being beaten they could justify entry based upon a pressing emergency. The only corroboration offered by the officers[] established the Defendant as the person accused by the unidentified informant, *not the crime*. Here nothing close to a pressing emergency was observed by the officers, thus the entry into the motel room was clearly illegal and all physical and testimonial evidence discovered as a result thereof must be suppressed." (Italics added.)

Contrary to defendant's argument, an anonymous tip corroborated in its innocent detail may, under the totality of the circumstances, support an objectively reasonable suspicion of criminal activity even though no officer has personally observed any illegality. (*Alabama v. White* (1990) 496 U.S. 325, 331.) Although the tip must be corroborated beyond a physical description and location of a suspect (*J.L., supra*, 529 U.S. at p. 271), an anonymous tip's reliability is not dependent on a police officer corroborating illegal activity. "A tip's reliability . . . need

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[4] Defendant also requests that this court "consider and rule on all issues raised by" his opening brief in the prior appeal, case No. B266604. We have already done so. (*People v. Conrad, supra*, case No. B266604.)

not depend exclusively on its ability to predict the suspect's future behavior [citation] or the officer's ability to corroborate present illegal activity [citation]. Rather, the tip's reliability depends upon an assessment of 'the totality of the circumstances in a given case.' [Citations.]" (*People v. Dolly* (2007) 40 Cal.4th 458, 464.) Indeed, in *Dolly*, the court declined to follow decisional authority from other jurisdictions that barred reliance on an anonymous tip unless "corroborated by the officer's direct observation 'of conduct or other circumstances suggestive of criminal activity.'" The court held: "These cases are contrary to *Wells*, which eschewed such rigid categories in favor of an approach that assesses reliability under the totality of the circumstances. [Citations.]" (*People v. Dolly, supra*, 40 Cal.4th at p. 470.)

C. *Officers Had Objectively Reasonable Belief of Exigency*

Here, the question is not whether the anonymous phone tip supported an objectively reasonable suspicion sufficient to warrant an investigatory detention, but whether, based on the tip, and the facts known to them, the officers had an objectively reasonable belief entry into defendant's motel room, a more intrusive privacy violation, was necessary to rescue a seriously injured occupant or to protect that person from imminent injury or death. (*Brigham City v. Stuart* (2006) 547 U.S. 398, 400, 403-404; *People v. Troyer* (2011) 51 Cal.4th 599, 605-606.)[5] We note

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[5] In *Troyer*, our Supreme Court discussed whether probable cause is required in these circumstances. The defendant argued, "[T]he objectively reasonable basis for a warrantless entry under

that cases such as *Wells*, which involve a drunk or erratic driver; are distinguishable on grounds the observed, possibly illegal activity does not require any inside knowledge. Such cases fall into a category our colleagues in Division Seven described as "'"illegality open to public observation."'" (*Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926, 938.) In circumstances such as those presented in this case, however, the officers necessarily rely on the unknown informant's knowledge of conduct the police cannot observe. The officers, having found the information provided by the tipster, including information not observable by passers-by, to be reliable, reason that the allegation of illegal conduct is also likely to be true.

The United States Court of Appeals considered a warrantless entry based on an anonymous tip in *U.S. v. Holloway* (11th Cir. 2002) 290 F.3d 1331, 1334, specifically, "whether law enforcement officers may conduct a warrantless search of a

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the emergency aid exception must be established by proof amounting to 'probable cause' . . . ." (*People v. Troyer, supra*, 51 Cal.4th at p. 606.) The court noted that: "[S]ome courts have held that any probable cause requirement is automatically satisfied whenever there is an objectively reasonable basis for believing that an occupant is in need of emergency aid. [Citations.] Other courts have reasoned that the concept of probable cause simply has no role in the analysis of a warrantless entry into a residence under the emergency aid exception. [Citations.] We decline to resolve here what appears to be a debate over semantics. Under either approach, and in light of the fact that 'the ultimate touchstone of the Fourth Amendment is "reasonableness,"' our task is to determine whether there was an objectively reasonable basis for believing that an occupant was seriously injured or threatened with such injury. [Citations.]" (*Id.* at p. 607.)

private residence in response to an emergency situation reported by an anonymous 911 caller." The caller had reported shots fired during a domestic dispute at the defendant's residence. When responding officers arrived: "[N]othing at the mobile home dissuaded [them] from believing the veracity of the 911 calls. Rather, the presence of [the defendant] and his wife on the front porch supported the information conveyed by the 911 caller." (*Id.* at p. 1338.) The court concluded, "[W]hen exigent circumstances demand an immediate response, particularly where there is danger to human life, protection of the public becomes paramount and can justify a limited, warrantless intrusion into the home." (*Id.* at p. 1334; see also *U.S. v. Richardson* (7th Cir. 2000) 208 F.3d 626, 630 [because many 911 calls are inspired by true emergencies that require an immediate response, such calls can be enough to support warrantless searches under exigent circumstances exception particularly when caller identifies himself]; *U.S. v. Cunningham* (8th Cir. 1998) 133 F.3d 1070, 1072 [defendant acknowledged police had right to enter apartment to investigate 911 call in which caller identified herself and said she was being held against her will].)

The officers here relied on an anonymous call to a "WeTip" line rather than a 911 call. The facts of *Winchester v. Cosaineau* (D.Colo. 2005) 404 F.Supp.2d 1262, are therefore more analogous. In that case, a person identified only as "Jerry" telephoned the police/fire dispatch and reported a possible suicide/overdose at a specific location. Officers went to the location where they spoke with a neighbor. The neighbor confirmed the person in question took pain medication. Officers entered the apartment only after knocking loudly on the door and announcing their presence but receiving no response. (*Id.* at pp. 1264-1266, 1270.) The

apartment resident brought a civil rights action under 42 United States Code section 1983, alleging the officers violated her Fourth Amendment rights. The District Court held there was sufficient corroboration of an emergency to support the officers entry into plaintiff's apartment and thus no Fourth Amendment violation. (*Id.* at p. 1270.)

A Florida District Court of Appeal reached the opposite conclusion on different facts in *Wheeler v. State* (Fla.App. 2007) 956 So.2d 517. An anonymous phone report to law enforcement personnel said a male was battering a female in the driveway of a residence. The report was later updated to say the combatants had gone inside the home. The court held the tip was not sufficiently corroborated and did not afford officers a reasonable basis to believe an emergency existed inside the house: "[T]he record shows that the dispatch consisted of an anonymous report that a male was battering a female in the driveway of the designated residence. It was reasonable for the deputies to infer that the report was made by an eyewitness, especially after the dispatch was later updated to report that the individuals involved had gone inside the residence. However, the report contained no other details. There was no description of either of the persons involved, no description of the nature of the battery, and no indication that anyone appeared injured. Upon arrival, the deputies found nothing to corroborate the report of a battery. They saw no physical evidence indicating a struggle or an injury to a person. No one they spoke with knew anything about the incident. There was nothing suspicious about the residence itself, such as an open door, and the deputies did not determine that there were persons inside the residence who refused to answer the door. Moreover, the deputies did not testify that there was

any indication from inside the residence that someone within was in need of their assistance. In fact, the only information that may have corroborated the dispatch was an indication by [a] male working on [a] car [outside the residence] that there were persons inside the house and [the defendant's] acknowledgment, after answering the door, that a female had left. [¶] Not only did the deputies not find anything at the scene to corroborate the anonymous report of a battery, the interviews with persons at the scene indicated that a battery had not taken place. [¶] With nothing more than these facts, we conclude that the deputies did not have a reasonable basis to believe that a grave emergency existed that made it imperative to the safety of the police and the community that they enter the home contrary to the requirements of the Fourth Amendment." (*Id.* at p. 521.) *Wheeler* is distinguishable for its complete lack of corroboration.

The authority discussed above supports a conclusion that, under the totality of the circumstances, an anonymous tip may support an objectively reasonable belief exigent circumstances warrant entry into a home or, as in this case, a motel room, even though officers have not personally observed or otherwise corroborated *illegal activity*. Moreover, here, the anonymous phone tip was sufficiently corroborated in its innocent detail and the officers, having also conducted further consistent investigation, could reasonably conclude the tipster's claim a young woman was being beaten was reliable. Officers on the scene confirmed that defendant, accompanied by a young woman, had rented room 108 and a car registered to defendant, matching the anonymous caller's description as to style, color and exact license plate number, was parked in front of room 108. Further investigation revealed that although the motel manager did not

think defendant's companion was being held against her will or was otherwise in distress, he was not in a position to know what was happening inside the motel room. The motel office was too far from room 108 for the manager to have heard any commotion or cries for help. And, in the detectives' experience, even if the victim was in distress, it was unlikely she would have revealed that information to the motel manager, a stranger. The motel manager did have a view from the office to the parking lot. He believed defendant and the young woman were in the motel room at the time the officers were present because he had not seen them leave. Moreover, condensation on room 108's window indicated the room was occupied, but there was no response to repeated knocking on the locked motel room door and announcements of law enforcement presence. Under the totality of the circumstances—the anonymous phone tip's accuracy in significant innocent detail, coupled with the information garnered from the motel manager and the officers' own observations—the detectives had an objectively reasonable basis for crediting the tipster's assertion of illegality and believing an occupant of room 108 was seriously injured or was threatened with imminent serious injury or death.

It is true that anyone passing the motel could have seen defendant's car parked in front of room 108. But such a person would not have known defendant's name, that it was his car parked there, that he was in room 108, or that he was accompanied by a young woman. Further, that the motel manager did not describe the victim as appearing to have been beaten, for example, or the officers did not hear anything consistent with a woman being physically harmed, did not undermine their objectively reasonable conclusion, on the

information provided and the facts known to them, that the anonymous caller's claim about the victim's plight was reliable.

D. *No Error in Denial of New Trial Motion*

Because the police officers reasonably relied on the anonymous phone tip and because their warrantless entry into defendant's motel room was legally justified by exigent circumstances, it is not reasonably probable that defendant would have prevailed in his suppression motion. Defendant therefore suffered no prejudice as a result of the fact his trial attorney never filed such a motion.[6] The trial court did not abuse its discretion when it denied defendant's new trial motion on ineffective assistance of counsel grounds. Given this resolution, we need not address other issues raised by the Attorney General. (*People v. Panah* (2005) 35 Cal.4th 395, 466, fn. 24; *People v. Butler* (2003) 111 Cal.App.4th 150, 162.)

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[6] It was defendant's burden to show he was entitled to a new trial because his trial attorney "failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to . . . defendant would have resulted in the absence of counsel's failings. [Citation.]" (*People v. Fosselman* (1983) 33 Cal.3d 572, 584.) A court need not resolve the question whether counsel's performance was deficient before examining whether the defendant suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *People v. Holt* (1997) 15 Cal.4th 619, 703.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

IV. DISPOSITON

The new trial denial order and judgment are affirmed.
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Filed 5/10/17 P. v. Conrad CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RONNIE YEARNELL CONRAD, Defendant and Appellant.	B266604 (Los Angeles County Super. Ct. No. VA128106)

APPEAL from a judgment and an order of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Conditionally reversed and remanded with directions.

H. Russell Halpern for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

In December 2012, defendant Ronnie Yearnell Conrad tortured his 19-year-old girlfriend. He stands convicted of torture, mayhem, corporal injury, methamphetamine possession, possession of cocaine base for sale, firearm possession by a felon and ammunition possession. (Pen. Code,[1] §§ 206, 203, 273.5, subd. (a), 29800, subd. (a)(1), 30305, subd. (a)(1); Health & Saf. Code, §§ 11378, 11351.5.) The jury also found true firearm, deadly weapon, and great bodily injury infliction allegations. (§§ 12022, subds. (b)(1), (c), 12022.5, subd. (a), 12022.7, subd. (e), 12022.53, subd. (b).) Defendant admitted prior conviction and prison term allegations. (§§ 667, subds. (a)(1), (b)-(i), 667.5, subd. (b), 1170.12; Health & Saf. Code, § 11370.2, subd. (a).) The trial court sentenced defendant to two life terms plus twenty years.

This is the second appeal in this matter. Previously, the trial court granted defendant's new trial motion. The trial court found defendant's attorney, Chad Calabria, had a conflict of interest that was presumptively prejudicial. We reversed the new trial order on appeal and remanded for an assessment whether the conflict of interest resulted in actual prejudice to defendant. (*People v. Conrad* (Feb. 6, 2015, B256866) [nonpub. opn.].) On remand, the trial court relitigated and denied the new trial motion and sentenced defendant to state prison. Defendant appeals from the order and judgment. We conditionally reverse the new trial denial order and remand for further proceedings.

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[1] Further statutory references are to the Penal Code except where otherwise noted.

We further conclude the trial court committed errors in sentencing defendant.

II. BACKGROUND

On December 27 and 28, 2012, defendant tortured his girlfriend, 19-year-old Tania Garcia, for three to six hours. The assault occurred in a motel room. Defendant repeatedly struck and burned Ms. Garcia with objects including a hot clothing iron, a metal broom handle or pipe with jagged edges, a toilet plunger, and a hair straightening iron.

Law enforcement officers were alerted to a possible hostage situation by a "WeTip" phone call. When sheriff's deputies entered the motel room, they found the injured victim tied to defendant. They also found two loaded semi-automatic handguns, live ammunition , large amounts of methamphetamine and cocaine base, digital scales, several items of drug paraphernalia and $926 in currency. The handguns were on a nightstand closest to defendant. Defendant's fingerprints were on one of the guns. Ms. Garcia showed Deputy Shelby Martin and Detective Michael Garfin the different weapons defendant had used on her, including a clothing iron, pipe, hair straightening iron and toilet plunger. The tangible items were seized and introduced at trial together with photographs of the narcotics and drug paraphernalia on the motel nightstand and dining table.

Ms. Garcia told four people she had been assaulted by her boyfriend: an emergency room nurse, David Geary; an emergency room nurse practitioner, William Worth; Deputy Martin; and Detective Garfin. Mr. Geary, Mr. Worth and Deputy Martin observed and photographically recorded the victim's injuries. The photographs were introduced in evidence.

Ms. Garcia subsequently was uncooperative. She had been in a relationship with defendant for five years, beginning when she was 14. She was dependent on him. Defendant, who was in county jail, and Ms. Garcia spoke by telephone on December 31, 2012, and January 2 and 3, 2013. In those conversations defendant urged Ms. Garcia to deny the assault and to take responsibility for the weapons and drugs. Defendant and Ms. Garcia repeatedly professed their love for one another. Between the December 27, 2012 assault and the March 5, 2013 preliminary hearing, Ms. Garcia repeatedly requested the charges against defendant be dropped. Also during that time, Ms. Garcia had defendant's name tattooed on her face.

Ms. Garcia testified at the March 5, 2013 preliminary hearing, but denied defendant had harmed her. She said she had been in a fight with someone other than defendant. She claimed ownership of the guns, narcotics and drug paraphernalia found in the motel room. Ms. Garcia repeatedly denied telling Deputy Martin defendant was responsible for her injuries. Much later, in connection with a new trial motion, Ms. Garcia filed a declaration. Ms. Garcia stated she had lied to Deputy Martin about defendant causing her injuries. Ms. Garcia declared Deputy Martin threatened her with imprisonment for narcotics possession.

The prosecution was unable to locate Ms. Garcia at the time of trial. The trial court found she was unavailable. Her preliminary hearing testimony was admitted in evidence. A person identifying herself as Ms. Garcia telephoned the courtroom during the trial. She told the clerk "that she wanted to speak to the court to inform the court that everything that's being said is not true and . . . nothing happened and that it's all a lie." She also said "that she did not want to come in because every time she comes in people tell her she lies."

III. DISCUSSION

A. Unavailable Victim-Witness

Defendant argues admitting Ms. Garcia's preliminary hearing testimony violated his Sixth Amendment confrontation rights under the United States Constitution. Defendant asserts the prosecution failed to secure contact information for a known uncooperative witness and failed to exercise due diligence to locate her.

A criminal defendant has a federal and state constitutional right to confront prosecution witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15; *People v. Herrera* (2010) 49 Cal.4th 613, 620-621.) The right is not, however, absolute. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295; *People v. Herrera, supra,* 49 Cal.4th at p. 621.) An exception exists where an unavailable witness has testified at a prior judicial proceeding against the same defendant and was subject to cross-examination. (Evid. Code, § 1291, subd. (a)(2); *People v. Herrera, supra,* 49 Cal.4th at p. 621.) It is undisputed Ms. Garcia testified

at defendant's preliminary hearing and was subject to cross-examination. The question here is whether she was unavailable.

Our Supreme Court has explained: "A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to obtain the witness's presence at the trial. (*Barber v. Page* (1968) 390 U.S. 719, 724-725 (*Barber*).) The United States Supreme Court has described the good-faith requirement this way: 'The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists . . . , "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." [Citation.] The ultimate question is whether the witness is unavailable despite good faith efforts undertaken prior to trial to locate and present that witness.' (*Ohio v. Roberts* (1980) 448 U.S. 56, 74, disapproved on another point in *Crawford v. Washington* (2004) 541 U.S. 36, 60-68.) [¶] Our Evidence Code features a similar requirement for establishing a witness's unavailability. Under section 240, subdivision (a)(5) . . . , a witness is unavailable when he or she is '[a]bsent from the hearing and the proponent of his or her statement has exercised *reasonable diligence* but has been unable to procure his or her attendance by the court's process.' (Italics added.) The term '[r]easoanble diligence, often called "due diligence" in case law, "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'"' (*People v. Cogswell* (2010) 48 Cal.4th 467, 477.) Considerations relevant to the due diligence inquiry 'include the

timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were completely explored.' (*People v. Wilson* (2005) 36 Cal.4th 309, 341 [relying on [*People v.*] *Cromer* [(2001)] 24 Cal.4th [889,] 904.) In this regard, 'California law and federal constitutional requirements are the same.' (*People v. Valencia* (2008) 43 Cal.4th 268, 291-292.) [¶] . . . [¶] As indicated, to establish unavailability, the prosecution must show that its efforts to locate and produce a witness for trial were reasonable under the circumstances presented. (*Ohio v. Roberts, supra,* 448 U.S. at p. 74; *People v. Smith* (2003) 30 Cal.4th 581, 609 (*Smith*).) We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard ([*People v.*] *Cromer, supra,* 24 Cal.4th at p. 902), and independently review whether the facts demonstrate prosecutorial good faith and due diligence (*id.* at pp. 902–903)." (*People v. Herrera*, *supra,* 49 Cal.4th at pp. 622-623.)

On January 15, 2013, Ms. Garcia met with the district attorney and others to discuss the case. She sought to have the charges dropped. Ms. Garcia was present in court on April 22, 2013, and was ordered to return on May 24. She appeared on May 24 and was ordered to return on June 7. She first failed to appear in court on June 7, 2013. The court issued a body attachment but held it until July 25, 2013. On July 25, at the prosecution's request, the body attachment was issued in the amount of $50,000.

Carlos Barragan, an investigator with the District Attorney's office, testified at a Wednesday, July 31, 2013 due diligence hearing. He had received a subpoena for Ms. Garcia on July 3, 2013, together with her Mexican birth certificate. He consulted two databases for information about her—the Department of Motor Vehicles and "TLO," a county database containing residence information. He also consulted the Department of Motor Vehicle's database for information on Ms. Garcia's mother, but, she did not have a driver's license. He searched another database, "JADIC," for driver's license or warrant information on Ms. Garcia's father but found no information.

On July 17, 2013, Mr. Barragan went to an Orange Avenue apartment and spoke with the managers. He learned Ms. Garcia had lived there with her mother but had moved away. The managers thought the mother might have moved to Rialto. One of the managers gave Mr. Barragan the name of a Mexican restaurant where the mother might be employed. Mr. Barragan went to a restaurant on Figueroa Street in Los Angeles. The restaurant's manager said the mother worked at the Gardena location. Mr. Barragan went to the Gardena restaurant. The manager said the mother had worked there four years ago but not since. He thought she might have moved to Fresno. Mr. Barragan visited a second address associated with Ms. Garcia, on West 168th Street in Gardena. He knocked on the door but no one answered.

Mr. Barragan heard a rumor Ms. Garcia might be with defendant's mother, Walterine Conrad. He discovered several addresses for Ms. Conrad in Mississippi as well as a telephone number. He did not find any Mississippi addresses for Ms. Garcia. Mr. Barragan called the telephone number. A female answered. When Mr. Barragan identified himself as an investigator, the female hung up.

Mr. Barragan spoke with Ms. Garcia's cousin at an address on East 70th Street in Long Beach. The cousin said Ms. Garcia's mother lived in Riverside. She told Mr. Barragan that Ms. Garcia had been with defendant's mother somewhere "nearby" and "during court time." Mr. Barragan testified, "She said . . . she's living around the . . . Orange [Avenue] address." The cousin had not seen Ms. Garcia since June 24.

Mr. Barragan then visited defendant's father's home on East 56th Street. There was no answer when he knocked at the door. But he spoke with a Black female who lived on the same block. The woman knew Ms. Garcia and had been in a fight with her two months earlier, sometime in May. The woman did not know where Ms. Garcia was.

On Tuesday, July 30, 2013, the day before the due diligence hearing, Mr. Barragan returned to the East 56th Street address and spoke with defendant's father for 20 to 30 minutes. Defendant's father did not know Ms. Garcia's whereabouts or that of defendant's mother. He had not seen Ms. Garcia since his son was arrested on December 28, 2012.

On Wednesday, July 31, 2013, the day of the due diligence hearing, Mr. Barragan checked the coroner's office, several local hospitals, and Los Angeles, Orange and San Bernardino County jail records. He found no information about Ms. Garcia.

At the due diligence hearing, Ms. Tillson argued: "[Defendant's counsel] is right, we did have awareness that we expected this witness to be difficult, uncooperative. As a result, I ordered her back for virtually every single court date following the preliminary hearing. [¶] She failed to appear on June the 7th. It was my hope that she would reappear and we wouldn't need to release a warrant into the system for her, thereby arresting a domestic violence victim unnecessarily. As a result I asked the court to hold that warrant hoping again that she would reappear. [¶] When it became apparent she was not going to appear, I actually made an effort to contact her counsel, who is Donald Calabria,[2] [defense counsel's] father, and informed him that we were not having positive contact with the victim, and it was my intention potentially to release the warrant into the system. At that time he informed me that he has not had contact with her for over two months; and that conversation was on the 25th of July.[3] At that time I received approval and went to [the

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[2] Because the Calabrias share the same last name, we will refer to Chad Calabria as Mr. Calabria and to Donald Calabria as Donald. Chad Calabria is deceased.

[3] On February 26, 2014, in connection with defendant's new trial motion, Donald declared: "A day before the trial of [defendant], I received a phone call from Ms. Tilson. This was the first I had heard from her since our initial conversation [after Donald was retained]. She asked for the whereabouts of Ms. Garcia, and I told her that at that moment I did not know and

trial court] to release the warrant into the system. [¶] That having been said, Mr. Barragan was already going out and looking for her . . . ."

The foregoing facts demonstrate prosecutorial good faith and due diligence in attempting to locate Ms. Garcia. Ms. Garcia had appeared in court on March 5, April 22 and May 24, 2013. Ms. Garcia first failed to appear on June 7, 2013. Ms. Tillson reasonably sought not to arrest a domestic violence victim unnecessarily. Ms. Garcia's attorney, Donald, was unable to provide contact information for her. On July 3, 2013, less than a month after Ms. Garcia failed to appear in court, Mr. Barragan commenced his investigation. Between July 3 and July 31, 2013, Mr. Barragan searched multiple databases, visited several locations and spoke to eight individuals in search of information about Ms. Garcia and a means to contact her. It is true, as defendant asserts, that Ms. Garcia sought to have the charges against defendant dismissed. But prior to June 7, 2013, Ms. Garcia had been present at proceedings with respect to defendant's prosecution. She had returned to court as ordered. *People v. Cromer, supra,* 24 Cal.4th 889, on which defendant relies, is distinguishable. There, a formerly cooperative witness disappeared from her neighborhood around June 27, 1997. But the prosecution made no attempt to locate her until December 1997, a six-month delay. Our Supreme Court held efforts to

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had not heard from her in a couple of months. [¶] . . . If I had been contacted by Ms. Tilson within reasonable time I would have been able to make phone calls to persons who could have located Ms. Garcia." This information was not before the trial court when, on July 31, 2013, it ruled on the prosecution's due diligence in attempting to locate Ms. Garcia.

locate the witness were unreasonably delayed. (*Id.* at p. 904.) There was no unreasonable delay in the present case. Mr. Barragan began searching for Ms. Garcia only 26 days after she first failed to appear in court as ordered.

B. Deputy Martin's Testimony

As noted above, Ms. Garcia testified at the preliminary hearing, denied defendant had harmed her, and further denied she had told Deputy Shelby Martin otherwise. At trial, Deputy Martin testified Ms. Garcia told her it was defendant who assaulted her and inflicted injuries. Those statements were inconsistent with Ms. Garcia's preliminary hearing testimony. On appeal, defendant argues: "Absent the preliminary hearing testimony of Ms. Garcia, the People would not have been able to present the testimony of [Deputy] Martin. Without [Deputy] Martin's testimony concerning the inconsistent statements of Ms. Garcia there would not [have] been any evidence to sustain a conviction, it cannot be said that beyond a reasonable doubt the jury would have convicted [defendant] without the prior recorded testimony of Ms. Garcia." As discussed above, admitting Ms. Garcia's preliminary hearing testimony did not violate the confrontation clause. Moreover, Ms. Garcia's statements to Deputy Martin were admissible to impeach Ms. Garcia's preliminary hearing testimony. (Evid. Code, §§ 785, 1202; *People v. Blacksher* (2011) 52 Cal.4th 769, 806-808; *People v. Osorio* (2008) 165 Cal.App.4th 603, 615, 616-617.)

C. New Trial: Ineffective Assistance of Counsel

Defendant challenges the trial court's denial of his new trial motion on ineffective assistance grounds. Defendant asserts his trial attorney, Mr. Calabria, was ineffective as follows: (1) Mr. Calabria's law office represented both defendant and the victim, Ms. Garcia; (2) while representing defendant, including during trial, Mr. Calabria was being actively prosecuted by the Los Angeles County District Attorney; (3) "Mr. Calabria failed to maintain a state of sobriety during [defendant's] trial"; (4) Mr. Calabria did not investigate a potentially exculpatory witness; (5) Mr. Calabria "failed to make timely objections to a number of clearly objection[able] questions and statements by the Deputy District Attorney"; and (6) Mr. Calabria failed to file an evidence suppression motion.

Our Supreme Court has held: "'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. . . . If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there

simply could be no satisfactory explanation. [Citation.]' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

We review the trial court's ruling on defendant's new trial motion for an abuse of discretion. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 127; *People v. Navarette* (2003) 30 Cal.4th 458, 526.) In *People v. Delgado* (1993) 5 Cal.4th 312, 328, our Supreme Court explained: "'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citation.]" (Accord, *People v. Thompson* (2010) 49 Cal.4th 79, 140.) We conclude there is an arguable, unresolved question whether Mr. Calabria was prejudicially ineffective for failing to file a section 1538.5 evidence suppression motion. But in all other respects denial of the new trial motion was not an abuse of discretion.

1. Conflict Issues

The right to effective assistance of counsel includes the right to counsel free of conflicts of interest that may compromise the attorney's loyalty to his or her client. (*Wood v. Georgia* (1981) 450 U.S. 261, 271; *People v. Gonzales* (2011) 52 Cal.4th 254, 309; *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1009-1010; *People v. Doolin* (2009) 45 Cal.4th 390, 417.) As our Supreme Court has explained, "'[S]uch conflicts "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his [or her] responsibilities to another client or a third person or his own interests. [Citation.]"' [Citations.]" (*People v. Doolin, supra,* 45 Cal.4th at p. 417.) Further: "[T]o obtain reversal of a criminal verdict, the defendant must

demonstrate that (1) counsel labored under an actual conflict of interest that adversely affected counsel's performance, and (2) absent counsel's deficiencies arising from the conflict, it is reasonably probable the result of the proceeding would have been different. (*Mickens v. Taylor* (2002) 535 U.S. 162, 166 . . . ; [*People v.*] *Doolin, supra,* [45 Cal.4th] at pp. 417-418, 421; see *Strickland v. Washington* (1984) 466 U.S. 668, 687." (*People v. Hung Thanh Mai, supra,* 57 Cal.4th at pp. 1009-1010; accord, *Strickland v. Washington, supra,* 466 U.S. at p. 692; *People v. Rundle* (2008) 43 Cal.4th 76, 169, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) With respect to a failure to act in a certain way, our Supreme Court has explained, "[W]here a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission." (*People v. Cox* (2003) 30 Cal.4th 916, 948–949[, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22].)' ([*People v.*] *Doolin, supra,* 45 Cal.4th 390, 418.)" (*People v. Hung Thanh Mai*, *supra,* 57 Cal.4th at p. 1010.)

a. dual representation

Defendant asserts a prejudicial conflict of interest in that defendant and the victim, Ms. Garcia, were represented by the same law firm. Mr. Calabria represented defendant while his father, Donald, represented the victim. According to the record before us, Donald's representation of the victim was extremely limited. Prior to trial, Ms. Garcia retained Donald to represent her in her role as a witness in this matter. He agreed to accompany her to court and "stand by her" if she was called to testify. On April 16, 2013, he contacted the district attorney concerning immunity for the victim. On July 25, 2013, Donald said he had no means of contacting Ms. Garcia; he had not had any contact with her for the preceding two months. There was no evidence Donald's representation of Ms. Garcia threatened Mr. Calabria's loyalty to defendant. With the exception of Ms. Garcia's statements in the immediate aftermath of the assault, the victim at all times aligned her interests with defendant.[4] Defendant has not shown a prejudicial conflict of interest.

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[4] In a declaration submitted in support of defendant's motion to reopen the new trial hearing for newly discovered evidence, Ms. Garcia stated: she had intended to testify at defendant's trial consistent with her preliminary hearing testimony; but Mr. Calabria told her if she so testified she could be prosecuted for making false statements to law enforcement officers; and as a result of Mr. Calabria's advice, she did not appear at trial; further, Donald, who knew how to contact her, never told her she was needed at trial. The trial court denied the motion to reopen the new trial hearing.

b. Pending felony charges

During trial, and unbeknownst to defendant, Mr. Calabria was subject to criminal prosecution by the Los Angeles County District Attorney's office—the same government agency prosecuting defendant.[5] As a result, an actual conflict existed. (See *People v. Almanza* (2015) 233 Cal.App.4th 990, 1002 [district attorney contemplated possible criminal prosecution of defense trial counsel].) As to prejudice, defendant relies on *Harris v.*

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[5] Mr. Calabria's record was recited into the record as follows. On August 10, 2012, Mr. Calabria was arraigned in case No. LA071672, a "drug case." He pled guilty on October 2, 2012. Entry of judgment was deferred. On January 29, 2013, Mr. Calabria was arraigned in case No. BA407248, alleging forgery in violation of Penal Code section 476. On February 1, 2013, he was charged with a probation violation in case No. BA407248. On March 12, 2013, Mr. Calabria was convicted in case No. LA071672. Mr. Calabria first appeared in this case on March 20, 2013. On April 3, 2013, a complaint was lodged against Mr. Calabria with the State Bar. Between March 2013 and August 28, 2013, the probation violation matter was continued multiple times including on July 24, 2013. Defendant was tried on August 5, 6 and 7, 2013. On August 28, 2013, Mr. Calabria pled guilty in the forgery case. On September 5, 2013, he first appeared in "drug court." He tested positive on September 26, 2013, and was charged with a probation violation. Mr. Halpern represented: "[Mr. Calabria] tested positive for opiates and barbiturates while he was in drug court, and he was violated in drug court, put back into custody, and the negative report remanded him – they were suggesting he be taken out of drug court and put into alternative treatment programs. [¶] So during the pendency of the trial not only was he facing a probation violation, but he was actually with an open unconvicted matter."

Superior Court (2014) 225 Cal.App.4th 1129 for the proposition prejudice is presumed. However, we rejected that argument in defendant's first appeal. We held *Harris* inapplicable in the post-trial conflict of interest context. We concluded defendant was required to demonstrate actual prejudice. (*People v. Conrad, supra,* typed opn. at pp. 3-5; accord, *People v. Almanza, supra,* 233 Cal.App.4th at pp. 1003-1006.)

2. Failure to maintain sobriety

Defendant argues Mr. Calabria stood moot when objectionable evidence was introduced because he was "suffering from an altered mental state due to drug intoxication." We find no substantial evidence Mr. Calabria was under the influence of narcotics during defendant's trial or that any drug use prejudicially affected his representation of defendant.

Deputy Daren Nigsarian testified for the defense at the June 8, 2015 new trial motion hearing. Deputy Nigsarian was the courtroom bailiff during defendant's trial. He sat not more than five feet from Mr. Calabria and defendant. Deputy Nigsarian's memory of defendant's August 2013 trial was "a little foggy." Deputy Nigsarian testified that on three or four occasions, while witnesses were on the stand Mr. Calabria was writing on a yellow legal pad, his pen stopped moving, his eyes closed and his head dropped slowly towards the table until it was three inches from the surface. Mr. Calabria remained in that position with his eyes closed for five-minute stretches. Deputy Nigsarian opined Mr. Calabria's demeanor was consistent with being under the influence of narcotics: "His gait was slow and unsteady. His voice was weak. His speech pattern was . . .

delayed, somewhat strung out. . . . [P]hysically he seemed extremely frail and as if he had a lack of balance, coordination." While the trial was in progress, Deputy Nigsarian heard that Mr. Calabria had "issues" with drug use. But when a motion or an objection was interposed, Mr. Calabria's head would snap back up as if he were waking up. Deputy Nigsarian testified, "I recall him making objections from that state, and I remember him responding to People's objections from that state." During the new trial motion hearing, Mr. Calabria admitted he was experiencing health problems during defendant's trial, but he denied he had a "chemical dependency problem."

The foregoing evidence did not establish Mr. Calabria was under the influence of narcotics during defendant's trial. Moreover, there was no evidence any such drug use prejudiced defendant's case. It does appear, as discussed above, that Mr. Calabria had criminal charges pending against him during the trial and that at least some of those charges involved drug offenses. And Deputy Nigsarian did observe conduct he opined was consistent with being under the influence of narcotics. But Deputy Nigsarian also testified Mr. Calabria responded to what was happening in the courtroom. Deputy Nigsarian testified, "I recall him making objections from that state, and I remember him responding to People's objections from that state." Moreover, we have reviewed the record of the trial and do not find that Mr. Calabria's representation of defendant fell below an objective standard of reasonableness. We also do not find any prejudice to defendant.

3. Failure to locate witness

At the preliminary hearing, Ms. Garcia testified she was "gang affiliated" and she sustained her injuries during a fight with "a girl" a few days before defendant's arrest. Mr. Garcia said: "I had got in a fight with a girl on Tuesday; and then when I seen her again on Thursday, we went at it again. I was mad because she had given me a purple eye, so I wanted to get her back for it, so I went back . . . I just jumped out [of Ronnie's car] and run to the girl. So about the time [Ronnie] got to go park the car, the girls had jumped me." As noted above, Ms. Garcia was missing at the time of trial. During a due diligence hearing held after Ms. Garcia went missing, Mr. Barragan, the investigator from the District Attorney's office, testified he spoke to a woman who lived near defendant's father's residence. The woman thought Mr. Barragan was there to investigate a fight she had with Ms. Garcia at a Food for Less market sometime in May 2013. In connection with defendant's new trial motion, Mr. Calabria testified he was aware of the woman but could not find her. He did not retain an investigator to look for her. Mr. Calabria further testified nothing in the discovery he received, including police reports, indicated the police had a witness who had been involved in a fight with Ms. Garcia. On appeal, defendant argues Mr. Calabria, who was present at the due diligence hearing, was ineffective for failing to interview this material, potentially exculpatory witness.

Ms. Garcia described two altercations with a girl or girls, one on Tuesday, December 25, 2012, and the other on Thursday, December 27, 2012. The woman who spoke to Mr. Barragan said she had a fight with Ms. Garcia in May 2013. The likelihood that these events were related was remote at best. Moreover, Ms. Garcia's injuries included multiple burns. There was no evidence Ms. Garcia had been burned during the December 2012 or May 2013 fights with a girl or girls. Further, the injuries Deputy Martin observed on December 28, 2012 appeared to be fresh and getting worse as the night progressed. Defendant has not shown an outcome more favorable to him was reasonably probable had Mr. Calabria located and interviewed the unidentified woman. Defendant has not established Mr. Calabria's conflict of interest with respect to his own criminal matters contributed to his failure to locate the woman.

4. Failure to interpose objections

Defendant lists multiple points at which he contends Mr. Calabria should have objected and failed to do so. He lists these items in a cursory fashion, with only infrequent citation to the record, without developed argument, and with almost no citation to authority. For that reason, and consistent with established authority, we decline to address these claims. (Cal. Rules of Court, rules 8.204(a)(1)(C), 8.360(a); *People v. Gidney* (1937) 10 Cal.2d 138, 142-143, disapproved on another point in *People v. Hutchinson* (1969) 71 Cal.2d 342, 347-348; *People v. Webber* (1991) 228 Cal.App.3d 1146, 1166, fn. 4; *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1123; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283; *People v. Murphy* (1973) 35 Cal.App.3d

905, 924; *People v. Woods* (1968) 260 Cal.App.2d 728, 731; *People v. Wilson* (1965) 238 Cal.App.2d 447, 464; *People v. Meyer* (1963) 216 Cal.App.2d 618, 635; *People v. Seals* (1961) 191 Cal.App.2d 734, 737.) Moreover, even were we to consider the merits, defendant has not shown ineffective assistance or that he suffered prejudice. Whether to object to evidence admission is a tactical decision; failure to object will seldom establish ineffective assistance. (*People v. Williams* (1997) 16 Cal.4th 153, 215.) Moreover, the record sheds no light on why Mr. Calabria chose to act or not to act in the challenged instances. (*People v. Michaels* (2002) 28 Cal.4th 486, 526.) Defendant's claims are more appropriately raised, if at all, in a habeas corpus proceeding. (*People v. Johnson* (2016) 62 Cal.4th 600, 653; *People v. Michaels, supra,* 28 Cal.4th at p. 526.)

5. Evidence suppression motion

Defendant asserts he was prejudiced by Mr. Calabria's failure to file an evidence suppression motion based on the warrantless entry into the motel room. The failure to so move deprived defendant of the opportunity to adjudicate the admission in evidence of the items discovered there including the implements defendant used to torture Ms. Garcia, the loaded handguns, narcotics and drug paraphernalia.

As discussed above, to establish ineffective assistance, a defendant must show both deficient performance—the representation fell below an objective standard of reasonableness—and prejudice. (*People v. Wharton* (1991) 53 Cal.3d 522, 575.) "Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*In re Sixto* (1989) 48 Cal.3d 1247, 1257; *Strickland* [*v. Washington, supra,* [466 U.S.] at p. 694.)" (*People v. Wharton, supra,* 53 Cal.3d at p. 575; accord, *People v. Vines* (2011) 51 Cal.4th 830, 875-876.) In the present context, as our Supreme Court has held, "'Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must . . . prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excluded evidence in order to demonstrate actual prejudice.' (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 375.)" (*People v. Wharton, supra,* 53 Cal.3d at p. 576.)

As noted above, law enforcement officers entered the motel room after receiving an anonymous tip. A "WeTip" caller said a male Black named "Ronnie Conrot" was holding a 17-year-old girl named "Tanya" against her will at the Lucky Lodge Motel in Bellflower, room 108, and was beating her. The caller also said Mr. "Conrot" drove a silver Chevrolet Camaro with the license plate 5JFB122. Upon arrival at the motel, Detective Michael Garfin noticed a silver Ford Mustang with license place 5JFB122 parked in front of room 108. A Department of Motor Vehicles records search revealed the Ford was registered to "Ronnie Conrod." Detective Garfin and his partner, identified only as Deputy Meyers, approached the door to room 108. Both officers observed that the curtains were completely closed and there was condensation on the window. The condensation led Deputy Meyers to believe the room was occupied. The door was closed and locked. Deputy Meyers knocked on the door several times

and announced, "Sheriff's Department." There was no response. Detective Garfin did not hear any movement inside the room. The officers requested back-up.

Deputy Martin responded to the back-up call. Deputy Meyers told her, "[T]here was possibly a barricaded suspect holding a 17 year old hostage" in room 108. Deputy Martin observed the door to the motel room was shut, the blinds were closed, and there was condensation on the inside of the window. The condensation indicated the room was probably occupied.

Detective Garfin contacted the motel manager, John Wu. Mr. Wu said the room was registered to Ronnie Conrad who drove the silver vehicle; further, there was a young female with Mr. Conrod. The girl had been staying with Mr. Conrad for two weeks. Mr. Wu did not believe the girl was in any distress or that she was being held against her will. Mr. Wu believed Mr. Conrad and the young female were in the room at that time because he had not seen them leave. After obtaining a room key from the manager, forming a "crisis entry team to rescue the female," knocking several more times, and listening but hearing no sound, the officers entered the room.

During the May 14, 2014 new trial motion hearing, Mr. Calabria testified he was aware the motel room was searched without a warrant. He considered filing an evidence suppression motion. He did not file the motion because he believed there were exigent circumstances justifying the officers' actions. He recalled someone had reported that an underage girl was being held at the motel. He believed it was a member of the victim's family who had called. He believed it was the victim's mother. Mr. Calabria did not recall any police report stating the tip was anonymous. Mr. Calabria agreed that if there was a warrantless

search based on an anonymous tip he would have "explored" filing an evidence suppression motion. He told defendant why he thought an evidence suppression motion was unwarranted and that, "I thought there were better grounds of fighting this case, and those are the grounds I proceeded on."

In denying defendant's new trial motion, the trial court impliedly determined either Mr. Calabria was not ineffective in failing to seek suppression or defendant was not prejudiced by the motion's absence. A trial court's determination a search did not violate the Fourth Amendment is subject to independent review. (*People v. Troyer* (2011) 51 Cal.4th 599, 605; *People v. Rogers* (2009) 46 Cal.4th 1136, 1157.) In response to an evidence suppression motion, it is the prosecution's burden to establish exigent circumstances or another exception to the warrant requirement justifies a warrantless entry into a motel room such as occurred here. (*People v. Troyer, supra,* 51 Cal.4th at p. 605; *People v. Rogers, supra,* 46 Cal.4th at p. 1156.) As our Supreme Court has explained, """"Exigent circumstances' means an emergency situation requiring swift action to prevent imminent danger or serious damage to property . . . ."""" (*People v. Wharton, supra,* 53 Cal.3d at p. 577.) Under the exigent circumstances exception, the facts known to the officers must amount to an objectively reasonable basis for believing a person inside the motel room is seriously injured or imminently threatened with serious injury. (*Mincey v. Arizona* (1978) 437 U.S. 385, 392; *People v. Troyer, supra,* 51 Cal.4th at p. 605; *People v. Rogers, supra,* 46 Cal.4th at pp. 1156-1157.) There must be "specific, articulable facts indicating the need for "'swift action to prevent imminent danger to life[.]"'" (*People v. Ray* (1999) 21 Cal.4th 464, 472; *People v. Duncan* (1986) 42 Cal.3d 91, 97.) Here, the officers

acted on an anonymous tip that a young woman was being held against her will and was being beaten. The anonymous tip was corroborated by the occupants' failure to come to the door and the deputies' deduction the room was occupied. Further, the deputies knew there was a material consistency between the WeTip information and defendant's presence in the motel. However, the motel manager told the officers the purported victim had been at the motel with defendant for two weeks and did not appear to be in distress or held against her will.

We conclude a reasonable argument could be made, given the totality of the circumstances and the information known to the officers, that the warrantless motel room entry to protect an occupant was not objectively reasonable. (Compare, *People v. Troyer, supra,* 51 Cal.4th at pp. 607-609; *Tamborino v. Superior Court* (1986) 41 Cal.3d 919, 921-925.) We further conclude the record supports the argument a more favorable outcome was reasonably probable had Mr. Calabria moved to suppress the incriminating evidence officers discovered in the motel room. (*Strickland v. Washington, supra,* 466 U.S. at p. 696; *People v. Carrasco* (2014) 59 Cal.4th 924, 982.) The arguably illegal entry led officers to discover the victim's identity and seize evidence introduced at trial including implements defendant used to torture Ms. Garcia, loaded handguns, narcotics and drug paraphernalia. The tangible items seized substantially corroborated the case against defendant, particularly in light of the victim's recantation.[6] Mr. Calabria's testimony at the initial

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[6] Defendant argues that as a result of the illegal entry, "all physical *and testimonial* evidence discovered . . . must be suppressed." Defendant has not, however, analyzed the relevant

new trial hearing established he had no legitimate tactical reason for refraining from filing an evidence suppression motion. He thought such motion would be unsuccessful because the tip came from the purported victim's family member. He admitted he would have explored filing a suppression motion had he known the tip was anonymous. On the record before us, we cannot say the suppression motion would have been denied—that under the totality of the circumstances, an emergency situation existed sufficient to justify the deputies' warrantless entry into the motel room. In other words, given the opportunity, defendant may be able to prove his Fourth Amendment claim is meritorious, his attorney's performance was deficient, and it is reasonably probable the verdict would have been more favorable to him absent the seized evidence.

On remand, the trial court is to consider this issue. If the trial court finds Mr. Calabria was *not* ineffective in failing to file such motion, or defendant suffered no prejudice, it shall reinstate its order denying defendant a new trial. If the trial court finds Mr. Calabria was ineffective and there is a reasonable probability of a different result had an evidence suppression motion been pursued, it shall issue an order granting defendant a new trial.

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law. (See, e.g., *United States v. Crews* (1980) 445 U.S. 463; *Wong Sun v. U.S.* (1963) 371 U.S. 471; *People v. Teresinski* (1982) 30 Cal.3d 822.) Application of the exclusionary rule to evidence other than the tangible items seized has not as yet been litigated in this case.

D. The Prosecutor's Duty to Notify Defendant his Counsel was being Prosecuted

Defendant contends the district attorney's office had an obligation to notify the trial court that Mr. Calabria faced criminal charges and was "drug dependen[t]." Defendant reasons an informed trial court could have taken steps to ensure defendant had conflict-free, drug-free counsel. As discussed above, however, there has been no showing the pending criminal charges adversely affected Mr. Calabria's representation of defendant or that Mr. Calabria was under the influence of drugs. We find no denial of defendant's fair trial right.

E. Sentencing

As noted above, the jury convicted defendant of torture, mayhem, corporal injury, methamphetamine possession, cocaine base for sale, firearm possession by a felon and ammunition possession. (§§ 206, 203, 273.5, subd. (a), 29800, subd. (a)(1), 30305, subd. (a)(1); Health & Saf. Code, §§ 11378, 11351.5.) The jury also found true firearm, deadly weapon, and great bodily injury infliction allegations. (§§ 12022, subds. (b)(1), (c), 12022.5, subd. (a), 12022.7, subd. (e), 12022.53, subd. (b).) Defendant admitted prior conviction and prison term allegations. (§§ 667, subds. (a)(1), (b)-(i), 1170.12; Health & Saf. Code, § 11370.2, subd. (a).) The trial court sentenced defendant to two life terms plus twenty years.

We asked the parties to brief several sentencing issues. The trial court erred when it imposed two life terms for torture under sections 667, subdivisions (b) through (i), and 1170.12. The trial court should have doubled the minimum 7-year term for a 14-year-to-life sentence. (*People v. Jefferson* (1999) 21 Cal.4th 86, 96-100.) The trial court also erred in failing to impose, impose and stay, or strike multiple enhancements under sections 667, subdivision (a)(1), 667.5, subdivision (b), 12022, subdivisions (b)(1) and (c), 12022.5, subdivision (a), and 12022.7, subdivision (e). (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) On remand, if the trial court again denies defendant a new trial, it shall resentence defendant as discussed above.

IV. DISPOSITION

The judgment and order are conditionally reversed and the matter is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

BAKER, J.

Filed 2/6/15 P. v. Conrad CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Appellant, v. RONNIE YEARNELL CONRAD, Defendant and Respondent.	B256866 (Los Angeles County Super. Ct. No. VA128106)

APPEAL from an order of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Reversed and remanded.

Jackie Lacey, District Attorney, Phyllis C. Asayama and John Harlan II, Deputy District Attorneys, for Plaintiff and Appellant.

H. Russell Halpern for Defendant and Respondent.

I. INTRODUCTION

A jury convicted defendant, Ronnie Yearnell Conrad, of seven felonies: mayhem (Pen. Code,[1] § 203) (count 1); corporal injury to a cohabitant (§ 273.5, subd. (a)) (count 2); methamphetamine possession for sale (Health & Saf. Code, § 11378) (count 3); cocaine base possession for sale (Health & Saf. Code, § 11351.5) (count 4); torture (§ 206) (count 6); firearm possession by felon (§ 29800, subd. (a)(1)) (count 7); and ammunition possession (§ 30305, subd. (a)(1)) (count 8). The jury further found defendant: personally used a deadly or dangerous weapon, a clothing iron (§ 12022, subd. (b)(1)) (counts 1, 2, 6); personally used a firearm (§ 12022.5, subd. (a)) (count 2); personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)) (count 2); was personally armed with a firearm (§ 12022, subd. (c)) (counts 3, 4); and personally used a firearm (§ 12022.53, subd. (b)) (count 6). The trial court, however, granted defendant a new trial. The trial court concluded defendant's trial counsel had a conflict of interest that was presumptively prejudicial. The prosecution appeals from that order. (§ 1238, subd. (a)(3).) We reverse the new trial order and remand for further consideration.

II. PROCEEDINGS IN THE TRIAL COURT

Chad Calabria represented defendant at trial. Following the return of the verdict, defendant retained H. Russell Halpern. Mr. Halpern brought a non-statutory new trial motion. The trial court then learned for the first time that during the entirety of defendant's trial, Mr. Calabria was facing criminal prosecution. Mr. Calabria was facing prosecution in two cases brought by the same entity that was prosecuting defendant, the Los Angeles County District Attorney. The trial court found Mr. Calabria had an actual,

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[1] Further statutory references are to the Penal Code except where otherwise noted.

not merely potential, conflict of interest. The trial court further found this was a violation of defendant's federal and state constitutional right to conflict-free counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Wood v. Georgia* (1981) 450 U.S. 261, 271; *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1234.) Moreover, the trial court presumed Mr. Calabria's conflict of interest affected his performance and resulted in prejudice. Hence, the trial court granted defendant a new trial.

III. DISCUSSION

A. Defendant Was Required to Show Prejudice

In presuming deficient performance and prejudice, the trial court relied on *Harris v. Superior Court* (2014) 225 Cal.App.4th 1129 (*Harris*). In *Harris*, Gustavo Diaz represented the defendant at the preliminary hearing. Mr. Diaz had a conflict of interest in two respects. First, Mr. Diaz had been arrested and was facing felony charges brought by the Los Angeles County District Attorney. This was the same entity that was prosecuting the defendant. Second, the same law enforcement officer had arrested both Mr. Diaz and the defendant. Further, the arresting officer was the sole prosecution witness at the defendant's preliminary hearing. And the arresting officer was a potential witness in proceedings against Mr. Diaz. Our colleagues in Division One of this appellate district held Mr. Diaz had an actual, not merely potential, conflict of interest. (*Id.* at pp. 1137-1144) Further, the court held no affirmative showing of prejudice was required to obtain a dismissal of the information. (*Id.* at pp. 1145-1148.)

Our Division One colleagues held the denial of a substantial right *at the preliminary hearing* renders the ensuing commitment illegal and entitles a defendant to *dismissal of the information*. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 523 [defendant denied right to public preliminary examination]; *Reid v. Superior Court* (1982) 140 Cal.App.3d 624, 633-635 [defendant denied conflict-free counsel at preliminary hearing]; see *Stroud v. Superior Court* (2000) 23 Cal.4th 952, 963, fn. 4.)

Harris held: "When the issue is raised in the trial court before the defendant's conviction, a challenge to counsel's conflict of interest does not depend on a showing that conflict-free counsel would have obtained a better result. ([*People v.*] *Pompa-Ortiz, supra,* 27 Cal.3d at p. 529 [If the issue is raised before trial, prejudice is presumed]; *People v. Booker* (2011) 51 Cal.4th 141, 157 ['the need for a showing of prejudice depends on the stage of the proceedings at which a defendant raises the claim in a reviewing court']." (*Harris v. Superior Court, supra,* 225 Cal.App.4th at p. 1146.) No review petition was filed in *Harris*.

Here, *Harris* does not control the outcome of our case. First, in *Harris*, the conflict of interest came to light following a preliminary hearing, not after a full trial. Second, in *Harris*, the defendant brought a pre-trial motion to dismiss the information, not a motion for a new trial. And third, the motion to dismiss in *Harris* was governed by the rule, applicable in that pre-trial context, that no affirmative showing of prejudice was required. Here, however, the conflict of interest came to light only after a full trial. Moreover, as discussed below, a trial court cannot order a new trial absent a showing of actual prejudice to defendant.

Except in a concurrent representation case, there is no presumption of prejudice in the post-trial conflict of interest context. (See *People v. Gonzales* (2011) 52 Cal.4th 254, 309; *People v. Doolin* (2009) 45 Cal.4th 390, 420; *People v. Ramirez* (2006) 39 Cal.4th 398, 427-428.) There was no concurrent representation in this case. Here, the trial court was required to consider whether Mr. Calabria's conflict of interest affected his performance and whether it resulted in actual prejudice to defendant. (*Mickens v. Taylor* (2002) 535 U.S. 162, 166; *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1009-1010; *People v. Doolin, supra,* 45 Cal.4th at pp. 417-421.) As our Supreme Court recently explained: "The federal and state constitutional right to counsel in a criminal case also includes the right to representation free of conflicts of interest that may compromise the attorney's loyalty to the client and impair counsel's efforts on the client's behalf. (E.g., *Glasser v. United States* (1942) 315 U.S. 60, 69-70; *People v. Doolin*[, *supra,*] 45 Cal.4th [at p.] 417 . . .) For both state and federal purposes, a claim of conflicted representation

is one variety of claim that counsel provided ineffective assistance. Hence, *to obtain reversal of a criminal verdict*, the defendant must demonstrate that (1) counsel labored under an actual conflict of interest that adversely affected counsel's performance, and (2) absent counsel's deficiencies arising from the conflict, it is reasonably probable the result of the proceeding would have been different. (*Mickens v. Taylor*[, *supra*,] 535 U.S. [at p.] 166 . . . ; [*People v.*] *Doolin*, *supra*, [45 Cal.4th] at pp. 417-418, 421; see *Strickland v. Washington* (1984) 466 U.S. 668, 687.)" (*People v. Hung Thanh Mai*, *supra*, 57 Cal.4th at pp. 1009-1010, italics added.)

B. The Prejudice Determination Must Be Made by the Trial Court in the First Instance

An order granting a new trial on the ground of ineffective assistance of counsel is subject to an abuse of discretion standard of review. (*People v. Callahan* (2004) 124 Cal.App.4th 198, 201, 209-212; *People v. Andrade* (2000) 79 Cal.App.4th 651, 659-662; cf. *People v. Ault* (2004) 33 Cal.4th 1250, 1255 [juror misconduct].) The abuse of discretion standard of review applies to the trial court's determinations of first, whether defense counsel's representation was deficient and second, whether the defendant was prejudiced. (*People v. Callahan*, *supra*, 124 Cal.App.4th at p. 201; 5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 268, p. 448.) Moreover, the requisite deficient performance and prejudice determinations must be made by the trial court in the first instance. Trial courts are in the best position to evaluate the questions of law and fact pertaining to counsel's performance and its effect on a defendant's case. (*People v. Ault*, *supra*, 33 Cal.4th at pp. 1267-1268; *People v. Fosselman* (1983) 33 Cal.3d 572, 582; *People v. Callahan*, *supra*, 124 Cal.App.4th at pp. 201, 209-211; *People v. Andrade*, *supra*, 79 Cal.App.4th at p. 660; 22B Cal.Jur.3d Criminal Law: Post-Trial Proceedings, § 612.) As our Supreme Court has observed: "[I]t is the trial court that has a 'first-person vantage' [citation] on the *effect* of trial errors or irregularities on the fairness of the proceedings in that court. . . . [¶] A trial court's finding of prejudice is based, to a significant extent, on '"first-hand observations made in open court,"' which that court

itself is best positioned to interpret. [Citation.]" (*People v. Ault, supra,* 33 Cal.4th at p. 1267; *People v. Callahan, supra,* 124 Cal.App.4th at pp. 210-211.) It is precisely because trial courts are uniquely qualified to determine whether a new trial should be granted that appellate courts apply a deferential standard of review. (*People v. Ault, supra,* 33 Cal.4th at pp. 1260-1272; *People v. Callahan, supra,* 124 Cal.App.4th at p. 209.)

In the present case, the trial court found Mr. Calabria had an actual conflict of interest. However, relying on *Harris,* the trial court presumed deficient performance and prejudice. The trial court failed to make an independent determination of whether Mr. Calabria's representation was deficient and whether defendant was prejudiced. We cannot review the trial court's ruling for an abuse of discretion when the required discretion has never been exercised. (See *People v. Fosselman, supra,* 33 Cal.3d at p. 584 [remand to reconsider new trial denial where trial court erroneously concluded it lacked statutory authority to order a new trial on the asserted basis]; *Application of Friedman* (1956) 46 Cal.2d 810, 815-817 [appellate court will not act on bail application where trial court has not exercised its discretion]; *People v. McCoy* (1886) 71 Cal. 395, 398-399 [record failed to disclose grounds upon which new trial motion was heard and determined, therefore ruling could not be reviewed on appeal]; *Eneaji v. Ubboe* (2014) 229 Cal.App.4th 1457, 1465 [remand for trial court to exercise its discretion on restraining order renewal request].) The trial court is in the best position to assess the effect of any alleged deficient performance by Mr. Calabria. (*People v. Ault, supra,* 33 Cal.4th at pp. 1267-1268; *People v. Fosselman, supra,* 33 Cal.3d at p. 582; *People v. Callahan, supra,* 124 Cal.App.4th at p. 201; *People v. Andrade, supra,* 79 Cal.App.4th at p. 660.) Accordingly, the new trial order must be reversed.

IV. DISPOSITION

The new trial order is reversed. Upon remittitur issuance, the trial court is to independently assess whether the conflict of interest resulted in actual prejudice to defendant.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

I concur:

KRIEGLER, J.

MOSK, J., Concurring

I concur.

Defendant has to show the prejudice required under *People v. Doolin* (2009) 45 Cal.4th 390, 421. In addition, I presume the trial court will consider the effect of the alleged conflict in connection with the representation of the victims.

MOSK, J.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

COURTHOUSE ADDRESS: NORWALK COURT 12720 NORWALK BLVD NORWALK, CA 90650	**CASE NUMBER:** VA VA128106-01
PLAINTIFF/PETITIONER: PEOPLE OF THE STATE OF CALIFORNIA	
DEFENDANT/RESPONDENT: RONNIE YEARNELL CONRAD	**DEPARTMENT/UNIT** CRIMINAL
CLERK'S CERTIFICATION OF REPRODUCED COURT RECORDS	**TELEPHONE NUMBER** 562-345-0896

I, SHERRI R. CARTER, Executive Officer/Clerk of the Superior Court of California, County of Los Angeles, certify that the reproduced court records attached hereto are a true and correct copy of the original documents contained in the original file or are of record, consisting of 4 pages from this office.

Seal of the
Superior Court of California, County of Los Angeles

An original seal is stamped herein in black ink.

SHERRI R. CARTER, Executive Officer/Clerk

Dated: AUGUST 14, 2020

C. SIRNA
By: Deputy

FELONY ABSTRACT OF JUDGMENT—DETERMINATE

(NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED)

Appendix J
127a

CR-290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF:
LOS ANGELES - SOUTHEAST DISTRICT

FILED
LOS ANGELES SUPERIOR COURT
AUG 21 2017
Sherri R. Carter, Executive Officer/Clerk
By T. Bilgeang, Deputy
T. Bilgeang

PEOPLE OF THE STATE OF CALIFORNIA vs.
DEFENDANT: RONNIE YEARNELL CONRAD
DOB: 11/27/84
AKA:
CII NO.: A22335778
BOOKING NO.: 5072204
☐ NOT PRESENT

XSE VA128106-01 -A
-B
-C
-D

FELONY ABSTRACT OF JUDGMENT
☑ PRISON COMMITMENT ☐ COUNTY JAIL COMMITMENT ☑ AMENDED ABSTRACT

DATE OF HEARING	DEPT. NO.	JUDGE
08/17/17	SE K	ROBERT J. HIGA

CLERK	REPORTER	PROBATION NO. OR PROBATION OFFICER	
JULIET MALVAEZ	DEBBIE SCACCO	X- 1844431	☐ IMMEDIATE SENTENCING

COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	
JESSICA TILLSON, DDA	H.R. HALPERN PRVT COUNSEL	☑ APPOINTED

1. Defendant was convicted of the commission of the following felonies:
☐ Additional counts are listed on attachment
_____ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YR.)	CONVICTED BY: JURY	COURT	PLEA	TERM (L, M, U)	CONCURRENT	1/3 CONSECUTIVE	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE (REFER TO item 5)	654 STAY	SERIOUS FELONY	VIOLENT FELONY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: YRS.	MOS.
01	PC	203	Mayhem	2012	08 / 07 / 13	X			M					X				
02	PC	273.5(a)	Crprl Injury to Spouse/coha	2012	08 / 07 / 13	X			M					X				
03	HS	11378	Poss for Sale Cntrld Substa	2012	08 / 07 / 13	X			M	X							(4	0)
04	HS	11351.5	Poss for Sale Cocaine Base	2012	08 / 07 / 13	X			M	X							(8	0)
07	PC	29800(a)(1)	Poss F/arm felon- four prioS	2012	08 / 07 / 13	X			M	X							(4	0)
08	PC	30305(a)(1)	Poss of ammunition	2012	08 / 07 / 13	X			M	X							(4	0)

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

COUNT	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL	

3. ENHANCEMENTS charged and found to be true for PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL	

4. Defendant sentenced ☐ to county jail per 1170(h)(1) or (2)
☐ to prison per 1170(a), 1170.1(a) or 1170(h)(3) due to ☐ current or prior serious or violent felony ☐ PC 290 or ☐ PC 186.11 enhancement
☑ per PC 667(b)-(i) or PC 1170.12 (strike prior)
☐ per PC 1170(a)(3). Preconfinement credits equal or exceed time imposed. ☐ Defendant ordered to report to local parole or probation office.

5. INCOMPLETE SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

6. TOTAL TIME ON ATTACHED PAGES:
7. ☑ Additional indeterminate term (see CR-292).
8. TOTAL TIME:

Attachments may be used but must be referred to in this document.

Form Adopted for Mandatory Use
Judicial Council of California
CR-290 [Rev. July 1, 2012]

FELONY ABSTRACT OF JUDGMENT—DETERMINATE

Penal Code, § 1213, 1213.5

PEOPLE OF THE STATE OF CALIFORNIA vs.
DEFENDANT: RONNIE YEARNELL CONRAD

Appendix J
128a

XSE VA128106-01 -A	-B	-C	-D

9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. **Restitution Fines:**

Case A: $_____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case B: $_____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case C: $_____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case D: $_____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

b. **Restitution per PC 1202.4(f):**

Case A: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case B: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case C: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case D: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

☐ *Victim name(s), if known, and amount breakdown in item 13, below. ☐ *Victim name(s) in probation officer's report.

c. **Fines:**

Case A: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐$___ Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case B: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐$___ Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case C: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐$___ Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case D: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐$___ Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. **Court Operations Assessment:** $_____ per PC 1465.8. e. **Conviction Assessment:** $____ per GC 70373. f. **Other:** $____ per *(specify)*: _____

10. TESTING: ☐ Compliance with PC 296 verified ☐ AIDS per PC 1202.1 ☐ other *(specify)*:

11. REGISTRATION REQUIREMENT: ☐ per *(specify code section)*: _____

12. ☐ MANDATORY SUPERVISION: Execution of a portion of the defendant's sentence is suspended and deemed a period of mandatory supervision under Penal Code section 1170(h)(5)(B) as follows *(specify total sentence, portion suspended, and amount to be served forthwith)*:
Total: Suspended: Served forthwith:

13. Other orders *(specify)*:

The total sentence imposed in this case is: 14 YTL plus 16 yrs to be served in the State Prison.

14. IMMEDIATE SENTENCING: ☐ Probation to prepare and submit a post-sentence report to CDCR per 1203c.
Defendant's race/national origin: BLA

15. EXECUTION OF SENTENCING IMPOSED
a. ☐ at initial sentencing hearing
b. ☑ at resentencing per decision on appeal
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment (PC 1170(d).)
e. ☐ other *(specify)*:

16. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A	963	963	0 [ ] 2933 [ ] 2933.1 [ ] 4019
B			[ ] 2933 [ ] 2933.1 [ ] 4019
C			[ ] 2933 [ ] 2933.1 [ ] 4019
D			[ ] 2933 [ ] 2933.1 [ ] 4019

Date Sentence Pronounced	Time Served in State Institution
08 17 17	DMH [ ] CDC [ ] CRC [ ]

17. The defendant is remanded to the custody of the sheriff ☑ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☑ the reception center designated by the director of the California Department of Corrections and Rehabilitation
☐ county jail ☐ other *(specify)*:

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE		DATE
T	T. BINGCANG	08/21/17

ABSTRACT OF JUDGMENT—PRISON COMMITMENT—INDETERMINATE

(NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-292 ATTACHED)

Appendix J
129a

CR-292

SUPERIOR COURT OF CALIFORNIA, COUNTY OF:

FILED
LOS ANGELES SUPERIOR COURT
AUG 21 2017
Sherri R. Carter, Executive Officer/Clerk
By T. Bilgeang, Deputy

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: RONNIE YEARNELL CONRAD
AKA:
CII NO.: A22335778
BOOKING NO.: 5072204
DOB: 11/27/84
☐ NOT PRESENT
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT
☑ AMENDED ABSTRACT

XSE VA128106-01 -A
-B
-C
-D

DATE OF HEARING	DEPT. NO.	JUDGE
08/17/17	SE K	ROBERT J. HIGA
CLERK	**REPORTER**	**PROBATION NO. OR PROBATION OFFICER** ☐ IMMEDIATE SENTENCING
JULIET MALVAEZ	DEBBIE SCACCO	X- 1844431
COUNSEL FOR PEOPLE		**COUNSEL FOR DEFENDANT** ☐ APPTD.
JESSICA TILLSON, DDA		H.R. HALPERN, PRVT COUNSEL

1. Defendant was convicted of the commission of the following felonies:
☐ Additional counts are listed on attachment
_____ (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YEAR)	CONVICTED BY: JURY	CONVICTED BY: COURT	CONVICTED BY: PLEA	CONCURRENT	CONSECUTIVE	654 STAY
06	PC	206	TORTURE	2012	08 /07 / 13	X					
					/ /						
					/ /						
					/ /						
					/ /						
					/ /						

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

COUNT	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	
6	12022.53(b) PC	10 Y	12022(b)(1) PC	1 Y			11	0

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed or "S" for stayed. DO NOT LIST ANY STRICKEN ENHANCEMENT(S).

ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	ENHANCEMENT	TIME IMPOSED OR "S" FOR STAYED	TOTAL	
667(a)(1) PC	5 Y					5	0

Defendant was sentenced to State Prison for an INDETERMINATE TERM as follows:

4. ☐ LIFE WITHOUT THE POSSIBILITY OF PAROLE on counts _____
5. ☐ LIFE WITH THE POSSIBILITY OF PAROLE on counts _____
6. a. ☐ 15 years to Life on counts _____ c. ☑ 14 years to Life on counts 06
b. ☐ 25 years to Life on counts _____ d. ☐ _____ years to Life on counts _____
PLUS enhancement time shown above
7. ☑ Additional determinate term (see CR-290).
8. ☑ Defendant was sentenced pursuant to ☑ PC 667(b)-(i) or PC 1170.12 ☐ PC 667.61 ☐ PC 667.7 ☐ other *(specify)*:

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

Form Adopted for Mandatory Use
Judicial Council of California
CR-292 [Rev. January 1, 2012]

Pen. Code, §§ 1213, 1213.5

Appendix J
130a

PEOPLE OF THE STATE OF CALIFORNIA vs.
DEFENDANT: RONNIE YEARNELL CONRAD

XSE VA128106-01 -A	-B	-C	-D

9. FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. **Restitution Fines:**

Case A: $300 per PC 1202.4(b) forthwith per PC 2085.5; $300 per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case B: $_____ per PC 1202.4(b) forthwith per PC 2085.5; $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case C: $_____ per PC 1202.4(b) forthwith per PC 2085.5; $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

Case D: $_____ per PC 1202.4(b) forthwith per PC 2085.5; $_____ per PC 1202.45 suspended unless parole is revoked.
$_____ per PC 1202.44 is now due, probation having been revoked.

b. **Restitution per PC 1202.4(f):**

Case A: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case B: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case C: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund
Case D: $_____ ☐ Amount to be determined to ☐ victim(s)* ☐ Restitution Fund

☐ *Victim name(s), if known, and amount breakdown in item 12, below. ☐ *Victim name(s) in probation officer's report.

c. **Fines:**

Case A: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case B: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case C: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case D: $_____ per PC 1202.5 $_____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ $_____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. **Court Security Fee:** $280 per PC 1465.8. e. **Criminal Conviction Assessment:** $210 per GC 70373.

10. TESTING: a. ☐ Compliance with PC 296 verified b. ☐ AIDS per PC 1202.1 c. ☑ other *(specify)*: DNA per PC 296

11. REGISTRATION REQUIREMENT: ☐ per *(specify code section)*: _____

12. Other orders *(specify)*:
Total sentence imposed in this case is: 14 YTL Plus 16 yrs to be served in the State Prison.

13. IMMEDIATE SENTENCING:
☐ Probation to prepare and submit post-sentence report to CDCR per PC 1203c.
Defendant's race/national origin: BLA

14. EXECUTION OF SENTENCING IMPOSED
a. ☐ at initial sentencing hearing
b. ☑ at resentencing per decision on appeal
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment (PC 1170(d).)
e. ☐ other *(specify)*:

15. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A	SEE CR 290		[ ] 2933 [ ] 2933.1 [ ] 4019
B			[ ] 2933 [ ] 2933.1 [ ] 4019
C			[ ] 2933 [ ] 2933.1 [ ] 4019
D			[ ] 2933 [ ] 2933.1 [ ] 4019

Date Sentence Pronounced	Time Served in State Institution
08 17 17	DMH [ ] CDC [ ] CRC [ ]

16. The defendant is remanded to the custody of the sheriff ☑ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☑ the reception center designated by the director of the California Department of Corrections and Rehabilitation.
☐ other *(specify)*:

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE		DATE
T. [signature]	T. BINGCANG	08/21/17

ABSTRACT OF JUDGMENT—PRISON COMMITMENT—INDETERMINATE