

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 30 2018

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

WILBERT FRANK, Jr.,

Petitioner-Appellant,

v.

RON RACKLEY, Warden,

Respondent-Appellee.

No. 17-55659

D.C. No.

5:15-cv-02048-CJC-PJW

Central District of California,  
Riverside

ORDER

Before: NGUYEN and OWENS, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 5).

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

Ord. 6.11.

No further filings will be entertained in this closed case.

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Central District of California,  
Riverside

ORDER

Before: BYBEE and MURGUIA, Circuit Judges.

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

Any pending motions are denied as moot.

**DENIED.**

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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

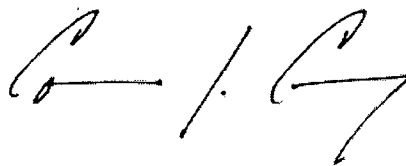
10 WILBERT FRANK, JR., ) CASE NO. ED CV 15-2048-CJC (PJW)  
11 )  
12 Petitioner, ) ORDER ACCEPTING REPORT AND  
13 v. ) ADOPTING FINDINGS, CONCLUSIONS,  
14 ) AND RECOMMENDATIONS OF UNITED  
15 ) STATES MAGISTRATE JUDGE, AND  
16 ) DENYING CERTIFICATE OF  
17 ) APPEALABILITY  
18 )  
19 Respondent. )  
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29 Pursuant to 28 U.S.C. Section 636, the Court has reviewed the  
30 Petition, records on file, and the Report and Recommendation of the  
31 United States Magistrate Judge. Further, the Court has engaged in a  
32 *de novo* review of those portions of the Report to which Petitioner has  
33 objected. The Court accepts the Report and adopts the findings,  
34 conclusions, and recommendations of the Magistrate Judge.

35 Further, for the reasons stated in the Report and  
36 Recommendation, the Court finds that Petitioner has not made a  
37 substantial showing of the denial of a constitutional right and  
38 therefore, a certificate of appealability is denied. See 28 U.S.C.

1 § 2253(c)(2); Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S.  
2 322, 336 (2003).

3  
4 DATED: April 11, 2017.



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7 CORMAC J. CARNEY  
8 UNITED STATES DISTRICT JUDGE  
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

WILBERT FRANK, JR.,

Petitioner,

v.

KELLY SANTORO, Warden,

Respondent.

Case No. EDCV 15-2048-CJC (LAL)

**REPORT AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable Cormac J. Carney,  
United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of  
the United States District Court for the Central District of California.

**I.**

**PROCEEDINGS**

On October 5, 2015, Wilbert Frank, Jr. ("Petitioner") filed a Petition for Writ of Habeas  
Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). On January 15,  
2016, Respondent filed a Return to the Petition. On March 21, 2016, Petitioner filed a Reply.  
Thus, this matter is ready for decision.

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II.

**PROCEDURAL HISTORY**

On December 16, 2011, Petitioner was convicted after a jury trial in the Riverside County Superior Court of one count of first degree murder<sup>1</sup> and one count of unlawful possession of a firearm.<sup>2</sup> The jury further found true an allegation that during the commission of the murder Petitioner personally and intentionally discharged a firearm causing death.<sup>3</sup> (Volume 1 Clerk's Transcript ("CT") at 268-70; 2 CT at 361-64; Volume 4 Reporter's Transcript ("RT") at 802-03.) On January 13, 2012, the trial court sentenced Petitioner to a state prison term of 50 years to life. (2 CT at 336-37, 361-64; 4 RT at 823-24.)

Petitioner appealed his convictions to the California Court of Appeal. (Lodgments 4-6.) On December 4, 2013, the California Court of Appeal affirmed the judgment. (Lodgment 7.)

Next, Petitioner filed a Petition for Review in the California Supreme Court. (Lodgment 8.) On March 12, 2014, the California Supreme Court denied review. (Lodgment 9.)

On May 20, 2014, Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court. (Lodgment 10.) On October 14, 2014, the United States Supreme Court denied the petition. (Lodgment 11.)

III.

**SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL**

Because Petitioner is not challenging the sufficiency of the evidence, this Court adopts the factual discussion of the California Court of Appeal opinion as a fair and accurate summary of the evidence presented at trial.<sup>4</sup>

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<sup>1</sup> Cal. Penal Code § 187(a).

<sup>2</sup> Cal. Penal Code § 12021(c)(1).

<sup>3</sup> Cal. Penal Code § 12022.53(5).

<sup>4</sup> "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary. . . ." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Thus, Ninth Circuit cases have presumed correct the factual summary set forth in an opinion of the California Court of Appeal under 28 U.S.C. § 2254(e)(1). See, e.g., Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted); Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009).

1           A.     BACKGROUND

2           Defendant and Silvia Frank (the victim) were married for 18 years.  
3           Defendant and the victim shared five daughters, who were ages 18, 16, 14, 5, and  
4           2 in December 2011.

5           On September 25, 2008, defendant arrived home smelling of alcohol.  
6           Defendant cornered his eldest daughter (Clarke) in a bathroom and screamed at  
7           her. The victim used a shoe to "fight [defendant] off" of Clarke. Clarke hid in a  
8           closet with her sisters and called the police. Clarke could see defendant holding  
9           the victim in a headlock and punching the victim's face.

10          August 15 was the anniversary of the stillborn birth of defendant's and the  
11          victim's son. August 15 was a "rough" day for the family due to the anniversary.  
12          On August 15, 2010, defendant arrived home angry and smelling of alcohol.  
13          Defendant argued with the victim and Clarke for approximately one hour.  
14          Defendant began "swinging" at Clarke while she was holding one of her younger  
15          sisters in her arms. Defendant began fighting with Clarke's uncle. Someone  
16          called the police, but defendant drove away before the police arrived. When  
17          defendant returned home, he engaged in a physical altercation with the police.

18          Defendant and the victim separated on August 15, 2010; defendant moved  
19          out of the family home. Henry Munoz, whom defendant knew through their work  
20          in the financial services industry, helped defendant find a home to rent in Hemet.  
21          The home was built in 1978 and was approximately 1,750 square feet. The house  
22          was broken into multiple times, most likely by the tenants who lived in the house  
23          prior to defendant. Defendant feared for his life due to the repeated break-ins and  
24          told Munoz that he would need to move out of the house. In response, Munoz  
25          lent defendant a shotgun.

26          Munoz told defendant to leave the gun unloaded, keep the ammunition  
27          separate from the gun, and not to leave the gun in the house when defendant was  
28          not home due to the break-ins. Defendant took the shotgun and a box of

1 ammunition. Around early or mid-October 2010, the break-ins at the property  
2 ended. Approximately one month later, in November 2010, Munoz began asking  
3 defendant to return the shotgun, but defendant did not return it at that time.

4 From November 10 to November 30, defendant and the victim exchanged  
5 a series of text messages. In the messages, defendant discussed his desire to  
6 reconcile with the victim, but she refused. Defendant also informed the victim  
7 that his "unemployment ran out" and he would not be paying child support. At  
8 one point, the victim told defendant to stop calling her because he had called 146  
9 times. Defendant responded that if she answered the telephone then he would not  
10 have to call so many times. The victim refused to speak to defendant on the  
11 telephone. In mid-November, the victim began having a romantic relationship  
12 with Ronald Flores (Flores).

13 B. NOVEMBER 30, 2010

14 On November 30, 2010, at 8:57 a.m., the victim sent a text message to  
15 defendant informing him she would be introducing Flores to the children that  
16 night. Defendant asked if Flores would be coming to the family home, and the  
17 victim responded, "Yes." Defendant asked if the victim had been "cheating" on  
18 defendant with Flores via Facebook prior to the victim and defendant separating.  
19 The victim denied having an affair. Defendant asked if the victim thought their  
20 daughters would like Flores, and the victim responded, "Yes." Defendant asked  
21 the victim how serious her and Flores's relationship was and whether Flores was  
22 moving into the family home. The victim responded, "Not yet." At 9:09 a.m.,  
23 defendant sent a text message to the victim reading, "Good luck & I wish you the  
24 very best."

25 As the text message conversation progressed, at 9:27 a.m., defendant  
26 wrote, "I would never disrespect you with having a woman in the house you built.  
27 But we have different views in the matter of respect in that area. You are free to  
28 do what you want . . . we're separated." At 3:23 p.m., defendant asked the victim

1 to bring him his jacket, which was still at the family house. Defendant asked the  
2 victim to meet him at a restaurant. The victim agreed to meet defendant.

3 Clarke accompanied the victim to the restaurant. On the way to the  
4 restaurant, Clarke saw defendant's vehicle at a gas station. Clarke stopped her  
5 vehicle behind defendant's vehicle at the gas station. As defendant exited the  
6 restroom, the victim walked toward defendant with the jacket. Defendant waved  
7 at Clarke and the victim to follow him, and he entered his vehicle.

8 The victim, Clarke, and defendant arrived at the restaurant parking lot at  
9 the same time. The victim exited the car, while Clarke stayed in the car to read a  
10 text message. As Clarke was looking at her phone, she heard the victim say,  
11 "'Oh, my God, Frank,'" and then she heard a gunshot. Clarke heard defendant  
12 say, "'That will teach you to fuck with me,'" and saw defendant holding a gun.  
13 Defendant returned to his vehicle, placed the gun inside it, and drove away.

14 Clarke told a person passing by to call the police. Clarke held the victim's  
15 hand, but the victim did not speak. The victim had been shot in her abdomen.  
16 Deputies arrived at the restaurant at 4:50 p.m. A paramedic could not find a pulse  
17 in the victim's forearm, but found a "very faint pulse" along her carotid artery.  
18 The victim's intestines were protruding from her body. The victim died at the  
19 hospital. The cause of the victim's death was a "[s]hotgun wound to the  
20 abdomen." The shot severed two major arteries causing the victim "to bleed  
21 significantly."

22 Defendant was arrested at 6:42 p.m. in Temecula. A detective found a  
23 handwritten will in defendant's vehicle. The will was dated November 30.

24 C. DEFENSE

25 Defendant testified at trial. The following are the defense's version of the  
26 events. On September 25, 2008, defendant and Clarke were arguing in a  
27 bathroom because defendant made Clarke stop playing on a computer. Defendant  
28 pushed Clarke's head and said, "'Don't talk to me like that, Clarke.'" The victim

1 entered the bathroom and struck defendant's shoulder with a shoe she was  
2 holding. Defendant placed the victim in a headlock, but let her go "[w]ithin  
3 seconds" when she "calmed down."

4 On August 15, 2010, defendant was drinking due to it being the  
5 anniversary of the stillborn birth of his son. Defendant argued with the victim.  
6 Defendant and the victim agreed he would leave the house and return after the  
7 victim left to work her nightshift at the hospital, as a nurse. Defendant never  
8 struck the victim or his children. When defendant returned to the house law  
9 enforcement officers were there and defendant was arrested. The officers "beat  
10 the shit out of [defendant]."

11 Defendant never returned to live in the family home, and he did not gather  
12 his possessions due to a restraining order being in place. Defendant moved into  
13 the house Munoz offered him. The only amenities in the house were a bed, radio,  
14 and recliner. The house did not have a refrigerator or other appliances. Deputies  
15 suggested defendant should protect himself because the people breaking into the  
16 house were likely drug addicts. Defendant borrowed the gun from Munoz in mid-  
17 October. Defendant had never owned a gun and did not know how to operate a  
18 gun. Munoz showed defendant how to use the gun. Defendant carried the gun in  
19 his vehicle, so it would not be stolen during a break-in. Defendant loaded the gun  
20 when a man came to the house at 3:00 a.m. asking for money. Defendant kept the  
21 gun loaded.

22 During the second week of November, the furnace at defendant's house  
23 stopped working, so defendant began using the fireplace. It was "freezing" inside  
24 the house. Defendant slept on a recliner next to the fireplace. Defendant did not  
25 have wood to burn, so would "[b]urn whatever would burn." Defendant closed all  
26 the doors and windows when heating the house, and only left the fireplace area to  
27 use the restroom.  
28

1 Defendant called the victim multiple times, in order to insure the children  
2 were being supervised while the victim was at work. Defendant offered to help  
3 watch the children, but the victim often refused his offers. When defendant  
4 visited with his two youngest daughters at the home he rented, his daughters  
5 would sometimes nap in front of the fireplace on a blanket.

6 On the night of November 29, defendant burned scrap wood and  
7 newspaper in the fireplace at his rented house. There was also a "log lighter or  
8 pilot light inside the fireplace," which defendant left running to generate heat. On  
9 the morning of November 30, defendant did not have any material to burn so he  
10 "was just using the pilot or the log burner or whatever." Defendant contacted the  
11 victim about getting his coat because it "was extremely cold in the house."  
12 Defendant was surprised when the victim informed him that she planned to  
13 introduce their daughters to Flores.

14 Defendant spoke to Munoz that morning and told Munoz that he needed to  
15 return Munoz's gun to him. In the afternoon, at approximately 3:00, defendant  
16 spoke to Leanna Bradley (Bradley), who owned the home defendant rented.  
17 Defendant asked Bradley how long she would wait before introducing a boyfriend  
18 to her son. Bradley responded that "it would take [her] awhile." Defendant told  
19 Bradley he might have to move if his financial situation did not improve.  
20 Defendant told Bradley his daughters were scared to be inside his rented house  
21 because they believed the house was haunted. Defendant asked Bradley if anyone  
22 died inside the home. Bradley responded that a woman passed away in the house.  
23 Defendant said, "[O]h, that is who has been talking to me," or "Oh, that is the  
24 voices I have been hearing." Bradley thought defendant's comment was "kind of  
25 strange and maybe he was joking around."

26 When defendant, the victim, and Clarke arrived at the restaurant on  
27 November 30, defendant asked the victim for his coat. The victim retrieved the  
28 coat and asked defendant, "'What about the things for the girls?'" Defendant

1 walked to the back of his truck and lifted the tailgate in order to get the items for  
2 his daughters, but picked up the shotgun instead. Defendant held the gun at the  
3 level of his waist. Defendant recalled "the gun going off," but did not remember  
4 shooting the victim. Defendant did not recall saying anything to the victim.

5 Defendant did not recall driving to Munoz's residence, but he remembered  
6 being there. Defendant left the shotgun outside Munoz's house. Defendant drove  
7 toward Temecula and parked at a winery. Defendant was "[t]rying to figure out  
8 had happened." Defendant handwrote a will because he assumed law  
9 enforcement officers would kill him due to defendant shooting the victim. In the  
10 will, defendant left three vehicles and \$3 to his three eldest daughters, and  
11 insurance policies to his two youngest daughters. Defendant left the insurance for  
12 his youngest daughters because he is "closer to them." Defendant also left items  
13 or information to his mother, brothers, children from prior relationships, and ex-  
14 wife.

15 Defendant called his mother, Mary Frank (Mary). When Mary answered  
16 the phone, defendant was "crying and praying to God and just out of it." When  
17 the call ended, Mary called Clarke. Defendant then called Mary again. Mary told  
18 defendant that she learned defendant shot the victim. Defendant "was still crying  
19 and praying and he said 'Yes.'" Defendant was speaking clearly; however, Mary  
20 thought he "kind of sounded out of it," because he kept crying, praying, and  
21 "couldn't get ahold of himself." Mary suggested defendant contact law  
22 enforcement and confess.

23 Defendant called a colleague, Steve Gronlund (Gronlund), and then drove  
24 to Gronlund's house. Gronlund's wife answered the door. She had to ask  
25 defendant five times how he was doing before he responded. Defendant  
26 surrendered to law enforcement officers at Gronlund's house. Defendant was  
27 shackled and placed in a holding cell. Two deputies tried to "get [defendant's]  
28 attention" in the cell, but defendant did not have the strength to hold his head up

1 and talk. Defendant was sweating profusely, his heart was beating rapidly, he was  
2 struggling to breathe, nauseous, and suffering chest pains. A deputy noticed  
3 defendant urinated on himself. Defendant complained of blurred vision or feeling  
4 dizzy. Defendant lost consciousness.

5 Paramedics took defendant to a hospital sometime between 10:00 p.m. and  
6 11:00 p.m. Defendant's condition began improving in the ambulance. Defendant  
7 "felt considerably better" at the hospital. Dr. Bohdan Olesnicky (Olesnicky)  
8 treated defendant. Olesnicky examined defendant for a "cardiac condition, a  
9 pneumonia, or toxic substance ingested," due to defendant complaining of chest  
10 pains. Olesnicky also considered the possibility that defendant was suffering  
11 from anxiety or a psychiatric illness. Defendant told Olesnicky that he was  
12 feeling anxious and "did not know what came over him." Blood tests showed a  
13 minimal amount of alcohol in defendant's blood. Olesnicky concluded defendant  
14 suffered an anxiety attack. Olesnicky did not test defendant's blood for carbon  
15 monoxide poisoning because Olesnicky "had no indication" of such poisoning.

16 Defendant was transported back to the sheriff's station at approximately  
17 midnight. Defendant explained that he never intended to harm the victim and on  
18 November 30 "the one thing [he] wanted more than anything in the world" was  
19 his family. When Bradley went to the house after defendant's arrest, she noticed  
20 that defendant appeared to have been in the middle of preparing a meal when he  
21 left and Christmas music was playing on the radio. Bradley saw a recliner was a  
22 few feet away from the fireplace.

23 (Lodgment 7 at 3-11 (footnote omitted).)

#### 24 IV.

#### 25 PETITIONER'S CLAIMS

26 Petitioner raises the following claims for habeas corpus relief:

- 27 (1) The trial court erred by excluding evidence that Petitioner suffered from carbon  
28 monoxide poisoning;

- 1 (2) The prosecution failed to preserve evidence and the trial court erred in failing to  
2 instruct the jury regarding the prosecution's failure;  
3 (3) The trial court erred by failing to instruct the jury on provocation and heat of passion;  
4 and  
5 (4) The trial court abused its discretion in imposing the restitution order.

6 V.

7 **STANDARD OF REVIEW**

8 A. **28 U.S.C. § 2254.**

9 The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as  
10 amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

11 (d) An application for a writ of habeas corpus on behalf of a person in custody  
12 pursuant to the judgment of a State court shall not be granted with respect to any  
13 claim that was adjudicated on the merits in State court proceedings unless the  
14 adjudication of the claim—

15 (1) resulted in a decision that was contrary to, or involved an  
16 unreasonable application of, clearly established Federal law, as determined by the  
17 Supreme Court of the United States; or

18 (2) resulted in a decision that was based on an unreasonable  
19 determination of the facts in light of the evidence presented in  
20 the State court proceeding.

21 28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be.  
22 As the United States Supreme Court stated in Harrington v. Richter,<sup>5</sup> while the AEDPA "stops  
23 short of imposing a complete bar on federal court relitigation of claims already rejected in state  
24 proceedings[.]" habeas relief may be granted only "where there is no possibility fairminded  
25 jurists could disagree that the state court's decision conflicts" with United States Supreme Court  
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<sup>5</sup> 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).

precedent. Further, a state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.<sup>6</sup>

**B. Sources of “Clearly Established Federal Law.”**

According to Williams v. Taylor,<sup>7</sup> the law that controls federal habeas review of state court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court decisions “as of the time of the relevant state-court decision.” To determine what, if any, “clearly established” United States Supreme Court law exists, a federal habeas court also may examine decisions other than those of the United States Supreme Court.<sup>8</sup> Ninth Circuit cases “may be persuasive.”<sup>9</sup> A state court’s decision cannot be contrary to, or an unreasonable application of, clearly established federal law, if no Supreme Court decision has provided a clear holding relating to the legal issue the habeas petitioner raised in state court.<sup>10</sup>

Although a particular state court decision may be both “contrary to” and an “unreasonable application of” controlling Supreme Court law, the two phrases have distinct meanings under Williams. A state court decision is “contrary to” clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on “materially indistinguishable” facts.<sup>11</sup> If a state court decision denying a claim is “contrary to” controlling Supreme Court precedent, the reviewing federal habeas court is “unconstrained by § 2254(d)(1).”<sup>12</sup> However, the state court need not cite or even be aware of the controlling Supreme Court cases, “so long as neither the reasoning nor the result of the state-court decision contradicts them.”<sup>13</sup>

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<sup>6</sup> 28 U.S.C. § 2254(e)(1).

<sup>7</sup> 529 U.S. 362, 412, 120 S. Ct. 1495, 146, L. Ed. 2d 389 (2000).

<sup>8</sup> LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).

<sup>9</sup> Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

<sup>10</sup> Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S. Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators’ courtroom conduct, the state court’s decision could not have been contrary to or an unreasonable application of clearly established federal law).

<sup>11</sup> Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06).

<sup>12</sup> Williams, 529 U.S. at 406.

<sup>13</sup> Early, 537 U.S. at 8.

1 State court decisions that are not “contrary to” Supreme Court law may be set aside on  
2 federal habeas review only “if they are not merely erroneous, but ‘an unreasonable application’  
3 of clearly established federal law, or based on ‘an unreasonable determination of the facts.’”<sup>14</sup>  
4 Accordingly, this Court may reject a state court decision that correctly identified the applicable  
5 federal rule but unreasonably applied the rule to the facts of a particular case.<sup>15</sup> However, to  
6 obtain federal habeas relief for such an “unreasonable application,” a petitioner must show that  
7 the state court’s application of Supreme Court law was “objectively unreasonable” under  
8 Woodford v. Visciotti.<sup>16</sup> An “unreasonable application” is different from merely an incorrect  
9 one.<sup>17</sup>

10 Where, as here, the California Supreme Court denied a petitioner’s claims without  
11 comment, the state high court’s “silent” denial is considered to be “on the merits” and to rest on  
12 the last reasoned decision on these claims, in this case, the grounds the California Court of  
13 Appeal stated in its decision on direct appeal.<sup>18</sup>

## 14 VI.

### 15 DISCUSSION

#### 16 A. Exclusion of Evidence

##### 17 1. Background

18 In Claim One, Petitioner argues the trial court erred by excluding evidence that Petitioner  
19 was suffering from carbon monoxide poisoning at the time of the crime and, thus, was either  
20 legally unconscious or unable to form the intent to commit first degree murder. (Petition at 5;  
21 MPA<sup>19</sup> at 2-26.)

22 On the night of Petitioner’s arrest, he became sick at the jail and a paramedic suggested  
23 that Petitioner “might have poisoned himself before he got taken into custody”; a police officer  
24

25 <sup>14</sup> Id. at 11 (citing 28 U.S.C. § 2254(d)).

26 <sup>15</sup> See Williams, 529 U.S. at 406-10, 413.

26 <sup>16</sup> 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

27 <sup>17</sup> Williams, 529 U.S. at 409-10.

27 <sup>18</sup> See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); see also Kennedy v. Lockyer, 379 F.3d 1041, 1052 (9th Cir. 2004).

28 <sup>19</sup> Petitioner has attached a 45-page supplement to the form Petition. This Court refers to this document as a Memorandum of Points and Authorities or “MPA.”

1 agreed. (1 CT at 150.) Before trial, Petitioner proposed a theory that at the time of the shooting  
2 he was suffering from carbon monoxide poisoning from the fireplace in his home. The  
3 California Court of Appeal accurately detailed the trial court proceedings related to Petitioner's  
4 attempt to introduce evidence of his carbon monoxide poisoning:

5           In the "Facts" section of defendant's written motions in limine, defendant  
6 asserted "he may very well have been suffering from carbon monoxide  
7 poisoning" at the time of the murder. In the prosecutor's motions in limine, the  
8 prosecutor moved the trial court to exclude evidence concerning defendant's  
9 possible exposure to carbon monoxide. The prosecutor asserted defendant  
10 planned to present the testimony of a psychologist, Stacey Wood, and a building  
11 inspector, Dale Feb.

12           The prosecutor argued that Feb's testimony was problematic because he  
13 examined the fireplace in defendant's rental home in April 2011, after other  
14 people had been living in the home for more than four months. Feb found the  
15 fireplace released high levels of carbon monoxide, but the prosecutor asserted Feb  
16 did not know the condition the fireplace was in on November 30 and therefore  
17 "has no idea what levels of carbon monoxide the defendant may or [may] not  
18 have been exposed to."

19           The prosecutor asserted Wood's testimony was problematic because her  
20 opinion was based on the foregoing faulty home inspection. The prosecutor  
21 explained Wood would testify that "defendant tested normally on her  
22 neuropsychological tests," so he may have been exposed to carbon monoxide on  
23 November 30.

24           Prior to opening statements, the trial court held a hearing on the motion.  
25 The prosecutor argued the carbon monoxide evidence would be "pure  
26 speculation." Defendant's trial counsel argued Wood would explain how the  
27 symptoms defendant suffered before, during, and after the murder were consistent  
28 with carbon monoxide poisoning. Wood would further explain how carbon

1 monoxide acts as a neurotoxin. Defendant asserted Wood could not conclude  
2 defendant suffered carbon monoxide poisoning at the time of the murder, but that  
3 defendant's symptoms were consistent with carbon monoxide poisoning. In  
4 regard to Feb, defendant argued that photographs of the fireplace taken "shortly  
5 after" the murder reflect the fireplace was in the same condition as the day Feb  
6 inspected it in April 2011.

7 The prosecutor again argued that the problem was a lack of evidence  
8 concerning the condition of the fireplace on November 30. The prosecutor noted  
9 new tenants moved into the house on December 11 and were burning wood in the  
10 fireplace, so there was no way to know what happened to the fireplace between  
11 November 30 and the day in January when the photographs of the fireplace were  
12 taken.

13 Defendant's trial counsel offered [Leanna] Bradley's testimony. Counsel  
14 contended Bradley would say there was a problem with the fireplace and the gas  
15 company "capped off" the log lighter in the fireplace. Counsel asserted the  
16 carbon monoxide evidence was relevant because it served as a "complete  
17 defense" and also could reflect a heat of passion killing due to involuntary  
18 intoxication.

19 The trial court explained that it was having difficulty with "whether or not  
20 [Feb] can testify as to the existence on the date in November of this defect, it was  
21 operating in that fashion." The trial court said it wanted to hear Feb's testimony.  
22 Defense counsel made an offer of proof; counsel gave the court Feb's written  
23 report. After reading the report the trial court said, "The statements of your expert  
24 in the document doesn't say that there was this condition in existence at the time."  
25 The trial court continued, "Then his final conclusion, it says he could have been  
26 exposed to carbon monoxide. That's not a definitive—that's just pure  
27 speculation. And it's sometime after the fact as well." The trial court also faulted  
28 Feb's report for not measuring the parts per million in different areas of the room;

1 Feb only measured directly over the fireplace. The trial court concluded, "If your  
2 witness, Mr. Feb, testified to what he put in that report, it would be speculation  
3 and it would not then be relevant." As a result, the trial court held the carbon  
4 monoxide evidence would be more prejudicial than probative under Evidence  
5 Code section 352.

6 ...

7 Defense counsel then returned to the carbon monoxide defense as a whole.  
8 Counsel asserted the prosecutor's motion was premature, and that through  
9 witnesses at trial the defense would lay a foundation for the experts' testimonies.  
10 The trial court responded, "[T]hat's entirely up to you. I'm not saying you cannot  
11 do it."

12 ...

13 Defense counsel informed the trial court Feb "would be able to say for  
14 certain that there was carbon monoxide in the room," because the fireplace was in  
15 the same condition prior to the murder. Counsel asserted defendant, Bradley, the  
16 defense investigator, and the tenants who moved into the home after the murder  
17 could all testify about the condition of the fireplace. Wood could testify about the  
18 symptoms associated with carbon monoxide poisoning, so the jury could make a  
19 reasonable inference about whether defendant was involuntarily intoxicated.  
20 Counsel analogized the situation to a defendant who is accused of driving under  
21 the influence, but refuses testing.

22 The trial court concluded the evidence was still "too speculative" and  
23 lacked foundation. However, the trial court permitted defense counsel to raise the  
24 motion again "down the road." During a recess in the midst of defendant's  
25 testimony, defense counsel asked the court to consider holding an Evidence Code  
26 section 402 hearing on Feb's and Wood's testimonies. Counsel asserted  
27 defendant's Sixth Amendment rights were being violated because he was being  
28 prevented from presenting a complete and meaningful defense.

1           The trial court noted it had read Feb's report and concluded Feb's  
2 testimony would be speculation. Defense counsel argued defendant testified to  
3 burning newspaper in the fireplace, which Feb found produces "extremely high  
4 levels of carbon monoxide." The trial court found no reason to change its prior  
5 ruling because the evidence was "just pure speculation." The trial court denied  
6 defendant's request.

7 (Lodgment 7 at 11-17.)

8           **2. State Court Opinion**

9           The California Court of Appeal denied Petitioner's claim on direct appeal, as  
10 follows:

11           Expert testimony must be based upon the facts shown by the evidence.  
12 (*People v. Vang* (2011) 52 Cal.4th 1038, 1045-1046.) An "'expert's opinion may  
13 not be based "on assumptions of fact without evidentiary support [citation], or on  
14 speculative or conjectural factors . . . ." [Citation.]" (*Id.* at p. 1046.) The reason  
15 for these rules is apparent, in that "[e]xpert testimony not based on the evidence  
16 will not assist the trier of fact." (*Ibid.*) We review the trial court's evidentiary  
17 ruling for an abuse of discretion. (*People v. Gutierrez* (2009) 45 Cal.4th 789,  
18 819.)

19           The trial court's decision was reasonable because the evidence presented  
20 at trial did not support an inference that defendant may have been suffering from  
21 carbon monoxide poisoning at the time of the murder. The record reflects that in  
22 the hours before the murder, defendant (1) spoke to Munoz about returning the  
23 shotgun; (2) spoke to Bradley about needing to move due to financial hardship;  
24 while speaking to Bradley defendant made a comment about talking to a ghost,  
25 but Bradley thought defendant was joking; (3) prepared food for himself; and (4)  
26 drove to a gas station and a restaurant.

27           There was nothing presented at trial indicating defendant suffered  
28 involuntary intoxication prior to the murder. The record reflects defendant

1 accomplished ordinary tasks in an ordinary manner. Given this evidence, the trial  
2 court could reasonably conclude expert testimony about defendant being under  
3 the influence of carbon monoxide lacked foundation because the testimony would  
4 not have been based on the evidence presented. Accordingly, we conclude the  
5 trial court did not err.

6 Defendant contends he made "substantial foundational showings based  
7 upon the circumstantial evidence of carbon monoxide poisoning." To support this  
8 assertion, defendant cites (1) Feb's report, (2) trial counsel's offer that Feb would  
9 say the fireplace was in substantially the same condition as it was on November  
10 30, (3) defendant's testimony about how he used the fireplace, and (4) Bradley's  
11 testimony about the condition of the fireplace.

12 Defendant's argument is not persuasive because he appears to be using the  
13 expert's opinion about the condition of the fireplace as the foundation for  
14 introducing the expert's testimony. However, there is nothing making Feb's  
15 report or Wood's information about carbon monoxide poisoning relevant in this  
16 case because there is nothing indicating defendant was impaired at the time of the  
17 murder or in the hours prior to the murder. The expert testimony would seem out  
18 of place given the state of the evidence because there was nothing supporting a  
19 finding of intoxication. Thus, expert opinion testimony about intoxication would  
20 not have been helpful to the jury.

21 Next, defendant analogizes this case to a "DUI" situation wherein the  
22 driver refuses medical tests and the issue of intoxication must be proven through  
23 circumstantial evidence. Defendant's analogy is not persuasive because in a DUI  
24 case there would typically be evidence of the defendant swerving or smelling of  
25 alcohol prior to an expert testifying. In this case, there is nothing indicating  
26 defendant was intoxicated prior to the murder.

27 (Lodgment 7 at 17-19.)

28 ///

1           **3.     Analysis**

2                   **a.     State Law Error**

3           To the extent Petitioner merely claims error under state evidentiary law, he does not state  
4 a claim cognizable on federal habeas corpus review.<sup>20</sup>

5                   **b.     Right to Present a Defense**

6           To the extent Petitioner claims the exclusion of evidence violated his right to present a  
7 defense, his claim fails. “Whether rooted directly in the Due Process Clause of the Fourteenth  
8 Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment,  
9 the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete  
10 defense.’”<sup>21</sup> The Ninth Circuit has noted, however, that cases in the United States Supreme  
11 Court “have focused only on whether an evidentiary rule, by its own terms, violated a  
12 defendant’s right to present evidence. These cases do not squarely address whether a court’s  
13 exercise of discretion to exclude expert testimony violates a criminal defendant’s constitutional  
14 right to present relevant evidence. Nor do they clearly establish a controlling legal standard for  
15 evaluating discretionary decisions to exclude the kind of evidence at issue here.”<sup>22</sup> Because the  
16 Supreme Court’s precedents do not establish a constitutional principle for evaluating  
17 discretionary decisions by trial courts to exclude evidence, Petitioner’s claim does not state a  
18 basis for federal habeas relief under AEDPA.<sup>23</sup>

19                   **c.     Fundamental Unfairness**

20           To the extent Petitioner argues that the exclusion of the evidence violated due process by  
21 resulting in a trial marked by fundamental unfairness, his claim also fails. The proposed  
22 evidence was speculative at best and was of little significance in light of other evidence  
23 presented at trial that Petitioner was conscious and in control of his faculties at the time of the  
24 shooting.

25  
26 <sup>20</sup> See *Estelle v. McGuire*, 502 U.S. 62, 71-72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

27 <sup>21</sup> *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting *California v.*  
*Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)); *Holmes v. South Carolina*, 547 U.S. 319,  
324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

28 <sup>22</sup> *Moses v. Payne*, 555 F.3d 742, 758-59 (9th Cir. 2009).

<sup>23</sup> *Id.* at 759.

1 On the day of the murder, Petitioner spoke with the victim and asked very pointed  
2 questions regarding her new romantic relationship. (1 CT at 184-86.) Also, he was able to  
3 engage in a coherent conversation with his landlady. (1 RT at 196-204.) Then, he was able to  
4 ask the victim to meet him at a specific restaurant parking lot to give him his jacket and he was  
5 able to drive himself to that location at the arranged time. (1 CT at 186.) Although the victim  
6 tried to give the jacket to Petitioner at the gas station next to the restaurant, he motioned for her  
7 to follow him back to the restaurant parking lot. (1 RT at 94-96, 101-02, 136-37; 2 RT at 456.)  
8 Once in the parking lot, Petitioner shot the victim with sufficient control and accuracy to hit her  
9 abdomen. (2 RT at 292.) Petitioner, apparently still in control of his actions, stated, "That will  
10 teach you to fuck with me," returned the gun to the back of his vehicle, and drove away. (1 RT  
11 at 97-98, 104, 131-32.)

12 Still appearing to be in control of himself, Petitioner drove to his friend's house to return  
13 the gun, (1 RT at 181, 200-01; 2 RT at 412, 459, 477, 492), and then continued his drive to  
14 Temecula, (2 RT at 412-14). At some point that night, Petitioner was able to write a will. (2 RT  
15 at 239, 248, 414-15, 421-23.) Later, having the capacity to realize what he had done, Petitioner  
16 called his mother and admitted shooting the victim, and then contacted law enforcement to turn  
17 himself in. (2 RT at 413-15; 3 RT at 554-55.)

18 After his arrest, Petitioner gave a statement to police in which he admitted shooting his  
19 wife. (2 RT at 463.) Crucially, when Petitioner testified in his own defense at trial, he was able  
20 to remember all of the events surrounding the shooting, except for the time between shooting the  
21 gun and returning the gun to his friend. (2 RT at 409-12.)

22 Petitioner's actions before, during, and after the shooting can lead to no other conclusion  
23 than that he was fully conscious and had complete control over his actions that afternoon. In  
24 light of this evidence, the exclusion of speculative testimony by defense witnesses that Petitioner  
25 might have been exposed to carbon monoxide could not have rendered his trial fundamentally  
26 unfair.

27 d. Harmlessness  
28

1 Even assuming that Petitioner was able to show that the trial court's ruling violated due  
2 process, this Court also must determine whether, in the context of the trial as a whole, the error  
3 had a "substantial and injurious effect or influence in determining the jury's verdict."<sup>24</sup> In  
4 evaluating the harmlessness of a constitutional error, the Court does not merely determine  
5 "whether there was enough to support the result, apart from the phase affected by the error. It is  
6 rather, even so, whether the error itself had substantial influence."<sup>25</sup>

7 Just as this Court cannot conclude the exclusion of the evidence resulted in fundamental  
8 unfairness, this Court similarly finds that the exclusion of the evidence, even if error, was  
9 harmless. In light of the evidence Petitioner acted consciously and with control over his actions,  
10 the exclusion of speculative evidence that he possibly could have been exposed to carbon  
11 monoxide could not have had a substantial or injurious effect on the jury's verdict.

12 Accordingly, the state court's denial of Petitioner's claims was not contrary to, or an  
13 unreasonable application of, clearly established federal law. Habeas relief is not warranted on  
14 Claim One.

15 **B. Failure to Preserve Evidence**

16 **1. Background**

17 In Claim Two, Petitioner argues the prosecution team violated its duty under California v.  
18 Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) to preserve  
19 Petitioner's blood sample, which, he suggests, could have been tested to prove Petitioner  
20 suffered from carbon monoxide poisoning. Petitioner further argues that the trial court erred by  
21 failing to instruct the jury that it could draw an adverse inference against the prosecution for its  
22 failure to preserve the blood sample. (Petition at 5-6; MPA at 26-35.)

23 The California Court of Appeal accurately detailed the trial court's ruling on Petitioner's  
24 Trombetta motion, as follows:

25 Defense counsel asked the trial court for leave to file a *Trombetta* motion.

26 Counsel asserted, "the officers knew that [defendant] may[] have poisoned

27  
28 <sup>24</sup> Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (quoting Kotteakos v.  
United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)).

<sup>25</sup> Kotteakos, 328 U.S. at 765.

1 himself,” so the blood should have been retained or tested. The prosecutor  
2 asserted, “the blood was obtained by workers at the hospital, not law enforcement.  
3 And the officers had no idea what he was being tested for. He was being taken to  
4 the hospital for an okay-to-book.” Defense counsel argued that the blood sample  
5 was the evidence that would show whether defendant was exposed to carbon  
6 monoxide on November 30.

7 . . .

8 When court resumed following the lunch recess, defendant presented the  
9 trial court with “a motion for sanctions based on the *Trombetta* case.” Defense  
10 counsel explained the hospital destroyed blood samples within one day to one  
11 week of collection. Defendant was arraigned on December 3, defense counsel  
12 was formally appointed on December 17, and defense counsel did not learn of the  
13 possible poisoning or hospital visit “until much later.” As a result, defense  
14 counsel requested charges be dismissed or that the prosecutor be barred from  
15 arguing the carbon monoxide evidence was speculative because the defense was  
16 forced to speculate by the prosecution’s failure to preserve evidence. Counsel  
17 asserted deputies did not diligently perform their duties because they should have  
18 secured a blood sample from defendant since they suspected he may have been  
19 poisoned.

20 The prosecutor asserted a paramedic suspected defendant might have been  
21 poisoned, but that it would be “completely inappropriate to assume” a deputy  
22 thought defendant may have been poisoned. Additionally, the prosecutor asserted  
23 the hospital collected defendant’s blood, so the sheriff’s department “was under  
24 no obligation to retain a sample of [defendant’s] blood.” The prosecutor  
25 contended the doctor diagnosed defendant as suffering a panic attack so the  
26 deputies had no reason to know evidence needed to be obtained from the hospital.

27 The trial court remarked that a transcript of a belt recording did not reflect  
28 who was speaking about defendant possibly being poisoned—deputies or

1 paramedics. The trial court asserted defendant's motion would be "stronger" if it  
2 could be shown that the officers were speaking. Nevertheless, the court  
3 concluded the transcript reflected deputies were likely involved in a conversation  
4 with paramedics and therefore "there is a basis for [defendant's] motion," because  
5 the deputies would have known about the possible poisoning.

6 The prosecutor then argued that assuming the deputies knew about the  
7 possible poisoning, there was still no evidence showing bad faith on the deputies'  
8 part in failing to obtain a blood sample. Additionally, the prosecutor argued that  
9 it was speculation as to whether the blood sample would have been exculpatory in  
10 regard to carbon monoxide levels. Defense counsel conceded he was "not  
11 alleging . . . bad faith," which "would require dismissal." Rather, counsel was  
12 asserting a "slack investigation . . . was conducted in this case," and therefore an  
13 instruction about the evidence should be given to the jury. Defense counsel  
14 suggested the trial court instruct the jury that "the blood samples were not kept in  
15 regards to this case."

16 The prosecutor disagreed with defense counsel's interpretation of the  
17 *Trombetta* law and asserted dismissal would not be the remedy even if there were  
18 bad faith. The prosecutor contended defendant needed to show the blood sample  
19 was in the deputies' possession, the sample was destroyed by the deputies, it was  
20 apparent the sample was exculpatory when it was destroyed, and there was bad  
21 faith on the part of the deputies. The prosecutor asserted that since there was not  
22 bad faith, defendant was not entitled to a remedy.

23 The trial court concluded that the exculpatory nature of the blood sample  
24 was not obvious, because defendant was ultimately diagnosed with suffering an  
25 anxiety attack. Accordingly, the trial court found there was not a *Trombetta*  
26 violation and denied defendant's motion.

27 (Lodgment 7 at 13-16 (footnote omitted).)

28 ///

1 ///

2 ///

3 **2. State Court Opinion**

4 The California Court of Appeal denied Petitioner's claim on direct review, finding:

5 "The standard of review of a trial court's determination that evidence is or  
6 is not sufficiently exculpatory under *Trombetta* and *Youngblood* is unsettled, and  
7 it may depend on the extent of the inquiry a court takes before ruling on a  
8 *Trombetta* motion." (*People v. Velasco* (2011) 194 Cal.App.4th 1258, 1262.) For  
9 the sake of caution, we will apply the de novo standard of review. (*U.S. v.*  
10 *Cooper* (9th Cir. 1993) 983 F.2d 928, 930-931 [applying de novo standard of  
11 review].)

12 "Under *Trombetta* and *Youngblood*, 'Law enforcement agencies must  
13 preserve evidence only if it possesses exculpatory value "apparent before [it] was  
14 destroyed," and not obtainable "by other reasonably available means."

15 [Citations.] The state's responsibility is further limited when the defendant  
16 challenges the failure to preserve evidence "of which no more can be said than  
17 that it could have been subjected to tests" that might have helped the defense.

18 [Citation.] In such a case, unless the defendant can show "bad faith" by the  
19 police, failure to preserve "potentially useful evidence" does not violate his due  
20 process rights.' [Citation.]" (*People v. Velasco, supra*, 194 Cal.App.4th at p.  
21 1262.) "Once the defendant has proved a loss of material evidence, the trial court  
22 has discretion to impose appropriate sanctions, including fashioning a suitable  
23 cautionary instruction. [Citations.]" (*People v. Medina* (1990) 51 Cal.3d 870,  
24 894.)

25 In the instant case, defendant would need to show bad faith in relation to  
26 the destruction of the blood sample; defendant has only asserted the blood could  
27 have been subjected to carbon monoxide screening, which may have resulted in  
28 the sample having exculpatory value. Defendant conceded at the trial court that

1 he was not asserting the deputies acted in bad faith by failing to preserve the  
2 sample. Since defendant did not meet the first step in the process—showing a bad  
3 faith loss of material evidence, the trial court had no reason to consider sanctions.  
4 In other words, there needed to be a bad faith finding before the trial court could  
5 properly consider the jury instruction issue. Since defendant conceded the bad  
6 faith issue, the trial court did not err.

7 Defendant asserts the trial court erred because there is “little question that  
8 the blood sample ‘possessed an exculpatory value.’” Defendant’s argument is not  
9 persuasive because defendant concedes the blood was not tested for carbon  
10 monoxide poisoning. Thus, defendant can only assert the blood could have been  
11 subjected to tests, which may have revealed exculpatory value. As a result,  
12 defendant must show bad faith on the part of the deputies, but defendant conceded  
13 the issue at the trial court.

14 Next, defendant contends that, even without a showing of bad faith under  
15 *Trombetta*, defendant was entitled to a curative instruction due to “the loss of  
16 constitutionally material evidence” resulting in violations of his “rights to due  
17 process and fair trial.” Defendant’s argument is not persuasive because  
18 *Trombetta* is a due process case. (*Trombetta, supra*, 467 U.S. at pp. 480-481.) In  
19 support of his argument, defendant cites *People v. Melton* (1988) 44 Cal.3d 713,  
20 750, which contains a citation to *Trombetta* and discusses the law presented in  
21 *Trombetta*. Accordingly, we conclude our *Trombetta* analysis would not differ  
22 from a due process/fair trial analysis.

23 (Lodgment 7 at 19-21 (footnote omitted) .)

### 24 **3. Legal Standard**

25 The Supreme Court explained in *California v. Trombetta*<sup>26</sup> that failure to preserve  
26 evidence violates a defendant’s right to due process only if the evidence possessed “exculpatory  
27 value that was apparent before the evidence was destroyed, and [is] of such a nature that the  
28

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<sup>26</sup> 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

1 defendant would be unable to obtain comparable evidence by other reasonably available  
2 means.”<sup>27</sup> Moreover, in Arizona v. Youngblood,<sup>28</sup> the Supreme Court held that a defendant must  
3 demonstrate that the police acted in bad faith in failing to preserve potentially useful evidence.<sup>29</sup>  
4 The presence or absence of bad faith turns on the government’s knowledge of the exculpatory  
5 value of the evidence at the time it was lost or destroyed.<sup>30</sup>

#### 6 **4. Analysis**

7 Here, Petitioner cannot be certain that the blood sample was exculpatory. He merely  
8 speculates that it might have shown he had been suffering from carbon monoxide poisoning on  
9 the afternoon of the shooting. Because the evidence was only potentially useful, in order to show  
10 a constitutional violation for the prosecution team’s failure to preserve the evidence, Petitioner  
11 must show that the prosecution team acted in bad faith when it failed to preserve the blood  
12 sample. This requires Petitioner to show that the prosecution team had knowledge that the blood  
13 sample had exculpatory value at the time it was destroyed.<sup>31</sup>

14 After Petitioner fell ill in the jail and was transported to the hospital, an emergency room  
15 doctor examined him for cardiac conditions, pneumonia, and toxic substance ingestion. (3 RT at  
16 530.) Petitioner’s blood and urine samples tested negative, except for “a minimal amount of  
17 blood alcohol.” (3 RT at 531, 535.) Although an audio recording of paramedics and jail staff  
18 captured speculation that Petitioner had poisoned himself, (1 CT at 150), the doctor did not order  
19 a carboxyhemoglobin test because he found no indication Petitioner was suffering from carbon  
20 monoxide poisoning, (3 RT at 531). The doctor concluded Petitioner had suffered an anxiety  
21 reaction. (3 RT at 535, 539-40.)

22 Given the doctor’s examination and diagnosis, there was no reason for the prosecution  
23 team to believe Petitioner’s blood held any exculpatory value, particularly as it related to carbon  
24 monoxide poisoning. Under these circumstances, Petitioner cannot show the prosecution team  
25

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26 <sup>27</sup> Id., at 489.

27 <sup>28</sup> 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

28 <sup>29</sup> Id., at 58.

<sup>30</sup> Id., at 56-57 n. \*.

<sup>31</sup> Id.

1 destroyed the blood sample in bad faith and, thus, cannot prove a violation of Trombetta and  
2 Youngblood.

3 Finally, because Petitioner has not shown any error in failing to preserve the blood  
4 sample, the trial court did not err by failing to instruct the jury regarding the destruction of the  
5 evidence.

6 Accordingly, this Court finds that the state courts' rejection of Petitioner's claim was  
7 neither contrary to, nor involved an unreasonable application of, clearly established federal law,  
8 as determined by the United States Supreme Court. Thus, habeas relief is not warranted on  
9 Claim Two.

10 **C. Instructional Error**

11 **1. Background**

12 In Claim Three, Petitioner argues the trial court erred by failing to instruct the jury that  
13 provocation and heat of passion can reduce a killing from first degree murder to second degree  
14 murder or voluntary manslaughter. (Petition at 6; MPA at 35-45.)

15 As with the other claims, the California Court of Appeal accurately detailed the  
16 procedural background related to Petitioner's claim:

17 a) **CALCRIM No. 522**

18 Defendant requested the trial court instruct the jury with an "imperfect  
19 heat of passion" instruction. The prosecutor asserted defendant was improperly  
20 modifying the provocation instruction to combine imperfect self-defense with  
21 heat of passion. (CALCRIM No. 522.) The prosecutor conceded defendant could  
22 have the jury instructed with the original version of CALCRIM No. 522, but not a  
23 modified version that combined two different theories. The original version of  
24 the instruction explains how provocation may reduce first degree murder to  
25 second degree murder or manslaughter. (CALCRIM No. 522.) The modification  
26 would have allowed for a heat of passion finding based upon a subjective  
27 standard, rather than an objective one.  
28

1           The prosecutor argued there was no evidence the victim verbally or  
2 physically provoked defendant to act rashly on the day of the murder. The  
3 prosecutor asserted the victim "was just standing there with a coat," and the  
4 information about Flores meeting defendant's daughters was exchanged eight  
5 hours prior to the murder so there could not be a provocation finding.

6           Defense counsel asserted the jury could find defendant was provoked  
7 because (1) defendant saw Clarke driving to the restaurant, and he was supposed  
8 to teach Clarke how to drive, so that experience was taken from him; (2) the  
9 victim "showed no remorse in regards to teaching Clarke how to drive"; (3) the  
10 victim told defendant she would be introducing Flores to defendant's daughters;  
11 and (4) defendant's overall life was stressful with his in-laws moving into the  
12 family home, defendant being forced to leave the family home, defendant living  
13 in fear at his rental home, defendant living with very few supplies in the rental  
14 home, and defendant being told his older children did not want to visit him.  
15 Counsel argued all these issues could be connected to the victim and the victim  
16 teaching Clarke how to drive was the last "straw."

17           The trial court found that none of the fear, disappointment, frustration,  
18 loss, or stress experienced by defendant constituted provocation, even if they were  
19 all combined. The trial court concluded it would instruct the jury on the lesser  
20 included offense of voluntary manslaughter, but not provocation. (CALCRIM  
21 No. 522.)

22           b)     CALCRIM No. 570

23           Defense counsel moved the trial court to instruct the jury with a modified  
24 version of CALCRIM No. 570, which concerns heat of passion voluntary  
25 manslaughter. Counsel asserted there was problematic burden-shifting language  
26 in the original version of the instruction, which counsel attempted to fix with  
27 modifications. The prosecutor asserted it would be inappropriate to change the  
28 language of the CALCRIM instruction. The trial court found defendant was

1 attempting to “stress portions of CALCRIM 570 that [were] not intended to be  
2 stressed.” The trial court declined to modify the instruction.

3 Defense counsel asserted the same evidence detailed *ante*, which would  
4 support a finding of provocation, would also support a heat of passion finding.  
5 The prosecutor asserted the victim’s mere presence was insufficient to support a  
6 heat of passion finding. The prosecutor asserted defendant and the victim were  
7 civil in making arrangements to meet and there was nothing indicating the victim  
8 said or did anything provocative at the restaurant parking lot.

9 The trial court ruled it would instruct the jury on heat of passion  
10 manslaughter. (CALCRIM No. 570.) The trial court commented that the  
11 evidence supporting a heat of passion finding was “extremely weak, but there is  
12 enough evidence.”

13 (Lodgment 7 at 21-23.)

14 **2. State Court Opinion**

15 The California Court of Appeal denied the claim on direct review, explaining:

16 Defendant contends the trial court erred by not instructing the jury that  
17 “even if the provocation was insufficient to *objectively* induce a heat of passion  
18 for purposes of manslaughter, a defendant’s *subjective* heat of passion response to  
19 provocation could reduce the crime from first to second degree murder by  
20 negating the existence of premeditation and deliberation.”

21 We review jury instructions de novo. (*People v. Jackson* (2010) 190  
22 Cal.App.4th 918, 923.) “We determine the correctness of the jury instructions  
23 from the entire charge of the court, not from considering only parts of an  
24 instruction or one particular instruction. [Citation.] The absence of an essential  
25 element from one instruction may be cured by another instruction or the  
26 instructions taken as a whole. [Citation.]” Further, in examining the entire charge  
27 we assume that jurors are ““intelligent persons and capable of understanding  
28

1 and correlating all jury instructions which are given.” [Citation.]” [Citations.]’  
2 [Citation.]” (*People v. Smith* (2008) 168 Cal.App.4th 7, 13.)

3 “The trial court is obligated to instruct the jury on all general principles of  
4 law relevant to the issues raised by the evidence, whether or not the defendant  
5 makes a formal request. [Citations.]” (*People v. Burney* (2009) 47 Cal.4th 203,  
6 250.) In *People v. Avila* (2009) 46 Cal.4th 680, our Supreme Court concluded a  
7 trial court did not err by failing to instruct the jury that provocation could affect  
8 the degree of murder. The Supreme Court wrote, “Although the court did not use  
9 the word “provocation” in regard to the degree of murder, it did instruct on “heat  
10 of passion.” It told the jury that for the killing to be first degree murder, it must  
11 not have been committed “under a sudden heat of passion or other condition  
12 precluding the idea of deliberation.” [Citation.] By specifically referring to heat  
13 of passion and generally referring to any other condition precluding deliberation,  
14 the court fully instructed on the law relevant to the actual evidence.” (*Id.* at pp.  
15 707-708.)

16 In the instant case, the trial court instructed the jury that “defendant acted  
17 deliberately if he carefully weighed the considerations for and against his choice  
18 and, knowing the consequences, decided to kill. The defendant acted with  
19 premeditation if he decided to kill before completing the acts that caused death.”  
20 (CALCRIM No. 521.) The court explained that if the prosecution did not prove  
21 these elements or the alternate theory of lying in wait, then the murder would be  
22 second degree.

23 In regard to heat of passion, the trial court informed the jury that it  
24 required defendant to have “acted rashly and under the influence of intense  
25 emotion that obscured his reasoning or judgment.” (CALCRIM No. 570.) The  
26 trial court further explained, “Heat of passion does not require anger, rage, or any  
27 specific emotion. It can be any violent or intense emotion that causes a person to  
28 act without due deliberation and reflection.” (CALCRIM No. 570.) The

1 instruction further set forth the rule that a heat of passion finding is not supported  
2 if a person could have “cool[ed] off” and regain[ed] his clear reasoning and  
3 judgment.” (CALCRIM No. 570.) In CALCRIM No. 521, the jury was  
4 informed, “A decision to kill made rashly, impulsively, or without careful  
5 consideration is not deliberate and premeditated.”

6 Given the totality of the instructions, the jury was adequately instructed  
7 that subjective factors affecting defendant’s decision-making skills would  
8 preclude a first degree murder verdict, similar to the situation in *People v. Avila*,  
9 *supra*. From the instructions, an intelligent juror, correlating the instructions,  
10 would understand that premeditation and deliberation require clear reasoning and  
11 judgment—that if the defendant’s thinking is obscured by emotion, then the  
12 premeditation and deliberation findings would be problematic. Accordingly,  
13 when reviewing the instructions as a whole, we conclude the trial court did not err  
14 because the instructions explained the relevance of a subjective heat of passion  
15 response to the jury as it relates to the degrees of murder.

16 Defendant asserts the foregoing alleged instructional error was further  
17 complicated by the trial court not defining second degree murder for the jury.  
18 Defendant’s argument is not persuasive because the trial court defined murder for  
19 the jury, explained how a killing qualified as first degree murder, and then  
20 explained that “all other murders are of the second degree.” The trial court’s  
21 instructions about second degree murder were reasonable. The instructions set  
22 forth the concept that if the definition of murder was met, but the first degree  
23 findings were not supported, then the murder would be second degree.

24 Accordingly, we find defendant’s argument to be unpersuasive.

25 (Lodgment 7 at 23-26.)

26 **3. Legal Standard**

27 Challenges to state jury instructions are generally questions of state law and the United  
28 States Supreme Court has established that alleged state law errors are not cognizable in habeas

1 corpus review.<sup>32</sup> In order to merit federal habeas relief on a claim that the trial court erred by  
2 failing to properly instruct a jury, a petitioner must show that the trial court committed an error  
3 that “so infected the entire trial that the resulting conviction violates due process.”<sup>33</sup> In making  
4 this determination, the jury instructions “may not be viewed in artificial isolation, but must be  
5 considered in the context of the instructions as a whole and the trial record.”<sup>34</sup> In addition, due  
6 process does not require that an instruction be given unless the evidence supports it,<sup>35</sup> and  
7 “[w]here the alleged error is the failure to give an instruction the burden on the petitioner is  
8 ‘especially heavy.’”<sup>36</sup>

9 A claim of instructional error is subject to harmless error analysis so long as the error at  
10 issue does not categorically “vitiate” all the jury’s findings,<sup>37</sup> such as when the instruction  
11 misdescribes the burden of proof.<sup>38</sup> An instructional error will be deemed harmless unless it had  
12 a “substantial and injurious effect or influence in determining the jury’s verdict.”<sup>39</sup>

#### 13 4. Analysis

14 First, the trial court instructed the jury pursuant to CALCRIM 570 that heat of passion,  
15 and the related concept of provocation, can reduce a murder to voluntary manslaughter. (2 CT at  
16 313.) Thus, Petitioner can complain only of the trial court’s refusal to instruct the jury pursuant  
17 CALCRIM 522 that provocation can reduce first degree murder to second degree murder, or its  
18 refusal to instruct the jury pursuant to Petitioner’s proposed modified version of CALCRIM 522  
19 that “imperfect” heat of passion can reduce first degree murder to second degree murder.  
20 However, the California Court of Appeal held that the trial court’s instructions adequately  
21 instructed the jury on the state law concept of “a subjective heat of passion response.” This court  
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23 <sup>32</sup> See *Estelle v. McGuire*, 502 U.S. 62, 71-72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

24 <sup>33</sup> *Id.* (internal quotation marks omitted).

25 <sup>34</sup> *Waddington v. Sarausad*, 555 U.S. 179, 191, 129 S. Ct. 823, 172 L. Ed. 2d 532 (2009) (internal quotation marks omitted).

26 <sup>35</sup> See *Menendez v. Terhune*, 422 F.3d 1012, 1029 (9th Cir. 2005) (no due process violation where state court correctly found that evidence did not support instruction at issue).

27 <sup>36</sup> *Hendricks v. Vasquez*, 974 F.2d 1099, 1106 (9th Cir. 1992) (as amended) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 155, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977)).

28 <sup>37</sup> *Doe v. Busby*, 661 F.3d 1001, 1021–22 (9th Cir. 2011).

<sup>38</sup> *Mendez v. Knowles*, 556 F.3d 757, 768 (9th Cir. 2009).

<sup>39</sup> *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

1 must defer to the state court's interpretation of state law and, thus, must accept its conclusion that  
2 the trial court adequately instructed the jury regarding the state legal concepts involved at trial.<sup>40</sup>

3 Moreover, Petitioner cannot show a due process violation based on the omission of an  
4 instruction that heat of passion or provocation can reduce a killing from first degree murder to  
5 second degree murder because the evidence did not support such an instruction. The evidence,  
6 as detailed here, showed that the victim amicably agreed to meet Petitioner to give him his  
7 jacket. The victim appeared at the designated time and place, and did not do or say anything that  
8 would have aroused Petitioner's emotions. To the extent Petitioner could have been upset about  
9 the marital separation generally or the discussion the couple had earlier in the day about the  
10 victim introducing her new love interest to the children, neither of these factors was sufficient to  
11 reduce Petitioner's culpability under state law. Although provocation can be comprised of  
12 "numerous incidents over a period of time," "the provocation [must be] sufficient to cause an  
13 ordinary person of average disposition to act rashly or without due deliberation and reflection."<sup>41</sup>  
14 The common stress related to the end of a marriage and one spouse's decision to begin a new  
15 romantic relationship is not sufficient to cause an ordinary person to act rashly or without due  
16 deliberation and reflection.

17 For these same reasons, even if Petitioner could show an instructional error, any error  
18 would be harmless. Because the evidence did not support the instruction Petitioner requested,  
19 the omission of the instruction could not have impacted the jury's verdict.

20 Accordingly, this Court finds that the state courts' rejection of Petitioner's instructional  
21 error claim was neither contrary to, nor involved an unreasonable application of, clearly  
22 established federal law, as determined by the United States Supreme Court. Thus, habeas relief  
23 is not warranted on Claim Three.

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27 <sup>40</sup> Bradshaw v. Richey, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) ("We have repeatedly held that a  
28 state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds  
a federal court sitting in habeas corpus.").

<sup>41</sup> People v. Wright, 242 Cal.App.4th 1461, 1481 (2015).

1 **D. Restitution**

2 Finally, in Claim Four, Petitioner argues the trial court abused its discretion by imposing  
3 a heavy restitution fine. (Petition at 6; MPA at 45.)

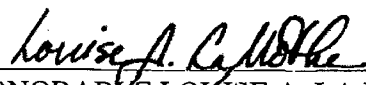
4 The federal writ of habeas corpus is available only to persons “in custody” at the time the  
5 petition is filed.<sup>42</sup> This requirement is jurisdictional.<sup>43</sup> The Ninth Circuit has explicitly held that  
6 “an attack on a restitution order is not an attack on the execution of a custodial sentence . . .  
7 [Thus,] § 2254(a) does not confer jurisdiction over a challenge to a restitution order.”<sup>44</sup> Because  
8 Petitioner’s claim challenges only the restitution portion of his sentence, the “custody”  
9 requirement of Section 2254(a) is not satisfied and the court does not have jurisdiction to  
10 entertain this claim. In addition, to the extent petitioner’s claim challenging his restitution order  
11 concerns a violation of state law only, petitioner has failed to state a cognizable federal habeas  
12 claim, as federal habeas relief does not lie for violations of state law.<sup>45</sup>

13 **VII.**

14 **RECOMMENDATION**

15 IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1)  
16 approving and accepting this Report and Recommendation; and (2) directing that Judgment be  
17 entered denying the Petition and dismissing this action with prejudice.

18  
19  
20 DATED: December 14, 2016

  
HONORABLE LOUISE A. LA MOTHE  
United States Magistrate Judge

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26 <sup>42</sup> 28 U.S.C. §§ 2241(c), 2254(a); Carafas v. LaVallee, 391 U.S. 234, 238, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968).

27 <sup>43</sup> Id.

<sup>44</sup> Bailey v. Hill, 599 F.3d 976, 983 (9th Cir.2010) (citing United States v. Kramer, 195 F.3d 1129 (9th Cir.1999)).

28 <sup>45</sup> Estelle v. McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir.1991) (“the issue for us, always, is whether the state proceedings satisfied due process; the presence or absence of a state law violation is largely beside the point”).

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