Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 30 2018

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

STEVEN ANTHONY ALVAREZ, Petitioner-Appellant, v. M. ELIOT SPEARMAN, Respondent-Appellee.	No. 17-56306 D.C. No. 2:16-cv-08497-AFM Central District of California, Los Angeles ORDER

Before: CLIFTON and CHRISTEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) 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.

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN ANTHONY ALVAREZ Petitioner, v. M.E. SPEARMAN, Respondent.	Case No. CV 16-08497 AFM **ORDER RE CERTIFICATE OF APPEALABILITY**

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts reads as follows:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (internal quotation marks omitted).

Here, after duly considering Petitioner's contentions in support of the claims alleged in the Petition, the Court finds that Petitioner has not satisfied the requirements for a Certificate of Appealability. Accordingly, a Certificate is DENIED.

DATED: July 18, 2017

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEVEN ANTHONY ALVAREZ, Petitioner, v. M.E. SPEARMAN, Respondent.	Case No. CV 16-08497 AFM **DECISION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS (28 U.S.C. § 2254)**

INTRODUCTION

On November 15, 2016, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254). The Petition raises twelve grounds for federal habeas relief directed to petitioner's convictions of crimes arising from an incident of domestic abuse.

The parties have consented to the jurisdiction of the undersigned Magistrate Judge under 28 U.S.C. § 636(c). On March 3, 2017, respondent filed an Answer. On June 13, 2017, petitioner filed a Traverse. Thus, this matter is ready for decision.

For the reasons discussed below, the Petition is denied, and this action is dismissed with prejudice.

PROCEDURAL BACKGROUND

On August 6, 2014, a Los Angeles County Superior Court jury convicted petitioner of willful infliction of corporal injury on a cohabitant, misdemeanor assault, and false imprisonment. The jury also found true an allegation that petitioner personally inflicted great bodily injury. In a bifurcated proceeding, the trial court found allegations relating to petitioner's prior convictions to be true. Petitioner was sentenced to state prison for 20 years and 4 months. (4 Reporter's Transcript ["RT"] 1204-05, 1836; 2 Clerk's Transcript ["CT"] 272-75, 399.)

Petitioner appealed, raising a single claim of sentencing error. (Respondent's notice of lodging, Lodgment 3.) In an unpublished decision issued on December 17, 2015, the California Court of Appeal agreed with petitioner that there was insufficient evidence to support a prior-prison-term allegation and modified his sentence accordingly. (Lodgment 9.) Petitioner was resentenced to state prison for 19 years and 4 months. (Lodgment 10 at 28-29.)

Petitioner also litigated multiple habeas petitions in the state courts. On March 18, 2015, petitioner filed a habeas petition in the Los Angeles County Superior Court. (Lodgment 11.) It was denied on March 23, 2015. (Lodgment 12.) On May 23, 2016, petitioner filed another habeas petition in the Los Angeles County Superior Court. (Lodgment 13.) It was denied on June 7, 2016. (Lodgment 14.) On June 23, 2016, petitioner filed a habeas petition in the California Court of Appeal. (Lodgment 15.) It was denied on July 8, 2016. (Lodgment 16.) On August 5, 2016, petitioner filed a habeas petition in the California Supreme Court. (Lodgment 17.) It was denied on October 12, 2016. (Lodgment 18.)

Petitioner filed this Petition on November 15, 2016.

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SUMMARY OF THE TRIAL EVIDENCE

The California Court of Appeal's opinion on direct appeal did not include a summary of the evidence presented at petitioner's trial. Accordingly, the following summary is based on the Court's review of the trial record.

Petitioner was convicted of crimes based on his attack on Blanca Doe, his girlfriend. On January 27, 2014, the date of the attack, petitioner and Blanca had been dating for approximately two and a half years and were living together in an apartment in Pomona. (2 RT 325.)

On that day, Blanca became angry because she saw photographs on petitioner's phone depicting another woman (the mother of petitioner's seven-year-old child) engaging in lewd behavior. (2 RT 330-31.) Blanca had been drinking alcohol. (2 RT 334.) She confronted petitioner about the photographs. (2 RT 331-32.)

Petitioner attacked her violently. He "all of a sudden hit her" and then "threw her around like a rag doll in the kitchen." (3 RT 806, 813.) Blanca's face was bleeding from a gash over her left eye. Petitioner dragged Blanca by her hair toward the shower, where he punched and kicked her some more. (3 RT 814.)

While Blanca was still in the shower, petitioner phoned his mother, Irene Alvarez, to come to the apartment to help them. (3 RT 815.) Irene arrived and tried to help Blanca by applying pressure to the wound on her face.

Blanca's neighbors called 911 because they had heard screaming coming from the apartment. (2 CT 208, 226.) When police knocked on the apartment door, petitioner answered it and claimed that no one else was inside. (3 RT 793-94.) Officer James Suess, one of the responding officers, had earlier heard a shriek, so he asked petitioner to step outside while the officers checked inside the apartment. (3 RT 795.) Petitioner became belligerent and started screaming profanities. (3 RT 795-97.)

Inside the apartment, Officer Suess saw Blanca and Irene. Irene was holding a bloody towel. (3 RT 798.) Blanca had blood on her face and seemed grateful for Officer Suess's presence. (3 RT 799-99.)

Meanwhile, petitioner was outside, yelling and screaming. (3 RT 800.) Because Officer Suess did not have a recording device, he called Sergeant Baker, who arrived at the scene with a dashcarm recorder. (3 RT 801.) The dashcam recorder captured an audio recording of the events leading to petitioner's arrest. (2 RT 210-24.)

Blanca received emergency medical treatment for her injuries, which included a bleeding gash over her left eye and bruises on her body. (2 RT 340, 365; 3 RT 810.)

Blanca told Officer Suess that petitioner had violently attacked her. (3 RT 806-07, 813-14.) Blanca told a social worker at the hospital that petitioner had attacked her two or three times before. (3 RT 678-79.)

One week after the attack, Blanca and petitioner reconciled. (2 RT 399.) Blanca's goal was to resume their relationship. (2 RT 400.)

During trial, Blanca testified that her injuries ultimately were caused by a slip and fall. She became dizzy, lost her balance, slipped on a rug, fell forward, and hit her head on a cabinet door. (2 RT 336-40.) The cabinet door caused the gash on her head, and the bruises were caused by the fall. (2 RT 340.) According to Blanca, petitioner was never angry during the encounter, but only upset and disappointed with Blanca. (2 RT 346.) Blanca, however, was irate with petitioner because she suspected his infidelity. (2 RT 366-68.) She never accused petitioner of assaulting her, but if she did, she falsely accused him out of anger and vindictiveness. (2 RT 373.)

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PETITIONER'S CLAIMS

1. Petitioner's constitutional rights were violated by the suppression of exculpatory evidence from Blanca Doe's medical record. (Petition [ECF No. 1] at 9.)

2. Trial counsel was ineffective for failing to object to the admission of an audio recording of petitioner at the time of his arrest. (ECF No. 1 at 10.)

3. The trial court erred in admitting portions of Blanca Doe's medical record. (ECF No. 1 at 11.)

4. Trial counsel was ineffective for failing to present a defense and call favorable witnesses. (ECF No. 1 at 12.)

5. The prosecutor misstated the evidence and presented false evidence. (ECF No. 1 at 13.)

6. Jurors were biased because they had scheduling conflicts. (ECF No. 1 at 14.)

7. Trial counsel was ineffective for failing to investigate the validity of petitioner's prior "strike" conviction. (ECF No. 1 at 15.)

8. The trial court committed multiple sentencing errors. (ECF No. 1 at 16.)

9. The prosecutor withheld and destroyed exculpatory evidence from the audio recording of petitioner at the time of his arrest. (ECF No. 1 at 17, 19.)

10. The evidence presented at trial was insufficient to support petitioner's convictions. (ECF No. 1 at 18.)

11. Appellate counsel was ineffective for failing to investigate the records on appeal, failing to raise the claims raised in this Petition, and failing to consult with petitioner. (ECF No. 1 at 20.)

12. The California Court of Appeal abused its discretion in denying petitioner's state habeas petition. (ECF No. 1 at 21.)

STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("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 unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also Carey v. Musladin*, 549 U.S. 70, 74 (2006).

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. *See Williams*, 529 U.S. at 391, 413. 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. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *Williams*, 529 U.S. at 405-06. When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." *See Williams*, 529 U.S. at 406. 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." *See Early*, 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.'" *See Early*, 537 U.S. at 11 (citing 28 U.S.C. § 2254(d)) (emphasis added). 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 the *Strickland* standard correctly but apply it unreasonably); *Woodford v. Visciotti*, 537 U.S. 19, 24-27 (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 409-10; *Visciotti*, 537 U.S. at 25; *Bell v. Cone*, 535 U.S. 685, 699 (2002). Moreover, 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." *See Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

As the Supreme Court explained in *Harrington v. Richter*, 562 U.S. 86, 102 (2011):

> "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here [i.e., where there was no reasoned state-court decision], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."

Furthermore, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in

federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Petitioner's claims in Grounds One to Eleven were rejected by the California Court of Appeal in a briefly-reasoned decision denying his habeas petition. (Lodgments 15 and 16.) These claims then were presented in petitioner's habeas petition in the California Supreme Court, which denied the petition without comment or citation of authority. (Lodgments 17 and 18.) Thus, the California Court of Appeal's decision constitutes the relevant state court adjudication on the merits for purposes of the AEDPA standard of review for Grounds One to Eleven. *See Cannedy v. Adams*, 706 F.3d 1148, 1159 (9th Cir. 2013) (noting that federal courts look through summary denials to the last reasoned decision, whether those denials are on the merits or of discretionary review).

Petitioner's remaining claim in Ground Twelve was rejected by the California Supreme Court when it denied petitioner's habeas petition without comment or citation of authority. (Lodgments 17 and 18.) Thus, the California Supreme Court's decision constitutes the relevant state court adjudication on the merits for purposes of the AEDPA standard of review for Ground Twelve.

DISCUSSION

Respondent argues that several of petitioner's claims are procedurally defaulted because the California Court of Appeal rejected them on collateral review under the "*Dixon* rule," meaning that petitioner failed to raise the claims on direct appeal when he had the opportunity to do so. (Answer Mem. at 10-11; Lodgment 16 at 1.) However, consideration of this issue would require the Court to conduct a detailed analysis as to whether petitioner had demonstrated cause and prejudice for each of the defaulted claims, based on appellate counsel's alleged ineffectiveness for failing to raise the defaulted claims as issues on direct appeal. Because it would

be simpler to review all of petitioner's claims on the merits, the Court elects to resolve them solely on that basis. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002).

For purposes of the discussion below, petitioner's claims have been reordered to correspond to the approximate chronology of his criminal proceeding.

A. Alleged suppression of exculpatory evidence (Grounds One and Nine).

In Grounds One and Nine, petitioner claims that exculpatory evidence was withheld from the defense. (ECF No. 1 at 9, 17, 19.)

1. Legal standard.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In *Giglio v. United States*, 405 U.S. 150, 154 (1972), the Supreme Court extended the *Brady* rule to impeachment evidence, if the reliability of the witness may be determinative of the defendant's guilt or innocence. The obligation extends to favorable evidence regardless of whether it was requested by the defense. *See Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997). A *Brady* violation has three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Jackson v. Brown*, 513 F.3d 1057, 1071 (9th Cir. 2008).

2. Evidence from the victim's medical record (Ground One).

In Ground One, petitioner claims that his right to exculpatory evidence was

violated by the admission of a redacted portion of Blanca Doe's medical record of her hospitalization from the attack. (ECF No. 1 at 9.)

During trial, the prosecutor introduced 5 pages from Blanca's medical record, which totaled 148 pages. (4 RT 929-35; Petition Exhibit A at 78-84.) The selected pages, in which Blanca told hospital workers that petitioner had assaulted her, were introduced to impeach Blanca's trial testimony that her injuries were caused by a slip and fall. (4 RT 930.) Petitioner's trial counsel objected to the selective introduction of the evidence, arguing that the jury should see more of Blanca's medical record. (4 RT 933.) The trial court responded that "you can use whatever medical record that are in the subpoenaed documents that you wish." (4 RT 935.) Trial counsel responded "okay." (*Id.*)

Petitioner claims that the remaining parts of Blanca's medical record would have contradicted the prosecutor's theory of an assault. (ECF No. 1 at 9.) According to petitioner, the "undisclosed" record would have shown that Blanca's injuries were caused by her sinus problem, her brain tumor, and a metal plate in her head. (Traverse at 9.) The California Court of Appeal rejected petitioner's *Brady* claim, concluding that petitioner had "failed to demonstrate that material evidence was not disclosed at trial." (Lodgment 16 at 1.)

The Court of Appeal's rejection of this claim was not objectively unreasonable. Petitioner has not shown that the medical evidence at issue was suppressed by the prosecution, as required by *Brady*. To the contrary, petitioner's trial counsel was aware of Blanca's medical record in its entirety and had reviewed its contents. (4 RT 934.) If Blanca's medical record said what petitioner claims, trial counsel was not prevented from presenting it. Petitioner therefore cannot show *Brady* error. *See United States v. Bracy*, 67 F.3d 1421, 1428 (9th Cir. 1995) (defendant cannot show suppression of *Brady* material where government made requisite disclosure to the defense) (citing cases).

Petitioner further claims that this alleged error was compounded by the trial

court and trial counsel: The trial court "allowed" the prosecutor to suppress the exculpatory medical evidence, and trial counsel failed to object to the redaction. (ECF No. 1 at 9.) To the contrary, the trial court did not allow any *Brady* error because there was no suppression of exculpatory evidence. And trial counsel did in fact object to the redaction, but was overruled and given the opportunity to introduce any portions of Blanca's medical record as part of the defense. (4 RT 935.)

In sum, the California Court of Appeal's rejection of this claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law.

3. Evidence from the audiotape of petitioner's arrest (Ground Nine).

In Ground Nine, petitioner claims that exculpatory evidence from the audiotape of his arrest was withheld and destroyed. (ECF No. 1 at 17, 19.)

The prosecutor introduced an audiotape of petitioner's arrest taken from Sergeant Baker's dashcam recorder. (2 CT 210-24.) According to petitioner, a second recording was secretly made by Officer Suess and would have shown that the arresting officers used excessive force on petitioner and arrested him in bad faith. (ECF No. at 17, 19.) Petitioner's allegation that such evidence was created and then was "withheld and destroyed" is based on an inference he draws from the trial testimony of Officer Suess, one of the arresting officers. Officer Suess testified that he and his partner lacked any recording device when they first arrived at the crime scene. (4 RT 907; Petition Exhibit A at 70.) But a few minutes later, another officer, Sergeant Baker, arrived at the crime scene in a vehicle equipped with a dashcam recorder. (4 RT 914.) The officers used Sergeant Baker's dashcam recorder to make an audio recording of the events leading to petitioner's arrest. (3 RT 801.) Officer Suess testified about how the microphone on a dashcam recorder worked: "I have a pouch, mine's not in the case as of now, but there's a

microphone that sits in there." (4 RT 916; Petition Exhibit A at 75.) Apparently, petitioner is inferring from this "I have a pouch" testimony that Officer Suess admitted that he personally made his own recording of petitioner's arrest and never disclosed it. (ECF No. 1 at 17, 19.)

The California Court of Appeal rejected petitioner's *Brady* claim, concluding that there was not "any indication that material evidence in the case was deliberately destroyed in bad faith." (Lodgment 16 at 1.)

The Court of Appeal's rejection of this claim was not objectively unreasonable. Petitioner's premise that Officer Suess secretly made another recording of petitioner's arrest is based on an unreasonable inference from the record. Officer Suess's testimony does not permit any reasonable inference that he admitted to secretly recording petitioner's arrest. When Officer Suess testified that "I have a pouch," he was testifying about how dashcam recorders work in general, not about any particular methods he employed in this case. (4 RT 916.) Petitioner has adduced no credible evidence of the existence of a second audio recording.

In sum, the California Court of Appeal's rejection of this claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law; nor was it based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

B. Allegedly erroneous admission of evidence (Ground Three).

In Ground Three, petitioner claims that the trial court erred in admitting portions of Blanca Doe's medical record. (ECF No. 1 at 11.)

As noted, the prosecutor presented a redacted portion of Blanca's medical record in which Blanca told hospital staff that petitioner had assaulted her. Petitioner claims that this evidence lacked "foundation" and consisted of "hearsay" because the physician who wrote the medical record was not called to testify. (ECF No. 1 at 11.)

1. State-law evidentiary claim.

Petitioner's claim that the medical record lacked foundation under California's evidentiary rules is not cognizable on federal habeas review. *See Johnson v. Sublett*, 63 F.3d 926, 931 (9th Cir. 1998) (challenge to admissibility of evidence on state-law foundational grounds raises no federal habeas issue) (citing *Estelle v. McGuire*, 502 U.S. 62, 68 (1991)); *see also Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1990 (federal habeas courts do not review questions of state evidence law); *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998) (same).

2. Confrontation Clause claim.

Petitioner's related claim that the medical record consisted of hearsay, because the authoring physician did not appear at trial, appears to be a claim that his federal constitutional right of confrontation was violated.

In *Crawford v. Washington*, 541 U.S. 36, 54 (2004), the Supreme Court held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." But "non-testimonial statements do not implicate the Confrontation Clause." *Moses v. Payne*, 555 F.3d 742, 754 (9th Cir. 2009) (citing *Whorton v. Bockting*, 549 U.S. 406, 420 (2007)). In *Williams v. Illinois*, 567 U.S. 50, 82 (2012), a plurality of Justices discussed two characteristics of testimonial statements: (1) they involve out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct; and (2) they involve formalized statements such as affidavits, depositions, prior testimony, or confessions.

Petitioner has not clearly identified what statements from Blanca's medical record were erroneously admitted in violation of the Confrontation Clause, but any possible construction of petitioner's claim does not raise a constitutional issue. To the extent that petitioner is challenging the admission of Blanca's own statements to

her physicians (Traverse at 23), no confrontation error could have occurred in this regard because Blanca appeared at trial and was cross-examined by the defense. To the extent that petitioner is challenging the admission of any statements made by a non-testifying physician (ECF No. 1 at 11), petitioner has not identified what those statements were. Nothing in the record suggests that the jury saw a statement by a physician that was inculpatory of petitioner. And as a general matter, statements from medical records are not considered testimonial because, by their nature, they are usually generated for purposes of diagnosis and treatment, rather than for the primary purpose of proving some fact in a future criminal prosecution. *See Michigan v. Bryant*, 562 U.S. 344, 362 n.9 (2011); *see also Moses*, 555 F.3d at 755 (statements from medical record made for purposes of diagnosis and treatment, rather than to inculpate petitioner, were non-testimonial). Nor was there anything in the state court record to indicate that the portion of Blanca's medical record introduced into evidence had the requisite formality of an affidavit, deposition, prior testimony, or confession. *See Williams*, 567 U.S. at 111 (conc. op. of Thomas, J.); *Bullcoming v. New Mexico*, 564 U.S. 647, 664-65 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009).

In sum, petitioner has not met his burden of showing that the admission of a portion of Blanca's medical record raised an issue under the Confrontation Clause. Accordingly, the California Court of Appeal's rejection of this claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law.

C. Alleged insufficiency of the evidence (Ground Ten).

In Ground Ten, petitioner claims that the evidence presented at trial was insufficient to support his convictions. (ECF No. 1 at 18.)

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1. Legal standard.

The Due Process Clause of the Fourteenth Amendment protects a criminal defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *accord Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). Thus, a state prisoner who alleges that the evidence introduced at trial was insufficient to support the jury's findings states a cognizable federal habeas claim. *See Herrera v. Collins*, 506 U.S. 390, 401-02 (1993). But the prisoner faces a "heavy burden" to prevail on such a claim. *See Juan H.*, 408 F.3d at 1274, 1275 n.13. Under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (italics in original), the question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

When determining the sufficiency of the evidence, a reviewing court makes no determination of the facts in the ordinary sense of resolving factual disputes. *See Sarausad v. Porter*, 479 F.3d 671, 678 (9th Cir.), *vacated in part*, 503 F.3d 822 (9th Cir. 2007), *rev'd on other grds*, 555 U.S. 179 (2009). Rather, the reviewing court "must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." *See Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995); *see also Jackson*, 443 U.S. at 319, 324, 326. Thus, in determining the sufficiency of the evidence, "the assessment of the credibility of witnesses is generally beyond the scope of review." *See Schlup v. Delo*, 513 U.S. 298, 330, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); *see also United States v. Lindsey*, 634 F.3d 541, 552 (9th Cir. 2011); *Bruce v. Terhune*, 376 F.3d 950, 957 (9th Cir. 2004) ("A jury's credibility determinations are . . . entitled to near-total deference under *Jackson*.").

Moreover, while "'mere suspicion or speculation cannot be the basis for the creation of logical inferences,'" *see Maass*, 45 F.3d at 1358 (citation omitted),

"'[c]ircumstantial evidence can be used to prove any fact, including facts from which another fact is to be inferred, and is not to be distinguished from testimonial evidence insofar as the jury's fact-finding function is concerned,'" *Payne v. Borg*, 982 F.2d 335, 339 (9th Cir. 1992) (citation omitted). Furthermore, "to establish sufficient evidence, the prosecution need not affirmatively 'rule out every hypothesis except that of guilt.'" *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000) (en banc) (*quoting Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion)).

A state court's resolution of an insufficiency of the evidence claim is evaluated under 28 U.S.C. § 2254(d)(1), not § 2254(d)(2). *See Emery v. Clark*, 643 F.3d 1210, 1213-14 (9th Cir. 2011) ("When we undertake collateral review of a state court decision rejecting a claim of insufficiency of the evidence pursuant to 28 U.S.C. § 2254(d)(1), . . . we ask only whether the state court's decision was contrary to or reflected an unreasonable application of *Jackson* to the facts of a particular case."); *see also Long v. Johnson*, 736 F.3d 891, 896 (9th Cir. 2013) ("The pivotal question, then, is whether the California Court of Appeal . . . unreasonably applied *Jackson* in affirming Petitioner's conviction for second-degree murder."); *Boyer v, Belleque*, 659 F.3d 957, 965 (9th Cir. 2011) ("[T]he state court's application of the *Jackson* standard must be 'objectively unreasonable' to warrant habeas relief for a state court prisoner."); *Juan H.*, 408 F.3d at 1275 ("[W]e must ask whether the decision of the California Court of Appeal reflected an 'unreasonable application of' *Jackson* and *Winship* to the facts of this case.") (citing 28 U.S.C. § 2254(d)(1)).

Finally, in adjudicating an insufficiency of the evidence claim, a federal habeas court "look[s] to [state] law only to establish the elements of [the crime] and then turn[s] to the federal question of whether the [state court] was objectively unreasonable in concluding that sufficient evidence supported [the conviction]." *See Juan H.*, 408 F.3d at 1278 n.14 (*citing Jackson*, 443 U.S. at 324 n.16); *Chein v.*

Shumsky, 373 F.3d 978, 983 (9th Cir. 2004) (en banc) ("The *Jackson* standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.") (internal quotation marks omitted).

2. Analysis.

Petitioner was convicted of three offenses: willful infliction of corporal injury on a cohabitant, misdemeanor assault, and false imprisonment. The jury also found true an allegation that petitioner personally inflicted great bodily injury during the commission of offense of willful infliction of corporal injury. It would not have been objectively unreasonable for the California Court of Appeal to conclude that sufficient evidence supported each of the jury's findings.

Willful infliction of corporal injury (Cal. Penal Code § 273.5(a)) is committed when a direct application of force by the defendant upon the victim causes injury. *People v. Jackson*, 77 Cal. App. 4th 574, 578 (2000). Evidence was presented that petitioner punched Blanca Doe, threw her around like a "rag doll" in the kitchen, and dragged her by the hair toward the shower, where he punched and kicked her. (3 RT 806-07, 813-14.) A reasonable jury could conclude that petitioner willfully inflicted corporal injury on a cohabitant.

Any person "who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony" is subject to an additional and consecutive term of three, four, or five years. Cal. Penal Code § 12022.7(e). Great bodily injury is "a significant or substantial physical injury." *See* Cal. Penal Code § 12022.7(f). "Proof that a victim's bodily injury is 'great' — that is, significant or substantial within the meaning of section 12022.7 — is commonly established by evidence of the severity of the victim's injury, the resulting pain, or the medical care required to treat or repair the injury." *People v. Cross*, 45 Cal. 4th 58, 66 (2008). "In order to constitute significant or substantial injury, the damage need not be permanent." *People v. Harvey*, 7 Cal.

App. 4th 823, 827 (1992). The types of injuries that can constitute great bodily injury include, for example, burns, abrasions, cuts, and bruises. *See Harvey*, 7 Cal. App. 4th at 827-28; *People v. Escobar* (1992) 3 Cal. 4th 740, 744, 752 (1992) (en banc). Evidence was presented that Blanca suffered a deep cut over her left eye and bruises on her face and body. (3 RT 776, 798, 814, 820, 824-25.) She required emergency medical treatment, including seven sutures on her face. (2 RT 365, 435; 4 RT 948.) A reasonable jury could conclude that petitioner personally inflicted great bodily injury.

Assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. Cal. Penal Code § 240. "Assault requires the willful commission of an act that by its nature will probably and directly result in injury to another (i.e., a battery), and with the knowledge of the facts sufficient to establish that the act by its nature will probably and directly result in such injury." *People v. Miceli*, 104 Cal. App. 4th 256, 269 (2002). Evidence was presented that petitioner punched Blanca, threw her around like a "rag doll" in the kitchen, and dragged her by the hair toward the shower, where he punched and kicked her. (3 RT 806-07, 813-14.) A reasonable jury could conclude that petitioner committed an assault. Eventually, however, petitioner's sentence for this offense was stayed under Cal. Penal Code § 654, which prohibits multiple punishments for the same acts. (4 RT 1836.)

False imprisonment is the unlawful violation of the personal liberty of another. Cal. Penal Code § 236. False imprisonment is a felony if effected by violence, menace, fraud, or deceit. *People v. Dominquez*, 180 Cal. App. 4th 1351, 1356-57 (2010) (citing Cal. Penal Code § 237(a)). Evidence was presented that petitioner dragged Blanca into the shower and then punched and kicked her in order to keep her there when she tried to get out. (3 RT 814, 820-21.) Blanca told Office Suess that petitioner ordered her to stay in the shower and that she obeyed him in order to avoid another beating. (3 RT 821-22.) A reasonable jury could conclude

that petitioner committed false imprisonment.

Petitioner claims that the evidence was insufficient to support his convictions primarily because Blanca changed her story after reconciling with petitioner and claimed that she slipped and fell. The jury, however, made a credibility determination about Blanca's various accounts, and the Court has no basis to revisit that determination. *See Bruce*, 376 F.3d at 957. A reasonable jury could find that Blanca's initial account of an attack — which was consistent with other evidence such as the 911 calls, the officer's testimony, and the evidence of her injuries — was more credible than her post-reconciliation account of a slip and fall. Moreover, the Court must presume that any conflicting inferences that could be drawn from Blanca's testimony were resolved by the jury in favor of the prosecution. *See Jackson*, 443 U.S. at 326; *see also Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (rejecting insufficiency-of-the-evidence claim where the jury "was presented with competing views of how [the victim] died" and credited the prosecutor's theory).

In sum, the California Court of Appeal's rejection of this claim did not involve an unreasonable application of the *Jackson* standard.

D. Trial counsel's alleged ineffectiveness during trial (Grounds Two and Four).

In Grounds Two and Four, petitioner claims that his trial counsel was ineffective in various respects during trial. (ECF No. 1 at 10, 12.)

1. Legal standard.

In *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the Supreme Court held that there are two components to an ineffective assistance of counsel claim: "deficient performance" and "prejudice." "Deficient performance" in this context means unreasonable representation falling below professional norms prevailing at the time of trial. *See Strickland*, 466 U.S. at 688-89. To show "deficient

performance," petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Further, petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The Court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Id.* The Supreme Court in *Strickland* recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Accordingly, to overturn the strong presumption of adequate assistance, petitioner must demonstrate that "the challenged action cannot reasonably be considered sound trial strategy under the circumstances of the case." *See Lord v. Wood*, 184 F.3d 1083, 1085 (9th Cir. 1999).

To meet his burden of showing the distinctive kind of "prejudice" required by *Strickland*, petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See Strickland*, 466 U.S. at 694; *see also Richter*, 562 U.S. at 111 ("In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (noting that the "prejudice" component "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair").

Moreover, it is unnecessary to address both *Strickland* requirements if the petitioner makes an insufficient showing on one. *See Strickland*, 466 U.S. at 697

("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other."); *Williams v. Calderon*, 52 F.3d 1465, 1470 and n.3 (9th Cir. 1995) (disposing of an ineffective assistance of counsel claim without reaching the issue of deficient performance because petitioner failed to make the requisite showing of prejudice).

In *Richter*, the Supreme Court reiterated that the AEDPA requires an additional level of deference if state court has rejected an ineffective assistance of counsel claim. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *See Richter*, 562 U.S. at 101. As the Supreme Court further observed (*id.* at 105):

> "'Surmounting *Strickland*'s high bar is never an easy task.' *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' *Id.*, at 689, 104 S. Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914

(2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S .Ct. 2052.

"Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' *id.*, at 689, 104 S. Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), and when the two apply in tandem, review is 'doubly' so, *Knowles*, 556 U.S., at -, 129 S. Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."

2. Failure to object to the audio recording (Ground Two).

In Ground Two, petitioner claims that his trial counsel was ineffective for failing to object to the admission of the audio recording of his arrest under *Miranda v. Arizona*, 384 U.S. 436 (1966). The audio recording of the events leading to petitioner's arrest was captured, as noted, from Sergeant Baker's dashcam recorder. (2 CT 210-24.)

A motion by trial counsel under *Miranda* would have been meritorious if trial counsel could have shown that statements were elicited from petitioner as a result

of custodial interrogation without a *Miranda* warning. An officer's obligation to give *Miranda* warnings to a suspect applies if the person is subjected to "either express questioning or its functional equivalent." *See Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). In other words, "interrogation" for purposes of *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police officers that "they should have known were reasonably likely to elicit an incriminating response." *See id.* at 301 (italics in original); *Pennsylvania v. Muniz*, 496 U.S. 582, 600-01 (1990) (plurality opinion).

Petitioner has not identified any particular self-incriminating statements captured on the audio recording that were elicited in violation of *Miranda*, but he appears to be challenging the statements highlighted by the prosecutor in her closing argument. The prosecutor highlighted three types of statements petitioner made on the audio recording. First, petitioner could be heard complaining of police brutality, leading to him screaming and throwing a fit. (4 RT 1011-12; *see also* 2 CT 218.) Second, petitioner could be heard calling the victim derogatory names such as "bitch," "puta," "thief," and "liar." (4 RT 1012; *see also* 2 CT 215, 216.) Third, petitioner could be heard claiming that he had acted in self-defense. (4 RT 1013; *see also* 2 CT 216.)

None of these three types of statements by petitioner was protected by *Miranda* because none of them was the product of express questioning or its equivalent. Rather, petitioner made each of the statements spontaneously and voluntarily, without any prompting by the officers. *See Miranda*, 384 U.S. at 478 (voluntary statements are not subject to *Miranda* warnings). Accordingly, trial counsel would have had no grounds to bring a motion under *Miranda*.

In sum, it would not have been objectively unreasonable for the California Court of Appeal to reject this claim because petitioner had failed to show deficient performance and prejudice under the *Strickland* standard.

3. Failure to present a defense and call favorable witnesses (Ground Four).

In Ground Four, petitioner claims that his trial counsel was ineffective in several other respects in conducting petitioner's defense at trial. As discussed below, the California Court of Appeal's rejection of this claim, for failure to show both deficient performance and prejudice under the *Strickland* standard, was not objectively unreasonable.

Petitioner claims that his trial counsel was ineffective for failing to impeach Officer Suess about the destruction of the secret audio recording of petitioner's arrest and about the alteration of photographs of Blanca's injuries. Neither of these claims has any basis in the record. The record does not permit a reasonable inference that Officer Suess secretly made his own audio recording of petitioner's arrest, as discussed above. Likewise, the record does not permit a reasonable inference that the government altered photographs of Blanca's injuries. In any event, before trial began, during a brief period when petitioner was representing himself, petitioner did bring a motion to exclude the prosecutor's photographs of Blanca, but his motion was denied. (2 RT C-9 to C-12; Petition Exhibit A at 26-29.) Any further objection by trial counsel on this point therefore would have been futile. *See James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) (trial counsel cannot be ineffective for failing to bring a motion that had already been denied). Moreover, the photographs were not the only evidence of Blanca's injuries: The jury heard testimony that Blanca's wounds led to severe bleeding and required emergency medical treatment. Accordingly, there was no reasonable probability that, but for trial counsel's failure to move to exclude the photographs, the trial court would have granted the motion as meritorious and the result of the trial would have been different.

Petitioner similarly claims that his trial counsel was ineffective for failing to object to any of the prosecutor's exhibits. (4 RT 952; Petition Exhibit A at 88.)

Petitioner's failure to clearly identify what exhibits should have been excluded, apart from the photographs of Blanca's injuries, is sufficient for the Court to find that the California Court of Appeal's rejection of this claim was not objectively unreasonable. *See Greenway v. Schriro*, 653 F.3d 790, 804 (9th Cir. 2011) (rejecting ineffective assistance claim where petitioner makes only a "cursory and vague" claim and "does not allege what specific facts or information" counsel should have pursued).

Petitioner claims that his trial counsel was ineffective for failing to present an expert witness who could have contradicted the prosecutor's theory that petitioner attacked Blanca. As support, petitioner cites a report prepared for the defense by Dr. Ryan O'Connor in June 2014, approximately five months after the attack. (ECF No. 1 at 25-27; Petition Exhibit A at 2-4.) Upon reviewing Blanca's court and medical records, Dr. O'Connor concluded that Blanca's facial laceration could have been caused *either* by an attack *or* by an accidental slip and fall. (*Id.*)

To the extent that petitioner is contending that trial counsel should have called Dr. O'Connor as an expert witness for the defense, he has shown neither deficient performance nor prejudice. The central issue at trial of what caused Blanca's injuries was not resolved through medical experts. Dr. O'Connor's opinion was inconclusive about the cause of Blanca's laceration. Similarly, the prosecutor presented no expert medical evidence (4 RT 1080) and in particular, presented no expert medical opinion that Blanca's laceration was intentionally inflicted. The only medical evidence presented at trial was five pages of Blanca's medical records, introduced for the sole purpose of impeaching her credibility with her prior inconsistent statements about the cause of her injuries. (4 RT 929-35.) Indeed, the jury's finding as to the cause of Blanca's injuries depended on the jury's credibility determination of the eyewitnesses, including Blanca herself. Dr. O'Connor's neutral opinion would have added nothing in that regard.

Petitioner claims that his trial counsel was ineffective for failing to present a

defense of self-defense. When he was arrested, petitioner told the arresting officers that Blanca had attacked him first. (2 CT 216-17.) A defense of self-defense built on this flimsy evidence, however, would have conflicted with the defense that trial counsel actually chose to present at trial: a defense of reasonable doubt, based on Blanca's own trial testimony that she accused petitioner of assault only because she was angry with him and that her injuries were in fact caused by a slip and fall. Trial counsel had a reasonable basis to select this defense because it was based on the victim's own trial testimony. In comparison, trial counsel's only evidence for a defense of self-defense would have been petitioner's self-serving statements and possibly the testimony of his mother. Trial counsel's failure to present a defense of self-defense was not unreasonable under these circumstances. *See Bean v. Calderon*, 163 F.3d 1073, 1082 (9th Cir. 1998) (once trial counsel reasonably selects a defense, he has no obligation to pursue a conflicting defense); *Turk v. White*, 116 F.3d 1264, 1167 (9th Cir. 1997) (same).

In sum, it would not have been objectively unreasonable for the California Court of Appeal to reject each of petitioner's claims of ineffective assistance of trial counsel, before and during trial, on the grounds that petitioner had failed to show deficient performance and prejudice.

E. Prosecutor's alleged misconduct (Ground Five).

In Ground Five, petitioner claims that the prosecutor committed misconduct by misstating the evidence and presenting false evidence. (ECF No. 1 at 13.)

1. Legal standard.

Federal habeas review of prosecutorial misconduct claims is limited to the narrow issue of whether the alleged misconduct violated due process. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974); *Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir. 1996). Misconduct is reviewed in light of the entire trial record, and relief

will be granted only if the misconduct by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. *See Donnelly*, 416 U.S. at 639-43; *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). Under *Darden v. Wainwright*, 477 U.S. 168, 181-83 (1986), the first issue is whether the prosecutor's remarks or conduct were improper; if so, the next question is whether such remarks or conduct infected the trial with unfairness. *See Tak Sun Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005). In the absence of misconduct by the prosecutor, the Court need not reach the issue of whether the conduct in question infected the trial with unfairness. *See id.*

2. Analysis.

Petitioner claims that the prosecutor committed misconduct in several broad instances. (ECF No. 1 at 13.) For the following reasons, however, it would not have been objectively unreasonable for the California Court of Appeal to reject each of these claims because the prosecutor's alleged acts or statements did not constitute misconduct.

Petitioner claims that the prosecutor misled the jury into thinking that Blanca had sought a protective order against petitioner. Although a protective order was in fact issued, Blanca testified that she did not request it. (3 RT 665-66.) In fact, shortly after it was issued, Blanca unsuccessfully tried to have the protective order modified. (Petition Exhibit A at 7; ECF No. 1 at 30.) At trial, the protective order was admitted as evidence over the defense's objection. (4 RT 955.) The trial court ruled that it was admissible to impeach Blanca: She disregarded the protective order by continuing to communicate with petitioner, thereby showing her bias against the government. (*Id.*) At the sentencing hearing, Blanca again pointed out that she had not requested the protective order. (4 RT 1830-31.)

Contrary to petitioner's characterization of the prosecutor's actions and statements, the prosecutor did not mislead the jury into thinking that Blanca had sought the protective order. The jury heard Blanca testify that she did not request it. (3 RT 665-66.) Although the prosecutor did mention in her closing argument that Blanca had violated a protective order, she did not suggest that it was Blanca who had requested it in the first instance. (4 RT 1004-05.) Accordingly, the prosecutor did not commit misconduct by misleading the jury about the circumstances of the protective order.

Petitioner also claims that the prosecutor misstated the evidence about Blanca's blood from her injuries. In her opening statement, the prosecutor said that Blanca "bled a lot" from the injury to her face and that petitioner dragged Blanca by her hair to the shower. (2 RT 303; Petition Exhibit A at 34.) In her closing statement, the prosecutor repeatedly said that there was "blood everywhere" from the "gash" on Blanca's head and that petitioner dragged Blanca by her hair into the bathroom. (4 RT 1006, 1085; Petition Exhibit A at 113.) According to petitioner, no evidence supported the prosecutor's statements that "there was blood everywhere," that "there was a bloody rag," and that petitioner dragged Blanca by the hair across a "rug full of blood."

Contrary to petitioner's characterization of the evidence, witnesses testified that they saw a lot of blood on the day of the incident. Blanca testified that her cut bled "tremendously" and that there was blood "everywhere," including her clothing, the floor, and the kitchen cabinet. (2 RT 340, 341.) Irene Alvarez testified that the towel she used to help Blanca had blood on it. (3 RT 716.) Officer Suess testified that Irene Alvarez was holding a towel with "blood all over it" and that Blanca had "blood running down her face." (3 RT 798.) Officer Suess also testified that Blanca said petitioner dragged her by the hair toward the shower. (3 RT 814.) In light of all this testimony, the prosecutor did not commit misconduct by overstating the evidence about the blood resulting from Blanca's

injuries.

Petitioner further claims that the prosecutor made several other false or misleading statements. As discussed below, each of petitioner's claims is belied by the record, with the single exception of a minor misstatement by the prosecutor.

Petitioner points out that the prosecutor made a misstatement about his conviction. The prosecutor wrote in a sentencing memorandum that petitioner had committed assault with force likely to produce great bodily injury. (2 CT 329.) This was a misstatement because petitioner in fact had been convicted of only misdemeanor assault. (2 CT 273-74.) But the error could have had no effect on any subsequent proceeding because the sentencing court was well-aware of petitioner's conviction of the lesser offense. (4 RT 1501, 1801, 1836.)

Petitioner also claims that the prosecutor's closing argument contained misstatements. Contrary to petitioner's claims, the prosecutor's statements were permissible inferences from the evidence or directly supported by the evidence. The prosecutor stated that petitioner had manipulated Blanca. (4 RT 1818, 1819.) This was a permissible inference from the evidence, which reflected that Blanca changed her account of the incident after reconciling with petitioner. (2 RT 399.) The prosecutor stated that petitioner threw Blanca around like a rag doll and dragged her by her hair. (4 RT 1005, 1006.) These statements were supported by the evidence. (3 RT 806, 813-814.) The prosecutor stated that petitioner had complained about police brutality. (4 RT 1011.) This statement was supported by the evidence. (3 RT 800; 2 CT 218.)

Petitioner also claims that the prosecutor made misstatements about petitioner's criminal history for purposes of sentencing, but this claim also is belied by the record. Petitioner claims that the prosecutor falsely said petitioner had been arrested for robbery and rape, but the prosecutor made no such statement. Petitioner claims that the prosecutor falsely said at the sentencing hearing that he had violated his parole, but the prosecutor's statement was supported by petitioner's

probation report. (4 RT 1835; Sealed Lodgment 19 at 8, 13).

In sum, none of the instances identified by petitioner amounted to prosecutorial misconduct. The California Court of Appeal's rejection of this claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law.

F. Alleged juror Bias (Ground Six).

In Ground Six, petitioner claims that his right to an impartial jury was violated because some of the jurors had scheduling conflicts. (ECF No. 1 at 14.)

A criminal defendant has a Sixth Amendment right to a "fair trial by a panel of impartial, 'indifferent' jurors." *Irwin v. Dowd*, 366 U.S. 717, 722 (1961); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998). If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel." *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977); *Dyer*, 151 F.3d at 973.

On the day that deliberations began, the jurors sent the trial court a note stating in part, "Some jurors are unavailable tomorrow." (4 RT 1100; 2 CT 228.) The trial court addressed the jurors about their scheduling issues. (4 RT 1102-03.) One juror said that her childcare was going to be "maxed out." (4 RT 1103.) Two jurors each had doctor's appointments the next morning. (4 RT 1103-04.) One juror had to go to back to work the next day, so she was given a note for her employer. (4 RT 1105.) In order to accommodate the jurors' scheduling issues, the trial court recessed deliberations until 1:30 the next day. (4 RT 1105.)

The jurors returned to court the next day at 1:30. (4 RT 1201.) When this afternoon session began, the trial court answered an unrelated question (about the definition of the word "likely") and had the jurors resume deliberations. (4 RT 1201-02.) An hour later, they reached a verdict. (4 RT 1203-05; 2 CT 284.)

Petitioner points to the duration of the deliberations, apparently to argue that

the jurors' scheduling conflicts caused them to rush to judgment. (ECF No. 1 at 14.) But the length of a jury's deliberations, by itself, does not prove juror bias. *See United States v. Anderson*, 561 F.2d 1301, 1303 (9th Cir. 1977) ("There is no established rule that any specified time is required to reach unanimity."); *United States v. Caro-Quintero*, 769 F. Supp. 1564, 1582 (C.D. Cal. 1991) ("A rushed verdict is not necessarily prejudicial to defendant."); *United States v. Aguilera*, 625 F.3d 482, 487 (8th Cir. 2010) ("We agree with other circuits that brief jury deliberation alone is not a sufficient basis for a new trial."); *see also Marx v. Hartford Acc. & Indem. Co.*, 321 F.2d 70, 71 (5th Cir. 1963) ("We cannot hold an hour-glass over the jury. If the evidence is sufficient to support the verdict, the length of time the jury deliberates is immaterial.").

This was not a complex case, and the evidence was not voluminous. It was not suspicious under these circumstances that the jury took 1 hour to reach its verdict. *See Wall v. United States*, 384 F.2d 758, 762 (10th Cir. 1967) (finding no irregularity where jury took 1 hour to deliberate after 8 days of trial); *United States v. Brotherton*, 427 F.2d 1286, 1289 (8th Cir. 1970) (same where jury deliberated for 5 to 7 minutes); *Kimes v. United States*, 242 F.2d 99, 100 (5th Cir. 1957) (same where jury deliberated for 20 minutes).

Petitioner also apparently is arguing that the jurors' scheduling conflicts caused them to make inconsistent findings. (ECF No. 1 at 14.) The alleged inconsistency is about the issue of great bodily injury: The jury found in Count 2 that petitioner was not guilty of felony assault with force likely to produce great bodily injury, yet it also found with respect to Count 1 that petitioner personally inflicted great bodily injury. (2 CT 272-73.) These findings were not inconsistent. The jury's focus of Count 2 was "on the force used, not the injury actually inflicted." *See People v. Johnson*, 244 Cal. App. 4th 384, 396 n.8 (2016). Thus, the jury's finding in Count 2 did not constitute any implied findings with respect to the great-bodily-injury enhancement for Count 1. *See id.* ("The jury's acquittals on

the assault charges do not constitute implied findings with respect to the nature and severity of the injuries inflicted.").

And in any event, even if the jury's findings in this regard were inconsistent, they would afford no basis for federal habeas relief. *See Ferriz v. Giurbino*, 543 F.3d 990, 992 (9th Cir. 2005) ("The Supreme Court has made it clear that inconsistent verdicts may stand when one of those verdicts is a conviction and the other an acquittal.") (*citing United States v. Powell*, 469 U.S. 57, 65 (1984), and *Dunn v. United States*, 284 U.S. 390, 393 (1932)).

In sum, petitioner has not shown that either the jurors' scheduling issues or their eventual verdicts demonstrated an absence of impartiality. It therefore would not have been objectively unreasonable for the California Court of Appeal to reject petitioner's juror-bias claim.

G. Trial counsel's alleged ineffectiveness at sentencing (Ground Seven).

In Ground Seven, petitioner claims that his trial counsel was ineffective at sentencing by failing to investigate the validity of petitioner's prior strike conviction and failing to inform the trial court that the strike allegation was invalid. (ECF No. 1 at 15.)

The prosecutor alleged that petitioner had a prior strike conviction based on a 1991 conviction for attempted murder (Case No. KA005302). (2 CT 335; 4 RT 1504.) Petitioner committed the attempted murder, which was gang-related, when he was 17 years old. (4 RT 1803, 1805.) The trial court found beyond a reasonable doubt that the strike allegation was true. (4 RT 1523.) Later, at the sentencing hearing, trial counsel brought a motion to strike the prior conviction under *People v. Superior Court (Romero)*, 13 Cal. 4th 497 (1996). (4 RT 1802; 2 CT 320-27.) In her *Romero* argument, trial counsel emphasized petitioner's youth and susceptibility to gang influence at the time of the offense, as well as petitioner's later attempts to avoid gangs and straighten out his life. (4 RT 1802-07.) The trial

court denied the *Romero* motion. (4 RT 1823.)

Petitioner contends that his prior conviction for attempted murder was not a strike conviction because he was sentenced to the California Youth Authority, was paroled in 1997, never violated his parole, and was regularly audited on parole. (ECF No. 1 at 15.) According to petitioner, his trial counsel was ineffective for failing to argue these facts when she brought a motion to strike the allegation under *People v. Superior Court (Romero)*, 13 Cal. 4th 497 (1996). (ECF No. 1 at 15; 2 CT 320-27.)

It is unclear whether petitioner is claiming that trial counsel should have disputed the truth of the strike allegation or should have argued more forcefully for the *Romero* motion. Neither claim, however, demonstrates that trial counsel was ineffective for purposes of sentencing.

Petitioner's prior conviction for attempted murder constituted a strike conviction under California law. *See* Cal. Penal Code §§ 667.5 (c)(12) (attempted murder), 1192.7(c)(9) (attempted murder). Petitioner's alleged commitment at the California Youth Authority would have made no difference. Although the record is unclear as to whether petitioner is correct in asserting that he served a term of confinement in the California Youth Authority (4 RT 1802, 1806), it would have made no difference under the Three Strikes Law even if he were correct on this point. *See People v. Daniels*, 51 Cal. App. 4th 520, 522 (1996), *as modified* (Jan. 6, 1997) (felony conviction that was expunged upon defendant's honorable discharge from the California Youth Authority could still later count as a strike under the Three Strikes Law); *People v. Franklin*, 57 Cal. App. 4th 68, 73 (1997) (Three Strikes law applied even though defendant subsequently received a general discharge from the Youth Authority). Accordingly, any argument by trial counsel on this basis as an attempt to challenge the truth of strike allegation would have been meritless. The failure to make a futile or meritless argument does not constitute ineffective assistance of counsel. *See, e.g., Rupe v. Wood*, 93 F.3d 1434,

1445 (9th Cir. 1996); *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994); *Morrison v. Estelle*, 981 F.2d 425, 429 (9th Cir. 1992); *Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir. 1989).

Moreover, petitioner's allegedly successful completion of his term of commitment at the California Youth Authority would not have added any force to the *Romero* argument that trial counsel in fact made. For purposes of submitting a *Romero* motion, an attorney "should investigate a defendant's 'background, character, and prospects,' and then relay those findings to the court." *Daire v. Lattimore*, 818 F.3d 454, 463 (9th Cir. 2016) (quoting *People v. Thimmes*, 138 Cal. App. 4th 1207, 1213 (2006)). Trial counsel did so here, in both her written motion and oral argument. (2 CT 320-27; 4 RT 1802-07.) In particular, trial counsel argued at length about petitioner's personal circumstances at the time he committed the attempted murder, including his youth, his chaotic family situation, and his vulnerability to gang influence. (4 RT 1802-04.) Trial counsel also pointed out that petitioner had left the gang and was trying to straighten out his life. (4 RT 1806-07.) Petitioner's argument about his successful completion of his term of commitment at the California Youth Authority is of the same nature as the arguments that trial counsel already made and that the trial court rejected. It therefore would not have been objectively unreasonable for the California Court of Appeal to conclude that trial counsel had met her obligations for purposes of the *Romero* motion. *See Daire*, 818 F.3d at 463 ("Given the litany of mitigating factors presented at sentencing, it was reasonable for the state court to conclude that counsel had satisfied her constitutional obligation to [petitioner].").

In sum, it would not have been objectively unreasonable for the California Court of Appeal to reject this claim because petitioner had failed to show deficient performance and prejudice under the *Strickland* standard.

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H. Trial court's alleged sentencing errors (Ground Eight).

In Ground Eight, petitioner claims that the trial court committed multiple sentencing errors. (ECF No. 1 at 16.)

At the initial sentencing hearing, the trial court sentenced petitioner to 20 years and 4 months, calculated as follows (4 RT 1834-36):

- 8 years for Count 1, willful infliction of corporal injury (Cal. Penal Code § 273.5(a)), consisting of the high term of 4 years doubled to 8 years under the Three Strikes Law; plus
- 5 years for petitioner's prior conviction for a serious felony (Cal. Penal Code § 667(a)); plus
- 1 year for petitioner's prior prison term (Cal. Penal Code § 667.5(b)); plus
- 5 years for the enhancement as to Count 1 for personal infliction of great bodily injury (Cal. Penal Code § 12022.7(e)); plus
- 1 year and 4 months for Count 3, false imprisonment (Cal. Penal Code § 236), consisting of one-third of the middle term of 2 years doubled to 1 year and 4 months under the Three Strikes Law.

Petitioner also was sentenced to 6 months in county jail for Count 2, misdemeanor assault, but that term was stayed under Cal. Penal Code § 654. (4 RT 1836.) And eventually, petitioner's one-year enhancement for a prior prison term, for his prior conviction of being a felon in possession of a firearm, was reversed on appeal for insufficient evidence (specifically, because more than 5 years had elapsed since his release from custody for that conviction and the commission of the instant crimes). (Lodgment 9.) Thus, petitioner eventually was resentenced to 19 years and 4 months. (Lodgment 10 at 28-29.)

With respect to his eventual sentence, petitioner raises four additional arguments of sentencing error. According to petitioner, the trial court erred by

(1) imposing an "aggravated sentence" for Count 1 when the evidence showed mitigation or actual innocence, (2) imposing "consecutive sentence for an allege[d] single act offense," (3) failing to stay the term for Count 3 under § 654, and (4) imposing a 5-year enhancement for a prior serious felony conviction that was "void" because he was found "not guilty" of the prior prison term allegation. (ECF No. 1 at 16.)

Federal habeas relief only is available if the petitioner is contending that he is in custody in violation of the Constitution or laws or treaties of the United States. *See* 28 U.S.C. § 2254(a). Federal habeas relief is unavailable for alleged errors in the interpretation or application of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Smith v. Phillips*, 455 U.S. 209, 221 (1982). Each of petitioner's four sentencing arguments raises only questions as to the interpretation and application of state law. *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (rejecting petitioner's claim that a state court misapplied its own aggravating circumstance to the facts of his case because "federal habeas corpus relief does not lie for errors of state law"); *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) ("The decision whether to impose sentences concurrently or consecutively is a matter of state criminal procedure and is not within the purview of federal habeas corpus."); *Watts v. Bonneville*, 879 F.2d 685, 687 (9th Cir. 1989) (holding that sentencing error claim under California Penal Code § 654 is not cognizable on federal habeas review); *Miller v. Vasquez*, 868 F.2d 1116, 1118-19 (9th Cir. 1989) (holding that sentencing error claim as to whether a prior offense qualified as a "serious felony" under § 667(a), for purposes of California's sentence enhancement provisions, is not cognizable on federal habeas review).

Under the foregoing authorities, petitioner's sentencing-error claims are not cognizable on federal habeas review.

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I. Appellate counsel's alleged ineffectiveness (Ground Eleven).

In Ground Eleven, petitioner claims that his appellate counsel was ineffective for failing to investigate the records on appeal, failing to raise the claims raised in this Petition, and failing to consult with petitioner. (ECF No. 1 at 20.)

Claims of ineffective assistance of appellate counsel are reviewed under the *Strickland* standard. Petitioner must show that the performance of appellate counsel fell below an objective standard of reasonableness and that, for appellate counsel's professional errors, there is a reasonable probability that petitioner would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000).

Each of petitioner's proposed claims has been shown to be invalid for the reasons discussed above. Petitioner therefore has failed to meet his burden of showing a reasonable probability that he would have prevailed on appeal if his appellate counsel had raised these issues. *See Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985) ("[Petitioner] claims as well that appellate counsel's failure to argue the issues presented above constituted ineffective assistance of counsel. In view of the fact that those claims have been shown to be invalid [petitioner] would not have gained anything by raising them.").

Moreover, many of petitioner's claims of ineffective assistance of trial counsel would not have been proper issues on appeal because they were not based on the appellate record. *See People v. Wilson*, 3 Cal. 4th 926, 936 (1992) ("[B]ecause, in general, it is inappropriate for an appellate court to speculate as to the existence or nonexistence of a tactical basis for a defense attorney's course of conduct when the record on appeal does not illuminate the basis for the attorney's challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a habeas corpus proceeding.")

In sum, the issues appellate counsel failed to raise lacked merit and in some cases were not appropriate appellate issues. It therefore would not have been objectively unreasonable for the California Court of Appeal to reject this claim on

the ground that neither *Strickland* prong was satisfied.

J. The California Court of Appeal's alleged abuse of discretion in denying petitioner's habeas petition (Ground Twelve).

In Ground Twelve, petitioner claims that the California Court of Appeal abused its discretion in denying petitioner's state habeas petition. (ECF No. 1 at 21.)

It is well-settled that claims of error in a state habeas proceeding are not addressable through federal habeas corpus. *See Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) (per curiam); *Cooper v. Neven*, 641 F.3d 322, 331 (9th Cir. 2011); *Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997); *Villafuerte v. Stewart*, 111 F.3d 616, 632 n.7 (9th Cir. 1997). This is because federal habeas corpus is limited to an attack on a prisoner's detention, and does not contemplate an attack on a state postconviction proceeding collateral to that detention. *See Franzen*, 877 F.2d at 26 ("A habeas petition must allege the petitioner's detention violates the constitution, a federal statute, or a treaty."). To the extent that petitioner is challenging any procedures from his state habeas proceeding, Ground Twelve does not raise a claim that is cognizable on federal habeas review.

To the extent that petitioner is challenging the substance of the California Court of Appeal's denial of his habeas petition on the merits, his claims are meritless under the AEDPA standard of review for the reasons discussed above. Petitioner therefore has not met his burden of showing that the Court of Appeal's rejection of his claims was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 562 U.S. at 103.

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K. Petitioner's request for an evidentiary hearing.

Finally, petitioner requests an evidentiary hearing to resolve his claims. (Traverse at 27.) The request is denied.

As noted above, the Supreme Court held in *Pinholster*, 563 U.S. at 180, that 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." By its express terms, § 2254(d)(2) restricts federal habeas review to the record that was before the state court. *See also Pinholster*, 563 U.S. at 185 n.7 (noting that an unreasonable determination of fact under § 2254(d)(2) must be unreasonable "in light of the evidence presented in the State court proceeding," and stating that "[t]he additional clarity of § 2254(d)(2) on this point . . . does not detract from our view that § 2254(d)(1) also is plainly limited to the state-court record."). Thus, federal courts may not consider new evidence on claims adjudicated on the merits in state court unless the petitioner first satisfies his burden under § 2254(d) and then satisfies his burden under § 2254(e)(2). *See Pinholster*, 563 U.S. at 181-85; *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004). Accordingly, the Court's findings above that petitioner is not entitled to federal habeas relief under the AEDPA standard of review for any of his claims are dispositive of petitioner's request for an evidentiary hearing.

ORDER

IT THEREFORE IS ORDERED that (1) the Petition is denied; (2) petitioner's request for an evidentiary hearing is denied; and (3) this action is dismissed with prejudice.

DATED: July 18, 2017

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

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