

EXHIBIT COVER PAGE

A

Exhibit

Description of exhibit DENIAL OF CERTIFICATE
OF APPEALABILITY by the UNITED STATES
COURT OF APPEAL

Number of pages to this exhibit 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 8 2017

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

JOSE WILSON GUZMAN,

Petitioner-Appellant,

v.

RAYMOND MADDEN,

Respondent-Appellee.

No. 17-55314

D.C. No. 5:15-cv-02038-RSWL
Central District of California,
Riverside

ORDER

Before: SILVERMAN and IKUTA, Circuit Judges.

The request for a certificate of appealability 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.

EXHIBIT COVER PAGE

B

Exhibit

Description of exhibit Opinion of the
UNITED STATES DISTRICT COURT.

Number of pages to this exhibit _____

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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13

14 JOSE WILSON GUZMAN,) Case No. EDCV 15-02038-RSWL (DTB)
15 Petitioner,)
16 vs.) ORDER ACCEPTING FINDINGS,
17 RAYMOND MADDEN, Warden,) CONCLUSIONS AND
18 Respondent.) RECOMMENDATIONS OF UNITED
19 STATES MAGISTRATE JUDGE

20 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the
21 records and files herein, and the Report and Recommendation of the United States
22 Magistrate Judge. Objections to the Report and Recommendation have been filed
23 herein. Having made a de novo determination of those portions of the Report and
24 Recommendation to which objections have been made, the Court concurs with and
25 accepts the findings, conclusions and recommendations of the Magistrate Judge.

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

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4 DATED: January 13, 2017

5 s/ RONALD S.W. LEW
6 RONALD S.W. LEW
7 UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE WILSON GUZMAN,

Petitioner,

VS.

RAYMOND MADDEN, Warden,

Respondent.

Case No. EDCV 15-02038-RSWL (DTB)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Ronald S. W. Lew, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On October 2, 2015, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (“Pet.”) herein. In accordance with the Court’s Order Requiring Response to Petition, and after one extension of time, respondent filed an

1 Answer to Petition for Writ of Habeas Corpus (“Ans.”) on December 15, 2015, along
2 with a supporting Memorandum of Points and Authorities (“Ans. Mem.”). On
3 January 15, 2016, petitioner filed his Traverse (“Reply”), along with a supporting
4 Memorandum of Points and Authorities (“Reply Mem.”).

5 Thus, this matter is now ready for decision. For the reasons discussed hereafter,
6 the Court recommends that the Petition be denied.

7 8 **PROCEDURAL HISTORY**

9 On February 4, 2013, a Riverside County Superior Court jury found petitioner
10 guilty of committing five sex offenses against three girls under the age of 14 years.
11 (1 Clerk’s Transcript on Appeal [“CT”] 272-78.) On April 5, 2013, the trial court
12 sentenced petitioner under the “One Strike” law to life without the possibility of
13 parole on count 1 and two 25 years-to-life terms on counts 4 and 5. Petitioner was
14 sentenced to four years on count 2 and one year on count 3, both terms to run
15 consecutive to count 1. (1 CT 279-80.)

16 Petitioner appealed his conviction and sentence to the California Court of
17 Appeal raising claims generally corresponding to Grounds One, Two, and Four of the
18 Petition herein. (Respondent’s Notice of Lodgment [“Lodgment”] No. 3.) In an
19 unpublished decision issued on October 23, 2014, the Court of Appeal affirmed the
20 judgment. (Lodgment No. 7.) Petitioner’s ensuing Petition for Review to the
21 California Supreme Court raising claims generally corresponding to Grounds One and
22 Two of the Petition herein was summarily denied without comment or citation of
23 authority on February 11, 2015. (Lodgment Nos. 8, 9.)

24 Petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme
25 Court on April 17, 2015, raising claims generally corresponding to Grounds Three and
26 Four of the Petition herein. That petition was summarily denied on June 24, 2015.
27 (Lodgment Nos. 15, 16.)

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SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

Since petitioner is not challenging the sufficiency of the evidence to support his convictions, the following summary is taken from the “Facts and Procedural History” section of the California Court of Appeal opinion (Lodgment No. 7 at 3-7) (footnote omitted):¹

A. The Sexual Assault of Doe 1 (May 7-8, 2011) [¶] On May 7, 2011, around 9:00 p.m., nine-year-old Doe 1’s mother went to work, leaving Doe 1 and her brother and sister home alone in the family’s apartment. After falling asleep, Doe 1 woke to a man, later identified as [petitioner], covering her mouth, telling her to be quiet. Doe 1 recalled little about what happened next; she recalled only that the man carried her out of her apartment, took her to his apartment, placed her on a bed, and began strangling her. She fell asleep again and awoke as [petitioner] left her lying in a grassy area near a residential street, in the middle of the night, more than two miles from her apartment. [¶] Feeling dizzy and confused, Doe 1 knocked on doors in the neighborhood where [petitioner] left her, looking for help. She told a woman she was lost and did not recall how she got there. The police were called and Doe 1 was taken to the hospital. She had extensive

¹ The Court notes that Ninth Circuit cases have accorded the factual summary set forth in an opinion of a state court a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). See Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009) (as amended); Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (as amended); Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008); Mejia v. Garcia, 534 F.3d 1036, 1039 n.1 (9th Cir. 2008). Petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. Here, petitioner does not contest the California Court of Appeal’s summary of the underlying facts, nor has he attempted to overcome the presumption of correctness accorded to it. Tilcock, 538 F.3d at 1141; see Reply at 3 (petitioner requesting that the Court to consider the facts as described in the Court of Appeal opinion).

1 injuries, including severe vaginal and anal tears requiring surgery. She
2 also had a broken hyoid bone in her throat and petechial hemorrhages
3 on her scalp, ears, neck, throat, upper chest, and back arms, all
4 consistent with having been strangled. The petechial hemorrhages in the
5 back of her throat were consistent with forced oral copulation. [¶] At
6 Doe 1's apartment, police found an open window and its screen was
7 propped against the exterior wall. [Petitioner's] fingerprints were on
8 the apartment front doorknob and bathroom doorknob. A surveillance
9 camera at Doe 1's apartment complex showed a man in dark clothing
10 walking up the stairs toward Doe 1's apartment, then walking down the
11 stairs with Doe 1 in his arms. Months earlier, [petitioner] rented a room
12 in Doe 1's apartment and moved out two to three months before Doe 1
13 was abducted and sexually assaulted. [¶] A surveillance camera at a
14 residence near where Doe 1 was found showed a dark-colored truck
15 driving with its headlights off, the same truck driving in the other
16 direction approximately 10 minutes later, and Doe 1 looking for help.
17 The next day, police detained [petitioner] as he was driving a black Ford
18 F-150 pickup truck. A replica of a handgun was found in the truck. [¶]
19 [Petitioner] agreed to be questioned at the police station. While there,
20 he drank from a styrofoam cup, and police extracted a DNA sample from
21 the saliva on the cup. The DNA from the saliva on the cup matched DNA
22 from [petitioner's] blood sample and DNA from semen in Doe 1's anus.
23 After the police collected the cup for evidence, [petitioner] became
24 visibly upset and said: "Oh, God. I asked for . . . that cup of water." [¶]
25 In [petitioner's] apartment, police found four pairs of girls' underwear
26 in the pocket of a sweatshirt, including the pair Doe 1 was wearing the
27 night she was abducted. A laptop computer in [petitioner's] room
28 contained thousands of pictures of preteen girls in sexually provocative

1 poses, and [petitioner's] cell phone showed multiple searches for Web
2 sites with pictures of preteen children in sexually provocative poses.

3 Doe 1's blood was found on a mattress in [petitioner's] apartment. [¶]

4 B. The Attempted Forcible Sexual Assault of Doe 2 (November 2008)

5 [¶] In November 2008, 12-year-old Doe 2 woke to a man kneeling at the
6 foot of her bed. The man told her to "shush," threatened to shoot her
7 father if she made a noise, pulled down her pajama pants and
8 underwear, and placed a gun against her. She pushed the man off of
9 her, ran out of the room, and called for her father as the man ran after
10 her, waving the gun. [¶] Doe 2's father heard Doe 2 screaming and
11 saw someone jumping out of the living room window. Police found three
12 fingerprints matching [petitioner's] fingerprints around the open living
13 room window, and the window screen was propped against the side of
14 the house. [¶] C. The Forcible Sexual Assault of Doe 3 (September

15 2008) [¶] In September 2008, 12-year-old Doe 3 woke and saw a man
16 in her bedroom wearing dark clothing. The man pulled on her legs and
17 she tried to kick him away. He pulled her shorts and underwear off,
18 licked her vagina, and turned her over and tried to get on top of her.
19 Doe 3 screamed for her father, and the man said he was her father. The
20 man put his finger into her anus and her vagina as he kissed her
21 buttocks. He tried to put his penis in her mouth, but she resisted. [¶]
22 Doe 3 screamed for her father again, and the man began strangling her.
23 After she continued to resist, the man left. Doe 3 woke her family and
24 the police were called. Doe 3 was taken to the hospital and had
25 overstretched tissues in her genital area, consistent with having been
26 sexually assaulted. [Petitioner's] DNA matched DNA in saliva on Doe
27 3's buttocks. Outside Doe 3's house, the police found an open bathroom
28 window with its screen removed. [¶] D. The Amended Information [¶]

1 As indicated, at the close of the prosecution's case, the court indicated
 2 it would grant [petitioner's] section 1118.1 motion to dismiss the charge
 3 in count 3 of attempting to murder Doe 1 based on insufficient evidence
 4 [petitioner] intended to kill Doe 1. Immediately thereafter, however, the
 5 court granted the prosecution's motion to amend count 3 to charge
 6 [petitioner] with assaulting Doe 1 with great bodily injury (§ 245, subd.
 7 (a)(1)) in lieu of the attempted murder charge. [¶] Additionally, the
 8 court allowed the prosecution to amend count 4 to charge an attempted
 9 forcible lewd act on Doe 2 (§§ 664, 288, subd. (b)(1)), rather than a
 10 (completed) forcible lewd act, as previously charged. Two other counts
 11 were dismissed, and the prosecutor filed an amended information. [¶]
 12 The amended information charged [petitioner] in five counts:
 13 aggravated sexual assault of Doe 1 by means of forcible sexual
 14 penetration (§§ 269, subd. (a)(5), 289, subd. (a); count 1), assault with
 15 great bodily injury on Doe 1 (§ 245, subd. (a)(1)); count 2), attempted
 16 forcible lewd act on Doe 2 (§§ 664, 288, subd. (b)(1); count 3),
 17 aggravated sexual assault of Doe 3 by means of forcible oral copulation
 18 (§§ 269, subd. (a)(4), 288a, subd. (c)(2) or (3) or subd. (d); count 4), and
 19 aggravated sexual assault of Doe 3 by means of sexual penetration (§§
 20 269, subd. (a)(5), 289, subd. (a); count 5). One Strike law sentencing
 21 enhancements were alleged in counts 1, 4, and 5. (§ 667.61.) [¶] E.
 22 Verdicts and Sentencing [¶] The jury found [petitioner] guilty as
 23 charged in counts 1 through 5 of the amended information, and found
 24 the One Strike allegations on counts 1, 4, and 5 true. [Petitioner] was
 25 sentenced to life without parole on count 1, consecutive 25-year-to-life
 26 terms on counts 4 and 5, four years on count 2, and one year on count
 27 3, consecutive to count 1. The court imposed but stayed a \$200 parole
 28 revocation fine. (§ 1202.45.)

PETITIONER'S CLAIMS HEREIN

1. The imposition of California's One Strike Law violated petitioner's Eighth Amendment rights because California Penal Code section 269 is not a qualifying offense. (Pet. at 5, 9-16.)²

2. The trial court's failure to instruct on an essential element of California Penal Code section 288 (b)(1), which requires the use of force or fear, violated petitioner's right of trial by jury and due process. (Pet. at 5, 17-19.)

3. Trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment by failing to subject the prosecution's case to meaningful adversarial testing, by failing to investigate possible defenses and prepare the case for trial, and by failing to move for a mistrial. (Pet. at 5-6, 20-23.)

4. The trial court violated due process by permitting the prosecution to amend the accusatory pleading. (Pet. at 6, 24-30.)

STANDARD OF REVIEW

The standard of review applicable to petitioner's claims herein is set forth in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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

² The Court has followed petitioner's sequential numbering of his "Appendix," which immediately follows his Petition and starts at page 9.

1 unreasonable determination of the facts in light of the evidence presented
 2 in the State court proceeding.

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 4 Under the AEDPA, the “clearly established Federal law” that controls federal
 5 habeas review of state court decisions consists of holdings (as opposed to dicta) of
 6 Supreme Court decisions “as of the time of the relevant state-court decision.”
 7 Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); see
 8 also Howes v. Fields, 565 U.S. 499, 505, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012);
 9 Greene v. Fisher, 565 U.S. 34, 40, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011); Carey v.
 10 Musladin, 549 U.S. 70, 74, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

11 Although a particular state court decision may be “contrary to” and “an
 12 unreasonable application of” controlling Supreme Court law, the two phrases have
 13 distinct meanings. Williams, 529 U.S. at 391, 413. A state court decision is “contrary
 14 to” clearly established federal law if the decision either applies a rule that contradicts
 15 the governing Supreme Court law, or reaches a result that differs from the result the
 16 Supreme Court reached on “materially indistinguishable” facts. Brown v. Payton, 544
 17 U.S. 133, 141, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005); Early v. Packer, 537 U.S.
 18 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam); Williams, 529 U.S. at
 19 405-06. When a state court decision adjudicating a claim is contrary to controlling
 20 Supreme Court law, the reviewing federal habeas court is “unconstrained by §
 21 2254(d)(1).” Williams, 529 U.S. at 406. However, the state court need not cite or
 22 even be aware of the controlling Supreme Court cases, “so long as neither the
 23 reasoning nor the result of the state-court decision contradicts them.” Packer, 537
 24 U.S. at 8.

25 State court decisions that are not “contrary to” Supreme Court law may only be
 26 set aside on federal habeas review “if they are not merely erroneous, but ‘an
 27 unreasonable application’ of clearly established federal law, or based on ‘an
 28 unreasonable determination of the facts.’” Packer, 537 U.S. at 11 (citing 28 U.S.C.

§ 2254(d) and adding emphasis). A state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. See Williams, 529 U.S. at 406-10, 413 (e.g., the rejected decision may state Strickland rule correctly but apply it unreasonably); Woodford v. Visciotti, 537 U.S. 19, 24-27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (per curiam). However, to obtain federal habeas relief for such an “unreasonable application,” a petitioner must show that the state court’s application of Supreme Court law was “objectively unreasonable.” Visciotti, 537 U.S. at 24-27; Williams, 529 U.S. at 413. An “unreasonable application” is different from an erroneous or incorrect one. See Williams, 529 U.S. at 409-11; see also Visciotti, 537 U.S. at 25; Bell v. Cone, 535 U.S. 685, 699, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). “To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on ‘an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’” Metrish v. Lancaster, 569 U.S. —, 133 S. Ct. 1781, 1786-87, 185 L. Ed. 2d 988 (2013) (quoting Harrington v. Richter, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)). Moreover, as the Supreme Court held in Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), review of state court decisions under § 2254(d)(1) “is limited to the record that was before the state court that adjudicated the claim on the merits.”

In Richter, 562 U.S. at 99, the Supreme Court held that a summary denial order will be presumed to be a merits determination “in the absence of any indication or state-law procedural principles to the contrary.” The Supreme Court further held that the AEDPA standard of review applies to such summary denial orders. See id. at 98.³

³ However, the Supreme Court did not state in Richter that it was overruling any existing Supreme Court jurisprudence. For example, under existing Supreme Court jurisprudence, when a state court in a reasoned decision denies an ineffective assistance of counsel claim without ever reaching the issue of prejudice, (continued...)

1 “Where a state court’s decision is unaccompanied by an explanation, the habeas
2 petitioner’s burden still must be met by showing there was no reasonable basis for the
3 state court to deny relief.” Id.; see also Pinholster, 563 U.S. at 187 (“Section 2254(d)
4 applies even where there has been a summary denial.”). “A habeas court must
5 determine what arguments or theories could have supported the state court’s decision;
6 and then it must ask whether it is possible fairminded jurists could disagree that those
7 arguments or theories are inconsistent with the holding in a prior decision of this
8 Court.” Pinholster, 563 U.S. at 188 (quoting Richter, 562 U.S. at 102 (internal
9 quotation marks and alterations omitted)). As such, “when the state court does not
10 supply reasoning for its decision,” the federal court must conduct an “independent
11 review of the record and ascertain whether the state court’s decision was objectively
12 unreasonable.” Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 2013) (internal
13 quotation marks and citation omitted); see also Murray v. Schriro, 745 F.3d 984, 996
14 (9th Cir. 2014).

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22 ³(...continued)

23 the AEDPA does not circumscribe federal habeas review of the prejudice issue, which
24 is considered de novo. See Rompilla v. Beard, 545 U.S. 374, 390, 125 S. Ct. 2456,
25 162 L. Ed. 2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 534, 123 S. Ct. 2527, 156
26 L. Ed. 2d 471 (2003). Similarly, when a state court in a reasoned decision denies an
27 ineffective assistance claim without ever reaching the issue of deficient performance,
28 the deficient performance issue is reviewed de novo. See Porter v. McCollum, 558
U.S. 30, 39, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (per curiam).

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1 decisions in the exercise of reasonable professional judgment.” Id. at 689-90.
2 Further, petitioner “must identify the acts or omissions of counsel that are alleged not
3 to have been the result of reasonable professional judgment.” Id. at 690. The Court
4 must then “determine whether, in light of all the circumstances, the identified acts or
5 omissions were outside the range of professionally competent assistance.” Id. The
6 Supreme Court in Strickland recognized that “it is all too easy for a court, examining
7 counsel’s defense after it has proved unsuccessful, to conclude that a particular act or
8 omission of counsel was unreasonable.” Id. at 689. Accordingly, to overturn the
9 strong presumption of adequate assistance, petitioner must demonstrate that “the
10 challenged action cannot reasonably be considered sound trial strategy under the
11 circumstances of the case.” Lord v. Wood, 184 F.3d 1083, 1085 (9th Cir. 1999).⁵

12 To meet his burden of showing the distinctive kind of “prejudice” required by
13 Strickland, petitioner must affirmatively “show that there is a reasonable probability
14 that, but for counsel’s unprofessional errors, the result of the proceeding would have
15 been different. A reasonable probability is a probability sufficient to undermine
16 confidence in the outcome.” Strickland, 466 U.S. at 694; see also Lockhart v.
17 Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (noting that the
18 “prejudice” component “focuses on the question whether counsel’s deficient
19 performance renders the result of the trial unreliable or the proceeding fundamentally
20 unfair”).

21 In Richter, the Supreme Court reiterated that the AEDPA requires an additional
22 level of deference to a state court decision rejecting an ineffective assistance of
23 counsel claim. “The pivotal question is whether the state court’s application of the
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25 ⁵ Because the standard for “deficient performance” is an objective one, a
26 reviewing court is not confined to evidence of counsel’s subjective state of mind,
27 “[a]lthough courts may not indulge [in] ‘*post hoc* rationalization’ for counsel’s
28 decisionmaking that contradicts the available evidence of counsel’s actions.” Richter,
562 U.S. 109 (emphasis in original).

1 Strickland standard was unreasonable. This is different from asking whether defense
2 counsel's performance fell below Strickland's standard." Richter, 562 U.S. at 101.
3 "Under § 2254(d), a habeas court must determine what arguments or theories
4 supported or . . . could have supported, the state court's decision; and then it must ask
5 whether it is possible fairminded jurists could disagree that those arguments or
6 theories are inconsistent with the holding in a prior decision of this Court." Id. at 102.
7 As the Supreme Court observed in Richter (id. at 105):

8 "Surmounting Strickland's high bar is never an easy task." Padilla
9 v. Kentucky, 559 U.S. ----, ----, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284
10 (2010). An ineffective-assistance claim can function as a way to escape
11 rules of waiver and forfeiture and raise issues not presented at trial, and
12 so the Strickland standard must be applied with scrupulous care, lest
13 "intrusive post-trial inquiry" threaten the integrity of the very adversary
14 process the right to counsel is meant to serve. Strickland, 466 U.S., at
15 689-690, 104 S. Ct. 2052. Even under *de novo* review, the standard for
16 judging counsel's representation is a most deferential one. Unlike a later
17 reviewing court, the attorney observed the relevant proceedings, knew
18 of materials outside the record, and interacted with the client, with
19 opposing counsel, and with the judge. It is "all too tempting" to
20 "second-guess counsel's assistance after conviction or adverse sentence."
21 Id., at 689, 104 S. Ct. 2052; see also Bell v. Cone, 535 U.S. 685, 702,
22 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); Lockhart v. Fretwell, 506
23 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question
24 is whether an attorney's representation amounted to incompetence under
25 "prevailing professional norms," not whether it deviated from best
26 practices or most common custom. Strickland, 466 U.S., at 690, 104 S.
27 Ct. 2052.

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1 Establishing that a state court's application of Strickland was
2 unreasonable under § 2254(d) is all the more difficult. The standards
3 created by Strickland and § 2254(d) are both "highly deferential," id., at
4 689, 104 S. Ct. 2052; Lindh v. Murphy, 521 U.S. 320, 333, n. 7, 117 S.
5 Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem,
6 review is "doubly" so, Knowles, 556 U.S., at ----, 129 S. Ct. at 1420.
7 The Strickland standard is a general one, so the range of reasonable
8 applications is substantial. 556 U.S., at ----, 129 S. Ct. at 1420. Federal
9 habeas courts must guard against the danger of equating
10 unreasonableness under Strickland with unreasonableness under §
11 2254(d). When § 2254(d) applies, the question is not whether counsel's
12 actions were reasonable. The question is whether there is any reasonable
13 argument that counsel satisfied Strickland's deferential standard.
14

15 B. Analysis

16 Here, petitioner's ineffective assistance of counsel claim was raised only in a
17 collateral attack filed in the California Supreme Court and was denied in a summary
18 order. As previously described, "when the state court does not supply reasoning for
19 its decision," the federal court must conduct an "independent review of the record and
20 ascertain whether the state court's decision was objectively unreasonable." Walker,
21 709 F.3d at 939; see also Murray, 745 F.3d at 996.
22

23 1. Failure to investigate and call witnesses

24 Petitioner, without any factual support, claims that counsel "failed to make an
25 adequate investigation of the facts related to the alleged crimes and possible defenses,
26 and allowed the petitioner to go to trial with insufficient preparation." (Pet. at 21.)
27 Petitioner also contends that this lack of preparation "may result in the unjustified
28 failure to call material witnesses for the defense." (Id.) In his Petition however,

petitioner fails to identify any witness favorable to his defense who counsel unreasonably neglected to call and also fails to identify any defense that trial counsel failed to explore or present. Vague and conclusory allegations do not warrant habeas relief as they do not meet the specificity requirement. See Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995) (conclusory allegations unsupported by a statement of specific facts do not warrant habeas relief); see also Murtishaw v. Woodford, 255 F.3d 926, 939 (9th Cir. 2001) (“The defendant bears the heavy burden of proving that counsel’s assistance was neither reasonable nor the result of sound trial strategy.”); James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (rejecting ineffective assistance of counsel claim where the petitioner failed to identify what evidence counsel should have presented which would have aided him); see also Blackledge v. Allison, 431 U.S. 63, 75 n.7, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977) (“the petition is expected to state facts that point to a real possibility of constitutional error” (citation and internal quotation marks omitted)).

In his Reply, petitioner identifies “Delia Lopez” as a potential witness for the defense. (Reply at 12.) Lopez, petitioner claims, was petitioner’s “exliving partner” who lived where the alleged victim Doe 3’s underwear were found.⁶ (Id.) He claims that she would have testified that the underwear used in evidence belonged to her daughter, a fact which police knew. (Id.) He also claims that she could have testified that they were together on the night of Doe 1’s assault. Also, in his Reply, petitioner identifies a man he claims was questioned by police at the scene where Doe 1 was left following her abduction, asserting that his counsel should have investigated or interviewed him. (Reply Mem. at 13.) The Court notes that many of the arguments

⁶ The record reflects that four pairs of girls’ underwear were found inside a white sweatshirt at petitioner’s residence. (1 RT 120-21.) One of the pair of underwear with peace signs and hearts (People’s Exhibit No. 5), belonged to Doe 1. (1 RT 120, 4 RT 608.) The Court assumes that petitioner was simply mistaken in referencing Doe 3 in this claim. (Reply at 12.)

1 made in petitioner's Reply were not so well articulated in his habeas petition before
2 the California Supreme Court, arguably rendering those aspects of the ineffective
3 assistance of counsel claim unexhausted. While petitioner did raise, generally, trial
4 counsel's failure to call witnesses in his collateral challenge in the California Supreme
5 Court, he did not specifically identify the witnesses whom he claims counsel should
6 have called. (Lodgment No. 10.) In the absence of those specific factual allegations,
7 the California Supreme Court was not on notice of the operative facts on which the
8 claim was based, arguably rendering the claim, as clarified in the Reply, unexhausted.
9 Duncan v. Henry, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995)
10 (per curiam) (A claim has not been fairly presented to a state court unless the
11 petitioner has described both the operative facts and the federal legal theory on which
12 the claim is based.); Greenway v. Schriro, 653 F.3d 790, 801 (9th Cir. 2011)
13 (Exhaustion requires that the petitioner present both the factual and legal basis for his
14 claim to the highest state court.)

15 Moreover, ineffective assistance of counsel claims based upon uncalled
16 witnesses are not favored in habeas corpus petitions because the presentation of
17 witness testimony is essentially strategic and, thus, within trial counsel's domain. See
18 Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985); Lord, 184 F.3d at 1095
19 ("Few decisions a lawyer makes draw so heavily on professional judgment as whether
20 or not to proffer a witness at trial."). In order to show ineffective assistance of counsel
21 based on the failure to call a witness, the defendant must show that the particular
22 witness was willing to testify, see United States v. Harden, 846 F.2d 1229, 1231-32
23 (9th Cir. 1988); what his or her testimony would have been, see United States v.
24 Berry, 814 F.2d 1406, 1409 (9th Cir. 1987); and that his or her testimony would have
25 been sufficient to create a reasonable probability that the jury would have had a
26 reasonable doubt concerning the petitioner's guilt, see Tinsley v. Borg, 895 F.2d 520,
27 532 (9th Cir. 1990). Generally, this requires the submission of affidavits from the
28 witnesses themselves. See Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000); Harden,

1 846 F.2d at 1231-32 (denying ineffective assistance of counsel claim based on failure
2 to call a witness because “[t]here is no evidence in the record which establishes that
3 [the witness] would [have] testif[ied]”). Here, in his Petition, as in his collateral
4 challenge in the California Supreme Court, petitioner has failed to even identify the
5 witnesses he claims counsel should have called. On this record, the Court is precluded
6 from finding that relief is warranted.

7 Even if this Court were to consider the ineffective assistance of counsel claim
8 based on trial counsel’s failure to call Dalia Lopez and the man at the police station,
9 relief still would not be warranted. Without any affidavit to support his claim,
10 petitioner asserts that Delia Lopez “would have testified” that the underwear found at
11 his residence belonged to her daughter. Even if this Court were to take his assertion
12 at face value, he cannot succeed on this claim. While it is true that forensic evidence
13 could not link three pairs of girls’ underwear found in petitioner’s apartment to Doe
14 1 (4RT 605-06), DNA evidence presented at trial established that Doe 1’s DNA was
15 the likely contributor to one pair of the underwear – the one with peace signs and
16 hearts – that was recovered from petitioner’s residence. (4RT 606-09.) DNA
17 evidence was also presented showing that the semen found in Doe 1’s anus matched
18 petitioner’s DNA, which was taken from a styrofoam cup at the police station. (1 RT
19 134-35, 4RT 584-85, 588-91, 599.) Doe 1 had also told an officer that the night that
20 she was abducted, she was wearing little pink and white panties with peace signs on
21 them. (4 RT 650.) Thus, even if it were true that the three pairs of underwear
22 belonged to Lopez’s daughter and she had so testified at trial, in the face of DNA
23 evidence linking the fourth pair of underwear to Doe 1, the Court finds no reasonable
24 possibility that the jury would have had a reasonable doubt as to petitioner’s guilt.
25 Indeed, the ownership of the three other pairs of underwear was largely irrelevant
26 once the DNA showed that the one pair belonged to Doe 1. Alternatively, if petitioner
27 means to suggest that all four pairs of underwear belonged to Lopez’s daughter, the
28 DNA evidence would have contradicted such testimony. In the face of that evidence,

1 there is no reasonable probability the jury would have had reasonable doubts about
2 petitioner's guilt.

3 Petitioner also claims that Lopez would have testified that on the night Doe 1
4 was assaulted, petitioner had been with Lopez. Again, petitioner provides no affidavit
5 to support his contention that Lopez would have testified to this effect. Importantly,
6 video surveillance presented at trial showed, at approximately 10:57 p.m., a figure in
7 dark clothing approaching the stairs that lead to Doe 1's apartment. The dark figure
8 walked up the stairs, then came down the stairs carrying a small person around 11:35
9 p.m. (1 RT 87-88.) In another video from that night, at a residential location 3-5
10 miles away from Doe 1's apartment, a black truck generally matching petitioner's
11 truck appears making a couple of passes, and initially coming into camera view with
12 its headlights off. That video also showed a small person knocking on the doors of
13 homes. (1 RT 90; 2 RT 334.) Police responded to the call of Doe 1 wandering in the
14 same area of that second video surveillance around 12:50 a.m. (1 RT 55.) Petitioner
15 has provided no details regarding the time period which Lopez would have provided
16 an alibi for him. Indeed, petitioner may well have been with Lopez for some portion
17 of the night, but unless she was willing to testify that they were together during the
18 time the crime occurred, her testimony would not have helped petitioner's defense.
19 Furthermore, even if she had testified that she was with him the entire night, the jury
20 would have been left weighing Lopez's testimony against the DNA evidence –
21 including petitioner's semen in Doe 1's anus and her underwear found in his residence
22 – and the fact that Doe 1's blood was found on the mattress at petitioner's home. (4
23 RT 600-03.) On this record, there is no reasonable probability that a jury would have
24 had a reasonable doubt about petitioner's guilt had Lopez testified that petitioner was
25 with her on the night Doe 1 was assaulted.

26 With respect to petitioner's claim that defense counsel failed to interview a man
27 who was seen and interviewed by police at the scene where Doe 1 was left (Reply at
28 13), petitioner has wholly failed to identify any favorable evidence this witness would

1 have proffered at trial. James, 24 F.3d at 26 (rejecting ineffective assistance of
2 counsel claim where the petitioner failed to identify what evidence counsel should
3 have presented which would have aided him.)

4
5 2. Failure to move for a mistrial

6 Petitioner also alleges that counsel was ineffective in failing to move for a
7 mistrial based on the prosecutor's "comparison" of Cal Penal Code § 602.5 to § 459.
8 (Pet. at 22.) Petitioner claims that the prosecutor made a "personal" interpretation of
9 § 602.5 (aggravated trespass), comparing it to § 459 (burglary), which violated
10 petitioner's ability to present a defense. (Pet. at 22.) Petitioner has failed to identify
11 where in the record this "interpretation" occurred or how, exactly, it resulted in a
12 denial of his ability to present a defense. Jones, 66 F.3d at 204-05 (conclusory
13 allegations unsupported by a statement of specific facts do not warrant habeas relief).
14 He has also failed to show that any motion for a mistrial would have been granted.
15 See, e.g., James, 24 F.3d at 27 (failure to make a futile motion does not constitute
16 ineffective assistance of counsel); Shah v. United States, 878 F.2d 1156, 1162 (9th
17 Cir. 1989) (failure to raise meritless legal argument does not constitute ineffective
18 assistance of counsel). On this record, the Court has no basis for finding the
19 California Supreme Court's rejection of this claim was contrary to, or an unreasonable
20 application of, clearly established Supreme Court authority.

21
22 3. Other allegations made only in the Reply

23 Petitioner also makes a number of allegations only in his Reply, which are
24 aimed at trial counsel's alleged failures during the course of the trial court
25 proceedings. Petitioner claims that trial counsel failed to: (1) Present mitigating
26 evidence at petitioner's sentencing; (2) challenge the fingerprint evidence by arguing
27 that petitioner had once lived at the location where the fingerprints were found on the
28 doorknob of Doe 1's apartment, and that he occasionally visited that home; (3) point

1 out the inconsistency of the allegation that the second assault involved a weapon but
2 the first and third did not; and (4) argue that the sentence of life without the possibility
3 of parole did not apply to the charges of which petitioner was convicted. (Reply at
4 13.) As these allegations are not made in support of either aspect of the ineffective
5 assistance of counsel claim raised in his Petition (*i.e.*, failure to investigate and call
6 witnesses, and failure to make a motion for mistrial), and are raised only and for the
7 first time in petitioner's Reply, the Court declines to consider these claims. See
8 Cacoperdo, 37 F.3d at 507.

9
10 4. Conclusion

11 On this record, the Court has no basis for finding that the state court's denial
12 of petitioner's ineffective assistance of counsel claim(s) on collateral review was
13 contrary to, or an unreasonable application of, clearly established Supreme Court
14 authority. Accordingly, petitioner is not entitled to habeas relief on this claim.

15
16 **II. Habeas relief is not warranted with respect to petitioner's claim that his**
17 **right to due process was violated by the prosecution's amendment of the**
18 **information (Ground Four).**

19 Petitioner contends that the trial court violated due process by permitting the
20 prosecution to amend the accusatory pleading. (Pet. at 6, 24-30.)

21
22 A. The record below

23 At trial, after the close of the prosecution's case-in-chief, defense counsel made
24 a motion to dismiss then count 3, attempted murder. (4 RT 717-21.) The trial court
25 granted the motion, finding insufficient evidence of an intent to kill. (4 RT 719-21.)
26 The prosecution then sought to substitute assault with great bodily injury of Doe 1 in
27 place of attempted murder because that charge was not supported by the preliminary
28 hearing evidence. (4 RT 721.) The following exchange occurred (4 RT 721-22):

1 The trial court: I have been thinking about that, and I am inclined to let you
2 do that. I'll hear from the defense. It can't really be a
3 surprise to the defense given the nature of the injuries. It's
4 probably more of a surprise that I granted the 1118.1, but it
5 seems to me that there was an assault and with force likely
6 to create bodily injury, it did in fact create bodily injury. It
7 broke the bone in her throat, which I think by any standard
8 would be great bodily injury. Can you explain why I
9 shouldn't allow the amendment?

10 Defense counsel: I'd just formally object on the record that the jury has
11 already been read the Information at the outset. Submit to
12 the Court.

13 The trial court: All right. Then I'm going to permit you to amend Count 3
14 to a 245.
15

16 Petitioner claims that his constitutional due process right to notice was denied
17 when the trial court allowed this amendment to the Information because the
18 preliminary hearing evidence did not support the amended charge. Petitioner
19 maintains that assault with intent to commit great bodily injury is not a lesser included
20 offense of attempted murder. (Pet. at 28-30.)
21

22 B. The California Court of Appeal opinion⁷

23 The California Court of Appeal rejected this claim as follows (Lodgment No.
24 7 at 8-10):
25

26 ⁷ See Ylst v. Nunnemaker, 501 U.S. 797, 803-04, 111 S. Ct. 2590, 115 L.
27 Ed. 2d 706 (1991) ("Where there has been one reasoned state judgment rejecting a
28 federal claim, later unexplained orders upholding that judgment or rejecting the same
claim rest upon the same ground.").

1 *[Petitioner] claims the trial court abused its discretion and*
2 *violated his due process rights in allowing the prosecutor to amend the*
3 *information, following its case-in-chief, to charge him with assaulting*
4 *Doe 1 by means of force likely to produce great bodily injury in count 2*
5 *(formerly count 3), in lieu of her attempted murder. In allowing the*
6 *amendment, the court noted the assault charge would not “really be a*
7 *surprise to the defense given the nature of [Doe 1’s] injuries.” Defense*
8 *counsel objected, stating: “I’d just formally object on the record that the*
9 *jury has already been read the Information at the outset.” [¶] “Due*
10 *process requires that ‘an accused be advised of the charges against him*
11 *so that he has a reasonable opportunity to prepare and present his*
12 *defense and not be taken by surprise by evidence offered at his trial.’*
13 *[Citation.] Thus, it is the rule that ‘a defendant may not be prosecuted*
14 *for an offense not shown by the evidence at the preliminary hearing or*
15 *arising out of the transaction upon which the commitment was based.’*
16 *[Citations.]” (People v. Graff (2009) 170 Cal.App.4th 345, 360.) [¶]*
17 *“In accordance with this rule, our Supreme Court has interpreted*
18 *sections 739 and 1009 to “‘permit amendment of the information to add*
19 *charges . . . which are supported by the actual evidence at the*
20 *preliminary hearing, provided the facts show due notice by proof to the*
21 *accused.” [Citations.]’ [Citations.] ‘Under section 739, “[t]he law is*
22 *settled that unless the magistrate makes factual findings to the contrary,*
23 *the prosecution may amend the information after the preliminary*
24 *hearing to charge any offense shown by the evidence adduced at the*
25 *preliminary hearing provided the new crime is transactionally related*
26 *to the crimes for which the defendant has previously been held to*
27 *answer.” [Citations.] “Under the case law interpreting section 1009, the*
28 *test applied is whether or not the amendment changes the offense*

1 charged to one not shown by the evidence taken at the preliminary
2 examination. [Citation.]” [Citation.]” (People v. McCoy (2013) 215
3 Cal.App.4th 1510, 1531.) [¶] We review the court’s accession to an
4 amendment to the information, including the addition of counts, for an
5 abuse of discretion. (People v. Arevalo-Iraheta (2011) 193 Cal.App.4th
6 1574, 1581 [Fourth Dist., Div. Two].) Here, there was no due process
7 violation or abuse of discretion. At the preliminary hearing, Riverside
8 Police Detective Roberta Hopewell testified she interviewed Doe 1, who
9 recalled being awakened by a man who carried her away and
10 “chok[ed]” her. Detective Hopewell also spoke with medical
11 professionals who examined Doe 1 after she was taken to the hospital
12 and described the severe vaginal tearing she suffered, all the way to her
13 anus, and the petechial hemorrhages on her scalp, neck, and upper body.
14 The detective also testified that DNA and other evidence identified
15 [petitioner] as the person who abducted and sexually assaulted Doe 1.
16 [¶] All of this evidence was presented in the prosecution’s case-in-chief,
17 before the court allowed the amendment. As the court pointed out, the
18 aggravated assault charge was not “a surprise to the defense given the
19 nature of [Doe 1’s] injuries.” Indeed, the new charge was not a surprise
20 to [petitioner] given all the evidence adduced at the preliminary hearing
21 and at trial. [¶] [Petitioner] argues the court abused its discretion in
22 allowing the amendment simply because assault by means of force likely
23 to produce great bodily injury is not a lesser included offense of
24 attempted murder. But this does not mean there was an abuse of
25 discretion or due process violation. The aggravated assault charge was
26 shown by the evidence taken at the preliminary hearing (§ 1009) and
27 was transactionally related to the attempted murder charge (§ 739).
28 Further, [petitioner] had adequate notice and opportunity to defend

1 *against the aggravated assault charge, based on the evidence taken at*
2 *the preliminary hearing, and no evidence was presented during trial that*
3 *was substantially different from the evidence presented at the*
4 *preliminary hearing.*

5
6 C. Analysis

7 The Sixth Amendment to the United States Constitution provides, in pertinent
8 part that, “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be
9 informed of the nature and cause of the accusation.” The United States Supreme
10 Court has found that, “[a] defendant’s right to notice of the charges against which he
11 must defend is well established.” Gray v. Netherland, 518 U.S. 152, 168, 116 S. Ct.
12 2074, 135 L. Ed. 2d 457 (1996); Jackson v. Virginia, 443 U.S. 307, 314, 99 S. Ct.
13 2781, 61 L. Ed. 2d 560 (1979) (“[A] person cannot incur the loss of liberty for an
14 offense without notice and a meaningful opportunity to defend.”); cf. Lopez v. Smith,
15 574 U.S. —, 135 S. Ct. 1, 4, 190 L. Ed. 2d 1 (2014) (finding that a general rule that a
16 defendant must have adequate notice of the charges against him did not extend to
17 adequate notice of a particular theory of liability).

18 Here, the preliminary hearing testimony gave petitioner the notice required by
19 the Sixth Amendment. The preliminary hearing was held on January 27, 2012, a year
20 before the trial. With respect to the assault on Doe 1, Detective Roberta Hopewell
21 testified that she had spoken to Doe 1 on May 8, 2011 regarding “incidents” that
22 occurred the night before. (1 CT 42-43.) Doe 1 told her that she went to bed
23 around 10:00 or 11:00 p.m. and woke up to someone choking her. That person picked
24 her up out of bed and she could not recall where she went from there. Doe 1 told her
25 that she “fell back asleep.” (1 CT 43.) Next, Doe 1 remembered being put into “a
26 car” and falling back asleep again. She described going in and out of sleep and the
27 next thing she remembered was a man taking her out of the car and putting her on
28 grass. The detective testified that Doe 1 was found in a residential area. (1 CT 44.)

1 The detective spoke with a doctor who was a forensic pediatrician and who had
2 examined Doe 1 on the night of May 7th at Loma Linda Medical Center. She found
3 that Doe 1 had an extremely swollen tongue, petechia bruising from the chest up, a
4 tear from her vaginal area to her anus and internal injuries which required surgical
5 repair. Doe 1 also had bruising and finger marks all around her neck. (1 CT 45.) In
6 the doctor's opinion, the injuries were consistent with a sexual assault. (1 CT 46.) A
7 forensic nurse in pediatrics also examined Doe 1 and found that the injuries were
8 consistent with genital and anal penetration. Swabs of the rectum were collected. (1
9 CT 47.) Doe 1 identified as hers a pair of underwear with peace signs on them. Those
10 panties were recovered from petitioner's residence. (1 CT 49-51.)

11 During a police interview with petitioner at the police station, an officer
12 collected a styrofoam cup from which petitioner had drunk. (1 CT 52.) The DNA
13 profile collected from that cup matched the DNA profile collected from the swab from
14 Doe 1's rectum. (1 CT 53-54.)

15 The trial court held petitioner to answer the charges. (1 CT 100.)

16 Assault with great bodily injury, the amended count 2 charge that replaced the
17 attempted murder charge, required proof that: (1A) Petitioner did an act that by its
18 nature would directly and probably result in the application of force to a person, and
19 (1B) the force used was likely to produce great bodily injury; (2) petitioner did that
20 act willfully; (3) when petitioner acted, he was aware of facts that would lead a
21 reasonable person to realize that his act by its nature would directly and probably
22 result in the application of force to someone; and (4) when petitioner acted, he had the
23 present ability to apply force likely to produce great bodily injury to a person.
24 See CALCRIM No. 875; 1 CT 238-39. The preliminary hearing evidence supported
25 the elements of the assault with great bodily harm and the same evidence was
26 presented at trial. Indeed, that evidence showed significant physical injury to Doe 1,
27 including injuries so extensive they required surgical repair. On this record, the Court
28 is satisfied that petitioner had adequate notice of the charges against him. The Court

1 therefore finds and concludes that the state courts' rejection of this claim was neither
2 contrary to, nor involved an unreasonable application of, clearly established Supreme
3 Court law.

4
5 **III. Habeas relief is not warranted on the claim that the trial court violated**
6 **petitioner's right to due process by failing to instruct the jury on the**
7 **element of force or fear in Count 3 (Ground Two).**

8 Petitioner claims that the trial court's failure to instruct on an essential element
9 of California Penal Code section 288 (b)(1), which requires the use of force or fear,
10 violated petitioner's right of trial by jury and due process. (Pet. at 5, 17-19; Reply at
11 8-11.)

12
13 **A. The jury instructions given at trial**

14 In count 3, the jury found petitioner guilty of attempted lewd act by force upon
15 Jane Doe 2 within the meaning of Cal. Penal Code § 664/288(b)(1). (1 CT 275.)
16 "Force, violence, duress, or fear" were defined for the purpose of counts 1, 4, and 5
17 (involving aggravated sexual assault on a child under 14), but not for count 3. (1 CT
18 236-37, 242-43; 4 RT 746-47, 750.) At trial, the jury was not instructed that the use
19 of "force or fear" was required in order to convict petitioner of the attempted sexual
20 assault. Instead, the jury was instructed only on § 288(a), which describes the crime
21 of lewd or lascivious act on a child under the age of 14 years and the punishment for
22 that crime. (Cal. Penal Code § 240-41.) Section 288(b)(1) specifies that a person who
23 committed a lewd act as described in subsection (a) "by use of force, violence, duress,
24 menace, or fear of immediate and unlawful bodily injury on the victim or another
25 person" shall be punished with a longer term of incarceration. Cal. Penal Code §
26 288(b)(1).

27 ///

28 ///

1 B. The California Court of Appeal opinion

2 The California Court of Appeal rejected petitioner's claim, finding that though
3 the trial court did err in failing to instruct the jury on the element of force or fear, the
4 error was harmless (Lodgment No. 7 at 10-14) (*footnote omitted*) (emphasis in
5 original):

6 *[Petitioner] next claims the trial court prejudicially erred in*
7 *failing to instruct the jury that it had to find he acted with force or fear*
8 *in order to convict him of the attempted forcible sexual assault of Doe*
9 *2 in count 3 (§§ 664, 288, subd. (b)(1)), requiring reversal of count 3.*
10 *We agree there was error, but conclude it was harmless beyond a*
11 *reasonable doubt. No reasonable juror could have found [petitioner]*
12 *guilty in count 3 without finding he attempted to commit a lewd act on*
13 *Doe 2 by fear - specifically by placing a gun against her and threatening*
14 *to shoot her father unless she was quiet. [¶] 1. Relevant Background*
15 *[¶] On count 3, the court instructed the jury pursuant to CALCRIM No.*
16 *1110 on the elements necessary to prove a lewd and lascivious act on a*
17 *child under 14 years of age. (§ 288, subd. (a).) But rather than give*
18 *CALCRIM No. 1110, the court should have given CALCRIM No. 1111,*
19 *the pattern instruction on the elements of a lewd act on a child under 14*
20 *years of age, "by use of force, violence, duress, menace, or fear of*
21 *immediate and unlawful bodily injury on the victim or another person .*
22 *..." (§ 288, subd. (b)(1).) CALCRIM No. 1110 did not identify force or*
23 *fear as an element of the attempted, forcible lewd act charge in count 3.*
24 *[¶] 2. Applicable Law and Analysis [¶] "[T]he correctness of jury*
25 *instructions is to be determined from the entire charge of the court, not*
26 *from a consideration of parts of an instruction or from a particular*
27 *instruction.' [Citation.] "The absence of an essential element in one*
28 *instruction may be supplied by another instruction as a whole" [Citation.] (People v. Cash (1997) 16 Cal.4th 1009,*

1 1016.) We review the legal adequacy of jury instructions *de novo*. (*People v. Cole*
2 (2004) 33 Cal.4th 1158, 1210.) [¶] The People argue the entire charge to the jury
3 adequately instructed it on the force or fear element necessary to prove the attempted
4 forcible lewd act charge involving Doe 2 in count 3. The People point out that the
5 court gave CALCRIM No. 1123, defining the element of force or fear for purposes of
6 counts 1, 4, and 5, which charged [petitioner] with aggravated sexual assault on a
7 child under 14 years of age; the jury was instructed to consider all of the instructions
8 “together”; in closing argument, the prosecutor told the jury that in order to convict
9 [petitioner] in count 3 it had to find he attempted to commit a lewd act on Doe 2 by
10 “force, violence, duress, or fear”; and the verdict form in count 3 referred to the force
11 or fear element. It stated: “We, the jury, find [petitioner] _____ [insert GUILTY
12 or NOT GUILTY in blank] of **Attempted Lewd Act by Force upon Jane Doe 2**, within
13 the meaning of Penal Code section 664/228(b)(1), as charged in Count 3.” The jury
14 returned the verdict form, finding [petitioner] guilty. [¶] We disagree that the entire
15 charge adequately instructed on the force or fear element in count 3. As [petitioner]
16 points out, “force, violence, duress, or fear,” was not defined for purposes of count
17 3; it was only defined for purposes of counts 1, 4, and 5. Further, the jury was
18 instructed pursuant to CALCRIM No. 200 that if it believed the arguments of counsel
19 conflicted with the court’s instructions, it had to follow the court’s instructions. And
20 here, the prosecutor’s argument that the jury had to find [petitioner] attempted to
21 commit a lewd act by force or fear, in count 3, conflicted with the court’s instructions
22 on count 3. [¶] Still, the error was harmless beyond a reasonable doubt.
23 Instructional error that omits an element of an offense requires reversal, unless it
24 appears beyond a reasonable doubt that the error did not contribute to the verdict.
25 (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Flood* (1998) 18 Cal.4th
26 470, 504.) The question “is not whether, in a trial that occurred without the error,
27 a guilty verdict would surely have been rendered, but whether the guilty verdict
28 actually rendered in this trial was surely unattributable to the error.” (*Sullivan v.*

1 *Louisiana* (1993) 508 U.S. 275, 279; *see People v. Flood, supra*, at p. 515.) But
2 “instructional error is harmless ‘where a reviewing court concludes beyond a
3 reasonable doubt that the omitted element was uncontested and supported by
4 overwhelming evidence.’ [Citations.]” (*People v. Mil* (2012) 53 Cal.4th 400, 417,
5 quoting *Neder v. U.S.* (1999) 527 U.S. 1, 17.) [¶] Doe 2 testified she woke to a man,
6 later identified through DNA evidence as [petitioner], kneeling at the foot of her bed
7 who told her to “shush,” threatened to shoot her father if she made a noise, pulled
8 down her pajama pants and underwear, and placed a gun against her. Doe 2’s
9 testimony that [petitioner] threatened to shoot her father was uncontested and
10 overwhelming. [¶] [Petitioner] points out that Doe 2 could not recall exactly when
11 the man threatened to shoot her father, or exactly when he put a gun, or a replica of
12 a gun, against her - whether these acts occurred before or after the man pulled down
13 her pajama pants and underwear. But her failure to recollect these details made her
14 testimony no less overwhelming; she clearly recalled that the man threatened to shoot
15 her father around the same time he crawled onto her bed, placed a gun, or a replica
16 of a gun against her, and pulled down her pajama pants and underwear. Thus here,
17 the jury must have concluded [petitioner] threatened to shoot Doe 2’s father, and
18 placed a gun or a replica of a gun against her, and that [petitioner] accordingly used
19 fear in attempting to commit a lewd act on Doe 2, in finding him guilty in count 3.

20
21 B. Analysis

22 When, as here, a district court reviews a state court’s determination that an
23 instructional error is harmless, habeas relief is appropriate only if the decision
24 conflicted with the holdings of the United States Supreme Court, or if the state court
25 “applied harmless error review in an ‘objectively unreasonable’ manner.” *See*
26 *Mitchell v. Esparza*, 540 U.S. 12, 18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (per
27 curiam); *Medina v. Hornung*, 386 F.3d 872, 878-79 (9th Cir. 2004) (as amended); *see*
28 *also Davis v. Ayala*, 576 U.S. —, 135 S. Ct. 2187, 2198-99, 192 L. Ed. 2d 323 (2015).

1 If a habeas court “determine[s] under AEDPA that the state court’s harmless error
2 holding is contrary to Supreme Court precedent or objectively unreasonable, then no
3 deference is owed.” Inthavong, 420 F.3d at 1059. Under these standards, this Court
4 must determine whether the California Court of Appeal “applied harmless-error
5 review in an ‘objectively unreasonable’ manner.” Mitchell, 540 U.S. at 18; see also
6 Inthavong, 420 F.3d at 1058-59; Medina, 386 F.3d at 878-79. Having done so, as
7 described below, the Court finds that the Court of Appeal’s holding was not contrary
8 to Supreme Court precedent and was not objectively unreasonable.

9 In rejecting petitioner’s claim, the California Court of Appeal cited Chapman
10 v. California, 386 U.S. 18, 24 (1967) for the proposition that “[i]nstructional error that
11 omits an element of an offense requires reversal, unless it appears beyond a reasonable
12 doubt that the error did not contribute to the verdict.” (Lodgment No. 7 at 13.)
13 Although Chapman did not involve the omission of a jury instruction on an element
14 of a crime, the state appellate court’s usage of harmless error analysis to reject this
15 claim was proper. See Neder v. United States, 527 U.S. 1, 8-16, 119 S. Ct. 1827, 144
16 L. Ed. 2d 35 (1999) (holding that jury instruction that omitted an element of the
17 offense is subject to harmless error analysis); see also Clark v. Brown, 450 F.3d 898,
18 904 (9th Cir. 2006) (holding that instructional error is subject to harmless error
19 analysis); Bradley v. Duncan, 315 F.3d 1091, 1099 (9th Cir. 2002) (holding that the
20 failure to properly instruct the jury is a trial error subject to harmless-error analysis).
21 Further, the Court finds that the state appellate court’s analysis finding the
22 instructional error to be harmless was not objectively unreasonable. The Court of
23 Appeal found that, “the jury must have concluded [petitioner] threatened to shoot Doe
24 2’s father, and placed a gun or a replica of a gun against her, and that [petitioner]
25 accordingly *used fear* in attempting to commit a lewd act on Doe 2, in finding him
26 guilty in count 3.” (Lodgment No. 7 at 14.) This finding is supported by the record.
27 Doe 2 testified that she awoke in the night to someone kneeling at the bottom of her
28 bed. When she called out, thinking it was her father, the man said, “shush” and told

1 her that if she made any noise, he would shoot her father. (2 RT 263.) As he was
2 kneeling next to her, the man pulled down her pajama pants and her underwear to her
3 knees. Doe 2 could not remember when the man made the comment about shooting
4 her father but she remembered feeling a gun against her. (2 RT 264.) She started
5 crying but managed to push the man off, causing the man to fall to the floor. She then
6 ran to the door for her father. (Id.)

7 The Court agrees that, on this record, the jury *must* have found that petitioner
8 used fear to attempt to accomplish the sexual assault. The entire assault seems to have
9 lasted for only a matter of minutes, during which time, petitioner threatened to shoot
10 Doe 2's father if she made any noise, he held what she believed to be a gun against
11 her, and he pulled her pajama pants and underwear down to her knees. Indeed, it is
12 difficult to imagine petitioner's objective in making threats of physical violence and
13 holding a gun against Doe 2 if it was not to obtain Doe 2's cooperation and
14 acquiescence to the assault. The Court therefore concludes that the state courts'
15 rejection of this claim was neither contrary to, nor involved an unreasonable
16 application of, clearly established Supreme Court authority. Accordingly, habeas
17 relief is not warranted.

18
19 **IV. Petitioner's claim that the trial court erred in sentencing him as a one-**
20 **strike offender is not cognizable on federal habeas review.**

21 Petitioner contends that imposition of California's One Strike Law violated
22 petitioner's Eighth Amendment rights because California Penal Code Section 269 is
23 not a qualifying offense. (Pet. at 5, 9-16.)

24
25 **A. The underlying state law**

26 Below, the Court sets forth the state law relevant to petitioner's sentencing error
27 claim.

1 First, petitioner was convicted of violating Cal. Penal Code § 269(a)(4) and (5).
2 That statute provides, in pertinent part, as follows:

3 (a) Any person who commits any of the following acts upon a
4 child who is under 14 years of age and seven or more years younger than
5 the person is guilty of aggravated sexual assault of a child:

6 . . . (4) Oral copulation, in violation of paragraph (2) or (3) of
7 subdivision (c), or subdivision (d), of Section 288a.

8 (5) Sexual penetration, in violation of subdivision (a) of Section
9 289.

10
11 Next, Cal. Penal Code § 667.61 is known as California's One Strike Law. It
12 requires a sentence of 25 years-to-life in prison whenever a defendant is convicted of
13 a current offense specified in subdivision (c) and certain other circumstances are met.
14 People v. Hammer, 30 Cal. 4th 756, 761 (Cal. 2003). The crimes outlined in
15 subdivision (c) are as follows:

16 (1) Rape, in violation of paragraph (2) or (6) of subdivision
17 (a) of Section 261.

18 (2) Spousal rape, in violation of paragraph (1) or (4) of
19 subdivision (a) of Section 262.

20 (3) Rape, spousal rape, or sexual penetration, in concert, in
21 violation of Section 264.1.

22 (4) Lewd or lascivious act, in violation of subdivision (b) of
23 Section 288.

24 (5) Sexual penetration, in violation of subdivision (a) of Section
25 289.

26 (6) Sodomy, in violation of paragraph (2) or (3) of subdivision (c),
27 or subdivision (d), of Section 286.
28

1 (7) Oral copulation, in violation of paragraph (2) or (3) of
2 subdivision (c), or subdivision (d), of Section 288a.

3 (8) Lewd or lascivious act, in violation of subdivision (a) of
4 Section 288.

5 (9) Continuous sexual abuse of a child, in violation of Section
6 288.5.

7
8 Petitioner argues here that because § 269(a)(4) and (5) are not specifically
9 enumerated in § 667.61(c), the imposition of a One Strike sentence violated his right
10 to due process. (Pet. at 5, 9-16; Reply at 5-8.)

11
12 B. The California Court of Appeal opinion

13 The California Court of Appeal rejected petitioner's claim as follows
14 (Lodgment No. 7 at 14-16):

15 *[Petitioner] was sentenced on count 1 to life without the*
16 *possibility of parole under subdivision (j)(1) of section 667.61, and on*
17 *counts 4 and 5 he was sentenced to 25-year-to-life terms under*
18 *subdivision (a) of section 667.61. Subdivisions (a) and (j)(1) provide that*
19 *"[a]ny person who is convicted of an offense specified in subdivision (c)*
20 *... shall be punished [as provided in section 667.61]." Section 667.61,*
21 *subdivision (c) states that "[t]his section shall apply to any of the*
22 *following offenses," and goes on to enumerate these offenses in clauses*
23 *(1) through (9). [¶] In count 1, [petitioner] was convicted of violating*
24 *section 269, subdivision (a)(5) (aggravated sexual assault of child under*
25 *age 14 and seven or more years younger than defendant) by committing*
26 *"sexual penetration" of Doe 1. (Capitalization omitted.) Section 269,*
27 *subdivision (a)(5) is violated by committing "[s]exual penetration, in*
28 *violation of subdivision (a) of section 289."* (Italics added.) And

1 “[s]exual penetration, in violation of subdivision (a) of Section 289” is
2 the “offense” listed in section 667.61, subdivision (c)(5). [¶] Likewise,
3 [petitioner] was convicted in count 4 of the aggravated sexual assault of
4 Doe 3, by forcible oral copulation (§ 269, subd. (a)(4)) and in count 5
5 of the aggravated sexual assault of Doe 3 by sexual penetration (§ 269,
6 subd. (a)(5)). Section 269, subdivision (a)(4) is violated by a person who
7 commits “[o]ral copulation, in violation of paragraph (2) or (3) of
8 subdivision (c), or subdivision (d), of Section 288a” against a child
9 under the age of 14 and seven or more years younger than the person.
10 “Oral copulation, in violation of paragraph (2) or (3) of subdivision (c),
11 or subdivision (d), of Section 288a” is the offense listed in section
12 667.61, subdivision (c)(7). And, as indicated, section 269, subdivision
13 (a)(5) is violated by a person who commits “[s]exual penetration, in
14 violation of subdivision (a) of Section 289” against a child under the age
15 of 14 and seven or more years younger than the person, and “[s]exual
16 penetration, in violation of subdivision (a) of Section 289” is the offense
17 listed in section 667.61, subdivision (c)(5). [¶] [Petitioner’s]
18 interpretation of section 667.61 is absurd, because it means that a
19 person who commits an offense listed in section 667.61 subdivision (c)
20 against a child under age 14 and seven or more years younger than the
21 person, is not subject to sentencing under the One Strike law, but a
22 person who commits the same offense against a person 14 years of age
23 or older, or less than seven years younger than the person, is to be
24 sentenced under the One Strike law. Nothing in the language of section
25 667.61 supports this absurd interpretation, and [petitioner] points to
26 nothing in the legislative history of section 667.61 indicating it is what
27 the Legislature intended. (*In re Greg F.* (2012) 55 Cal.4th 393, 406
28

1 *[courts are to avoid interpreting statutes in a way that would produce*
2 *absurd consequences the Legislature could not have intended].)*

3
4 C. Analysis

5 It is well established that habeas corpus relief is not available to correct alleged
6 errors in the state court's application or interpretation of state law. Estelle v.
7 McGuire, 502 U.S. 62, 67, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ("We have stated
8 many times that 'federal habeas corpus relief does not lie for errors in state law.'" (citation omitted)). Although petitioner attempts to frame this claim as a violation of
9 his federal constitutional right to due process, the claim is necessarily predicated on
10 the erroneous application of a state sentencing law. The claim that a state court erred
11 in applying its own state sentencing law is not cognizable in this federal habeas action.
12 See Miller v. Vasquez, 868 F.2d 1116, 1118-19 (9th Cir. 1989) ("Whether assault with
13 a deadly weapon qualifies as a 'serious felony' under California's sentence
14 enhancement provisions is a question of state sentencing law."). Further, on direct
15 appeal, the state appellate court found that, *as a matter of state law*, there was no error
16 in the application of the One Strike provisions to petitioner's sentence. This Court,
17 in considering a petition for writ of habeas corpus, is bound by, and may not revisit,
18 the determinations of state law by the California Court of Appeal, including those
19 announced on direct appeal of the challenged conviction. See Bradshaw v. Richey,
20 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (per curiam) ("We have
21 repeatedly held that a state court's interpretation of state law, including one announced
22 on direct appeal of the challenged conviction, binds a federal court sitting in habeas
23 corpus."); McGuire, 502 U.S. at 67-68 (noting that the Supreme Court repeatedly has
24 stated that challenges to state jury instructions based on errors of state law are not
25 cognizable on habeas review and reiterating that "it is not the province of a federal
26 habeas court to reexamine state-court determinations on state-law questions"); Deck
27 v. Jenkins, 814 F.3d 954, 977 (9th Cir. 2014) ("We do not review whether the decision
28

1 to exclude the evidence was consistent with state law. Instead, we only determine
2 whether the state evidentiary rule violates the federal Constitution.” (citation
3 omitted)); see generally Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 71 L. Ed.
4 2d 78 (1982) (“A federally issued writ of habeas corpus, of course, reaches only
5 convictions obtained in violation of some provision of the United States
6 Constitution.”). Further, if there was no error in the application of the state sentencing
7 law in petitioner’s case, his claim cannot succeed. For these reasons, this Court finds
8 that habeas relief on this claim is not warranted.

9
10 **V. An evidentiary hearing is not warranted in this case.**

11 In his Reply, petitioner has asked the Court for an evidentiary hearing. (Reply
12 at 14.) However, the Supreme Court has held that the AEDPA requires federal courts
13 to evaluate the reasonableness of state court decisions on the basis of the record before
14 the state court. Pinholster, 563 U.S. at 181-85. The Supreme Court reasoned that the
15 “backward-looking language” of Section 2254(d)(1) “requires an examination of the
16 state-court decision at the time it was made,” and thus, the record under review must
17 be “limited to the record in existence at that same time *i.e.*, the record before the state
18 court.” Id. at 182. Accordingly, under Pinholster, petitioner is not entitled to an
19 evidentiary hearing.

20 Further, an evidentiary hearing is not warranted where, as here, “the record
21 refutes the applicant’s factual allegations or otherwise precludes habeas relief.”
22 Schriro v. Landrigan, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).
23 “It is axiomatic that when issues can be resolved by reference to the state court record,
24 an evidentiary hearing becomes nothing more than a futile exercise.” Totten v.
25 Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998). Therefore, petitioner’s request for an
26 evidentiary hearing should be denied.

27
28 **RECOMMENDATION**

1 IT THEREFORE IS RECOMMENDED that the District Court issue an Order:
2 (1) Approving and accepting this Report and Recommendation; (2) denying the
3 Petition; and (3) directing that Judgment be entered dismissing this action with
4 prejudice.

5
6 DATED: November 28, 2016



7
8 THE HONORABLE DAVID T. BRISTOW
9 UNITED STATES MAGISTRATE JUDGE
10

11 **NOTICE**

12 Reports and Recommendations are not appealable to the Court of Appeals, but
13 may be subject to the right of any party to file Objections as provided in the Local
14 Rules and review by the District Judge whose initials appear in the docket number.
15 No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be
16 filed until entry of the Judgment of the District Court.
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**Additional material
from this filing is
available in the
Clerk's Office.**