

APPENDIX A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GLENN SUNKETT,

Petitioner,

v.

MARTIN BITER,

Respondent.

Case No. 14-cv-00069-RS (PR)

JUDGMENT

The petition for writ of habeas corpus having been denied, judgment is entered in favor of respondent.

IT IS SO ORDERED.

Dated: December 6, 2016



RICHARD SEEBORG
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
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v.

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Case No. 14-cv-00069-RS (PR)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

INTRODUCTION

Petitioner seeks federal habeas relief from his state convictions. For the reasons set forth below, the petition for such relief is DENIED.

BACKGROUND

In July 2008, petitioner and two other men held Michael Bennett and his friends at gunpoint for several hours in order to rob them, according to evidence presented at trial. The following summary of the events is based on the state appellate court's recitation of the facts.

I. The Crimes

Bennett, a marijuana farmer, arrived at his house in Fort Bragg around 10pm on July 10, 2008 in the company of his friend Max Stover. Immediately after exiting Bennett's vehicle, both were confronted by three men with guns. Bennett was struck with

1 great force on the head, rendering him unconscious for most of the rest of the evening.¹
 2 Stover was handcuffed and led into the house where he saw two of Bennett's other friends,
 3 Matt Graves and Dusty Miller, whose hands were bound with zip ties, sitting on a sofa in
 4 the living room. He was placed with them and was asked whether he knew where
 5 Bennett's money or valuables were. A few minutes later, Bennett was dragged into the
 6 living room. He was asked questions, but was too injured to respond coherently. One
 7 man, later identified as petitioner, lit a butane torch and threatened to burn their testicles if
 8 Bennett and his friends did not tell them what they wanted to hear. (Ans., Ex. 9 (State
 9 Appellate Opinion) at 3-4.)

10 The men took Stover, Graves and Miller 24 feet from the living room to a small
 11 room.² The three were made to sit before duct tape was placed around their ankles.
 12 Bennett was later brought in and Stover taken out, though just for a few minutes. The
 13 robbers asked more questions, took \$200 or \$300 from Stover, locked the victims in the
 14 room, and left. (*Id.* at 5-8.)

15 There were three perpetrators. All were African-American men, who were
 16 similarly dressed in camouflage pants, black military-style boots. Two wore masks.

17 **II. Identification of Petitioner by Miller and Graves**

18 **A. Miller**

19 Miller described to police the man who held the gun as being six feet and one inch
 20 tall, broad shouldered, with a square chin, African-American, clean shaven, and roughly
 21 twenty-seven years old. He was wearing a black jacket, black military-style lace-up boots,
 22

23
 24 ¹ Neither Bennett nor Stover was able to identify petitioner from a photographic line up. It
 appears that Bennett was too injured to have much recollection. Stover avoided looking at
 the perpetrators because he was scared. (Ans., Ex. 2, Vol. 7 at 1639.)

25
 26 ² This is the distance determined by the state appellate court. The trial court concluded that
 petitioner had moved the victims 40 to 50 feet, rather than the 24 feet Stover testified to. It
 27 appears that the additional feet were added by the trial court to include the distance from
 the driveway into the house. (Ans., Ex. 9 at 34, n.14.)

1 and camouflage pants. Later, the police showed her six to eight photographic lineups, each
2 containing six photographs. From one of these, she picked out a photograph of a man she
3 thought “might be” the first man who pointed a gun at her and Graves. At trial, Miller
4 unequivocally identified petitioner as that man:

5 Miller did not recognize him based on seeing photographs. When asked
6 what it was about [petitioner] that made her recognize him in the
7 courtroom, Miller said, ‘It’s really why I came in today, to see him in
8 person and see whether I did recognize him. And I’m just — on his
9 appearance, his demeanor, it’s him.’ She further explained, ‘[w]ith
10 reference to the photographs again, I want to make it clear that part of the
11 reason that I’m here today or that I wanted to come, besides having to
12 come, is to see him, because I was not convinced with the photos, and I
13 would never have said what I’ve said how certain I am just looking at those
14 photos. They didn’t do much for me. In fact, it just made me more, like,
15 I’m not sure. But being here today has made me pretty confident. I would
16 say certain.’ When counsel asked, ‘It’s not just because he’s seated at that
17 table over there?’ Miller responded, ‘No. It’s just because it’s him.’

18 (Ans., Ex. 9 at 8–9; Ex. 2, Vol. 2 at 252.)

19 A detective working on the investigation, Greg Van Patten, testified that he told
20 Miller before he showed her the photographs that she was not obligated to pick anyone.
21 Later, he emailed her a copy of the photograph she had selected. In response, she emailed
22 Van Patten that “I only saw an old picture of [petitioner] and based on that picture I am
23 NOT 100% sure it is him. Is the first time I will see a more recent image of him when I
24 am on the witness stand?” (Ans., Ex. 9 at 10.)

25 Van Patten then emailed her the booking photo of [petitioner], taken on September
26 11, 2008, because it had been released publicly. He also warned her:

27 Attached to this email is a booking photograph of the person whom [*sic*]
28 was arrested, Glenn Samual [*sic*] Sunkett, but don’t be influenced by the
photograph just because I am sending it to you. When it comes to
testifying in court rely on your memory of the incident. After viewing the
booking photograph feel free to email me with any questions or concerns.

(*Id.* at 10.) Miller did not reply to Van Patten’s inquiry regarding the booking photograph,

1 though she had replied to his previous emails.

2 Petitioner alleges Miller's in-court identification was tainted by her having his
3 booking photograph, and its inculpatory implications, for three weeks prior to trial. Also,
4 her description, according to petitioner, did not fit him. She described the suspect as clean-
5 shaven. He testified at trial that he always has some facial hair, as he had in the photo in
6 the line up. (Ans., Ex. 2, Vol. 5 at 1124; Pet. at 33.) She said he was about 27, when he
7 was 37 at the time of the incident. (Pet. at 33.) Her estimation of the suspect's height (six
8 feet, one inch) however did match, more or less, petitioner's admitted height of six feet,
9 two inches. (*Id.*)

10 **B. Graves**

11 Graves described the same suspect as six feet, one inch tall, with a "medium or
12 beefy build . . . the size of Barry Bonds," and clean shaven. He wore a faded black shirt
13 with "FBI" printed on it, camouflage pants, and black boots. (Ans., Ex. 9 at 9.)

14 Graves identified petitioner from a police photographic line up, though he was far
15 more certain than Miller that the photo he chose was of the man he saw in Fort Bragg. At
16 trial, he also unequivocally identified petitioner as the man who pointed a gun at him and
17 firmly denied that his identification was based on a photograph:

18 I recognize the individual here today on the facial features that I can
19 recognize. You know, when you see somebody in your face with a loaded
20 – or supposed loaded weapon, it's not a face that you tend to forget.

21 [Petitioner] exhibits negroid features. That's not a racial term. That's a
22 cranial facial identification technique used by anthropologists. Forensic
23 scientists use that in identifying people, just to clarify that. That's no –
24 anything Caucasoid. [¶] He has a standard squared, isocephalic skull
25 shape[.]

26 [Defense counsel objected. The trial court sustained the objection and
27 struck the testimony.]

28

His eyes are very, very distinct. I was being stared at by [petitioner] for several hours, and looking at him now, that's the individual. I can tell you 100 million percent. This isn't something I would forget.

(Ans., Ex. 2 at 393-94, 395.)

III. Additional Evidence Against Petitioner

A search of petitioner's apartment yielded a duffel bag containing duct tape, a butane torch, a flashlight, a spotlight, camouflage pants, and black military boots. A backpack found there contained two bags of marijuana, duct tape, and three handcuff keys, which fit the handcuffs found at Bennett's house.³ Both Miller and Graves said that the pants and boots were similar to the ones they saw petitioner wearing.⁴ (Ans., Ex. 9 at 10-11.)

GPS⁵ evidence, rental car, hotel and bank records were also presented at trial:

Employees from a number of Fort Bragg motels verified records showing that [petitioner] had rented motel rooms in his own name on various occasions in the spring and summer of 2008, nearly always identifying himself with his California driver's license. The rentals occurred on April 9 to April 10 (Holiday Inn Express), April 25 to April 27 (Surf Motel and Gardens), May 1 to May 3 (Holiday Inn Express), May 23 to May 24 (Best Western Lodge), July 9 to July 10 (Beachcomber Motel), and July 10 (Ocean View Lodge). A clerk from the Beachcomber Motel remembered seeing three men, including a man she identified as [petitioner], check out shortly after noon on July 10. Another clerk testified that, although a tall, good looking, dark-skinned man named Glenn Sunkett checked into the Ocean View Lodge at around noon on July 10 for one night, he did not check out the following day.

Records from Hertz Corporation showed that [petitioner] had rented five

³ The defense investigator, William Kidd, bought a pair of handcuffs at a military equipment store. The keys from petitioner's apartment "fit" into these cuffs. (Ans., Ex. 9 at 15 n.5.)

⁴ Petitioner points out that Miller and Graves testified only that the items were similar to those they saw on the night of the crimes.

⁵ Global Positioning System

1 large vehicles in his own name between April and July 2008, including a
2 Lincoln Navigator that he rented from July 9 to July 11.

3 [Petitioner] owned a portable Covert Track GPS device in 2008. GPS
4 records showed that the device had tracked a drive from Fort Bragg to a
5 location two-tenths of a mile north of Bennett's house on April 26; a drive
6 from [petitioner]'s apartment in Oakland to Fort Bragg on April 30 and
7 May 1; and two drives past Bennett's house on May 24.⁶ The GPS records
8 also showed a drive from Berkeley to Fort Bragg on the evening of July 9,
9 during which the device moved north past Bennett's house before heading
10 south again into Fort Bragg. Subsequently, on July 10, after the device
11 moved to several locations in Fort Bragg, it was at Bennett's property from
12 11:11 p.m. to 1:20 a.m. The device then moved to the Bay Area, eventually
13 stopping at [petitioner]'s Oakland apartment at 4:24 a.m. on July 11.

14 Records from Bank of America and an Army/Navy surplus store located
15 near [petitioner]'s apartment in Oakland showed that [petitioner] had
16 purchased three neoprene masks and a pair of camouflage pants from the
17 store on July 9, 2008, using an ATM card. Other items sold by the store
18 included black T-shirts with 'FBI' written on the front, black military-style
19 boots very similar to those worn by the suspects, and handcuffs.

20 (Ans., Ex. 9 at 12–13.)

21 **IV. The Defense**

22 Petitioner presented an alibi defense at trial. He testified that on July 9 — the day
23 before the crimes — he and his girlfriend, Jamila Thomas, drove from his house in
24 Oakland to Fort Bragg to purchase \$75,000 worth of marijuana, stayed overnight, and
25 returned to Oakland the next day. On the way home, they stopped to pick up his uncle,
26 Guy Sunkett,⁷ who was stranded at a gas station in West Oakland. (*Id.* at 15-17.)

27 On the July 9 trip, he brought with him three masks and a pair of pants he had
28 purchased in anticipation of playing in a paintball "event." He asserted that he ran several
businesses and worked in construction and marijuana dealing. Many of the items found in

⁶ Van Patten "acknowledged [on cross-examination] that there was no information showing that [petitioner's] GPS device stopped at Bennett's house during its five or six trips past the property from late April 2008 to July 9, 2008." (Ans., Ex. 9 at 18.)

⁷ To avoid confusion, he will be called Guy throughout.

1 his apartment — such as the gloves, camouflage pants, duct tape and butane torch — were
2 used in his construction and towing work. He often travelled to Fort Bragg to purchase
3 marijuana, but he handed the drugs to “runners” who would then transport the drugs to
4 Oakland. He used GPS devices to track his runners and the marijuana. (*Id.*) Petitioner
5 asserts that during the time of the crimes at Bennett’s house, the GPS device travelled with
6 the marijuana he had purchased, not with him.

7 In support of his defense, Thomas and Guy testified at trial. Petitioner did not
8 inform counsel or the defense investigator, William Kidd, about these alibi witnesses until
9 a month before trial. Before this, petitioner had not told Kidd any details about July 2008.
10 (*Id.* at 15.)

11 Thomas testified that she was with petitioner from 9pm on July 9 until 2am on July
12 10, the date of the crime. On the 9th, they travelled from the Bay Area to Fort Bragg and
13 stayed overnight at a hotel. They were together, it appears, nearly all that time. At 11am
14 on the morning of July 10, petitioner left the hotel alone for 30-45 minutes. When he
15 returned, they checked out of the hotel and drove to a restaurant. They ate and then sat in
16 the parking lot for three hours. During that time, a car entered the parking lot. Petitioner
17 spoke to the people in the car, handed one of them his credit card, and followed them to a
18 hotel around 4pm. He walked into the hotel, stayed for 10 minutes, walked out, handed
19 something to the driver in the other car. He and Thomas then drove to a beach about 40
20 minutes away. They stayed until roughly 9:30pm and then drove back to the Bay Area.
21 Between 11:45pm and 12:30am, they met petitioner’s uncle, Guy, at a gas station in West
22 Oakland. They drove Guy to a friend’s house, and then drove home to Richmond, arriving
23 around 1am. Petitioner was using the computer when Thomas fell asleep at 2am. She
24 testified she told no one that she spent July 10 with petitioner until she called the defense
25 investigator a month before trial. (*Id.* at 13-14.)

26 Petitioner never mentioned Thomas during the police investigation, however. He
27 admitted to Sergeant Van Patten that he had been to Fort Bragg twice with a “guy” to buy
28

1 marijuana. He never mentioned Thomas or that he had ever been to Fort Bragg with a
2 woman. (*Id.* at 18.)

3 Guy Sunkett, petitioner's uncle, testified at trial that at 10:30pm or 11pm on July 10
4 he telephoned petitioner to come pick him up at a gas station in West Oakland. An hour
5 later, around midnight, petitioner, who was with Thomas, arrived at the gas station. (*Id.* at
6 15.)

7 This defense was "thoroughly implausible" according to the state appellate court.
8 (*Id.* at 22.) Thomas and Guy gave "dubious" testimony. They "waited almost eight
9 months until, on the eve of [petitioner's] trial, they claimed to have been with him on the
10 night the crimes were committed." (*Id.*) Not only was their testimony "dubious,"
11 petitioner's testimony was "riddled with unlikely coincidences and inconsistencies." (*Id.*
12 at 23.) "As a whole, the defense testimony comes across as concocted to explain away
13 each of the various items of prosecution evidence presented." (*Id.*)

14 *

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15 In 2009, a Mendocino County Superior Court jury convicted petitioner of first
16 degree robbery, kidnapping, making criminal threats, false imprisonment, and possession
17 of a firearm by a felon. It also found true various sentencing enhancements. Consequent
18 to these verdicts and findings, he was sentenced in 2010 to an aggregate term of 63 years
19 to life. (Ans., Ex. 9 at 2.) On the same day sentence was imposed, the trial court denied
20 petitioner's motion for a new trial and his petition for writ of habeas corpus. (*Id.*)
21 Petitioner thereafter sought, but was denied, relief in the state appellate and supreme
22 courts. This federal habeas petition followed.

23 As grounds for federal habeas relief, petitioner claims (1) the trial court denied him
24 due process when it denied a motion to present expert witness testimony; (2) defense
25 counsel rendered ineffective assistance; (3) the use of a jury instruction violated his right to
26 due process; (4) the identification process used at trial violated due process; (5) his
27 kidnapping convictions were not supported by sufficient evidence; (6) the trial court

imposed a sentence impermissible under state law; and (7) there was cumulative error.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), this Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court’s adjudication of the claim: “(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.” *Id.* § 2254(d). “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

“Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. A federal habeas court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was “objectively unreasonable.” *Id.* at 409.

DISCUSSION

I. Trial Court's Denial of Motion to Present Expert Witness Testimony

Petitioner claims the trial court denied his due process right to a fair trial and to present a defense when it denied defense counsel's tardy motion to present an expert on cross-racial eyewitness identification. (Pet. at 43.) The relevant facts are as follows. After petitioner's testimony had finished, defense counsel moved to present expert testimony "relative to cross-racial I.D., the psychological factors that impact on identification." (Ans., Ex. 9 at 18-19.) An expert witness, Deborah Davis, was available to testify. The prosecutor objected that the motion was late. Defense counsel countered that she had no idea Miller, who had been unable to identify petitioner from police photographs, would identify petitioner in court. Also, she did not know the expert witness would be available until the night before. (*Id.* at 19.)

The trial court denied the motion for the following reasons: (1) the issue of the reliability of eyewitness identifications was not new; (2) the jury had been told that the trial would take two weeks but the trial was entering its third; (3) the jury would receive instructions on cross-racial eyewitness identification; and (4) the presentation of the expert witness would unduly consume valuable trial time and prejudice the prosecution. If the motion were granted, the trial would have to be delayed so that the prosecutor could prepare for rebuttal, either by consulting another expert witness or devising a cross-examination. (*Id.*)

Petitioner's due process claim was rejected on appeal. The state appellate court held that the trial court acted reasonably in determining that the potential probative value was outweighed by the time such testimony would consume. Also, because there was substantial inculpatory evidence, it found no prejudice. First, the eyewitness identifications were strong. Graves "expressed absolutely no doubt about his identification of [petitioner] as the first intruder, during either the photo lineup or at trial." (*Id.* at 21.) Miller too was sure at trial, however unsure she was during the photo lineups. Both

1 witnesses provided “fairly accurate” physical descriptions of petitioner soon after the
 2 crime and before they saw the photo lineups. (*Id.*) Also, both witnesses spent “two hours
 3 in very close quarters with the first intruder, and had repeated verbal interactions with
 4 him.” (*Id.*)

5 Second, the identifications were corroborated. GPS records showed petitioner
 6 taking numerous drives from the East Bay to Fort Bragg in the spring and summer of 2008.
 7 Of particular note is a record that showed the GPS device at or near Bennett’s residence
 8 during the hours of the crime, after which it moved to the Bay Area and to petitioner’s
 9 residence in Oakland. (Ans., Ex. 2, Vol. 3 at 757-768.)⁸ Also, a clerk at a hotel near Fort
 10 Bragg remembered seeing petitioner check out of the hotel at noon of July 10th. Clothing,
 11 a gun, and other items (such as a butane torch and duct tape) similar to those seen at the
 12 crime scene were found at petitioner’s apartment. Furthermore, petitioner’s alibi was
 13 weak. His witnesses came forward at a late date and gave unreliable testimony. (*Id.* at 21-
 14 22.)

15 Third, defense counsel had ample opportunity to address the reliability of the
 16 identifications. She thoroughly cross-examined Miller about the photo lineups and her
 17 identification of petitioner. In closing argument, she raised the possibility that the
 18 identifications were unreliable because of the difficulties of cross-racial identification. (*Id.*
 19 at 23-24.)

22 ⁸ Petitioner claims his GPS device was not with him or his vehicle during the time of the
 23 crimes. To prove this, he points to information not recorded by the GPS device. For
 24 example, the GPS does not note any stop in Cloverdale during the drive to Fort Bragg on
 25 July 9. He alleges he stopped in Cloverdale on July 9 and his bank records support this.
 26 (Pet. at 24.) Such evidence was reviewed and rejected by the state courts. This Court
 27 cannot say this rejection was unreasonable. The witness who testified about the GPS
 28 technology stated that petitioner’s device was set to report its location every 5-10 minutes,
 which may account for this alleged discrepancy. Petitioner’s other examples (that the
 device showed no movement during the times he made various purchases in Fort Bragg)
 are unavailing. Petitioner may have walked or been driven by another during that time.

1 Fourth, the trial court instructed the jury to consider numerous factors in evaluating
2 the identifications, including that the witness may have been under stress and that the
3 witness and defendant were of different races. (*Id.* at 24.)

4 State and federal rulemakers have broad discretion in excluding evidence from
5 trials. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). This discretion is limited by a
6 defendant's constitutional rights to due process and "a meaningful opportunity to present a
7 complete defense." *Id.* (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). Despite
8 this, "well-established rules of evidence permit trial judges to exclude evidence if its
9 probative value is outweighed by certain other factors such as unfair prejudice, confusion
10 of the issues, or potential to mislead the jury." *Holmes*, 547 U.S. at 326. Furthermore,
11 there is little guidance on how to evaluate claims regarding discretionary exclusion of
12 expert testimony or any other particular piece of evidence:

13 [T]he Supreme Court's cases have focused only on whether an evidentiary
14 rule, by its own terms, violated a defendant's right to present evidence.
15 These cases do not squarely address whether a court's exercise of discretion
16 to exclude expert testimony violates a criminal defendant's constitutional
17 right to present relevant evidence. Nor do they clearly establish 'a
controlling legal standard' for evaluating discretionary decisions to exclude
the kind of evidence at issue here.

18 *Brown v. Horell*, 644 F.3d 969, 983 (9th Cir. 2011) (quoting *Moses v. Payne*, 555 F.3d
19 742, 758-59 (9th Cir. 2009)).

20 Habeas relief is not warranted here. First, habeas relief is unavailable because the
21 Supreme Court has never addressed whether the exclusion of expert witness testimony
22 violates the Constitution. *Brown*, 644 F.3d at 983. In the absence of a Supreme Court case
23 on point, federal habeas relief is not available. Second, such testimony was largely
24 unnecessary. Defense counsel closely examined the witnesses on their identifications.
25 Also, she raised in closing argument the problems of cross-racial identification and how
26 those problems may have plagued the testimony. Third, the jury was instructed to consider
27 the issue of race when determining the reliability of the eyewitnesses' testimony. Fourth,

1 the eyewitnesses provided reliable testimony. Graves never wavered from his
2 identification of petitioner, a man with whom he spent considerable time. Miller's in-court
3 identification was confident and unequivocal.⁹

4 Fifth, petitioner has not shown prejudice. GPS records placed petitioner's vehicle
5 near or at the crime scene at the very time the crime occurred. Items found at petitioner's
6 house (a butane torch, camouflage pants, etc.) matched those used in the commission of
7 the crime. Petitioner's own admissions placed him in Fort Bragg on the day of the crime,
8 and showed that he was familiar with the marijuana business and growers of the crop.
9 Also, his alibi defense, in the words of the state appellate court, was "thoroughly
10 implausible." The state court's rejection of this claim was reasonable and is therefore
11 entitled to AEDPA deference. Accordingly, the claim is DENIED.

12 A further point is worth making. One of petitioner's central claims is that the
13 evidence supported his defense and refuted the prosecution's case. Stated another way,
14 petitioner asserts that the jury should have believed him, not the prosecution. This claim is
15 in essence a challenge to the jury's credibility determination in favor of the prosecution. A
16 jury's credibility determination is, however, entitled to near-total deference. *Jackson v.*
17 *Virginia*, 443 U.S. 307, 326 (1979). Indeed, if confronted by a record that supports
18 conflicting inferences, a federal habeas court "must presume — even if it does not
19 affirmatively appear in the record — that the trier of fact resolved any such conflicts in
20 favor of the prosecution, and must defer to that resolution." *Id.* This Court must defer to
21 the jury's credibility determination in favor of the prosecution's arguments and evidence,
22 and its rejection of petitioner's defense. This claim is DENIED.

23 **II. Assistance of Counsel**

24 Petitioner claims defense counsel rendered ineffective assistance by failing to
25 (A) call an expert witness in a timely manner; (B) move to suppress Miller's in-court
26

27 ⁹ Petitioner's objections to the reliability of the identifications are addressed below.

identification; and (C) prepare and investigate sufficiently. (Pet. at 58, 78, 99, 109, 114.)

A. Expert Witness

The state appellate court rejected this claim. Counsel's performance was not deficient, but rather a reasonable tactical decision:

In the present case, counsel explained at the hearing on the motion for a new trial and habeas petition that she did not think that such an expert would be helpful to the defense or that the expense would be reasonable because she believed, based on experience, that such a witness 'would likely be disregarded' by the jury in the circumstances of this case. She ultimately requested to call an expert on cross-racial identification 'to appease' [petitioner], who had insisted that such a witness was necessary and whose family was willing to pay for it. The trial court found that 'the method adopted by the public defender to attack the identification issue and whether to use an out-of-county cross-identification expert were tactical decisions which the court will not second-guess.'

(Ans., Ex. 9 at 26.) The appellate court also found no prejudice, owing to the strength of the evidence against him. (*Id.*)

In order to prevail on a claim of ineffectiveness of counsel, the petitioner must establish that (1) counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms, *Strickland v. Washington*, 466 U.S. 668, 687-68 (1984), and (2) he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Where the defendant is challenging his conviction, the appropriate question is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693).

A court must presume counsel's performance was constitutionally adequate. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range

1 of reasonable professional assistance; that is, the defendant must overcome the
2 presumption that, under the circumstances, the challenged action might be considered
3 sound trial strategy.” *Strickland*, 466 U.S. at 689 (citation and quotation marks omitted).

4 Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases
5 trial conduct on strategic considerations; (2) counsel makes an informed decision based
6 upon investigation; and (3) the decision appears reasonable under the circumstances. *See*
7 *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). The investigation itself must be
8 reasonable for an attorney’s tactical decision based on that investigation to be reasonable.
9 *Wiggins v. Smith*, 539 U.S. 510, 523-24 (2003) (tactical decision not to present life history
10 as mitigating evidence in capital sentencing trial unreasonable where counsel failed to
11 follow up on evidence that defendant had a miserable childhood). However, federal courts
12 should not overlook the “wide latitude counsel must have in making tactical decisions”;
13 therefore, there are no “strict rules” for counsel’s conduct “[b]eyond the general
14 requirement of reasonableness.” *Cullen v. Pinholster*, 563 U.S. 170, 194-96 (2011) (“No
15 particular set of detailed rules for counsel’s conduct can satisfactorily take account of the
16 variety of circumstances faced by defense counsel or the range of legitimate decisions”)
17 (quoting *Strickland*, 466 U.S. at 688-89).

18 The standards of 28 U.S.C. § 2254(d) and *Strickland* are “highly deferential . . . and
19 when the two apply in tandem, review is doubly so.” *Richter*, 562 U.S. at 105 (quotation
20 marks and citations omitted). “The question [under § 2254(d)] is not whether counsel’s
21 actions were reasonable. The question is whether there is any reasonable argument that
22 counsel satisfied *Strickland*’s deferential standard.” *Id.*

23 Habeas relief is not warranted here. The state appellate court reasonably
24 determined that there was neither deficient performance nor prejudice. Defense counsel
25 believed that an expert witness was not necessary because she could undermine Miller’s
26 and Graves’s credibility without expert testimony. For example, counsel drew the jury’s
27 attention to Miller’s inability to identify petitioner from the photographic lineup and

1 Miller's discrepant descriptions of the man she saw in Fort Bragg. She also drew attention
2 to Graves's reference to petitioner's "negroid features," her objection to which was
3 sustained. Counsel also freely explored the issue in her closing argument. With such great
4 attention to the issue, foregoing to call an expert witness cannot be thought deficient. This
5 conclusion is bolstered by the fact that counsel previously had rejected the idea of an
6 expert witness after considering and investigating the issue, rather than dismissing it out of
7 hand, without reflection. *Sanders*, 21 F.3d at 1456.

8 Second, petitioner suffered no prejudice. Graves's identification was unwavering.
9 Its reliability was explained by Graves himself. He spent hours with petitioner — this was
10 not a fleeting glance, but a sustained and dramatic viewing. Also, the GPS evidence places
11 petitioner near or at Bennett's residence at the time of the crime and later on the same day
12 at his own residence. Petitioner's testimony and hotel receipts placed petitioner in Fort
13 Bragg close to the time of the crime. Also, clothing, boots, and other items similar to those
14 used and worn by the perpetrators were found at his apartment. In face of such strong
15 evidence, petitioner has not shown a reasonable probability that the outcome of the
16 proceeding would have been different if counsel had timely called an expert witness to
17 testify.

18 The state court's rejection of this claim was reasonable and is therefore entitled to
19 AEDPA deference. Accordingly, the claim is DENIED.

20 **B. Miller's Identification**

21 The state appellate court rejected petitioner's claim that counsel rendered
22 ineffective assistance by failing to move to suppress Miller's identification. Because a
23 suppression motion would have been almost certainly denied, counsel's performance was
24 not deficient:

25 The evidence presented at trial showed that Miller spent some two hours in
26 Bennett's house with the first intruder and had a prolonged opportunity to
27 observe him. She also had numerous interactions with him. Miller's
28 description of the first intruder was fairly accurate and was similar to that

1 of Graves. In addition, although Miller testified at trial that she was not
2 certain that appellant was the first intruder after identifying him in a photo
3 lineup or after viewing the booking photo sent to her by Sergeant Van
4 Patten, she expressed certainty in her identification of appellant as the first
5 intruder at trial. As she explained, she was not convinced with the photos
6 and it was ‘really why I came in today, to see him in person and see
7 whether I did recognize him. And I’m just — on his appearance, his
8 demeanor, it’s him.’ At the hearing on the motion for a new trial and
9 habeas petition, the court found the emailed booking photo ‘highly
10 suggestive.’ It also found, however, that Miller’s trial testimony was
11 credible: ‘It was the in-court observation of the defendant’s demeanor and
12 appearance that led her to her identification. [¶] The court found Miss
13 Miller’s testimony to be credible.’

14 In light of the various factors supporting reliability, we conclude that
15 Miller’s identification of [petitioner] as the first intruder was reliable under
16 the totality of the circumstances, despite the suggestiveness of the second
17 photo identification procedure. [Citation omitted.] Hence, it was
18 reasonable for counsel to believe that a motion to suppress would not have
19 been granted, and [petitioner] has not shown that her failure to file such a
20 motion constituted ineffective assistance of counsel. [Citation omitted.]

21 (Ans., Ex. 9 at 28-29.) The court also denied that there was any prejudice. Even if
22 Miller’s identification had been suppressed, Graves’s identification and the GPS evidence
23 were highly inculpatory. (*Id.* at 29.)

24 Habeas relief is not warranted here. First, the state appellate court reasonably
25 determined that defense counsel’s performance was not deficient. Miller’s identification,
26 however marred, was unequivocal and supported by her first-hand experience seeing the
27 suspect at the crime scene. Also, as found by the trial and appellate courts, Miller averred
28 her identification was not based on the photographs, which, she testified, not only confused
her but also made her less sure. (Ans., Ex. 2, Vol. 7 at 1756.) She wanted to see the
suspect in person, a reason she gave for wanting to testify at trial. (*Id.*) In light of the facts
cited by the state appellate court, a motion to suppress would have been highly unlikely to
succeed. It is both reasonable and not prejudicial for defense counsel to forgo a meritless
objection. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005).

1 Second, there was no prejudice. Graves's identification was unequivocal before
2 and at trial, and the GPS evidence strongly supported petitioner's guilt.

3 The state court's rejection of this claim was reasonable and is therefore entitled to
4 AEDPA deference. Accordingly, the claim is DENIED.

5 **C. Pre-Trial Preparation and Investigation**

6 Petitioner gives a long list of defense counsel's alleged failures in preparing for
7 trial. He alleges counsel failed to (1) confer with petitioner in a timely manner; (2) meet
8 with the alibi witnesses or investigate their statements; (3) contact Alan Gordon, a
9 potential alibi witness who allegedly purchased three masks at the Army/Navy Store
10 before the crimes were committed; (4) contact Britney Flow, another possible alibi witness
11 who allegedly had a telephone conversation with petitioner when the crimes were
12 committed; (5) investigate and find a recorded telephone message that contained another
13 person's confession to the crimes; (6) investigate a coded letter that a possible suspect sent
14 to petitioner; (7) investigate the accuracy of the GPS evidence and the science behind it;
15 (8) review search warrants and move to suppress evidence that was not connected to him
16 or the crimes; and (9) file a motion to dismiss based on insufficiency of the evidence and
17 on grounds that he was charged three times for the same incident, a violation of state law.¹⁰

18 Petitioner presented these claims to the trial court in his motion for a new trial and
19 his petition for writ of habeas corpus. The trial court rejected these claims after hearing
20 lengthy testimony at the motion hearing. The state appellate court agreed with the trial
21

22 ¹⁰ Petitioner also raises conclusory claims regarding counsel's failure to ask for discovery;
23 to visit the crime scene; and prepare him to testify and be cross-examined. He fails to
24 provide any details or state with any specificity exactly how these alleged failures violated
25 his constitutional rights. These claims are DENIED. Rather than posing general
26 allegations, a federal habeas petition "is expected to state facts that point to a real
27 possibility of constitutional error." *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (internal
28 quotation marks and citation omitted). Conclusory allegations, such as those, are not
sufficient.

1 court's decision and crisply disposed of petitioner's claims.

2 Habeas relief is not warranted here. The record supports the following conclusions.
3 Petitioner did not tell counsel about Thomas and Guy until shortly before trial, but, despite
4 this, the witnesses, as the trial court determined, were well-prepared for trial (Ans., Ex. 2,
5 Vol. 7 at 1756); Gordon, who was present and willing to testify at trial, would have offered
6 duplicative testimony and did not respond to counsel's attempts to speak with him;
7 petitioner admitted he bought three neoprene masks at the Army/Navy store¹¹; his assertion
8 about Flow was supported only by a letter allegedly written by her, not by an affidavit or
9 declaration; counsel did obtain the recording, which contained the voices of Thomas and
10 Guy, neither of whom petitioner contends was involved in the crimes; the "coded" letter
11 could not aid petitioner because it had little reliability or probative value — the "code" was
12 made to appear when someone (possibly petitioner) circled letters in various words on the
13 page in an attempt to spell out "Sorry U R gettin blame. Didnt know GPS was on car.
14 Yo[u] snitch you die"; counsel made the reasonable tactical decision not to challenge the
15 GPS evidence because she considered such an effort a waste of time and because petitioner
16 himself did not dispute the accuracy of such evidence and in fact relied on it to support his
17 defense; counsel did review the search warrants and found no basis for a motion to
18 suppress;¹² the state appellate court rejected his claim that he was thrice charged with the
19 same incident, a determination under state law to which this Court is bound.

20 In addition, petitioner has not shown that any of these alleged failures resulted in
21

22
23 ¹¹ Miller testified the masks were camouflage colored. Petitioner testified the ones he
bought were fluorescent orange or had smiley faces printed on them. (Ans., Ex. 2, Vol. 7
at 1033.)

24 ¹² Petitioner fails to explain how the warrants were faulty. Rather than posing general
25 allegations, a federal habeas petition "is expected to state facts that point to a real
26 possibility of constitutional error." *Felix*, 545 U.S. at 655. Conclusory allegations, such as
those, are not sufficient.

prejudice. As noted at length and repeated above, there was strong evidence of his guilt, which also defeats any claim that counsel was ineffective for failing to move to dismiss on grounds of insufficient evidence. The state court's rejection of these claims was reasonable and is entitled to AEDPA deference. These claims are DENIED.

III. Use of CALCRIM No. 315

Petitioner claims his due process rights were violated when the trial court instructed the jury with CALCRIM No. 315, "which permitted the jury to consider a witness's level of certainty when evaluating eyewitness identification."¹³ (Ans., Ex. 9 at 29.) According to petitioner, the instruction is constitutionally flawed because scientific evidence has shown that eyewitness identifications are unreliable. (Pet. at 86.) No objection to the instruction was made at trial.

The state appellate court rejected this claim on two grounds. First, petitioner waived this claim by failing to raise an objection at trial. Second, the court was bound by precedent to find the instruction permissible. (Ans., Ex. 9 at 29-30.)

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the disputed instruction by itself so infected the entire trial that the resulting conviction violates due process. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. *Id.* In other words, a federal habeas court must evaluate jury instructions in the context of the overall charge to the jury as a component of the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982) (citing *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)).

Habeas relief is not warranted here. First, the claim is procedurally defaulted under the contemporaneous-objection rule, defense counsel having failed to object at trial. *See*

¹³ On direct appeal, petitioner also challenged the use of another instruction, CALCRIM No. 362. (Ans., Ex. 9 at 31.) He did not raise this claim in his federal habeas petition.

Coleman v. Thompson, 501 U.S. 722, 749-50 (1991), and *Paulino v. Castro*, 371 F.3d 1083, 1092-93 (9th Cir. 2004) (failure to object at trial bars federal habeas review).

Second, the Supreme Court has held that a witness's certainty is a permissible factor for a jury to consider "in evaluating the likelihood of misidentification." *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *see also Manson v. Braithwaite*, 432 U.S. 98, 114 (1977) (cites *Biggers* as the standard). Under this standard, petitioner has not shown that the instruction so infected the proceedings that he received an unfair trial.

The Court notes that the Supreme Court has rejected explicitly petitioner's assertion that all eyewitness testimony should be inadmissible because studies have shown it to be inherently unreliable. "[T]he potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." *Perry v. New Hampshire*, 132 S. Ct. 716, 718 (2012).

The state court's rejection of this claim was reasonable and is therefore entitled to AEDPA deference. Accordingly, the claim is DENIED.

IV. Identification Procedure

Petitioner claims that his convictions were obtained in violation of due process because the unconstitutional pretrial identification procedures resulted in unreliable in-court identifications. (Pet. at 31-33.) Miller's testimony, in petitioner's eyes, contains discrepancies and may have been improperly influenced. For instance, she said to police the men wore camouflage "pants." She called them "sweatpants" at trial after having seen a photograph of sweatpants seized from petitioner's apartment. (Pet. at 55.) She also testified that one of the men wore black tactical pants, which was discrepant with her other statements that all three men had worn camouflage pants. (*Id.*)

Petitioner also believes Miller was improperly influenced by having a booking photograph of petitioner in her possession for weeks before trial. She had been unable to identify petitioner from any of the photographs she saw, but was able to identify him in court, which occurred after she saw the booking photograph. Graves's identification,

1 according to petitioner, was also unreliable. His identification was based in part on seeing
2 “negroid” features in petitioner.

3 This claim was presented to the state courts only through a petition for review filed
4 in the state supreme court, which summarily denied it. When presented with a state court
5 decision that is unaccompanied by a rationale for its conclusions, a federal court must
6 conduct an independent review of the record to determine whether the state court decision
7 is objectively unreasonable. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).
8 This review is not de novo. “[W]here a state court’s decision is unaccompanied by an
9 explanation, the habeas petitioner’s burden still must be met by showing there was no
10 reasonable basis for the state court to deny relief.” *Harrington v. Richter*, 562 U.S. 86, 98
11 (2011).

12 Due process may require suppression of eyewitness identification evidence if law
13 enforcement procured the identification using unnecessarily suggestive procedures. *Perry*,
14 132 S. Ct. at 718. “Instead of mandating a *per se* exclusionary rule,” the U.S. Supreme
15 Court has held that the Due Process Clause “requires courts to assess, on a case-by-case
16 basis whether improper police conduct created a ‘substantial likelihood of
17 misidentification.’” *Id.* at 724 (quoting *Biggers*, 409 U.S. at 201).

18 Reliability is the “linchpin” of that evaluation. *Id.* at 724-25 (quoting *Brathwaite*,
19 432 U.S. at 116). “Where the ‘indicators of [a witness’s] ability to make an accurate
20 identification’ are ‘outweighed by the corrupting effect’ of law enforcement suggestion,
21 the identification should be suppressed.” *Id.* at 725 (quoting *Brathwaite*, 432 U.S. at 114).
22 “Otherwise, the evidence (if admissible in all other respects) should be submitted to the
23 jury.” *Id.*

24 Identification testimony is inadmissible as a violation of due process only if (1) a
25 pretrial encounter is so impermissibly suggestive as to give rise to a very substantial
26 likelihood of irreparable misidentification, and (2) the identification is not sufficiently
27 reliable to outweigh the corrupting effects of the suggestive procedure. *Van Pilon v. Reed*,

1 799 F.2d 1332, 1338 (9th Cir. 1986). An identification procedure is impermissibly
2 suggestive when it emphasizes the focus upon a single individual thereby increasing the
3 likelihood of misidentification. *See United States v. Bagley*, 772 F.2d 482, 493 (9th Cir.
4 1985); *see, e.g., United States v. Burdeau*, 168 F.3d 352, 357-58 (9th Cir. 1999) (finding
5 that photo placement, hue and facial expression were insubstantial differences between
6 defendant's photograph and the others in a photographic array and did not create an
7 impermissible suggestion that defendant was the offender); *Bagley*, 772 F.2d at 493
8 (repeated showing of picture of individual impermissibly reinforces image of picture in
9 mind of viewer).

10 Under these standards, petitioner's claim does not warrant habeas relief. The
11 admission of Graves's identification cannot give rise to a due process eyewitness
12 identification claim. First, such a claim requires law enforcement involvement. *Perry*,
13 132 S. Ct. at 730. Here, law enforcement was not involved in Graves's reference to and
14 belief in a theory of "negroid features." Second, his identification was unwavering from
15 the first and he observed the suspect over a considerable period of time.

16 Miller's identification, however, is troubling, as noted by the trial court. Yet, this
17 Court cannot say that the state court's rejection of this claim was unreasonable. Miller's
18 in-court identification, however allegedly marred, was unequivocal and supported by her
19 first-hand experience. Though it was, as the trial court concluded, suggestive to show her
20 the booking photograph (Ans., Ex. 2, Vol. 7 at 1756), the procedure was not so
21 impermissibly suggestive as to give rise to a very substantial likelihood of irreparable
22 misidentification. When Van Patten asked her through email what her thoughts were after
23 viewing the booking photograph, Miller did not reply, though she had replied to his prior
24 emails. Also, she testified that she came to court to see whether petitioner was the person
25 she saw during the crime — not whether he matched photographs she had seen. The trial
26 court found her testimony on this point credible. Furthermore, she consistently refused to
27 identify petitioner from the photographic line-ups.

Also, her identification was sufficiently reliable to outweigh whatever corrupting effects the procedure created. In court, she emphatically identified petitioner as the person she had spent hours with on the night of the crime. The Supreme Court has rejected due process eyewitness identification claims on similar facts. A witness's identification was reliable despite an improper procedure because she "saw her assailant for a considerable period of time under adequate light, provided police with a detailed description of her attacker long before the showup, and had 'no doubt' that the defendant was the person she had seen." *Biggers*, 409 U.S. at 200. In another case, the witness's identification was sufficiently reliable to outweigh the police's use of an improper procedure. "The witness, an undercover police officer, viewed the defendant in good light for several minutes, provided a thorough description of the suspect, and was certain of his identification." *Brathwaite*, 432 U.S. at 115.

Furthermore, there was no prejudice. There has been no showing that Graves's identification was tainted by law enforcement, or that it is anything other than reliable. His identification, coupled with the weight of the GPS evidence, forecloses the possibility of prejudice.

Petitioner asserts that this Court cannot dismiss any identification errors as harmless. He bases this on a juror's statement about deliberations. Kidd, the defense investigator, interviewed one of the jurors after trial. In an email to defense counsel, Kidd summarized his conversation with the juror. Petitioner submitted a copy of this email with his traverse, a relevant portion of which follows:

She said one of the first things they did was to see where each juror stood regarding guilt or innocence. All but one juror thought the defendant was guilty. One juror wanted to see some evidence, and they did check the evidence, but all quickly agreed to the defendant's guilt. [¶] She said the prosecutions's [sic] witnesses were good and the ID witnesses ' . . . were big.' [¶] She said the defense witnesses were not believable, and the late timing of their appearance was suspect. [¶] She said she felt comfortable in saying that the entire jury found the prosecution witnesses to be believable and the defense witnesses not believable. [¶] They compared

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Northern District of California

the timing with the tracking device. They noticed the tracker was in the area at the time of the robbery.

(Trav., Docket No. 25-3 at 3, Ex. E at 165.)

The juror's statements do not aid petitioner. First, the Court cannot consider such evidence because the statements relate to intrinsic trial matters. Evidence regarding intrinsic trial matters, such as a jury's deliberations concerning evidence presented at trial, cannot be the basis of inquiry by this Court. *See Raley v. Ylst*, 470 F.3d 792, 803 (9th Cir. 2006). Second, the statement offers nothing new. Eyewitness identifications were central to the prosecution's case, as they often are in criminal trials. Third, the statement, if it could be considered, shows the jury found his defense implausible and the prosecution's evidence convincing.

The state court's rejection of this claim was objectively reasonable and is therefore entitled to AEDPA deference. The claim is DENIED.

V. Sufficiency of the Evidence

Petitioner claims his kidnapping convictions were not supported by sufficient evidence that he asported the victims. (Pet. at 90-91.) The trial court rejected this claim when petitioner presented it at his new trial motion hearing and through his habeas petition:

The kidnapping was in furtherance of a robbery and gave the perpetrators of the robbery greater control over the victims and diminished the likelihood of interference by the victims. [¶] The movement itself was approximately 40 or 50 feet. [¶] Nevertheless, given the serious head injury suffered by Bennett, securing of the victims' legs, in addition to their hands, and the removal of their cell phones, supports a reasonable inference that the change in environment increased the potential risk of harm to the victims. [¶] Further, it gave the suspects the ability to search the home unimpeded, engage in other criminal conduct, and increased [sic] their risk of detection.

(Ans., Ex. 9 at 34-35.)

1 The state appellate court also rejected this claim:

2 We agree with the trial court and conclude appellant's convictions for
3 simple kidnapping are supported by substantial evidence. [Citation
4 omitted.] By ultimately moving the four victims some 24 feet into a tiny
5 storage room with no windows, binding their legs and locking them inside,
6 the jury could reasonably infer that appellant made it more difficult for
7 them to escape or sound an alarm, thereby increasing the risk that Bennett
8 would suffer serious harm from his wounds while also decreasing
9 appellant's risk of detection. It also gave [petitioner] and the other
10 intruders "[an] enhanced opportunity to commit additional crimes," given
11 that they no longer needed to watch over the victims. [Citation omitted.]
Hence, in light of these contextual factors, the evidence supported the
jury's finding that the movement of the victims from the living room to the
storage room satisfied the asportation requirement of section 207,
subdivision (a).

12 (Ans., Ex. 9 at 35.)

13 To establish a kidnapping under California law (California Penal Code section
14 207(a)), the prosecution must prove that "(1) a person was unlawfully moved by the use of
15 physical force or fear; (2) the movement was without the person's consent; and (3) the
16 movement of the person was for a substantial distance." *People v. Arias*, 193 Cal. App.
17 4th 1428, 1434 (2011) (citation and internal quotation marks omitted). To determine
18 whether the movement was for a substantial distance, "the jury should consider the totality
19 of the circumstances." *Id.* at 1444. Such circumstances include "not only the actual
20 distance the victim is moved, but also such factors as whether that movement increased the
21 risk of harm above that which existed prior to the asportation, decreased the likelihood of
22 detection, and increased both the danger inherent in a victim's foreseeable attempts to
23 escape and the attackers enhanced opportunity to commit additional crimes." *People v.*
24 *Martinez*, 20 Cal. 4th 225, 237 (1999). Asportation cannot be established if the movement
25 "is only a very short distance" no matter what the contextual factors are or whether they
26 are considered singly or in combination. *Id.*

1 Moving a victim as little as nine feet has been found sufficient by the California
2 courts, however. *People v. Shadden*, 93 Cal. App. 4th 164, 168-169 (Cal. App. Ct. 2001);
3 *see also Arias*, 193 Cal. App. 4th at 1435 (moving a person 15 feet to the inside of his
4 apartment to facilitate a criminal search found sufficient to meet asportation requirement);
5 *People v. Smith*, 33 Cal. App. 4th 1586, 1594 (Cal. Ct. App. 1995) (moving victim 40 to
6 50 feet from a driveway open to street view to the inside of a camper behind the house
7 found sufficient to meet asportation requirement).

8 When reviewing a state court's conviction for sufficiency of the evidence, a federal
9 court must determine only whether, "after viewing the evidence in the light most favorable
10 to the prosecution, *any* rational trier of fact could have found the essential elements of the
11 crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Only if
12 no rational trier of fact could have found proof of guilt beyond a reasonable doubt may the
13 writ be granted. *Id.* at 324. In sum, "the only question under *Jackson* is whether [the
14 jury's] finding was so insupportable as to fall below the threshold of bare rationality."
15 *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012).

16 Sufficient evidence existed to support the jury's finding. The record shows that
17 petitioner moved the victims at gunpoint at least 24 feet into a windowless storage room,
18 bound them, and took their cell phones, all of which prevented the victims from moving,
19 summoning help, or otherwise interfering with the commission of the crimes. These facts
20 certainly meet the requirements of forced, nonconsensual movement over a substantial
21 distance, as required by section 207(a). Also, incapacitating and isolating the victims
22 certainly made the search and robbery far easier. Because these facts meet the
23 requirements of the statute, there is no question that the jury's finding was not so
24 insupportable as to fall below the threshold of bare rationality. The state court's denial of
25 his claim was reasonable and therefore is entitled to AEDPA deference. This claim is
26 DENIED.

1 Petitioner also claims counsel rendered ineffective assistance when she failed to
2 move to have the kidnapping charges dismissed. Any such motion would have been futile,
3 as the above analysis shows. It is both reasonable and not prejudicial for defense counsel
4 to forgo a meritless objection. *See Juan H.*, 408 F.3d at 1273. The state appellate court's
5 rejection of this claim was reasonable and is therefore entitled to AEDPA deference. This
6 claim is DENIED.

7 **VI. Sentencing**

8 Petitioner alleges that the trial court violated his right to due process by misapplying
9 California Penal Code section 654. More specifically, he asserts that his robbery, rather
10 than his kidnapping, convictions should have been used as the base term. He also asserts
11 that if this was done, his other convictions should have been stayed under section 654.
12 (Pet. at 120-122.) This claim was presented to the state courts only by way of a habeas
13 petition that was submitted to the state supreme court, which summarily denied it. (Ans.,
14 Exs. 13 and 14.)

15 Petitioner's claim that the state court misapplied state law fails to state a cognizable
16 claim. An alleged violation of section 654 is a state law claim that is not cognizable in
17 federal habeas proceeding under 28 U.S.C. § 2254. *Watts v. Bonneville*, 879 F.2d 685, 687
18 (9th Cir. 1989); *see Swarthout v. Cooke*, 562 U.S. 216, 218-220 (2011) (an alleged
19 violation of state law is not remediable on federal habeas review, even if state law were
20 erroneously interpreted or applied).

21 The state court's rejection of this claim was reasonable and is therefore entitled to
22 AEDPA deference. Accordingly, this claim is DENIED.

23 **VII. Cumulative Error**

24 Petitioner claims that the cumulative effect of all the errors at trial violated his right
25 to due process. (Pet. at 93.) The state appellate court rejected this claim on the merits.
26 (Ans., Ex. C at 18.)
27
28

1 In some cases, although no single trial error is sufficiently prejudicial to warrant
2 reversal, the cumulative effect of several errors may still prejudice a defendant so much
3 that his conviction must be overturned. *See Alcala v. Woodford*, 334 F.3d 862, 893–95
4 (9th Cir. 2003). Where there is no single constitutional error existing, nothing can
5 accumulate to the level of a constitutional violation. *See Mancuso v. Olivarez*, 292 F.3d
6 939, 957 (9th Cir. 2002).

7 Because petitioner has not shown a single constitutional error, his cumulative error
8 claim necessarily fails. The state court's rejection of this claim was reasonable and is
9 entitled to AEDPA deference. Accordingly, this claim is DENIED.

10 CONCLUSION

11 The state court's denial of petitioner's claims did not result in a decision that was
12 contrary to, or involved an unreasonable application of, clearly established federal law, nor
13 did it result in a decision that was based on an unreasonable determination of the facts in
14 light of the evidence presented in the state court proceeding. Accordingly, the petition is
15 DENIED.

16 A certificate of appealability will not issue. Reasonable jurists would not "find the
17 district court's assessment of the constitutional claims debatable or wrong." *Slack v.*
18 *McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability
19 from the Ninth Circuit Court of Appeals.

20 Petitioner's motion to file a traverse in excess of 25 pages (Docket No. 22) is
21 GRANTED. The Clerk shall terminate Docket No. 22, enter judgment in favor of
22 respondent, and close the file.

23 **IT IS SO ORDERED.**

24 **Dated:** December 6, 2016


RICHARD SEEBORG
United States District Judge

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS
CASE NO. 14-cv-00069-RS

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 18 2017

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

GLENN SUNKETT,

Petitioner-Appellant,

v.

MARTIN BITER, Warden,

Respondent-Appellee.

No. 16-17320

D.C. No. 3:14-cv-00069-RS
Northern District of California,
San Francisco

ORDER

Before: FARRIS and LEAVY, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied. Appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 8 2017

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

GLENN SUNKETT,

Petitioner-Appellant,

v.

MARTIN BITER, Warden,

Respondent-Appellee.

No. 16-17320

D.C. No. 3:14-cv-00069-RS
Northern District of California,
San Francisco

ORDER

Before: SILVERMAN and IKUTA, Circuit Judges.

Appellant's motion for an extension of time (Docket Entry No. 7) is granted.

Appellant's motion for reconsideration (Docket Entry No. 7) is deemed timely
filed and is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.