

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

MAY 9 2025

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

EDWARD EARL ROBINSON,  
Petitioner - Appellant,

v.

RAYBON JOHNSON, Warden,  
Respondent - Appellee.

No. 24-6143

D.C. No. 2:20-cv-08778-WLH-PVC  
Central District of California,  
Los Angeles

ORDER

Before: R. NELSON and BUMATAY, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

*Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S.

322, 327 (2003).

All pending motions are denied as moot.

**DENIED.**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

EDWARD ROBINSON,  
Petitioner,

v.

BRIAN CATES, Warden,<sup>1</sup>  
Respondent.

Case No. CV 20-8778 WLH (PVC)

**ORDER ACCEPTING FINDINGS,  
CONCLUSIONS, AND  
RECOMMENDATIONS OF UNITED  
STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, and Petitioner's Objections. After having made a de novo determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition is denied, and Judgment shall be entered dismissing this action with prejudice.

---


<sup>1</sup> Brian Cates, Warden at California Correctional Institution (CCI), where Petitioner is incarcerated, is substituted for his predecessor. *See* Fed. R. Civ. P. 25(d).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on Petitioner at his current address of record and on counsel for Respondent.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

DATED: August 28, 2024

  
\_\_\_\_\_  
HON. WESLEY L. HSU  
UNITED STATES DISTRICT JUDGE

Edward Earl Robinson CDCAR0601  
California Correctional Institution State Prison  
PO Box 1906  
Tehachapi, CA 93581

United States District Court  
Central District of California

Reports & Recommendations

MIME-Version:1.0 From:cacd\_ecfmail@cacd.uscourts.gov To:ecfnef@cacd.uscourts.gov  
Message-Id:<37844133@cacd.uscourts.gov>Subject:Activity in Case 2:20-cv-08778-WLH-PVC  
Edward Robinson v. Raybon Johnson Notice of Report and Recommendation Content-Type: text/html

**This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.**

**\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**Notice of Electronic Filing**

The following transaction was entered on 4/30/2024 at 4:58 PM PDT and filed on 4/30/2024

**Case Name:** Edward Robinson v. Raybon Johnson

**Case Number:** 2:20-cv-08778-WLH-PVC

**Filer:**

**Document Number:** 92

**Docket Text:**

**NOTICE OF FILING REPORT AND RECOMMENDATION** by Magistrate Judge Pedro V. Castillo. Objections to R&R due by 5/20/2024.(hr)

**2:20-cv-08778-WLH-PVC Notice has been electronically mailed to:**

Kenneth C Byrne docketinglaawt@doj.ca.gov, marianne.siacunco@doj.ca.gov,  
lici.garcia@doj.ca.gov, kenneth.byrne@doj.ca.gov, judy.wu@doj.ca.gov

**2:20-cv-08778-WLH-PVC Notice has been delivered by First Class U. S. Mail or by other means**

**BY THE FILER to :**

Edward Earl Robinson

CDC AR0601

D-3 - 141 L

California Correctional Institution State Prison

PO Box 1906

Tehachapi CA 93581

US

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

EDWARD ROBINSON,

v.

TERESA CISNEROS, Warden,

CASE NUMBER:

CV 20-8778 WLH (PVC)

NOTICE OF FILING  
OF MAGISTRATE JUDGE'S REPORT  
AND RECOMMENDATION (COA)

TO: All Parties of Record

You are hereby notified that the Magistrate Judge's report and recommendation has been filed on  
April 30, 2024.

Any party having Objections to the report and recommendation and/or order shall, not later than  
May 20, 2024, file and serve a written statement of Objections with points and  
authorities in support thereof before the Honorable Pedro V. Castillo, U.S. Magistrate  
Judge. A party may respond to another party's Objections within 14 days after being served with a copy of the  
Objections.

Failure to object within the time limit specified shall be deemed a consent to any proposed findings of fact.  
Upon receipt of Objections and any Response thereto, or upon lapse of the time for filing Objections, the case will  
be submitted to the District Judge for disposition. Following entry of Judgment and/or order, all motions or other  
matters in the case will be considered and determined by the District Judge.

Parties are advised that, effective December 1, 2009, Rule 11 of the Rules Governing Section 2254 Cases  
was amended. Rule 11 now provides that in habeas corpus matters pursuant to 28 U.S.C. § 2254, the District Judge  
must issue or deny a Certificate of Appealability when a final order adverse to the applicant is entered. Parties may  
wish to take this Rule into consideration at the time they file any Objections to the report and recommendation.

The report and recommendation of a Magistrate Judge is not a final appealable order. A notice of appeal  
pursuant to Federal Rules of Appellate Procedure 4(a)(1) should not be filed until entry of a judgment and/or order  
by the District Judge.

CLERK, UNITED STATES DISTRICT COURT

Dated: April 30, 2024

By: Marlene Ramirez  
Deputy Clerk



1 the subclaims in Ground One).<sup>1</sup> (Petition, Dkt. No. 1). On February 3, 2021, Respondent  
2 filed a Motion to Dismiss contending that the Petition should be dismissed because it was  
3 “mixed,” as it contained exhausted and unexhausted claims, and raised claims that were  
4 procedurally defaulted or not cognizable on federal habeas review. (Dkt. No. 13). In  
5 response, Petitioner requested a stay pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005).  
6 (Dkt. Nos. 18, 21). On December 29, 2021, the District Court granted Petitioner a stay to  
7 exhaust claims in state court and denied Respondent’s Motion to Dismiss the entire  
8 Petition but dismissed one claim for failure to state a cognizable federal claim. (Dkt. Nos.  
9 24, 30).

10  
11 On December 14, 2022, after Petitioner exhausted all his claims in state court, the  
12 District Court vacated the stay. (Dkt. No. 49). On March 7, 2023, Respondent filed a  
13 Renewed Motion to Dismiss, arguing that several of the claims were procedurally  
14 defaulted and should be dismissed. (Dkt. No. 56). On August 18, 2023, the undersigned  
15 Magistrate Judge denied the Renewed Motion to Dismiss without prejudice and ordered  
16 Respondent to address the merits of the claims. (Dkt. No. 70). On October 27, 2023,  
17 Respondent filed an Answer with an accompanying memorandum of points and  
18 authorities (“Ans. Mem.”). (Dkt. No. 80). Respondent also lodged relevant portions of  
19 the record from Petitioner’s state court proceedings, including a 5-volume Reporter’s  
20 Transcript (“RT”) and a 3-volume Clerk’s Transcript (“CT”).<sup>2</sup> (Dkt. No. 81). On January  
21 25, 2024, Petitioner filed a Reply. (Dkt. No. 88). For the reasons discussed below, it is  
22 recommended that the Petition be DENIED and this action be DISMISSED with

23  
24 <sup>1</sup> Under the “mailbox rule,” a pleading filed by a *pro se* prisoner is deemed to be filed as  
25 of the date the prisoner delivered it to prison authorities for mailing to the court clerk, not  
26 the date on which the pleading may have been received by the court. *See Houston v.*  
27 *Lack*, 487 U.S. 266, 270 (1988); *Roberts v. Marshall*, 627 F.3d 768, 770 n.1 (9th Cir.  
2010). Accordingly, the Court adopts the date Petitioner signed the Petition, September  
20, 2020, as the constructive filing date. (*See* Petition at 106). For ease of reference,  
when citing to the parties’ filings, the Court relies on the CM/ECF-generated pagination  
on the Court’s docket.

28 <sup>2</sup> When referencing the state court record, the Court will cite to the original page  
numbers reflected in the documents rather than the CM/ECF-generated page numbers.

1 prejudice.

2  
3 **II.**

4 **PRIOR PROCEEDINGS**

5  
6 In November 2017, a Los Angeles County Superior Court jury found Petitioner  
7 guilty of forcible oral copulation and false imprisonment with the use of a knife. (CT at  
8 126-34). The trial court found he had one prior strike under California's Three Strikes  
9 law and sentenced him to 35 years to life in prison. (CT at 160-63).

10  
11 Petitioner appealed, raising several of the claims raised herein. (Dkt. No. 14,  
12 Lodgment 1 at 2). On June 19, 2019, the California Court of Appeal affirmed the  
13 judgment in a reasoned, written decision on the merits but remanded the matter to the trial  
14 court to determine whether a prior serious felony conviction enhancement should be  
15 stricken. (Dkt. No. 14, Lodgment 1 at 2, 38-39). Thereafter, Petitioner filed a petition for  
16 review, which was denied summarily by the California Supreme Court on September 18,  
17 2019. (Dkt. No. 14, Lodgments 2-3). On November 19, 2019, the trial court struck  
18 Petitioner's prior serious felony conviction enhancement, reducing Petitioner's sentence to  
19 30 years to life in prison. (Dkt. No. 14, Lodgment 4 at 10-11).

20  
21 On December 2, 2021, Petitioner filed a habeas corpus petition in the California  
22 Supreme Court. (Dkt. No. 57, Lodgment 6). On April 13, 2022, the California Supreme  
23 Court denied the Petition summarily. (Dkt. No. 57, Lodgment 7). On August 8, 2022,  
24 Petitioner filed a second habeas corpus petition in the California Supreme Court. (Dkt.  
25 No. 57, Lodgment 8). On November 9, 2022, the California Supreme Court denied the  
26 petition with citations to *In re Robbins*, 18 Cal.4th 770, 780 (1998) (courts will not  
27 entertain habeas corpus claims that are untimely) and *In re Clark*, 5 Cal.4th 750, 767-69

1 (courts will not entertain habeas corpus claims that are successive). (Dkt. No. 57,  
2 Lodgment 9).

3  
4 **III.**

5 **FACTUAL BACKGROUND**

6  
7 The following facts, taken from the California Court of Appeal's written decision  
8 on direct review, have not been rebutted with clear and convincing evidence and must,  
9 therefore, be presumed correct. 28 U.S.C. § 2254(e)(1); *Slovik v. Yates*, 556 F.3d 747,  
10 749 n.1 (9th Cir. 2009).

11  
12 ***I. Prosecution Evidence***

13  
14 ***A. Ursula***

15  
16 As discussed further below, Ursula did not testify at trial. Instead, the  
17 transcript of her testimony at [Petitioner's] preliminary hearing was read to  
18 the jury. Ursula testified at the preliminary hearing that she had known  
19 [Petitioner] for about three years. They had a dating relationship that she  
20 described as "rocky." They stopped dating in approximately November  
21 2015; afterward, they would occasionally exchange texts or see each other.

22  
23 On the afternoon of November 15, 2016, she drove to meet [Petitioner]  
24 at his mother's house. Ursula and [Petitioner] had been texting each other,  
25 and [Petitioner] occasionally "offered to help me out financially." That day,  
26 [Petitioner] offered her \$200 and she went to meet him to get the money.  
27 She believed he was trying to win her back by offering to give her money.  
28

1 [Petitioner's] mother lived in a duplex with a detached garage. When  
2 Ursula arrived, she parked in his mother's driveway. [Petitioner] met her  
3 outside and led her toward the garage. The garage had a roll-up door that  
4 appeared to be broken and was not fully closed. Ursula told [Petitioner] she  
5 could only stay for a minute, because she had to pick up her daughter from  
6 school. They went into the garage, and [Petitioner] put a table and large  
7 dumbbell weights in front of the garage door; these items held the door  
8 closed and blocked the exit.  
9

10 Once they were inside the garage, Ursula asked [Petitioner] if he was  
11 going to give her the money. He responded, "man, you tripping," and then  
12 pushed her to the floor. They started "arguing and tussling" and Ursula  
13 tried to tell [Petitioner] that she had to leave. He said, "you are not leaving.  
14 You are not going anywhere." They continued to struggle and Ursula noted  
15 there were "a couple of little knives around," so she grabbed one, but it  
16 folded closed as she tried to use it. She testified that [Petitioner] was  
17 stronger than she was, and "from episodes in the past, he already knows my  
18 weaknesses. Once he gets me down, there is nothing really I can do."  
19

20 Ursula continued to try to get up, but [Petitioner] put his knee on the  
21 back of her neck, saying "Bitch, be still. Be still." Ursula's phone started to  
22 ring, and she told him it was her daughter's school calling. He responded,  
23 "You better call somebody to come get them because you are not going to  
24 get your kids today from school." [Petitioner] then flipped her from her side  
25 onto her stomach and began to tie her hands behind her back with string. As  
26 Ursula continued to try to move, [Petitioner] used duct tape to further  
27 restrain her wrists and then her ankles.  
28

1 Ursula also testified that there were "two or three knives" around and  
2 [Petitioner] had a big knife, which he used to cut her shirt off after she was  
3 tied up. She was still moving around and kicking, but stopped when she  
4 saw the knife. [Petitioner] held the knife point toward her neck and said,  
5 "Bitch, I am not playing with you. You better stop moving."  
6

7 After taping her wrists and ankles, [Petitioner] flipped Ursula onto her  
8 back and lifted her shirt. He touched her breasts under her clothing. He also  
9 pulled down her pants and underwear to her ankles. He unzipped his pants  
10 and told her, "Suck my dick, bitch." He was having a difficult time  
11 achieving an erection, so he continued to touch her breasts, vagina, and  
12 butt. He also put his mouth on her vagina. Defendant then began roughly  
13 forcing his penis into her mouth. At this point she could not see the knife  
14 and thought he had put it down. Ursula continued to plead with [Petitioner]  
15 to let her go to pick up her children, but [Petitioner] refused.  
16

17 At some point, [Petitioner's] mother approached the garage and asked,  
18 "Eddie, is that Ursula's car in the driveway?" [Petitioner] told Ursula, "you  
19 better not say nothing," so she remained quiet. He responded affirmatively  
20 to his mother and his mother said, "She got to move her car. She cannot  
21 park in my driveway like that." Ursula thought this interaction would make  
22 [Petitioner] stop. When she told [Petitioner] that now his mother knew she  
23 was in the garage, he said, "I don't give a fuck. I will tie her up too." He  
24 then began forcing his penis in and out of her mouth faster and faster until  
25 he ejaculated into her mouth.  
26

27 [Petitioner] then told Ursula that he wanted to have vaginal sex and she  
28 asked him to untie her "so we can do it right." She testified that she was

1 trying to “do whatever it would take to get out,” and was very frightened  
2 for her life once she realized [Petitioner] did not care that someone else  
3 knew she was in the garage. [Petitioner] untied her arms and she continued  
4 to ask him to let her go to get her children, promising she would return.  
5 Ursula got dressed and started to leave. [Petitioner] “tried to block [her] a  
6 little bit” but she rolled the weight away from the door and managed to exit  
7 the garage. She ran up to his mother, who was sitting in a chair outside, and  
8 said, “Your son just assaulted me and had me tied up and taped in your  
9 garage.” [Petitioner’s] mother seemed “scared herself,” and said, “I’m sorry  
10 that happened to you.” Ursula saw [Petitioner] coming out of the garage, so  
11 she ran to her car and drove away. She estimated that she was in the garage  
12 for about two hours. [Petitioner] texted her the next day that she “better not  
13 tell” what happened or “there will be a hit on [her] head.”  
14

15 After Ursula left the garage, she called 911. Because she was driving  
16 when she made the call, the operator told her to call back. She called 911  
17 again when she reached her mother’s house.

18 [FN3] There is no recording or transcript of this first 911 call in the  
19 record.  
20

21 *B. 911 call*  
22

23 Ursula’s mother, Evelyn Foster, testified that Ursula called her from her  
24 car after the incident, hysterical and crying. She told her mother what had  
25 happened and said she was going to call the police. Foster was present  
26 when Ursula called 911 after arriving at Foster’s home. According to  
27 Foster, Ursula was still hysterical and crying during the 911 call. The  
28 prosecution played a recording of the 911 call for the jury.

1           In the call, Ursula reported that she went to her ex-boyfriend's house "to  
2 talk to him," but he "threw me in the garage. He tied me up. He duct taped  
3 me. He sexually assaulted me. He busted my lip." She told the operator that  
4 she was able to get free and drove away from the scene because "I didn't  
5 know if he was going to come out and do anything else." The operator  
6 asked if she needed a paramedic, and Ursula replied, "I don't know, I think  
7 so – my neck – I got a busted lip. He did sexually assault me, so I do want  
8 them to take swabs out of my mouth or whatever." She also said that  
9 [Petitioner] "put a knife to me making me perform oral sex on him," and  
10 that [Petitioner] "had knives everywhere." Ursula also told the operator that  
11 she "already filed a report against [Petitioner] a long time ago at 77th Street  
12 police station. So, I'm gonna go through with it this time," and that she had  
13 "been through so much with [Petitioner] before."

14  
15           *C. Investigation*

16  
17           Officer Juan Chavez of the Los Angeles Police Department (LAPD)  
18 testified that he responded to the 911 call around 3:00 p.m. on November  
19 15, 2016. He and his partner met with Ursula, who was standing in the  
20 driveway of the residence; she appeared to have been crying and seemed  
21 nervous. She told them that she went to [Petitioner's] residence and he  
22 "taped her up and forced oral copulation."

23  
24           In her statement to the officers, Ursula said she was dragged into the  
25 garage by [Petitioner] and that [Petitioner] punched her in the face. She also  
26 reported that [Petitioner] pressed a knife against her neck and that there  
27 were several knives on the ground, but when she tried to grab one,  
28 [Petitioner] kicked it away and punched her. Ursula also told the officers

1 that [Petitioner] played a pornographic movie during the assault. When his  
2 mother came to the door, [Petitioner] held a knife to Ursula's throat and  
3 said that she better not scream. He stated he did not care that his mother  
4 was there, and that he would kill her too.

5  
6 After the officers took Ursula's statement, they drove her to a rape  
7 treatment center. Ursula arrived at the center around 6:30 p.m. Sexual  
8 assault response team (SART) nurse practitioner Amarra McHale testified  
9 that she conducted a forensic examination of Ursula. McHale recalled that  
10 when she came in, Ursula was "terrified. . . . She truly thought she was  
11 going to die that day." Ursula had visible injuries, including redness,  
12 swelling, and tenderness to the right side of her face and mouth. Ursula  
13 reported that she was having pain in her mouth and her left shoulder, where  
14 [Petitioner] had put his knee on her. Ursula also told McHale that  
15 [Petitioner] had forced his penis into her mouth and in between her breasts,  
16 cut off her shirt, attempted to penetrate her anus with his fingers, and forced  
17 his mouth on her genitals. She also said [Petitioner] had slapped her face,  
18 bound her wrists and ankles with tape and string, showed her two knives,  
19 and held one knife to her throat. McHale testified that her physical  
20 examination found injuries consistent with Ursula's statements, including  
21 the injuries to the side of Ursula's face and lip and an abrasion inside her  
22 mouth, all of which appeared to be recent. There were no marks on Ursula's  
23 wrists or ankles.

24  
25 McHale also collected Ursula's shirt that had been cut, as well as her  
26 underwear and pants, as part of the evidence she sent to the LAPD crime  
27 lab.

28

1           The LAPD conducted forensic analysis of DNA swabs taken from  
2           Ursula during her sexual assault examination. DNA found on Ursula's left  
3           breast was consistent with [Petitioner's] DNA profile. The swabs were all  
4           negative for semen and sperm.

5  
6           LAPD detective Dara Brown testified to her search of [Petitioner's]  
7           mother's garage pursuant to a search warrant on November 23, 2016. She  
8           recovered two knife blades and an empty roll of tape from inside the  
9           garage. She also spoke with [Petitioner's] mother, Priscilla Craig, who said  
10          that when she saw Ursula on November 15, Ursula looked like she was  
11          about to cry.

12  
13           *D. [Petitioner's] mother*

14  
15          [Petitioner's] mother testified that [Petitioner] was not living with her at  
16          the time of the incident, but he would come over and sometimes "hang out"  
17          in the garage. Craig went out to the garage that day because she recognized  
18          Ursula's car parked in the driveway. She saw Ursula leave the garage by  
19          crawling underneath the partially open garage door. Craig testified that  
20          Ursula looked "normal," but admitted that Ursula told her that she had been  
21          assaulted and held hostage by [Petitioner].

22  
23          ***II. Defense Evidence***

24  
25          [Petitioner] did not present any evidence.

26  
27          (Dkt. No. 14, Lodgment 1 at 4-10).

28

1 IV.

2 PETITIONER'S CLAIMS

3  
4 The Petition raises the following grounds for federal habeas relief.<sup>3</sup> In Ground  
5 1(A), Petitioner claims that the admission of the victim's preliminary hearing testimony  
6 violated his right to confront adverse witnesses. In Ground 1(B), he claims that the trial  
7 court erred in admitted the victim's 911 call under California law.<sup>4</sup> In Ground 1(C),  
8 Petitioner contends that the admission of the victim's statements made during the 911 call  
9 violated Petitioner's right to confront adverse witnesses. In Ground 1(D), he argues that  
10 the admission of the victim's statements made during a sexual assault examination  
11 violated Petitioner's right to confront adverse witnesses. In Ground 1(E), Petitioner  
12 claims that trial counsel was ineffective for failing to object to the admission of the  
13 victim's statements made during the sexual assault examination. In Ground 1(F), he  
14 asserts that the cumulative effect of the foregoing errors deprived Petitioner of a fair trial.  
15 In Ground Two, Petitioner claims that the trial court's application of California Code of  
16 Civil Procedure § 1219 to exempt the victim from testifying violated Petitioner's Sixth  
17 Amendment rights of confrontation and compulsory process. Finally, in Ground Three,  
18 he argues that the trial court's application of California Code of Civil Procedure § 1219  
19 violated his right to a fair trial.

20  
21 (Petition at 5-104).

22  
23  
24 \_\_\_\_\_  
25 <sup>3</sup> The Petition is over 100 pages long, contains numerous subclaims, and is poorly  
26 organized. Nevertheless, the Court has construed the claims liberally and restated them in  
27 in a way most amenable to the governing legal standard. *See Porter v. Ollison*, 620 F.3d  
28 952, 958 (9th Cir. 2010) ("Prisoner *pro se* pleadings are given the benefit of liberal  
construction.").

29  
30 <sup>4</sup> This subclaim was previously dismissed by the Court with prejudice because it was a  
non-cognizable state law claim and, thus, it will not be discussed in this Petition. (*See*  
Dkt. No. 30 at 2).

V.

STANDARD OF REVIEW

1  
2  
3  
4 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) governs  
5 the adjudication of Petitioner’s § 2254 petition. *Lindh v. Murphy*, 521 U.S. 320, 336  
6 (1997). AEDPA “bars relitigation of any claim ‘adjudicated on the merits’ in state court,  
7 subject only to the exceptions in §§ 2254(d)(1) and (d)(2).” *Harrington v. Richter*, 562  
8 U.S. 86, 98 (2011). Under AEDPA’s deferential standard, a court “may not grant relief  
9 unless a state court’s ruling ‘was contrary to . . . clearly established Federal law[ ] as  
10 determined by the Supreme Court,’ ‘involved an unreasonable application of’ such law, or  
11 ‘was based on an unreasonable determination of the facts in light of the evidence  
12 presented in the State court proceeding.’” *Djerf v. Ryan*, 931 F.3d 870, 878 (9th Cir.  
13 2019) (quoting 28 U.S.C. § 2254(d)). “Clearly established federal law” means federal law  
14 that is clearly defined by the holdings of the Supreme Court at the time of the state court  
15 decision. *See, e.g., Cullen v. Pinholster*, 562 U.S. 170, 181 (2011) (citation omitted).  
16 Although only Supreme Court law is binding, “circuit court precedent may be persuasive  
17 in determining what law is clearly established and whether a state court applied that law  
18 unreasonably.” *Stanley v. Cullen*, 633 F.3d 852, 959 (9th Cir. 2011) (citation omitted).

19  
20 “Section 2254(d) reflects the view that habeas corpus is a ‘guard against extreme  
21 malfunctions in the state criminal justice systems,’ not a substitute for ordinary error  
22 correction through appeal.” *Richter*, 562 U.S. at 102-03 (quoting *Jackson v. Virginia*, 443  
23 U.S. 307, 332 n.5 (1979)). “This is a difficult to meet and highly deferential standard for  
24 evaluating state-court rulings, which demands that state-court decisions be given the  
25 benefit of the doubt[.]” *Pinholster*, 563 U.S. at 181; *see also Johnson v. Williams*, 568  
26 U.S. 289, 292, 298 (2013) (“AEDPA sharply limits the circumstances in which a federal  
27 court may issue a writ of habeas corpus to a state prisoner whose claim was adjudicated  
28 on the merits in State court proceedings.”). In conducting this review, the court looks “to

1 the last reasoned state court decision for each claim.” *Djerf*, 931 F.3d at 878 (citing *White*  
2 *v. Ryan*, 895 F.3d 641, 665 (9th Cir. 2018)). “Where there has been one reasoned state  
3 judgment rejecting a federal claim, later unexplained orders upholding that judgment or  
4 rejecting the same claim rest upon the same ground.” *Ylst v. Nunnemaker*, 501 U.S. 797,  
5 803 (1991); *see also Wilson v. Sellers*, 584 U.S. 122, 125 (2018) (“We hold that the  
6 federal court should ‘look through’ the unexplained decision to the last related state-court  
7 decision that does provide a relevant rationale. It should then presume that the  
8 unexplained decision adopted the same reasoning.”).

9  
10 Here, Petitioner raised each of his claims on appeal or on collateral review in the  
11 state courts. The California Court of Appeal denied subclaims A and C in Ground One in  
12 a written opinion. (Dkt. No. 14, Lodgment 1). Thereafter, the California Supreme Court  
13 denied the subclaims without a reasoned explanation in a petition for review. (Dkt. No.  
14 14, Lodgments 2-3). Accordingly, the Court will look through that silent denial to the  
15 California Court of Appeal’s reasoned decision as the basis for the high court’s ruling and  
16 apply AEDPA deference to subclaims A and C in Ground One. *Wilson*, 584 U.S. at 125;  
17 *Ylst*, 501 U.S. at 803. The remaining subclaims in Ground One (subclaims D, E, and F)  
18 were denied solely on procedural grounds and, thus, are arguably procedurally defaulted.  
19 (See Dkt. No. 14, Lodgment 1 at 31-33; Dkt. No. 57, Lodgment 9). To the extent this  
20 Court reaches the merits of these subclaims, it will do so under *de novo* review. *See*  
21 *Chaker v. Crogan*, 428 F.3d 1215, 1221 (9th Cir. 2005) (applying *de novo* standard of  
22 review to claim that was procedurally defaulted because there was “no state court ruling  
23 on the merits” of the claim). Finally, there is no decision on the merits by any California  
24 court denying Grounds Two and Three of the Petition and, therefore, the Court will also  
25 apply a *de novo* standard of review to these claims.<sup>5</sup> *See Cone v. Bell*, 556 U.S. 449, 472

26  
27 <sup>5</sup> Petitioner raised the claims challenging the constitutionality of California Code of Civil  
28 Procedure § 1219 on direct appeal, but the California Court of Appeal denied the claims  
without reaching the question of whether the application of the law was unconstitutional.  
(Dkt. No. 14, Lodgment 1 at 18 n.5). The Court assumes that the California Supreme

1 (2009) (holding that when a state court “did not reach the merits” of a federal claim,  
2 “federal habeas review is . . . de novo”); *Lewis v. Mayle*, 391 F.3d 989, 996 (9th Cir.  
3 2004) (finding standard of de novo review applies to claim that state court did not reach  
4 on the merits).

## 6 VI.

### 7 DISCUSSION

#### 9 A. Procedural Default of Untimely Claims

10  
11 Respondent argues that Grounds 1(E) and 1(F) are procedurally defaulted because  
12 they are untimely. (Ans. Mem. at 31-34). The Court agrees.

13  
14 Federal courts “will not review a question of federal law decided by a state court if  
15 the decision of that court rests on a state law ground that is independent of the federal  
16 question and adequate to support the judgment.” *Walker v. Martin*, 562 U.S. 307, 315  
17 (2011) (internal quotation marks omitted). The procedural default doctrine “bar[s] federal  
18 habeas [review] when a state court declined to address a prisoner’s federal claims because  
19 the prisoner had failed to meet a state procedural requirement.” *Coleman v. Thompson*,  
20 501 U.S. 722, 729-30 (1991). To constitute a procedural bar, the state’s rule had to be  
21 independent and adequate at the time the petitioner purportedly failed to comply with it.  
22 *Fields v. Calderon*, 125 F.3d 757, 760 (9th Cir. 1997). A state procedural rule is  
23 considered an independent bar if it is not interwoven with federal law or dependent upon a  
24 federal constitutional ruling. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *Michigan v. Long*,  
25 463 U.S. 1032, 1040-41 (1983). A state procedural rule constitutes an adequate bar to  
26 federal court review if it was “firmly established” and “regularly followed” at the time the  
27

---

28 Court’s subsequent silent denial similarly denied the claim without deciding the  
constitutionality of the law. (*See* Dkt. No. 14, Lodgments 2-3).

1 state court applied it. *Ford v. Georgia*, 498 U.S. 411, 423-25 (1991); *King v. Lamarque*,  
2 464 F.3d 963, 965 (9th Cir. 2006).

3  
4 Procedural default is an affirmative defense, *Gray v. Netherland*, 518 U.S. 152,  
5 165-66 (1996), “and the *state* has the burden of showing that the default constitutes an  
6 adequate and independent ground.” *Insyxiengmay v. Morgan*, 403 F.3d 657, 665-66 (9th  
7 Cir. 2005) (emphasis in original). However, “[o]nce the state has adequately pled the  
8 existence of an independent and adequate state procedural ground as an affirmative  
9 defense, the burden to place that defense in issue shifts to the petitioner.” *Bennett v.*  
10 *Mueller*, 322 F.3d 573, 586 (9th Cir. 2003). “The petitioner may satisfy this burden by  
11 asserting specific factual allegations that demonstrate the inadequacy of the state  
12 procedure, including citation to authority demonstrating inconsistent application of the  
13 rule.” *King*, 464 F.3d at 967 (internal quotation marks omitted). “Once a petitioner has  
14 demonstrated the inadequacy of a rule, the state bears the ultimate burden of proving the  
15 rule bars federal review.” *Collier v. Bayer*, 408 F.3d 1279, 1284 (9th Cir. 2005).

16  
17 After being granted a stay by this Court, Petitioner raised Grounds 1(E) and 1(F) in  
18 an August 2022 habeas corpus petition in the California Supreme Court. (Dkt. No. 57,  
19 Lodgment 8). In November 2022, the California Supreme Court denied the claims by  
20 citing to *In re Robbins*, 18 Cal.4th 770, 780 (1998), and *In re Clark*, 5 Cal.4th 750, 767-69  
21 (1993). (Dkt. No. 57, Lodgment 9). Specifically, in the *Robbins* parenthetical, the state  
22 supreme court noted that “courts will not entertain habeas corpus claims that are  
23 untimely.” (Dkt. No. 57, Lodgment 9). California’s timeliness bar (i.e., a *Clark-Robbins*  
24 denial) is an adequate and independent basis to preclude federal habeas review. *See*  
25 *Walker*, 562 U.S. at 317-21 (noting applicability of *Clark-Robbins* timeliness bar); *see*  
26 *also Clark v. Chappell*, 936 F.3d 944, 982 (9th Cir. 2019) (recognizing that California has  
27 placed “reasonable limits” on collateral attacks by way of habeas corpus, “includ[ing]  
28 procedural bars based on . . . timeliness (known as the *Clark* rule)”).

1           In his Reply, Petitioner argues that the Court should overlook any procedural  
2 defaulted claims because it would be a fundamental miscarriage of justice to not address  
3 the constitutional issues raised. (Reply at 30). Under the “fundamental miscarriage of  
4 justice” exception, a habeas petitioner may pursue constitutional claims on the merits  
5 “notwithstanding the existence of a procedural bar to relief” by making a “proper  
6 showing” of his actual innocence of the crimes. *McQuiggin v. Perkins*, 569 U.S. 383, 392  
7 (2013); *see also Schlup v. Delo*, 513 U.S. 298, 327 (2005) (stating that to qualify for  
8 fundamental miscarriage of justice exception to procedural default rule, a petitioner must  
9 “show that a constitutional violation has probably resulted in the conviction of one who is  
10 actually innocent” (internal quotation marks omitted)). Here, Petitioner makes nothing  
11 but conclusory claims that he is “innocent.” (Reply at 31, 34, 36). He offers no new  
12 evidence that undermines the victim’s statements that led to his conviction, much less that  
13 demonstrates he is actually innocent of sexually assaulting her. His repetitive claims of  
14 legal error at trial will not suffice to overcome the procedural default. *See Bousley v.*  
15 *United States*, 523 U.S. 614, 623 (1998) (“[A]ctual innocence’ means factual innocence,  
16 not mere legal insufficiency.”).

17  
18           Accordingly, the Court finds that Grounds 1(E) and 1(F) are procedurally defaulted  
19 because they are untimely. Nevertheless, out of an abundance of caution, the court will  
20 address these claims in the alternative on the merits. *See Flournoy v. Small*, 681 F.3d  
21 1000, 1004 n.1 (9th Cir. 2012) (“While we ordinarily resolve the issue of procedural bar  
22 prior to any consideration of the merits on habeas review, we are not required to do so  
23 when a petition clearly fails on the merits.”); *Franklin v. Johnson*, 290 F.3d 1223, 1232  
24 (9th Cir. 2002) (“[C]ourts are empowered to, and in some cases should, reach the merits  
25 of habeas petitions if they are . . . clearly not meritorious despite an asserted procedural  
26 bar.”).

27  
28           **B.     Admission of Preliminary Hearing Testimony**

1  
2 In Ground 1(A), Petitioner claims that the admission of the victim's preliminary  
3 hearing testimony violated his right to confront adverse witnesses under the Sixth  
4 Amendment because she did not testify in person at trial. (Petition at 5; Reply at 9-14).  
5 He argues that he did not have "the same motive or . . . opportunity to cross-examine [the  
6 victim] at the preliminary hearing [that] he had at trial" and, therefore, the admission of  
7 the prior testimony violated the Confrontation Clause. (Petition at 17).  
8

### 9 **1. The California Court of Appeal Opinion**

10  
11 First, the state appellate court recounted the factual circumstances regarding the  
12 prosecution's attempts to use Ursula as a witness in the Petitioner's case. Ursula testified  
13 at the preliminary hearing in March 2017 but refused to come to Petitioner's trial in  
14 October 2017. (Dkt. No. 14, Lodgment 1 at 10). Prior to trial, the trial court held a  
15 hearing to determine whether the prosecution had used due diligence in attempting to  
16 secure Ursula's attendance at trial. (Dkt. No. 14, Lodgment 1 at 10-11). Detective  
17 Brown testified that when she attempted to serve Ursula with a subpoena, "Ursula said she  
18 had already spoken with the prosecutor and she was not coming to court." (Dkt. No. 14,  
19 Lodgment 1 at 11). The following day, police detectives again attempted to serve Ursula  
20 with a subpoena, but she refused to sign or take the subpoena and stated that she would  
21 not testify out of fear for her and her family's safety. (Dkt. No. 14, Lodgment 1 at 12).  
22 The trial court ruled that the prosecution had exercised due diligence in attempting to  
23 secure Ursula's attendance at trial and that the police were not required to arrest her and  
24 forcibly transport her to court in order for the court to find that she was unavailable as a  
25 witness. (Dkt. No. 14, Lodgment 1 at 14). On appeal, the California Court of Appeal  
26 agreed that "the prosecution exercised due diligence in its efforts to secure Ursula as a  
27 trial witness" and, thus, she was "unavailable as a witness." (Dkt. No. 14, Lodgment 1 at  
28 14-20).

1           Second, the California Court of Appeal examined whether Petitioner had an  
2 opportunity to cross-examine Ursula at the preliminary hearing “with an interest and  
3 motive similar to his interests and motives at trial” before the prior testimony was  
4 admitted:

5  
6           Here, [Petitioner’s] trial counsel cross-examined Ursula at length at  
7 the preliminary hearing. His motives and interests, both then and at trial,  
8 were to impugn Ursula’s credibility and to demonstrate that the prosecution  
9 could not prove its case. Even if the motives may have shifted somewhat,  
10 they need not be identical, only similar. (*People v. Harris* (2005) 37 Cal.4th  
11 310, 333.)

12  
13           We are unconvinced by [Petitioner’s] contention that he was not  
14 afforded an adequate opportunity to cross-examine Ursula at the  
15 preliminary hearing because he was not yet aware of inconsistencies in her  
16 statements to the 911 operator and the SART nurse. A “defendant’s interest  
17 and motive at a second proceeding is not dissimilar to his interest at a first  
18 proceeding within the meaning of [California] Evidence Code section 1291,  
19 subdivision (a)(2),<sup>6</sup> simply because events occurring after the first  
20 proceeding might have led counsel to alter the nature and scope of cross-  
21 examination of the witness in certain particulars.” (*People v. Harris, supra*,  
22 37 Cal.4th at p. 333, citing *People v. Alcalá* (1992) 4 Cal.4th 742, 784.) We  
23 are not persuaded that the differences between Ursula’s statements were so  
24 significant as to fundamentally restrict [Petitioner’s] opportunity for cross-

25  
26 <sup>6</sup> California Evidence Code § 1291(a)(2) provides that evidence of former testimony is not  
27 made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the  
28 party against whom the former testimony is offered was a party to the action or  
proceeding in which the testimony was given and had the right and opportunity to cross-  
examine the declarant with an interest and motive similar to that which he has at the  
hearing.

1 examination. We also note that [Petitioner] was nevertheless able to elicit  
2 evidence of certain inconsistencies in Ursula's statements through the  
3 testifying police officers at trial, and focused on these inconsistencies in his  
4 closing argument.

5  
6 Accordingly, [Petitioner's] opportunity to cross-examine Ursula  
7 satisfied the confrontation clause, and the trial court did not err in admitting  
8 her preliminary hearing testimony.

9  
10 (Dkt. No. 14, Lodgment 1 at 20-21).

## 11 12 **2. Federal Law and Analysis**

13  
14 The Sixth Amendment's Confrontation Clause provides a criminal defendant with  
15 the right to face those who testify against him and the right to conduct cross-examination.  
16 *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). This right serves the purposes of  
17 insuring reliability by means of oath, exposing the witness to cross-examination, and  
18 permitting the trier of fact to weigh the demeanor of the witness. *California v. Green*, 399  
19 U.S. 149, 158 (1970); *see also Maryland v. Craig*, 497 U.S. 836, 845 (1990) ("The central  
20 concern of the Confrontation Clause is to ensure the reliability of the evidence against a  
21 criminal defendant by subjecting it to rigorous testing in the context of an adversary  
22 proceeding before the trier of fact."). In addition, a criminal defendant has the right to  
23 present a defense. *See, e.g., Moses v. Payne*, 555 F.3d 742, 757 (9th Cir. 2009) (citing  
24 *Washington v. Texas*, 388 U.S. 14, 23 (1967)). Thus, testimonial statements of a witness  
25 who does not appear at trial may not be admitted into evidence unless the witness is  
26 unavailable for trial and the defendant had a prior opportunity to cross-examine her.  
27 *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

28

1           A witness is “unavailable” if the prosecution makes a “good faith effort” to obtain  
2 her presence at trial but is unsuccessful. *Hardy v. Cross*, 565 U.S. 65, 69 (2011); *Barber*  
3 *v. Page*, 390 U.S. 719, 725 (1968). The Constitution requires the prosecution to use  
4 reasonable efforts to obtain a witness’s testimony. *See Ohio v. Roberts*, 448 U.S. 56, 74  
5 (1980), *overruled on other grounds by Crawford*, 541 U.S. at 62-63; *see also Marquis v.*  
6 *Iaria*, 432 F. App’x 707, 708 (9th Cir. 2011) (holding the Constitution does not require  
7 the prosecutor to engage in futile acts before a “state court may find a witness to be  
8 unavailable”) (unpublished).

9  
10           Here, Petitioner does not contest the fact that Ursula refused to come to court and  
11 take the stand at trial despite being subpoenaed. Instead, Petitioner suggests that the  
12 prosecution’s efforts to obtain her testimony were not reasonable and, instead, the police  
13 should have arrested her and forcibly transported her to court to face a contempt charge.  
14 (*See* Petition at 11-16; Reply at 11-12). Petitioner, however, has failed to offer any  
15 authority that such actions are necessary to render a witness unavailable under the  
16 Confrontation Clause. Rather, “[a] witness is unavailable for Confrontation Clause  
17 purposes when he or she refuses to testify, regardless of whether the refusal is in response  
18 to an order to testify under threat of sanctions.” *Ross v. Dist. Attorney of the Cnty. of*  
19 *Allegheny*, 672 F.3d 198, 206 (3d Cir. 2012); *see also Green*, 399 U.S. at 168 (finding  
20 state could introduce prior testimony of a witness who “simply refused to answer”  
21 questions during trial); *Marquis*, 432 F. App’x at 708 (holding victim was properly found  
22 unavailable despite failure to have him and his mother held in contempt because “nothing  
23 in the applicable Supreme Court precedent requires this step before a state court may find  
24 a witness to be unavailable”); *Anderson v. McDowell*, 2018 WL 3100256, at \*9 (C.D. Cal.  
25 May 4, 2018) (finding trial court acted reasonably in determining witnesses were  
26 unavailable despite California law that sexual assault victims could not be held in  
27 contempt for refusing to testify).

1           Furthermore, there is no viable Confrontation Clause claim for the introduction of  
2 Ursula's prior testimony where, as here, Petitioner's counsel was present at the  
3 preliminary hearing and had the opportunity to cross-examine the witness. *See Roberts*,  
4 448 U.S. at 71-73 (holding introduction of preliminary hearing testimony of witness who  
5 did not appear at trial was constitutionally permissible where witness's preliminary  
6 hearing testimony had been tested by defense counsel's questioning that was the  
7 equivalent of cross-examination); *Delgadillo v. Woodford*, 527 F.3d 919, 926 (9th Cir.  
8 2008) (finding no violation of Confrontation Clause in use of victim's preliminary hearing  
9 testimony at trial where victim was unavailable but had been cross-examined by counsel  
10 at the preliminary hearing).

11  
12           Here, Petitioner was represented by the same defense counsel at the preliminary  
13 hearing and at trial. (3 RT at 604). At the preliminary hearing, counsel questioned Ursula  
14 about her prior dating relationship with Petitioner and how it ended nearly one year ago.  
15 (CT at 47-51). On cross-examination, Ursula stated that she went to see him at his  
16 mother's home because he was going to give her \$200. (CT at 51). Although she denied  
17 that she offered him sexual favors in exchange for the money that day, she admitted that  
18 she "talked about [her] bills" and "about sex" with Petitioner but believed he was going to  
19 give her money "to win [her] back." (CT at 53-54). Thereafter, counsel questioned her  
20 about her recollection of the incident in the garage in which she claimed he sexually  
21 assaulted her and held her captive with a knife. (CT at 54-57). There were no objections  
22 made to any of counsel's questions and at no point did the court limit the scope of  
23 counsel's cross-examination. Thus, Petitioner had a full and fair opportunity to examine  
24 the witness, and Ursula's preliminary hearing testimony was properly admitted under the  
25 Constitution. *See Perez v. McDonald*, 2012 WL 1986294, at \*13 (C.D. Cal. Feb. 27,  
26 2012) (collecting Ninth Circuit cases post-*Crawford* rejecting Confrontation Clause  
27 challenges based on admission of unavailable witness's preliminary hearing testimony).

28

1           Petitioner argues that the opportunity to cross-examine Ursula at the preliminary  
2 hearing was inadequate under the Constitution because the prosecution had not yet  
3 provided transcripts of Ursula’s statements to the 911 operator and the SART nurse, so  
4 counsel was unable to impeach her with any inconsistencies. (Petition at 22; Reply at 15-  
5 18). The California Court of Appeal rejected this challenge, finding that any “differences  
6 between Ursula’s statements” were not “so significant” as to impinge on Petitioner’s right  
7 to cross-examination in light of the fact that Petitioner was able to highlight those  
8 inconsistencies through other testifying witnesses and in closing argument. (Dkt. No. 14,  
9 Lodgment 1 at 21). The record supports that conclusion. For example, in closing  
10 argument, defense counsel noted that her description of the sexual acts performed during  
11 the assault, as well as the degree of force used to get her into the Petitioner’s mother’s  
12 garage changed from the 911 call to the preliminary hearing. (5 RT at 1514-15).  
13 Similarly, counsel argued that the SART nurse did not find injuries on Ursula that would  
14 have corroborated her initial description of Petitioner’s assault. (5 RT at 1516-19). Thus,  
15 the state court’s conclusion was reasonable where, as here, the jury was aware of any  
16 inconsistencies by Ursula, the inconsistencies were relatively minor, and further cross-  
17 examination would not have materially aided the defense. *See Gibbs v. Covello*, 996 F.3d  
18 596, 605 (9th Cir. 2021) (holding that the “prosecution’s disclosures . . . after the  
19 preliminary hearing” did not undermine conclusion that defense counsel had an adequate  
20 opportunity for cross-examination where any “questioning based on those disclosures  
21 would not have materially enhanced the effectiveness of the cross-examination”); *see also*  
22 *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (holding that a defendant’s right to  
23 confrontation is denied when prohibited from conducting cross-examination that would  
24 cause a “significantly different impression” of a witness’s credibility). Accordingly, the  
25 California Courts reasonably rejected Petitioner’s claim in Ground 1(A) and, therefore,  
26 Petitioner is not entitled to habeas relief.

27  
28           **C.     Admission of 911 Call**

1  
2 In Ground 1(C), Petitioner contends that the admission of the victim's statements  
3 made during the 911 call violated his right to confront adverse witnesses under  
4 *Crawford*.<sup>7</sup> (Petition at 28-41; Reply at 19-20). He also argues that the trial court erred in  
5 finding that Ursula's 911 call was admissible under the spontaneous statement exception  
6 to the hearsay rule. (Petition at 29).

7  
8 **1. Background'**

9  
10 At trial, Petitioner objected to the introduction of Ursula's 911 call, arguing that the  
11 statements were made "in anticipation of some kind of legal proceedings or litigation." (3  
12 RT at 608). Petitioner also objected to specific portions of the call because they were  
13 unduly prejudicial—i.e., Petitioner's gang affiliation and a prior police report that Ursula  
14 filed against him. (3 RT at 608-15). The trial court found that Ursula's statements  
15 qualified as excited utterances, an exception to the hearsay rule, and were admissible but,  
16 nevertheless, excluded portions of the call including references to Petitioner's gang  
17 affiliation. (3 RT at 620-25).

18  
19 **2. The California Court of Appeal Opinion**

20  
21 In denying Petitioner's claim of Confrontation Clause error, the California Court of  
22 Appeal found that Ursula's statements in the 911 call were not testimonial and, therefore,  
23 their admission did not violate Petitioner's constitutional rights:

24  
25 [W]e conclude that Ursula's statements during the 911 call were  
26 made in the context of an ongoing emergency, and were thus

27  
28 <sup>7</sup> As noted previously, Ursula did testify at the preliminary hearing but, at the time of the  
cross-examination, the prosecution had not provided defense counsel with a transcript of  
the 911 call.

1 nontestimonial. Ursula testified that after being held by [Petitioner] in the  
2 garage, bound, threatened with a knife, and sexually assaulted for  
3 approximately two hours, she escaped the garage despite [Petitioner's]  
4 attempt to stop her. She then fled the scene when she saw [Petitioner]  
5 emerge from the garage; she first attempted to call 911 while driving away  
6 from [Petitioner's] mother's house. Once she reached her mother's house,  
7 she parked in the driveway and called 911 again. The prosecutor estimated  
8 that Ursula made the second 911 call within 15 minutes of leaving the  
9 garage.

10  
11 Ursula's mother testified that she was present during the 911 call and  
12 that Ursula was crying and hysterical. She told the 911 operator that  
13 [Petitioner] "threw me in the garage. He tied me up. He duct taped me. He  
14 sexually assaulted me. He busted my lip." She also reported that she fled  
15 the scene because she "didn't know if he was going to come out and do  
16 anything else." Ursula also had fresh wounds on her face and mouth. When  
17 the operator asked if she needed a paramedic, Ursula replied, "I don't  
18 know, I think so—my neck—I got a busted lip. He did sexually assault me,  
19 so I do want them to take swabs out of my mouth or whatever." She also  
20 answered questions from the operator regarding what weapons [Petitioner]  
21 had in the garage, and provided [Petitioner's] name, age, and a description.  
22 At the conclusion of the call, the operator told Ursula she was "sending  
23 police to you right now. If [Petitioner] shows up there before we get there,  
24 you call 911 again." Ursula responded that [Petitioner] "knows where my  
25 mom and I live."

26  
27 Under these circumstances, Ursula's statements to the 911 operator  
28 were made in the context of seeking assistance in an ongoing emergency,

1 rather than for the purpose of establishing some past fact. Ursula's  
2 description of the incident, the location, and [Petitioner's] appearance  
3 served to assist officers in determining the appropriate response, and  
4 statements by both Ursula and the 911 operator indicate that neither party  
5 believed Ursula was necessarily safe from a continuing threat by  
6 [Petitioner]. The few statements she made during the call referring to a  
7 prior incident with [Petitioner] and requesting oral swabs do not, in the  
8 context of the entire call, suggest that her purpose was to build a case for  
9 prosecution.

10  
11 (Dkt. No. 14, Lodgment 1 at 26-27).

12  
13 Additionally, the California Court of Appeal rejected Petitioner's challenge that  
14 some of the statements in the 911 call should have been excluded because they did not  
15 qualify as spontaneous statements under California Evidence Code § 1240<sup>8</sup>:

16  
17 [Petitioner] challenges the two statements Ursula made referring to a  
18 report she filed "a long time ago" and having been "through so much with  
19 [Petitioner] before." He contends those statements did not relate to the  
20 immediately preceding events and therefore were not admissible as part of  
21 the spontaneous statements Ursula made to the 911 operator.

22  
23 The "crucial element" in determining the admissibility of a  
24 purportedly spontaneous statement is "the mental state of the speaker at the  
25 time the statement was uttered." (*Merriman, supra*, 60 Cal.4th at p. 66,

26  
27 <sup>8</sup> California Evidence Code § 1240 provides an exception to the hearsay rule, permitting  
28 admission of a statement if it: "(a) Purports to narrate, describe, or explain an act,  
condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while  
the declarant was under the stress of excitement caused by such perception."

1 citing *People v. Gutierrez* (2009) 45 Cal.4th 789, 811.) As we have  
2 discussed, substantial evidence, including Ursula’s demeanor and the  
3 timing of the call, supports the conclusion that Ursula made the 911 call  
4 while under the stress of [Petitioner’s] acts. (*See, e.g., Saracoglu, supra*,  
5 152 Cal.App.4th at pp. 1589-1590 [noting that victim was “quite  
6 distraught” when making statements about 30 minutes after incident];  
7 *People v. Brown* (2003) 31 Cal.4th 518, 541 [two-and-one-half hours].)  
8 Moreover, Ursula’s statements regarding prior incidents with [Petitioner]  
9 were sufficiently related to the current offense to come within the scope of  
10 the hearsay exception—the statements explained her relationship with  
11 [Petitioner] and her state of mind at the time. (*See People v. Poggi*, 45  
12 Cal.3d at p. 318.) As such, the court did not abuse its discretion in  
13 admitting the statements under [California] Evidence Code section 1240.  
14

15 Further, even if admission of the statements was error, it was  
16 harmless. [Petitioner] has not established a federal constitutional violation.  
17

18 (Dkt. No. 14, Lodgment 1 at 29-30).  
19

### 20 3. Federal Law and Analysis 21

22 The Confrontation Clause of the Sixth Amendment prohibits the “admission of  
23 testimonial statements” of a witness without an “opportunity for cross-examination.”  
24 *Crawford*, 541 U.S. at 53-54. Non-testimonial statements, however, do not implicate the  
25 Confrontation Clause. *See Ohio v. Clark*, 576 U.S. 237, 245 (2015) (“[A] statement  
26 cannot fall within the Confrontation Clause unless its primary purpose was testimonial.”);  
27 *Giles v. California*, 554 U.S. 353, 376 (2008) (“[O]nly testimonial statements are  
28 excluded by the Confrontation Clause.” (emphasis in original)); *Whorton v. Bockting*, 549

1 U.S. 406, 420 (2007) (stating that *Crawford* eliminated the “Confrontation Clause  
2 protection against the admission of unreliable out-of-court nontestimonial statements”).

3  
4 Although the Supreme Court has not yet defined precisely what constitutes a  
5 “testimonial” statement, it has stated that “[a]n accuser who makes a formal statement to  
6 government officers bears testimony in a sense that a person who makes a casual remark  
7 to an acquaintance does not.” *Crawford*, 541 U.S. at 51; *see also Delgadillo*, 527 F.3d at  
8 927 (noting that *Crawford* “made clear that the Confrontation Clause was concerned with  
9 testimony, which is typically [a] solemn declaration or affirmation made for the purpose  
10 of establishing or proving some fact,” such as statements made during police  
11 interrogations) (internal quotation marks omitted). The test for determining if a statement  
12 is testimonial is whether the statement was made with the “primary purpose” of creating  
13 an out-of-court substitute for trial testimony. *Clark*, 576 U.S. at 245. “Where no such  
14 primary purpose exists, the admissibility of a statement is the concern of state and federal  
15 rules of evidence, not the Confrontation Clause.” *Id.*

16  
17 A “911 call . . . and at least the initial interrogation conducted in connection with a  
18 911 call, is ordinarily not designed primarily to establish or prove some past fact, but to  
19 describe current circumstances requiring police assistance.” *Davis v. Washington*, 547  
20 U.S. 813, 827 (2006) (internal quotation marks and brackets omitted). Here, the  
21 California Court of Appeal found that Ursula’s purpose in calling 911 was to “seek[ ]  
22 assistance in an ongoing emergency” and not to “establish[ ] some past fact” that could be  
23 used later in his prosecution. (Dkt. No. 14, Lodgment 1 at 27). The record supports that  
24 conclusion. Ursula initially called 911 after escaping from Petitioner’s mother’s garage  
25 but the 911 operator told her to call back when she was safe because Ursula “didn’t know  
26 if [Petitioner] was going to come out and do anything else.” (Aug. CT at 2). After  
27 driving to her mother’s house—approximately 15 minutes away—Ursula called 911 again  
28 and reported that Petitioner “sexually assaulted” her and “busted [her] lip.” (Aug. CT at

1 2). In response to the dispatcher’s question of whether she needed a paramedic, she  
2 responded, “I think so,” complaining about her neck and lip. (Aug. CT at 3). She then  
3 described the circumstances of the assault, including that he put a knife to her throat and  
4 threatened to kill his own mother if she screamed. (Aug. CT at 6-7). Ursula told the 911  
5 operator that Petitioner knew where she and her mother lived. (Aug. CT at 10). The 911  
6 operator immediately sent police to her location and told Ursula to call back immediately  
7 if Petitioner showed up before the police arrived. (Aug. CT at 10).

8  
9 Under these circumstances, Ursula’s 911 call was clearly aimed at getting medical  
10 assistance for her injuries and police assistance for her immediate safety during an  
11 ongoing emergency where the assailant remained a threat. Further, providing answers to  
12 the 911 operator about the identity and location of the assailant, as well as the cause and  
13 extent of her injuries, was necessary information to resolve the emergency. As such, the  
14 state court reasonably found that Ursula’s statements to the 911 operator following  
15 Petitioner’s attack on her were not testimonial. *See Davis*, 547 U.S. at 827 (“[W]hat was  
16 asked and answered [during the 911 call], viewed objectively, was such that the elicited  
17 statements were necessary to be able to *resolve* the present emergency, rather than simply  
18 to learn . . . what had happened in the past. That is true even of the operator’s effort to  
19 establish the identity of the assailant, so that the dispatched officers might know whether  
20 they would be encountering a violent felon.”); *Michigan v. Bryant*, 562 U.S. 344, 371-78  
21 (2011) (holding that, although wounded victim drove away from the crime scene before  
22 calling police, his statements to responding police officers identifying the shooter and  
23 describing the circumstances of the shooting were made in the course of an ongoing  
24 emergency and were nontestimonial); *see also Nava v. Baughman*, 2017 WL 1927873, at  
25 \*3 (C.D. Cal. May 9, 2017) (finding no Confrontation Clause violation in admitting  
26 statements from 911 call because statements were nontestimonial in nature that were  
27 “made in response to the 911 operator’s questions and involved an ongoing, potentially  
28 dangerous situation” and the “911 dispatcher’s concern that [p]etitioner might return”).

1           As for Petitioner’s claim that some of Ursula’s statements during the 911 call did  
2 not qualify as spontaneous statements under California Evidence Code § 1240, that claim  
3 is not cognizable on federal habeas review. No federal habeas relief may lie for an error  
4 of state law, and the Court is not empowered to second guess the state court’s finding that  
5 the statement was a spontaneous declaration under California law. *See Estelle v.*  
6 *McGuire*, 502 U.S. 62, 67-68 (1991) (holding correctness of state evidentiary rulings  
7 presenting only issues of state law not cognizable on federal habeas corpus review);  
8 *Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999) (“A federal court, of course, cannot  
9 review questions of state evidence law.”); *see also Winzer v. Hall*, 494 F.3d 1192, 1198  
10 (9th Cir. 2007) (holding a habeas petitioner “[cannot] obtain federal habeas relief on the  
11 grounds that the California courts wrongly found that his statement fit within California’s  
12 spontaneous statement exception to hearsay”).

13  
14           For these reasons, the California Courts reasonably rejected Petitioner’s  
15 claim in Ground 1(C) and, therefore, Petitioner is not entitled to habeas relief.

16  
17           **D. Admission of Statements to SART Nurse**

18  
19           In Ground 1(D), Petitioner asserts that the admission of the victim’s statements  
20 made to the SART nurse during the medical examination violated his right to confront  
21 adverse witnesses under *Crawford*.<sup>9</sup> (Petition at 41-45, 68-70; Reply at 21-22). In a  
22 related claim, Petitioner argues in Ground 1(E) that trial counsel was ineffective for  
23 failing to object to the admission of the victim’s statements made during the sexual assault  
24 examination. (Petition at 47; Reply at 23).

25  
26  
27  
28           <sup>9</sup> As noted previously, Ursula did testify at the preliminary hearing but, at the time of the  
cross-examination, the prosecution had not provided defense counsel with discovery  
regarding the victim’s statements made during the SART examination.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**1. Background**

At trial, SART nurse Amarra McHale testified about the sexual assault examination she conducted on Ursula in November 2016. (4 RT at 975-82). Nurse McHale explained the procedures and protocols used to collect any evidence of sexual activity, which included taking an oral history of the alleged sexual assault, collecting clothing items for testing, and checking for injuries and bodily fluids. (4 RT at 985-86). Nurse McHale testified that, during the examination, Ursula reported that Petitioner “forced his penis into her mouth, and forced his penis in between her breasts, that he had cut off her shirt . . . and that he had attempted to penetrate her anus with his finger, and that he had forced his mouth on her genitals.” (4 RT at 990). Additionally, Ursula told her that “she had been bound by the wrists and the ankles,” that he “put his knee down on to her shoulder,” and that “he had shown her . . . two knives . . . and one was held to her throat so she felt like she couldn’t leave.” (4 RT at 991-92). Nurse McHale explained that obtaining Ursula’s account of what happened was necessary to evaluate and document whether she sustained injuries that were consistent with her report. (4 RT at 993).

Petitioner’s counsel did not object to this testimony.

**2. Procedural Default**

Respondent contends that Petitioner’s claim in Ground 1(D) is procedurally barred from federal habeas review because Petitioner forfeited the claim by not objecting at the time of the SART nurse’s testimony. (Ans. Mem. at 30-31). Here, the California Court of Appeal clearly and expressly stated that Petitioner forfeited the Confrontation Clause claim by failing to make a timely and specific objection to the allegedly improper testimony. (Dkt. No. 14, Lodgment 1 at 31-32). The Ninth Circuit has recognized that California’s contemporaneous objection rule is an independent and adequate state ground

1 that precludes federal habeas review. *See, e.g., Cunningham v. Wong*, 704 F.3d 1143,  
2 1155 (9th Cir. 2013); *Tong Xiong v. Felker*, 681 F.3d 1067, 1075 (9th Cir. 2012);  
3 *Fairbank v. Ayers*, 650 F.3d 1243, 1256 (9th Cir. 2011). A petitioner, however, may  
4 obtain federal review of a defaulted claim by demonstrating either cause for the default  
5 and prejudice or that failure to consider the claim will result in a fundamental miscarriage  
6 of justice. *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991); *Paulino v. Castro*, 371  
7 F.3d 1083, 1092-93 (9th Cir. 2004).

8  
9 Ineffective assistance of counsel—such as Petitioner’s claim in Ground 1(E) that  
10 trial counsel was ineffective in failing to object to the testimony—can provide “cause” to  
11 excuse procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). The Court,  
12 however, cannot consider an ineffective assistance of trial or appellate counsel claim as  
13 “cause” for a procedural default when the ineffective assistance of counsel claim is itself  
14 procedurally defaulted. *Id.* at 453; *see also Moraga v. McDaniel*, 415 F. App’x 784, 786  
15 (9th Cir. 2011) (“While it is true that ineffective assistance of counsel may satisfy the  
16 cause requirement to overcome a procedural default, it cannot serve as cause if that claim  
17 is itself procedurally defaulted.”); *Hall v. Scribner*, 619 F. Supp. 2d 823, 844 (N.D. Cal.  
18 2008) (“A procedurally defaulted ineffective assistance of counsel claim is not cause to  
19 excuse the default of another habeas claim unless the petitioner can satisfy the cause and  
20 prejudice standard with respect to the ineffective assistance of counsel claim itself.”). The  
21 Court previously determined that Petitioner’s ineffective assistance claim in Ground 1(E)  
22 was procedurally defaulted. *See supra* Section VI(A). As such, it cannot be used to  
23 excuse the default for Ground 1(D).

24  
25 Petitioner offers no other “cause” to excuse the failure to make a timely and  
26 specific objection to Nurse McHale’s testimony and, as explained below, there was no  
27 prejudice from its admission. Nor has Petitioner shown that the failure to consider the  
28 Confrontation Clause claim will result in a fundamental miscarriage of justice because he

1 is actually innocent. *See McQuiggin*, 569 U.S. at 392; *Schlup*, 513 U.S. at 327. As such,  
2 Ground 1(D) is barred from review in this Court.

3  
4 **3. Merits**

5  
6 Even were the Court to consider Petitioner’s Confrontation Clause claim in Ground  
7 1(D) on its merits, it plainly fails warrant habeas relief. Any violation of the  
8 Confrontation Clause is subject to harmless-error analysis. *Van Arsdall*, 475 U.S. at 684;  
9 *Ocampo v. Vail*, 649 F.3d 1098, 1114 (9th Cir. 2011). If the error did not result in “actual  
10 prejudice,” Petitioner is not entitled to habeas relief. *Brecht v. Abrahamson*, 507 U.S.  
11 619, 637 (1993). Here, Nurse McHale’s brief recitation of Ursula’s account of the sexual  
12 assault was merely cumulative of Ursula’s own testimony about the incident. The jury  
13 heard Ursula’s preliminary hearing testimony, where she testified that Petitioner confined  
14 her by taping her wrists and ankles and used a “big” knife to cut her shirt off and held it  
15 “towards [her] neck . . . like a threat . . . to tell [her] to stop moving.” (3 RT at 692-95).  
16 After pulling down her pants, he “performed oral sex” on her, put the tip of his finger in  
17 her anus, and then “forc[ed] his penis into [her] mouth” until he ejaculated. (3 RT at 698-  
18 708). Ursula’s own testimony was far more detailed, graphic, and incriminating than the  
19 brief and entirely cumulative account of the assault recited by the SART nurse. As such,  
20 Petitioner cannot establish actual prejudice from any Confrontation Clause violation. *See*  
21 *Woods v. Sinclair*, 764 F.3d 1109, 1125-26 (9th Cir. 2014) (finding no “actual prejudice”  
22 from Confrontation Clause violation because improperly admitted statements were  
23 cumulative of other testimony); *Whelchel v. Washington*, 232 F.3d 1197, 1210-11 (9th  
24 Cir. 2000) (holding Confrontation Clause error was harmless where improperly admitted  
25 evidence was “merely cumulative”); *see also Varner v. Davey*, 729 F. App’x 520, 525  
26 (9th Cir. 2018) (finding admission of testimony from unavailable witness was “cumulative  
27 because . . . other eyewitnesses” testified to the same information) (unpublished).

1 For this same reason, Petitioner’s ineffective assistance of counsel claim in  
2 Ground 1(E)—for failing to object to Nurse McHale’s hearsay testimony—  
3 necessarily fails on its merits. Petitioner simply has not demonstrated that, even  
4 without the nurse’s testimony regarding Ursula’s account of the assault, the  
5 outcome of the case would have been different. *See Strickland v. Washington*, 466  
6 U.S. 668, 694 (1984) (holding that to succeed on an ineffective assistance of  
7 counsel claim “the defendant must show that there is a reasonable probability that,  
8 but for counsel’s unprofessional errors, the result of the proceeding would have  
9 been different”).

10  
11 Accordingly, Petitioner is not entitled to habeas relief on his Confrontation  
12 Clause claim in Ground 1(D) or his ineffective assistance of counsel claim in  
13 Ground 1(E).

14  
15 **E. Cumulative Prejudice**

16  
17 In Ground 1(F), Petitioner claims that the “accumulated errors” regarding the  
18 Confrontation Clause violations deprived him of a fair trial. (Petition at 70; Reply at 24).  
19 “Cumulative error applies where, although no single trial error examined in isolation is  
20 sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may  
21 still prejudice a defendant.” *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002)  
22 (internal quotation marks omitted), *overruled on other grounds by Slack v. McDaniel*, 529  
23 U.S. 473 (2000); *see also Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) (“[T]he  
24 Supreme Court has clearly established that the combined effect of multiple trial errors  
25 may give rise to a due process violation if it renders a trial fundamentally unfair, even  
26 where each error considered individually would not require reversal.”).

1 Here, Petitioner has not shown a single instance of constitutional error in his  
2 underlying claims, let alone multiple errors that combined to prejudice the outcome of his  
3 trial. For this reason, Petitioner's claim of cumulative error necessarily fails. *See Hayes*  
4 *v. Ayers*, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of  
5 constitutional magnitude occurred, no cumulative prejudice is possible."); *Mancuso*, 292  
6 F.3d at 957 ("Because there is no single constitutional error in this case, there is nothing to  
7 accumulate to a level of a constitutional violation."). Accordingly, Petitioner's claim in  
8 Ground 1(F) fails to warrant habeas relief.

9  
10 **F. California Code of Civil Procedure § 1219**

11  
12 In Grounds Two and Three, Petitioner claims that the trial court's application of  
13 California Code of Civil Procedure § 1219 to exempt the victim from testifying at trial  
14 violated his Sixth Amendment rights of confrontation and compulsory process, as well as  
15 his right to a fair trial. (Petition at 22, 61-64, 73-75, 100-04; Reply at 25-27).

16  
17 California Code of Civil Procedure § 1219(b), provides, in relevant part, that  
18 "[n]otwithstanding any other law, a court shall not imprison or otherwise confine or place  
19 in custody the victim of a sexual assault or domestic violence crime for contempt if the  
20 contempt consists of refusing to testify concerning that sexual assault or domestic  
21 violence crime." This provision "reflects the [California] Legislature's view that sexual  
22 assault victims generally should not be jailed for refusing to testify against the assailant."  
23 *People v. Cogswell*, 48 Cal.4th 467, 478 (2010).

24  
25 Here, when the police served Ursula with a subpoena to testify at Petitioner's trial,  
26 Ursula refused to sign the subpoena and told the police that she would not appear at trial  
27 because "she feared for her safety and her family's safety and her kids." (2 RT at 307-  
28 09). Detective Brown testified that Ursula was "very upset" and "shaking" and indicated

1 that Ursula had already told the prosecutor that “she was not coming to court.” (2 RT at  
2 313-14). At a pre-trial hearing, the prosecutor told the court that Ursula had been served  
3 with a subpoena but refused to sign it and that “all efforts ha[d] been done that could be  
4 done to try to compel [Ursula] to come to court to testify.” (2 RT at 323-24, 328).  
5 Petitioner’s counsel argued that Ursula was not “unavailable” under the Sixth Amendment  
6 and should be forcibly transported to the courthouse. (2 RT at 330). The court ruled that  
7 the police did not “have the authority to simply . . . confine her and bring her down to  
8 court” because California Code of Civil Procedure § 1219(b) did “not allow the police to  
9 arrest a sexual assault victim for purposes of bringing her in to testify.” (2 RT at 333).

10  
11         Petitioner argues that relying on California Code of Civil Procedure § 1219(b) to  
12 excuse Ursula from testifying without arresting her violated his constitutional right to  
13 confront and cross-examine the victim. The Constitution, however, only requires that the  
14 government make good-faith, reasonable efforts to obtain a witness’s presence at trial.  
15 *Hardy*, 565 U.S. at 69 (2011); *Roberts*, 448 U.S. at 74; *Barber*, 390 U.S. at 725. In  
16 making that determination, courts have held that the “the Confrontation Clause does not  
17 require the government to serve a legally effective subpoena on a witness as a prerequisite  
18 to showing good faith.” *Aliahmad v. Morris*, 2019 WL 7205992, at \*9 (C.D. Cal. May 31,  
19 2019); *see also Christie v. Hollins*, 409 F.3d 120, 125 (2d Cir. 2005) (rejecting an  
20 argument that the failure to issue a subpoena undermines a claim of diligence); *Dres v.*  
21 *Campoy*, 784 F.2d 996, 1000 (9th Cir. 1986) (finding good faith effort to locate a witness  
22 despite the prosecutor’s decision not to serve a subpoena for trial). Moreover, the  
23 Supreme Court has never suggested that police are required to undertake extraordinary  
24 measures such as arresting a victim and physically transporting them to court to comply  
25 with the Sixth Amendment’s unavailability requirement. *See Roberts*, 448 U.S. at 74  
26 (holding that the “law does not require the doing of a futile act” to secure a witness’s  
27 attendance at trial); *People v. Smith*, 30 Cal.4th 581, 624 (2003) (“Trial courts do not have

1 to take extreme actions before making a finding of unavailability.”) (internal quotation  
2 marks omitted).

3  
4 In the instant case, the prosecution clearly made reasonable, good-faith efforts to  
5 secure Ursula’s attendance at trial, including issuing her a subpoena, which she refused to  
6 obey. The fact that California Code of Civil Procedure § 1219(b) prohibited Ursula from  
7 being arrested and forcibly brought to court to testify or face contempt proceedings simply  
8 had no effect on the trial court’s determination that she was “unavailable” to testify under  
9 the Sixth Amendment. Furthermore, as explained previously, Ursula testified at  
10 Petitioner’s preliminary hearing and counsel had a full and fair opportunity to cross-  
11 examine her during that proceeding. Thus, Petitioner has failed to demonstrate that  
12 California Code of Civil Procedure § 1219(b) violated Petitioner’s Confrontation Clause  
13 rights or his right to a fair trial. Accordingly, Petitioner’s claims in Ground Two and  
14 Three fail to warrant habeas relief.

15  
16 **G. Evidentiary Hearing**

17  
18 Finally, Petitioner asks this Court to hold an evidentiary hearing to “unlock the  
19 doors of discovery” as to his claims. (Dkt. No. 89). However, habeas review under  
20 section 2254(d)(1) is “limited to the record that was before the state court that adjudicated  
21 the claim on the merits.” *Pinholster*, 563 U.S. at 181. “[E]vidence later introduced in  
22 federal court is irrelevant to § 2254(d)(1) review.” *Id.* at 184. Furthermore, even if  
23 Petitioner could satisfy the requirements of section 2254(e)(2), which authorizes a court to  
24 hold an evidentiary hearing in limited circumstances not present here, the Court concludes  
25 that an evidentiary hearing is not necessary in this case because the record is sufficient to  
26 refute Petitioner’s claims. *See Cook v. Kernan*, 948 F.3d 952, 971 (9th Cir. 2020) (“If the  
27 record contains a sufficient factual basis that refutes the applicant’s factual allegations or  
28 otherwise precludes habeas relief, a district court is not required to hold an evidentiary

1 hearing.” (internal quotation marks omitted)); *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th  
2 Cir. 1998) (holding that, in habeas proceedings, “an evidentiary hearing is not required on  
3 issues that can be resolved by reference to the state court record”); *see also Downs v.*  
4 *Hoyt*, 232 F.3d 1031, 1041 (9th Cir. 2000) (“[T]he fact that a hearing would be permitted  
5 does not mean that it is required. The district court retains discretion whether to hold  
6 one.”). Accordingly, Petitioner’s request for an evidentiary hearing should be denied.  
7  
8

9  
10 **VII.**  
11 **RECOMMENDATION**

12 For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an  
13 Order: (1) accepting this Report and Recommendation, (2) denying the Petition, and (3)  
14 directing that Judgment be entered dismissing this action with prejudice.  
15

16 DATED: April 30, 2024

17  
18 

19 

---

PEDRO V. CASTILLO  
20 UNITED STATES MAGISTRATE JUDGE  
21  
22  
23  
24  
25  
26  
27  
28

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