

No. _____

In the Supreme Court of the United States

ANTHONY JAMES MYERS

Petitioner,

v.

LUIS GARNICA,

Respondent.

Ninth Circuit No. 25-6780

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR NINTH CIRCUIT (RULE 14)**

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Questions Presented

A state may dispense with a criminal defendant’s right to face-to-face confrontation of a child witness only after the trial court hears evidence and makes a case-specific finding that the defendant’s physical presence would cause trauma sufficiently serious to impair the particular child’s ability to communicate. *Maryland v. Craig*, 497 U.S. 836, 855–57 (1990) (*Craig*). This Court recently reaffirmed those requirements in *Pitts v. Mississippi*, 609 U.S. _ (No. 24-1159, Nov. 24, 2025) (*Pitts*).

The trial court here initially found that the prosecution had not established the statutory and constitutional predicate for remote testimony. It nevertheless announced that the issue was on a “very, very short leash” and that crying, refusing to enter, or declining to answer could trigger video testimony. The prosecution then called the eight-year-old child as its first witness before the jury. After she became severely distressed and did not answer substantive questions, the court ordered one-way closed-circuit testimony. The record showed that the jury and Petitioner were both present during the critical episode; the prosecutor had stated that the child’s first reaction occurred upon seeing the jury; and the court did not conduct a renewed evidentiary hearing focused on whether Petitioner’s presence—rather than the jury, courtroom, questioning, or the general ordeal of testifying—caused an inability to communicate.

The questions presented are:

1. Whether reasonable jurists could debate that the state court unreasonably applied *Craig* by sustaining the denial of face-to-face confrontation without a focused, evidence-based finding that Petitioner's physical presence caused trauma sufficiently severe to impair the child's ability to communicate.
2. Whether the Ninth Circuit violated 28 U.S.C. § 2253(c) and this Court's decisions in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Buck v. Davis*, 580 U.S. 100 (2017), by denying a certificate of appealability after this Court's intervening decision in *Pitts* confirmed that strict compliance with *Craig*'s evidence-based, case-specific necessity requirement is constitutionally indispensable.

List of Parties

Petitioner Anthony James Myers was the petitioner in the United States District Court for the Eastern District of California and the petitioner-appellant in the United States Court of Appeals for the Ninth Circuit.

Respondent Luis Garnica was the respondent-appellee in the Ninth Circuit. Bryan D. Phillips was identified as respondent in the district court's final order.

Petitioner Anthony James Myers is an individual. Supreme Court Rule 29.6 does not apply.

Related Proceedings

- People v. Anthony Myers, No. VCF535342, Superior Court of California, County of Tulare, Convicted on August 16, 2018.
- People v. Myers, California Court of Appeal, __ Cal.App.5th __ [2021 Cal. App. Unpub. LEXIS 8032] (Dec. 21, 2021, No. F078318).
- People v. Myers, California Supreme Court, __ Cal.5th __ [2022 Cal. LEXIS 1556] (March 16, 2022, No. S272936).
- Anthony James Myers v. Garnica, No. 1:23-cv-00409-JLT-SAB, Petition for Writ of Habeas Corpus and Application for Certificate of Appealability denied, September 29, 2025.
- Anthony James Myers v. Garnica, No. 25-6780, Ninth Circuit Court of Appeal, Application for a Certificate of Appealability denied, May 12, 2026, and Motion for Reconsideration of Denial of Motion for Reconsideration, denied, May 29, 2026.

Petition for Certiorari

Petitioner Anthony James Myers respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit denying his application for a certificate of appealability from the district court's denial of his writ of habeas corpus.

Opinions Below

The court of appeals' order denying petitioner's motion for a certificate of appealability, dated May 12, 2026, is reproduced as Appendix A, at pp. A1–A2

The court of appeals' order denying reconsideration of its denial of petitioner's motion for a certificate of appealability, dated May 29, 2026, is reproduced as Appendix B, at pp. A3–A4.

The opinion of the United States District Court for the Eastern District of California, dated September 29, 2025, is unreported and reproduced as Appendix C, at pp. A5–A9.

The United States District Court Magistrate's Amended Report, dated February 10, 2025, is reproduced as Appendix D, at pp. 10–41.

The United States District Court Magistrate's Report, dated July 24, 2024, is reproduced as Appendix E, at pp. A42–72.

Jurisdiction

The court of appeals entered its order denying petitioner's motion for a certificate of appealability on May 12, 2026. It denied a timely petition for motion for reconsideration of the denial of its motion for a certificate of appealability on May 29, 2026.

This Court has jurisdiction under 28 U.S.C. § 1254(1), which authorizes review by writ of certiorari of cases in the United States courts of appeals.

This petition is timely under Supreme Court Rule 13.3 because it is filed within 90 days after denial of reconsideration.

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”

This Court’s decisions in *Maryland v. Craig*, 497 U.S. 836 (1990), recently affirmed in *Pitts v. Mississippi*, 607 U. S. ____ (2025), No. 24-1159 (Nov. 24, 2025), set forth the requirements for a trial court to consider when denying a defendant face-to-face confrontation to allow a child witness to testify via remote video.

This Court’s decisions in *Slack v. McDaniel*, 529 U.S. 473 (2000), *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (*Miller-El*), *Buck v. Davis*, 580 U.S. 100, and 28 U.S.C. § 2253 set forth the standard for the issuance of a certificate of appealability.

28 U.S.C. § 2253(c) provides in relevant part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court...

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

The California statutes in this petition are set forth in Appendix F, pp. A73–A78.

Statement of the Case

A. Pretrial hearing on necessity to accommodate the child witness through video testimony.

Petitioner Anthony James Myers was tried in the Tulare County Superior Court on multiple sexual-offense counts involving three complainants, including his daughter, S.M. The remote-testimony issue that is the subject of this petition concerns S.M., who was eight years old at the time of trial.

Twelve days before trial, the prosecution moved under [California Penal Code section 1347](#) to permit S.M. to testify by closed-circuit television. Section 1347 codifies the standard of [Maryland v. Craig](#), 497 U.S. 836, permitting remote testimony only upon clear and convincing evidence that testimony in the defendant’s presence would cause the child serious emotional distress rendering the child unavailable as a witness. [People v. Powell](#), 194 Cal. App. 4th 1268, 1282 (2011).

Before ruling, the trial court stated that it would not grant the motion without evidentiary support—declarations or live testimony, including from a counselor or treatment provider—establishing that testifying before the jury would be detrimental to S.M.’s mental health.

The sole witness at the hearing was S.M.'s mother Ashley (Petitioner's ex-wife), who testified that when S.M. learned she would be testifying in court, she became very upset, and had seen counselors for her emotional state.

Defense counsel separately moved to determine whether S.M. was competent to testify or should be disqualified as a witness (Cal. Evid. Code § 701) or was an unavailable witness (Cal. Evid. Code § 240), and sought discovery of the identities and records of S.M.'s therapists. The trial court denied the discovery request and never ruled on the motions to determine S.M.'s competency and availability.

B. The “Very Short Leash” Ruling

The trial court denied the motion to allow S.M. to testify via CCTV “at this point,” finding the prosecution had not shown by clear and convincing evidence that testimony in Petitioner's presence would render S.M. unavailable. The court nevertheless made clear that its ruling was “subject to a very, very short leash”: if S.M. “won’t even come in the courtroom,” “is a hysterical mess,” or “comes in here and won’t take the oath,” “it’s not going to take much” to switch to “this other procedure.” The court framed the trigger for remote testimony in terms of observed distress rather than a completed, evidence-based determination of the source of that distress.

C. The Child’s Distress Before the Jury and the CCTV Order

After jury selection, the court was informed that S.M. was refusing to come into the courtroom. The court had Petitioner step out of the courtroom so S.M. could view the courtroom out of the presence of the ju-

ry and her father. S.M. then entered the courtroom, sat in the witness box, showed no signs of distress, and skipped out.

When S.M. reentered the courtroom in front the jury and Petitioner, S.M. dropped to the ground, scrambled backwards, pulling against her grandmother, screaming, “ ‘I don’t want to go in there. I’m scared.’ ” The prosecutor said that S.M. was not willing to come into the courtroom. The jury was then removed from the courtroom. According to the prosecutor, S.M.’s first outburst occurred when she saw the jury.

The court had S.M. enter the courtroom with the Petitioner present and she took the stand without incident. After S.M. was seated, the jurors were brought into the courtroom.

The prosecutor began to question S.M. The first words out of S.M.’s mouth were, “I want my mommy.” S.M. refused to answer questions, stating that she didn’t want to be there, and repeatedly asked for her “mommy.” S.M. repeatedly asked the prosecutor to stop questioning her and said she wanted to leave.

The court interrupted stating, “I’ve seen enough,” and informed the jury a different procedure would be tried and sent them to the jury room. The court then found that S.M. “will not testify in the presence of” Petitioner and ordered one-way closed-circuit testimony.

Petitioner renewed his objections to the procedure based on his constitutional rights to confrontation and due process, and that an evidentiary inquiry was warranted since it was unknown whether S.M. was upset by testifying in front of Petitioner or some other reason. The court found by clear and convincing evidence that S.M. would not testify before her father in the courtroom.

The record reflects that the jury and Petitioner were both present during the episode the court relied on; that S.M. had earlier entered the courtroom without incident when Petitioner was present but the jury was not; and that the court did not reopen the § 1347 hearing to determine, on evidence, whether it was Petitioner's presence—rather than the jury, the courtroom, the questioning, or the general ordeal of testifying—that caused S.M.'s inability to communicate. The court also denied Petitioner's renewed motion determine whether S.M. was a competent and available witness.

During her subsequent CCTV testimony, S.M. answered general questions but did not answer many questions about the alleged offenses and specifically denied that something happened involving her father's or her private parts, or if she saw her father's private parts; the prosecution relied on her recorded forensic interview as the substantive evidence of the crime.

D. State Appellate Proceedings

The California Court of Appeal affirmed, holding that substantial evidence supported the trial court's case-specific findings and that expert testimony was not required. The California Supreme Court denied review on March 16, 2022.

E. Federal Habeas Proceedings

Petitioner filed a federal habeas petition raising a Confrontation Clause claim under *Craig*, a due-process/fair-trial claim, and a cumulative-error claim¹. The magistrate judge, applying 28 U.S.C. § 2254(d) and reviewing the last reasoned state decision, see *Wilson v. Sellers*, 584 U.S. 122 (2018), rec-

¹ The cumulative-error claim was dismissed as unexhausted.

ommended denial, concluding that the state court’s application of *Craig* was not objectively unreasonable and that certain competency, availability, and discovery contentions were unexhausted as freestanding due-process claims. The district court adopted the amended findings and recommendation, denied the petition, and declined to issue a certificate of appealability on September 29, 2025.

F. The Ninth Circuit’s Denial of a Certificate of Appealability

Petitioner sought a certificate of appealability. On May 12, 2026, the Ninth Circuit denied the request in a one-paragraph order, stating that Petitioner “has not made a ‘substantial showing of the denial of a constitutional right,’” citing 28 U.S.C. § 2253(c)(2) and *Miller-El v. Cockrell*, 537 U.S. at 327. The court denied reconsideration on May 29, 2026. Eleven days before the first order, this Court had decided *Pitts v. Mississippi*, 607 U.S. ___, No. 24-1159 (Nov. 24, 2025).

Reasons for Granting the Petition

Certiorari is warranted because the Ninth Circuit denied a certificate of appealability in a case that squarely implicates a right this Court has just reaffirmed, and it did so by demanding more of Petitioner at the threshold stage than 28 U.S.C. § 2253(c) permits. This Court’s intervening decision in *Pitts v. Mississippi* confirms that the constitutional issue Petitioner raised is, at a minimum, one that reasonable jurists could debate—which is all a certificate of appealability requires.

I. The Certificate-of-Appealability Standard Is a Threshold Inquiry, Not a Merits Adjudication

A certificate of appealability must issue when “jurists of reason could disagree with the district court’s resolution of [the] constitutional claims or could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. at 327. The inquiry is a “threshold” one that must be resolved “without full consideration of the factual or legal bases adduced in support of the claims.” *Id.* at 336. A court of appeals errs when it “first decid[es] the merits of an appeal, and then justifi[es] its denial of a COA based on its adjudication of the actual merits.” *Id.* at 336–37.

This Court reinforced those principles in *Buck v. Davis*, 580 U.S. 100, holding that the Fifth Circuit placed “too heavy a burden on the prisoner at the COA stage” by resolving the ultimate merits rather than asking only whether the district court’s decision was debatable. *Id.* at 115. A claim “can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail.” *Id.* (quoting *Miller-El*, 537 U.S. at 338).

Petitioner satisfied that standard. His Confrontation Clause claim rests on controlling precedent, a developed trial record, and an intervening decision of this Court. The debatability of that claim is confirmed—not foreclosed—by the governing law.

II. *Pitts v. Mississippi* Confirms That Petitioner’s Craig Claim Is at Least Debatable

Face-to-face confrontation is the ordinary rule; departures are permitted only where “necessary to further an important public policy and only where the re-

liability of the testimony is otherwise assured.” *Maryland v. Craig*, 497 U.S. at 850. The necessity finding “must of course be a case-specific one”: the trial court must “hear evidence,” find that the child “would be traumatized, not by the courtroom generally, but by the presence of the defendant,” and find that the resulting distress is “more than de minimis.” *Id.* at 855–56.

This Court applied those requirements just months before the Ninth Circuit’s order. In *Pitts v. Mississippi*, 609 U.S. ___, the Court reversed a state supreme court that had approved screening of a child witness without the required case-specific finding. The Court held that a trial court “must ‘hear evidence’ and make a ‘case-specific’ finding of ‘[t]he requisite . . . necessity,’” and that “[s]imply pointing to a state statute that authorizes screening, even one premised on ‘generalized finding[s]’ of necessity, will not suffice.” *Pitts*, slip op. at 1–2 (quoting *Craig*, 497 U.S. at 855, and *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988)). The Court rejected the State’s contention that the trial court had in fact heard evidence and made a necessity finding, explaining that reliance on a mandatory statutory right and generalized representations “fall well short of the procedures and findings *Coy* and *Craig* require.” *Id.* at 5.

Pitts squarely supports Petitioner’s position that the constitutional adequacy of the necessity determination here is, at the least, debatable. The trial court had already found the § 1347 predicate unproven and then predicated remote testimony on observed distress under a self-described “very short leash,” without reopening an evidentiary hearing to isolate the source of that distress.

The record shows that the jury and Petitioner were both present during the critical episode and that the child’s first reaction was attributed to seeing the jury.

When S.M. entered the courtroom and took the stand without incident, her father was present at counsel table but the jury was not present. Whether that record satisfies *Craig*'s command to find trauma caused "by the presence of the defendant," and not "by the courtroom generally," (*Craig*, 497 U.S. at 856), is precisely the kind of question that "deserve[s] encouragement to proceed further." *Miller-El*, 537 U.S. at 327.

III. The Denial of a Competency Determination and of Discovery Into S.M.'s Counseling Confirms That the Trial Court Failed to Conduct the Inquiry *Craig* and *Pitts* Require

Craig does not treat necessity in isolation. It permits the loss of physical, face-to-face confrontation only where two independent conditions are met: the denial of confrontation is "necessary to further an important public policy," and "the reliability of the testimony is otherwise assured." *Craig*, 497 U.S. at 850. Among the reliability safeguards *Craig* expressly identified is that "[t]he child witness must be competent to testify and must testify under oath." *Id.* at 851. *Competency* is thus not a separate, freestanding matter; it is one of the very safeguards on which *Craig* relied in concluding that remote testimony can be constitutionally reliable. And *necessity*, in turn, requires an evidence-based, case-specific finding that the *defendant's presence*—not the courtroom, the jury, or the ordeal of testifying—would cause trauma severe enough to impair the particular child's ability to communicate. *Id.* at 855–56.

Two rulings below prevented the trial court from ever conducting that inquiry on an adequate record.

The denied competency determination.

Petitioner moved, both in writing and orally, for a determination whether S.M. was competent to testify and whether she should be disqualified as a witness under [California Evidence Code section 701](#), and sought *voir dire* directed to her ability to perceive, recollect, communicate, and understand the duty to testify truthfully. The trial court never ruled on that motion and never permitted the requested inquiry. [Section 1347\(j\)](#) itself preserves the witness-disqualification rules of [Evidence Code § 701](#), and [Craig](#) makes competency a reliability prerequisite to remote testimony. Once the defense specifically challenged competency, the court could not simply presume it. By declining to resolve the challenge before invoking one-way CCTV, the court failed to establish a safeguard that [Craig](#) identified as essential to the constitutional reliability of remote testimony—particularly where S.M.’s subsequent CCTV testimony reflected substantial difficulty recalling and communicating the alleged events.

The denied discovery into S.M.’s counselors and treatment notes.

Petitioner also sought the identities of the counselors and therapists treating S.M. and their treatment notes, precisely so that the defense could test—at the necessity hearing and on cross-examination—whether S.M.’s anticipated distress arose from Petitioner’s presence or from other causes, and whether it was severe enough to impair her ability to communicate. The trial court denied that discovery and refused to order the prosecution to disclose the therapists’ identities or notes. That ruling is significant under *Pitts*. *Pitts* insists that a court “hear evidence” and make a genuine, case-specific finding, and rejects reliance on generalized or conclusory repre-

sentations in place of an evidentiary showing. *Pitts*, slip op. at 1–2, 5. Denying the defense access to the very information bearing on the *source* and *severity* of the child’s distress deprived the trial court—and the defense—of the evidentiary basis *Craig* and *Pitts* require, and left the necessity determination resting on observed courtroom distress rather than a controlled, evidence-based inquiry into causation.

Taken together, these rulings show that the deficiency here was not a mere departure from preferred practice. The court denied the tools needed to make the reliability and necessity findings on evidence: it refused to determine competency (a *Craig* reliability safeguard) and refused the discovery that would have allowed the parties and the court to isolate whether Petitioner’s presence, as opposed to the jury or the courtroom, caused an inability to communicate (the core of *Craig* necessity, as reaffirmed in *Pitts*). Reasonable jurists could at least debate whether a necessity determination reached without competency resolution and without that discovery satisfies the evidence-based, case-specific inquiry the Sixth Amendment demands. That debatability is all § 2253(c) requires. *Miller-El*, 537 U.S. at 327.

Petitioner presses these points as components of the exhausted *Craig* confrontation claim—as factual and analytical reasons the necessity and reliability findings were constitutionally inadequate—not as a new, freestanding due-process claim. See *Craig*, 497 U.S. at 851 (competency among confrontation’s reliability safeguards).

IV. The Intervening Decision in *Pitts* Made Denial of a Certificate of Appealability Especially Untenable

Pitts issued eleven days before the Ninth Circuit denied a certificate of appealability. When this Court decides a case that strengthens a petitioner's constitutional theory while a request for a certificate of appealability is pending, the debatability of the underlying claim is reinforced, not diminished. At a minimum, reasonable jurists could conclude that the state court's treatment of the necessity finding warranted plenary consideration in light of this Court's renewed insistence on evidence-based, case-specific findings. Denying even threshold review under those circumstances is difficult to reconcile with § 2253(c) as construed in *Miller-El* and *Buck*.

V. The Question Is Important and Recurring

This Court's decisions in *Coy*, *Craig*, and now *Pitts* reflect the continuing importance of the face-to-face confrontation right in child-witness prosecutions and the recurring temptation to substitute observed courtroom distress, or statutory authorization, for the individualized, evidence-based necessity finding the Constitution requires. Whether that requirement was satisfied where a trial court first found the predicate unproven, then ordered remote testimony after distress before the jury without a renewed hearing, is a question of substantial and recurring importance to the administration of criminal justice.

The confrontation error asserted here is a trial error subject to harmless-error review, not structural error. See *Pitts*, slip op. at 6; *Coy*, 487 U.S. at 1021; *Chapman v. California*, 386 U.S. 18, 24 (1967). That

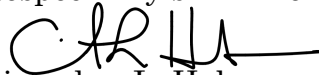
question, too, is properly resolved on the merits after a certificate of appealability issues, not used to foreclose threshold review.

Conclusion

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the judgment below, and remand for further consideration in light of *Pitts v. Mississippi*, 607 U.S. ___, No. 24-1159 (Nov. 24, 2025).

Petitioner made a substantial showing that he was denied his right to confrontation under the [Sixth Amendment](#) when the trial court ordered that S.M. testify via one-way CCTV without making the finding of necessity required by [Maryland v. Craig](#), which was recently reaffirmed in *Pitts v. Mississippi*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Haberman', with a horizontal line extending to the right.

Christopher L. Haberman

Attorney for Petitioner

Anthony James Myers,

In Forma Pauperis

Certificate of Compliance

1. This brief contains **3,663 words**, excluding the parts of the brief exempted by Supreme Court Rule, and complies with the word count limit of Supreme Court Rule 33(1)(g).
2. This brief is prepared using **12 point Century Schoolbook** and complies with the typeface and style requirements of Supreme Court Rule 33(1)(a-b).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. L. Haberman', with a horizontal line extending to the right.

Christopher L. Haberman

Attorney for Petitioner

Anthony James Myers,

In Forma Pauperis

Anthony James Myers v. Luis Garnica

Petition for Certiorari to the United States Court of Appeals
For the Ninth Circuit (No. 25-6780)

Appendix A

Order of the Court of Appeals
denying petitioner's application for a
certificate of appealability, dated May 12, 2026

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 12 2026

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

ANTHONY JAMES MYERS,

Petitioner - Appellant,

v.

LUIS GARNICA,

Respondent - Appellee.

No. 25-6780

D.C. No. 1:23-cv-00409-JLT-SAB
Eastern District of California,
Fresno

ORDER

Before: NGUYEN and DESAI, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 6) 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).

All pending motions are denied as moot.

DENIED.

Anthony James Myers v. Luis Garnica

Petition for Certiorari to the United States Court of Appeals
For the Ninth Circuit (No. 25-6780)

Appendix B

Order of the Court of Appeals
denying reconsideration of petitioner's motion for a
certificate of appealability, dated May 29, 2026

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 29 2026

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

ANTHONY JAMES MYERS,

Petitioner - Appellant,

v.

LUIS GARNICA,

Respondent - Appellee.

No. 25-6780

D.C. No. 1:23-cv-00409-JLT-SAB
Eastern District of California,
Fresno

ORDER

Before: VANDYKE and DE ALBA, Circuit Judges.

The motion (Docket Entry No. 9) for reconsideration is denied. *See* 9th Cir.

R. 27-10.

This court will not entertain any further filings in this closed case.

Anthony James Myers v. Luis Garnica

Petition for Certiorari to the United States Court of Appeals
For the Ninth Circuit (No. 25-6780)

Appendix C

Opinion of the United States District Court for the
Eastern District of California, denying petition for writ
of habeas corpus and request for certificate of
appealability, dated September 29, 2025

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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11 ANTHONY JAMES MYERS,

12 Petitioner,

13 v.

14 BRYAN D. PHILLIPS,

15 Respondent.¹
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No. 1:23-cv-00409-JLT-SAB (HC)

ORDER ADOPTING AMENDED FINDINGS
AND RECOMMENDATIONS, DENYING
PETITION FOR WRIT OF HABEAS
CORPUS, DIRECTING CLERK OF COURT
TO SUBSTITUTE WARDEN LUIS
GARNICA AS RESPONDENT AND CLOSE
CASE, DENYING PETITIONER'S MOTION
FOR CERTIFICATE OF APPEALABILITY,
AND DECLINING TO ISSUE CERTIFICATE
OF APPEALABILITY

(Docs. 32, 34)

19 Anthony James Myers is a state prisoner proceeding with a petition for writ of habeas
20 corpus brought pursuant to 28 U.S.C. § 2254. This matter was referred to a United States
21 Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

22 The magistrate judge issued findings and recommendations recommending that the
23 petition for writ of habeas corpus be denied. (Doc. 30; Doc. 32.) Petitioner filed timely
24 objections and a motion for certificate of appealability. (Docs. 33, 34.)

25 According to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of the
26

27 ¹ A CDCR California Incarcerated Records and Information Search ("CIRIS") shows that petitioner is
28 incarcerated at Mule Creek State Prison, in the care and custody of Acting Warden Luis Garnica. See
Ciris.mt.cdr.ca.gov (last visited September 29, 2025). Pursuant to Federal Rule of Civil Procedure 25(d),
Warden Garnica is substituted as Respondent in place of his predecessor wardens.

case. Having carefully reviewed the entire file, including petitioner's objections, the Court holds the findings and recommendation to be supported by the record and proper analysis.

Petitioner raises five objections to the amended findings and recommendations, none of which are a basis to find the magistrate judge erred.

First Objection - Petitioner asserts that the magistrate judge erred by finding the state appellate court fact-finding reasonable despite and because the magistrate judge did not mention or consider facts petitioner asserted on appeal. (Doc. 33 at 4-8.) Petitioner requests these facts be added to the amended findings and recommendations. (*Id.*) However, the magistrate judge did not err in his 28 U.S.C. § 2254(d)(2) analysis. Petitioner's proffered facts are in the record that was before the state appeal court. Even if ignored or overlooked in state court, petitioner has not demonstrated his proffered facts are highly probative and central to his claim so as to infect the fact-finding process. *See Hampton v. Shinn*, 143 F.4th 1047, 1087 (9th Cir. 2025); *see also id.* at 1086-87 ("[s]tate courts are not required to address every jot and tittle of proof suggested to them, nor need they make detailed findings addressing all the evidence before them."). Furthermore, the magistrate judge properly relied upon the summary of facts in the state appeal court opinion. (*See* Doc. 32 at 2 n.4 citing *Vasquez v. Kirkland*, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).)

Second and Third Objections - Petitioner objects that the magistrate judge erred by finding reasonable the state appellate court's denial of the Confrontation Clause claim. (Doc. 33 at 5-13.) However, the magistrate judge correctly found any state law error in S.M.'s testimonial proceeding did not contravene federal confrontation rights under *Maryland v. Craig*, 497 U.S. 836, 856 (1990), for the reasons stated by the magistrate judge.

Fourth Objection - Petitioner objects the magistrate judge erred by finding unexhausted his due process claim based on facts the trial court erred in failing to determine S.M.'s competency and availability and to allow related discovery. (Doc. 33 at 14.) However, the magistrate judge correctly found the claim unexhausted. The magistrate judge observed the Court previously found the claim was not fully exhausted. (*See* Doc. 32 at 26 citing Doc. 19 at 6.) To the extent petitioner argues he may pursue in this proceeding the unexhausted due process claim, he is wrong. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Davis v. Silva*, 511 F.3d 1005,

1 1008-09 (9th Cir. 2008). To the extent petitioner argues state law error contravening *Craig*, he
2 fails for the reasons stated by the magistrate judge.²

3 Fifth Objection - Petitioner objects the magistrate judge erred by finding the state court
4 reasonably denied the exhausted aspects of his due process and fair trial claim. (Doc. 33 at 17.)
5 However, the Court finds no error. Petitioner's re-argument of his First Objection is unavailing,
6 for the reasons stated. The magistrate judge correctly found *Andrews v. White*, 2025 WL 247502
7 (U.S. Jan. 21, 2025) not to be a basis for relief. The magistrate judge provided a reasoned
8 application of *Andrews* and *Payne v. Tennessee*, 501 U.S. 808 (1991) in finding the facts and
9 circumstances in this case not to suggest "the jury drew impermissible conclusions from S.M.'s
10 emotional testimony." (Doc. 32 at 30.)

11 Having found that Petitioner is not entitled to habeas relief, the Court now turns to
12 whether a certificate of appealability should issue. A petitioner seeking a writ of habeas corpus
13 has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only
14 allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); 28 U.S.C.
15 § 2253. If a court denies a habeas petition on the merits, the court may only issue a certificate of
16 appealability "if jurists of reason could disagree with the district court's resolution of [the
17 petitioner's] constitutional claims or that jurists could conclude the issues presented are adequate
18 to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*,
19 529 U.S. 473, 483-84 (2000). While the petitioner is not required to prove the merits of his case,
20 he must demonstrate "something more than the absence of frivolity or the existence of mere good
21 faith on his . . . part." *Miller-El*, 537 U.S. at 338.

22 In the present case, the Court finds that reasonable jurists would not find the Court's
23 determination that the petition should be denied debatable or wrong, or that Petitioner should be
24 allowed to proceed further. Petitioner has not made the required substantial showing of the denial
25 of a constitutional right. Therefore, the Court denies Petitioner's motion and declines to issue a
26

27 ² Petitioner's request to stay and amend the federal petition regarding the purported due process claim (*see*
28 Doc. 33 at 15) is denied as beyond the scope of the amended findings and recommendations and for the
reasons stated.

1 certificate of appealability. Accordingly, the Court **ORDERS**:

- 2 1. The amended findings and recommendations issued on February 10, 2025 (Doc. 32)
- 3 are **ADOPTED IN FULL**.
- 4 2. The petition for writ of habeas corpus is **DENIED**.
- 5 3. The Clerk of Court is directed to **SUBSTITUTE** Warden Luis Garnica as Respondent
- 6 and **CLOSE THE CASE**.
- 7 4. Petitioner's motion for certificate of appealability is **DENIED**, and the Court declines
- 8 to issue a certificate of appealability.
- 9

10 IT IS SO ORDERED.

11 Dated: **September 29, 2025**


UNITED STATES DISTRICT JUDGE

Anthony James Myers v. Luis Garnica

Petition for Certiorari to the United States Court of Appeals
For the Ninth Circuit (No. 25-6780)

Appendix D

United States District Court Magistrate's Report,
dated February 10, 2025

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ANTHONY JAMES MYERS,

Petitioner,

v.

BRYAN D. PHILLIPS, et al.,

Respondents.

Case No. 1:23-cv-00409-JLT-SAB-HC

ORDER VACATING JULY 24, 2024
FINDINGS AND RECOMMENDATION
AND DENYING PETITIONER'S REQUEST
FOR ORAL ARGUMENT

(ECF No. 29)

AMENDED FINDINGS AND
RECOMMENDATION RECOMMENDING
DENIAL OF PETITION FOR WRIT OF
HABEAS CORPUS

Petitioner, represented by counsel, is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

I.

BACKGROUND

On August 16, 2018, Petitioner was found guilty by a jury in the Tulare County Superior Court of multiple sex crimes against three minor victims. (3 CT¹ 593–631; ECF No. 1 at 10–11.²) On October 12, 2018, Petitioner was sentenced to an imprisonment term of 225 years to life plus 13 years. (3 CT 698–700, 705–06; ECF No. 1 at 11.) On December 21, 2021, the California Court of Appeal, Fifth Appellate District, stayed the sentence imposed on count 10 and affirmed the judgment in all other respects. People v. Myers, No. F078318, 2021 WL 6050630, at *14 (Cal. Ct. App. Dec. 21, 2021). On March 16, 2022, the California Supreme Court denied

¹ “CT” refers to the Clerk’s Transcript on Appeal lodged by Respondent. (ECF No. 24.)

² Page numbers refer to the ECF pagination stamped at the top of the page.

Petitioner's petition for review. (LDs³ 25, 26.) Petitioner did not file any state post-conviction collateral challenges. (ECF No. 1 at 13.)

On March 19, 2023, Petitioner, through counsel, filed a federal petition for writ of habeas corpus in this Court. (ECF No. 1.) The petition raised the following claims for relief: (1) violation of Petitioner's right to confrontation; (2) violation of Petitioner's right to a fair trial; and (3) cumulative error. (ECF No. 1.) On May 12, 2023, Respondent filed a motion to dismiss the petition because the cumulative error claim was unexhausted. (ECF No. 13.) On October 31, 2023, the Court granted Respondent's motion to dismiss in part and dismissed the cumulative error claim without prejudice. (ECF No. 21.) On December 26, 2023, Respondent filed an answer. (ECF No. 23.) Petitioner filed a reply and requested oral argument. (ECF Nos. 26, 29.)

On July 24, 2024, the Court issued findings and recommendation recommending denial of the petition. (ECF No. 30.) On August 5, 2024, Petitioner filed objections to the findings and recommendation. (ECF No. 31.) The Supreme Court recently issued its decision in Andrew v. White, No. 23-6573, 2025 WL 247502 (U.S. Jan. 21, 2025), which implicates an issue addressed in the Court's July 24, 2024 findings and recommendation. Accordingly, the Court will vacate its previous findings and recommendation and now issues amended findings and recommendation.

II.

STATEMENT OF FACTS⁴

I. Prosecution's case-in-chief

a. *Testimony of Ashley*

Ashley married defendant in August 2004. In 2008, she discovered child pornography on their computer. Ashley confronted defendant, who claimed that "someone had hacked into [the] computer and put some spyware, malware and all kinds of stuff on it" She "didn't know any better" and believed him. In 2009, Ashley gave birth to their daughter S.M. In 2016, the couple separated and shared child custody.

In June 2017, Ashley discovered adult pornography on S.M.'s tablet computer. She spoke to her daughter about "good touch, bad touch" and asked, "Has anyone ever touched you inappropriately?" S.M. replied that "her daddy did," gesturing that defendant had rubbed her vagina "to help her sleep." She also made a motion

³ "LD" refers to the documents lodged by Respondent. (ECF No. 24.)

⁴ The Court relies on the California Court of Appeal's December 21, 2021 opinion for this summary of the facts of the crime. See Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

1 with her hand “moving back and forth towards the mouth” and indicated that he
2 “tried to make her do this.” When Ashley asked S.M. how she came across the
pornographic material, S.M. replied that she “watch[ed] daddy watch that on TV.”

3 At trial, Ashley denied telling S.M. or any else to falsely accuse defendant of
4 sexual misdeeds.

5 **b. S.M.**

6 **i. June 21, 2017 CART⁵ interview**

7 S.M., then seven years old, told the forensic interviewer that defendant “d[id]
gross stuff to [her].” Once, he forced her to “suck” his “pee pee,” i.e., penis. He
8 attempted this “lots of times.” Defendant also touched S.M.’s “pee pee,” i.e.,
vagina, at least four times. He told her that “ ‘[i]t feels good’ ” but “to keep it
secret.”

9 **ii. Trial testimony**

10 S.M., then eight years old, testified via closed-circuit television. She “d[id]n’t
11 like” talking about defendant and “d[id]n’t know” how she felt toward him.
Something unpleasant had happened in his bedroom that S.M. did not want to
12 partake in, but she could not recall the details because her memory was
“[s]crambled.” She confirmed that defendant touched her body but could not
13 elaborate because “[t]hat part is hard to explain.” When S.M. first disclosed the
incident to Ashley, she told her the truth.

14 S.M. was both “[r]eally mad” and “sad” to testify. She was also scared that
15 “[defendant]’s going to say mean stuff to [her].” Before S.M. testified, she had
spoken with Ashley, who had told her to tell the truth on the witness stand.

16 **c. Testimony of M.W.**

17 M.W. was 15 years old when she visited her cousin Ashley and defendant for
18 about a one-week period in the summer of 2014. One night, she experienced
anxiety and went outside to calm herself down. Defendant joined M.W. and the
19 two went for a walk. During the stroll, he “pushed [her] up against [a] fence,”
“pinned down” her arms, and asked “if he could kiss [her].” Although M.W. “told
20 him no,” defendant kissed her on the lips. He also groped her breasts. On the way
back home, defendant asked M.W. if she “wanted to let him eat [her] out” and
21 other “disgusting things.”

22 Two more incidents occurred in M.W.’s bedroom. The first time, while she was
sleeping, defendant “spoon[ed]” her, i.e., “[her] back was up against his front and
23 he had his leg over [her hip].” He placed his hand underneath her shirt and groped
her chest and then placed his hand underneath her pants and touched her vagina.
24 When defendant tried to put his hand underneath M.W.’s underwear, he
complained that she “didn’t shave” her pubic hair and called her “disgusting.”
25 The second time, M.W. “woke up to [defendant] jacking off in [her] face.” He
“asked [her] to suck his cock” and “jack him off with [her] hands,” but she
26 refused. Before leaving, defendant ejaculated on M.W.’s knee and said, “Thank
you.”

27
28 ⁵ Child Abuse Response Team.

1 The last incident took place in the kitchen. While M.W. was “making something
2 to eat,” defendant “lifted [her] up,” “pushed [her] up against the counter,” and
3 “grabbed [her] vagina.” She felt his erection pressed against her inner thigh.
4 Defendant placed his hand underneath M.W.’s shirt and bra and fondled her
5 breasts. He also kissed her neck and face. M.W. “told [defendant] to stop” and
6 “leave [her] alone” and tried to push him off, but to no avail. Thereafter, he asked
7 her “if [she] liked it,” “if [she] wanted to do it again,” and “if he could eat [her]
8 out.”

9 **d. Testimony of A.P.**

10 A.P., Ashley’s sister, was five years old when she first met defendant in 2004.
11 She encountered him on a consistent basis between the ages of five and 17.
12 During that period, defendant sexually abused A.P. “about 20 times.” Each
13 episode adhered to a “basic routine”: he would kiss her mouth and try to put his
14 tongue inside, rub her vagina, force his penis into her mouth, and then “say some
15 weird shit like, ‘good job.’ ” Sometimes, defendant kissed A.P.’s stomach and
16 tried to kiss her vagina. Occasionally, he would attempt to insert his fingers
17 and/or his penis into her vagina without success. Defendant advised A.P. that “if
18 [she] ever told anybody,” he would testify in court that “[she] wanted it all.”

19 At trial, A.P. detailed some of the incidents. The earliest one occurred when she
20 was five or six years old. A.P. had gone to bed “knocked out” after undergoing
21 dental surgery. In the middle of the night, she woke up and observed defendant
22 touching her vagina with his hand over her shorts and “running his penis along
23 [her] stomach and leg area.” He pressed her head down, inserted his penis into her
24 mouth for “a couple minutes,” and ejaculated. On another occasion, A.P. and
25 defendant were in the living room when he kissed her neck and face and touched
26 her vagina with his hand and penis. When he could not insert his penis into her
27 vagina, he forced it into her mouth. Another time, defendant attempted to insert
28 his penis into A.P.’s vagina. When she “started raising [her] voice,” he stopped
and told her that “he just loves [her]” and “wasn’t trying to rape [her].” When
A.P. was nine or 10 years old, defendant rubbed her vagina with his hand and
tried to insert his penis into her vagina. Failing to do so, he forced his penis into
her mouth. The last incident occurred when A.P. was a teenager. Defendant
dragged her upstairs and the molestation “happened really fast.”

e. Arrest and search

On July 10, 2017, law enforcement apprehended defendant at his residence,
conducted a search of the premises, and seized a computer. A forensic
examination of the machine uncovered a user account belonging to “Anthony
M.”; software for a “Tor browser,” which “tries to mask [the user’s] IP address”
and allows him or her to find pornography and other illicit material on the “dark
web”; and one image of child pornography and 81 images of “child exploitation
or child erotica” in the hard drive’s unallocated space. The Tor browser was last
accessed by “Anthony M.” on July 5, 2017.

II. Defense’s case-in-chief

a. Testimony of defendant

Defendant denied touching S.M. in an inappropriate manner and believed that she
had been pressured by Ashley to falsely accuse him thereof. He also denied

1 molesting M.W. and A.P. and downloading the images found on the confiscated
2 computer.

3 **b. Dr. Tiffany Grant**

4 Dr. Grant, a psychologist, reviewed the transcript of S.M.'s June 21, 2017 CART
5 interview and opined that the interviewer asked leading questions.

6 Myers, 2021 WL 6050630, at *1–3 (footnote in original).

7 **III.**

8 **STANDARD OF REVIEW**

9 Relief by way of a petition for writ of habeas corpus extends to a person in custody
10 pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws
11 or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor,
12 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed
13 by the U.S. Constitution. The challenged convictions arise out of the Tulare County Superior
14 Court, which is located within the Eastern District of California. 28 U.S.C. § 2241(d).

15 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act
16 of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its
17 enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th
18 Cir. 1997) (en banc). The instant petition was filed after the enactment of AEDPA and is
19 therefore governed by its provisions.

20 Under AEDPA, relitigation of any claim adjudicated on the merits in state court is barred
21 unless a petitioner can show that the state court’s adjudication of his claim:

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

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

28 28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 97–98 (2011); Lockyer v. Andrade, 538
U.S. 63, 70–71 (2003); Williams, 529 U.S. at 413.

As a threshold matter, this Court must “first decide what constitutes ‘clearly established
Federal law, as determined by the Supreme Court of the United States.’” Lockyer, 538 U.S. at 71

(quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is “clearly established Federal law,” this Court must look to the “holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as of the time of the relevant state-court decision.” Williams, 529 U.S. at 412. “In other words, ‘clearly established Federal law’ under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.” Id. In addition, the Supreme Court decision must “squarely address [] the issue in th[e] case’ or establish a legal principle that ‘clearly extend[s]’ to a new context to the extent required by the Supreme Court in . . . recent decisions”; otherwise, there is no clearly established Federal law for purposes of review under AEDPA. Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009) (quoting Wright v. Van Patten, 552 U.S. 120, 125 (2008)); Panetti v. Quarterman, 551 U.S. 930 (2007); Carey v. Musladin, 549 U.S. 70 (2006). If no clearly established Federal law exists, the inquiry is at an end and the Court must defer to the state court’s decision. Musladin, 549 U.S. 70; Wright, 552 U.S. at 126; Moses, 555 F.3d at 760.

If the Court determines there is governing clearly established Federal law, the Court must then consider whether the state court’s decision was “contrary to, or involved an unreasonable application of, [the] clearly established Federal law.” Lockyer, 538 U.S. at 72 (quoting 28 U.S.C. § 2254(d)(1)). “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” Williams, 529 U.S. at 412–13; see also Lockyer, 538 U.S. at 72. “The word ‘contrary’ is commonly understood to mean ‘diametrically different,’ ‘opposite in character or nature,’ or ‘mutually opposed.’” Williams, 529 U.S. at 405 (quoting Webster’s Third New International Dictionary 495 (1976)). “A state-court decision will certainly be contrary to [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases.” Id. If the state court decision is “contrary to” clearly established Supreme Court precedent, the state decision is reviewed under the pre-AEDPA de novo standard. Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc).

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1 “Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if
2 the state court identifies the correct governing legal principle from [the] Court’s decisions but
3 unreasonably applies that principle to the facts of the prisoner’s case.” Williams, 529 U.S. at 413.
4 “[A] federal court may not issue the writ simply because the court concludes in its independent
5 judgment that the relevant state court decision applied clearly established federal law erroneously
6 or incorrectly. Rather, that application must also be unreasonable.” Id. at 411; see also Lockyer,
7 538 U.S. at 75–76. The writ may issue only “where there is no possibility fair minded jurists
8 could disagree that the state court’s decision conflicts with [the Supreme Court’s] precedents.”
9 Richter, 562 U.S. at 102. In other words, so long as fair minded jurists could disagree on the
10 correctness of the state court’s decision, the decision cannot be considered unreasonable. Id. If
11 the Court determines that the state court decision is objectively unreasonable, and the error is not
12 structural, habeas relief is nonetheless unavailable unless the error had a substantial and injurious
13 effect on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

14 The Court looks to the last reasoned state court decision as the basis for the state court
15 judgment. Wilson v. Sellers, 584 U.S. 122, 125 (2018); Stanley v. Cullen, 633 F.3d 852, 859 (9th
16 Cir. 2011). If the last reasoned state court decision adopts or substantially incorporates the
17 reasoning from a previous state court decision, this Court may consider both decisions to
18 ascertain the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir.
19 2007) (en banc). “When a federal claim has been presented to a state court and the state court has
20 denied relief, it may be presumed that the state court adjudicated the claim on the merits in the
21 absence of any indication or state-law procedural principles to the contrary.” Richter, 562 U.S. at
22 99. This presumption may be overcome by a showing “there is reason to think some other
23 explanation for the state court’s decision is more likely.” Id. at 99–100 (citing Ylst v.
24 Nunnemaker, 501 U.S. 797, 803 (1991)).

25 Where the state courts reach a decision on the merits but there is no reasoned decision, a
26 federal habeas court independently reviews the record to determine whether habeas corpus relief
27 is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v. Thompson, 336 F.3d 848, 853
28 (9th Cir. 2003). “Independent review of the record is not de novo review of the constitutional

1 issue, but rather, the only method by which we can determine whether a silent state court
 2 decision is objectively unreasonable.” Himes, 336 F.3d at 853. While the federal court cannot
 3 analyze just what the state court did when it issued a summary denial, the federal court must
 4 review the state court record to determine whether there was any “reasonable basis for the state
 5 court to deny relief.” Richter, 562 U.S. at 98. This Court “must determine what arguments or
 6 theories . . . could have supported, the state court’s decision; and then it must ask whether it is
 7 possible fairminded jurists could disagree that those arguments or theories are inconsistent with
 8 the holding in a prior decision of [the Supreme] Court.” Id. at 102.

9 **IV.**

10 **REVIEW OF CLAIMS**

11 **A. Confrontation Clause**

12 In his first claim for relief, Petitioner asserts that the trial court violated his right to
 13 confrontation under the Sixth Amendment when it failed to follow the procedures set forth in
 14 Maryland v. Craig, 497 U.S. 836 (1990), and California Penal Code section 1347. (ECF No. 1 at
 15 14.) Respondent argues that the state court’s rejection of the Confrontation Clause claim was not
 16 objectively unreasonable. (ECF No. 23.)

17 The California Court of Appeal denied the claim in a reasoned opinion. The California
 18 Supreme Court summarily denied Petitioner’s petition for review. As federal courts review the
 19 last reasoned state court opinion, the Court will “look through” the summary denial and examine
 20 the decision of the California Court of Appeal. See Wilson, 584 U.S. at 125.

21 In denying the Confrontation Clause claim, the California Court of Appeal stated:

22 **I. Section 1347**

23 **a. Background**

24 **i. Motion and hearing**

25 On July 27, 2018, the prosecution filed a motion to allow S.M. to testify via
 26 closed-circuit television pursuant to section 1347. On August 2, 2018, the defense
 filed its opposition.

27 On August 6, 2018, the court conducted an Evidence Code section 402 hearing.
 28 The prosecution called Ashley to the witness stand. She testified that when she
 first informed S.M. a few months earlier about testifying against defendant, S.M.

“immediately started crying and throwing a fit.” The matter “got dropped” until court proceedings “started coming closer and closer.” Starting around the end of June 2018, S.M. exhibited a drastic change in behavior. Whenever the topic of testifying against defendant was raised, she would threaten to kill herself, “drop on the floor and throw fits,” and strike her head with “both of her hands,” “against the wall,” “against the bed railing,” or “wherever.” S.M. revealed that she hit herself “because it blocks out” “having to testify against [defendant]”; still “loves him and misses him”; and was “afraid that she’s going to put him in jail.” Ashley felt that S.M. would “breakdown” if she had to testify in defendant’s presence. On the other hand, Ashley believed that S.M. would act differently if she were placed in a separate room because defendant “won’t be right there in front of her” and “that pressure of thinking that she’s going to be putting him in jail” “won’t be on her.”

After Ashley’s testimony, the following colloquy transpired between the court, Defense Counsel John Sarsfield, and Deputy District Attorney Chelsea Wayt:

“THE COURT: I don’t know if you want to present any expert testimony, but here’s a thought running through my mind.

“We can do this one of two ways. One, we can try to have [S.M.] testify in here, but if she won’t testify, then I want the whole thing set up so we can immediately move to the second phase, which would be the closed circuit television under [section] 1347, but, quite frankly, if that happens I think that would be a worse situation for the defense, but I’m going to – I give great weight to the fact that [Ashley] is scared for [S.M.’s] mental health, but I mean, if you want to call an expert – you have a doctor here or a counselor here,⁶ I’m willing to hear what they have to say, but my thinking is, okay, well, we can get started and we can try, but if she melts down in front of this jury here on this – from the witness stand and she won’t answer anything, I’m simply going to go into the 1347 mode, then I’ll remove her from the courtroom. We’ll set it up at some other place.

“We’ll do the closed circuit TV, but how does that help your case?

“MR. SARSFIELD: I understand what you’re saying. Could we take, like, a five-minute break to confer with Dr. Grant?

“THE COURT: Yes....

“MR. SARSFIELD: Thank you.

“(Recess taken.)

“THE COURT: All right. Counsel, where are we?

“MR. SARSFIELD: So I understand where the Court is going with that. I think procedurally we have to be clear because there’s the pending [section] 1347 motion, so what I would suggest would be that the Court deny it without prejudice and then we can proceed forward with what the Court suggested might happen....

⁶ Dr. Grant, the defense’s expert witness (see *ante*, at p. 7), was present at the motion hearing.

1 “If you’re inclined to grant their motion, but simply not give them the
2 remedy that they’re requesting, then I would offer Dr. Grant’s testimony
in an offer of proof.

3 “She would simply say that you cannot assess somebody’s psychological,
4 emotional or mental status based upon what we witnessed here today from
[Ashley]. That’s essentially all Dr. Grant would say, but if the Court
5 denies their motion without prejudice, would [*sic*] leave to refile. As
circumstances warrant, I think we’re going and we can start tomorrow.

6 “THE COURT: Well, here’s the way I see the 1347.

7 “Certainly, it’s a – the minor’s testimony involves an alleged sexual
8 offense committed against the minor, that the testimony by the minor in
the presence of the defendant – this is where I’m having my difficulty –
9 the statute says ‘would’ and I see it as ‘could’ result in the child suffering
serious emotional distress. So the child would essentially be unavailable as
10 a witness. I’m not convinced that it would result there yet, but my finding
is that it could.

11 “Now the mother is scared about the victim testifying in front of the
12 defendant. It’s too much pressure on her. She’s talked about committing
suicide now, acting out in a very self-destructive manner, hurting herself,
13 loves her dad, misses him, somehow has put this all on her that if he can’t
come home she’s going to be afraid. She’s the one that would put him in
14 jail forever, so I could see where this could be a situation causing the
minor serious emotional distress. But based upon what I’ve heard, I can’t
15 say definitely that it would result, but I’m going to have a very short leash.
[¶] ... [¶]

16 “... I’m going to have a very short leash on this. If [S.M.] will not even
17 enter the courtroom, I’m going to find – I want it set up for when she is
going to be called as a witness because I don’t think she’s going to testify.
18 I think she’s going to come up here – if she even comes in here, she’s just
going to sit here and sob and I think that’s what’s going to happen, and if
19 that does happen or she won’t even take the oath, I’m going to find her
unavailable for purposes of this section and we’re going to go right into
20 the other section, but at this point I can’t say that I find that this will
happen.

21 “I’m finding in all probability it will happen, but I can’t say for certain it
22 will, and until I know for certain then I can’t impose the restrictions or the
procedures set up under this code, but I want it set up because I think
23 that’s exactly what’s going to happen.

24 “We’re going to have to break the minute she’s called and take her to
another room, whenever you have that set up or where you plan to do this.
25 Hopefully we have another courtroom or something that we can do this, or
somebody’s office. So we have three, four cameras and the monitor in
26 here and then we’re going to move right into that situation. I’m going to
be pretty liberal about the interpretation on behalf of [S.M.]. I don’t want
27 to traumatize this girl.
28

1 “Now, certainly [defendant]’s looking at life in prison so he has some
2 rights too, and I have to try to balance these rights, and I can’t make that
final determination yet. [¶] ... [¶]

3 “MR. SARSFIELD: So procedurally – I hate to be the procedural horse,
4 but procedurally, is the Court going to grant their motion or deny their
motion without prejudice?

5 “THE COURT: I’m denying their motion at this point.

6 “MR. SARSFIELD: Thank you.

7 “THE COURT: But it’s subject to a very, very short leash in terms of what
8 happens if this victim [S.M.] – alleged victim [S.M.], if she won’t even
9 come in the courtroom, if she’s a hysterical mess, if she comes in here and
won’t take the oath, it’s not going to take much for me to say we’re going
to do this other procedure.

10 “MS. WAYT: And just to be super clear and prevent the defense from not
11 having an opportunity to present any evidence, would the testimony from
12 a doctor change the Court’s opinion of having a very short leash regarding
the 1347 motion, or are you satisfied with it ‘could,’ and if it does, then it
13 ‘would’, versus needing a doctor to say that you can’t determine her
mental well-being?

14 “THE COURT: No. Your first statement.

15 “MS. WAYT: Okay. I know they have their doctor here. I didn’t know if
you wanted to hear testimony.

16 “MR. SARSFIELD: In light of the Court’s ruling, I don’t think we need to
do that.”

17 **ii. First day of trial**

18 On August 8, 2018, prior to the start of trial, the following colloquy transpired
19 between the court, Defense Counsel Marguerite Melo, and Deputy District
Attorney Wayt:

20 “MS. MELO: [¶] ... [T]he discussions we’ve been having with respect
21 to the videotape equipment and [S.M.] coming into the courtroom. I
22 understand that the Court is going to force my client to be outside of her
presence for her to come into the courtroom. I’m objecting to this. I
23 believe that my client is entitled to see all the proceedings that occur here
and that’s part of those proceedings. He’s entitled to see how this witness
24 reacts upon entering the courtroom and he’s allowed to be here to see this.
[¶] ... [¶]

25 “THE COURT: All right. As far as the situation is I’m still trying to avert
26 the 1347 aspect of this trial. I’ve been informed that [S.M.] [¶] ... [¶] ... [i]s
down – on the second floor, the witness coordinator’s office, and is
27 refusing to come up here because she knows the defendant, Mr. Myers, is
here. Her fears are certainly understandable to me and so at a break or off
the record I’m going to ask that Mr. Myers step out into the foyer area
28 here behind the closed door and allow [S.M.] to come in and at least look

at the courtroom. It is my hope that that would give her enough confidence then to bring Mr. Myers back in, have her try to testify here in the courtroom.

“Now, if that doesn’t work, then we’re going to do the 1347 proceedings. So I note your objection, but this is going to take all of five seconds and it’s while we’re off the record. The jury will not be here. They will not see any of this.

“Ms. Wayt?

“MS. WAYT: Yes, it’s my understanding that she’s outside the courtroom and that’s what I’m trying to do is circumvent having to use the 1347.

“THE COURT: So over Ms. Melo’s objection, Deputy ... , would you simply take him to the holding cell and this will be something for about ten seconds. Thank you. [¶] ... [¶] Let’s bring [S.M.] in.

“Let the record reflect that [S.M.] has been here in the courtroom.

“MS. WAYT: The victim advocate from the District Attorney’s office as well as CASA⁷ advocate was also present.

“THE COURT: Let’s bring Mr. Myers back out. This whole situation took less than five minutes. Fair enough?

“MS. MELO: Yes.

“THE COURT: Mr. Myers has rejoined us. Anything else we need to take up before I bring the jury? ...

“MS. MELO: Nothing to put on the record, Your Honor.

“MS. WAYT: I think we can proceed.”

The jurors entered the courtroom and were preinstructed. After its opening statement, the prosecution called S.M. as its first witness. Thereafter, the following colloquy transpired between the court and the attorneys:

“MS. MELO: Objection, Your Honor. The entire theater that’s going on out there.

“MS. WAYT: At this point I don’t believe she’s willing to come into the courtroom. I don’t know – if I can have a few minutes to see if I can try.

“THE COURT: Take a few minutes. I’m going to have to conduct a couple things outside your presence so I need for you to retire to the jury room while we take up these preliminary matters. [¶] ... [¶]

“(Break in proceedings.)

“MR. SANSFIELD: As an offer, somebody, I don’t know if it was the mother of the witness, was heard outside the doors of the courtroom

⁷ Court Appointed Special Advocate.

1 saying something to the effect, 'She's scared, she's scared, she's scared,'
2 that needs to be noted in the record.

3 "THE COURT: Well, I didn't hear that. Did you hear that, Ms. Wayt?

4 "MS. WAYT: I was so concentrated on her. She had her feet planted. She
5 was on the ground. She wasn't coming in.

6 "MR. SARSFIELD: As an officer of the Court I will swear under penalty
7 of perjury that's what I heard.

8 "THE COURT: I'm just saying I didn't hear it.

9 "MS. WAYT: I will say that the mother was not present right there. The
10 person that was right there was the advocate from CASA. The mom was
11 down the hall. She's been instructed to be down the hall. And then her
12 grandmother is here, but I think she was just trying to hold her hand.
13 Honestly, I wasn't listening. I didn't – I was listening to her. She said, 'I
14 don't want to go in there. I don't want to go in there.' Would it be possible
15 if I suggest maybe she come in and get seated before we bring the jury
16 out?

17 "THE COURT: Absolutely.

18 "MS. WAYT: I'll try that. [¶] ... [¶]

19 "THE COURT: All right. We've been in recess for about ten minutes.

20 "What happened, for the record, is that Ms. Wayt indicated she was going
21 to call [S.M.], went outside to get her. Next thing I know there was some
22 type of commotion as the doors opened up. Some words were spoken. I
23 didn't hear them. Counsel indicated there was words to the effect of, 'I'm
24 scared, I'm scared.'

25 "Is that right, Counsel?

26 "MR. SARSFIELD: Yes, Your Honor, spoken by an adult female voice.

27 "THE COURT: So we have sent the jury into the jury room. We're
28 meeting outside of the presence of the jury. I've sent Ms. Wayt out to try
to find out how we're going to proceed.

"Bring me up to date.

"MS. WAYT: Your Honor, my – one of the victim advocates went
downstairs to grab, like, a little, like, color changing ball that she can hold
onto, you know, maybe distract her a little bit during – while she's up
there and not focus on what's happening. She's coming back up.

"And then [S.M.] said she'd like to try to come back in, and we'd ask that
the advocate – the CASA advocate be able to sit up there with her and
we'll try to do this and then bring the jury out.

"THE COURT: Any thoughts, Counsel?

1 “MS. MELO: We’ll see what happens.

2 “THE COURT: Okay.

3 “MS. WAYT: As soon as they get back I’ll bring her in so we can get
4 situated.”

5 S.M. and the jury entered the courtroom, respectively. On direct examination, the
6 following exchange occurred:

7 “Q. Hi, [S.M.]. I know, I know you want your mom.

8 “A. I want my mommy. [¶] ... [¶]

9 “Q. Here’s the microphone.

10 “A. I want my mommy.

11 “Q. I know. It’s not fun to be in here, right?

12 “A. I don’t want to. I want my mommy. Please.

13 “Q. I’m just going to ask you a few questions.

14 “A. No, I don’t want to do that.

15 “Q. I know it’s not that fun to be in here, right?

16 “A. I don’t want to.

17 “Q. Can you try to take a really deep breath for me? [¶] How come you
18 don’t want to be in here?

19 “A. I don’t want to be in here.

20 “Q. Are you scared?

21 “A. I want my mommy.

22 “Q. Have you ever been in a room like this before?

23 “A. I want my mommy. I don’t want to be here. Please, don’t let me.

24 “Q. Can I just ask you a few questions and then we’ll get out of here[?] It’s some pretty easy questions like, how old are you?” (Boldface omitted.)

25 S.M. answered questions about her ability and willingness to testify truthfully as
26 well as her age, birthday, grade, school, extracurricular activities, family
27 members, and pets. The following exchange occurred when the prosecutor
28 inquired about a family dog:

“Q. Did you ever have a dog?

“A. Yes.

1 "Q. What kind of dog did you have?
2 "A. English Mastiff. [¶] ... [¶]
3 "Q. Okay. What happened to [the dog]?
4 "A. He got – I don't know. I don't want to tell.
5 "Q. How come?
6 "A. I just don't want to. I just don't want to.
7 "Q. And how come you don't want to talk about [the dog]?
8 "A. Because I don't want to.
9 "Q. Where does [the dog] live?
10 "A. I don't want to talk about it.
11 "Q. Okay. Why don't you want to talk about where [the dog] lives?
12 "A. Because I don't want to talk about it.
13 "Q. Does it make you sad to talk about it?
14 "A. Yeah.
15 "Q. How come it makes you sad to talk about it?
16 "A. I don't want – I don't know. Stop asking me such hard questions. [¶]
17 ... [¶]
18 "Q. What kind of stuff do you do with [the dog]?
19 "A. He's not there anymore.
20 "Q. He's not in your family anymore?
21 "A. Yeah.
22 "Q. How does that make you feel that he's not in your family anymore?
23 "A. Very sad.
24 "Q. Do you love [the dog]?
25 "A. Yes.
26 "Q. Do you miss [the dog]?
27 "A. Yes.
28 "Q. Where does [the dog] live now?

1 “A. I don’t want to talk about that. [¶] ... [¶]

2 “Q. Okay. Do you think you’ll get to see [the dog] some day?

3 “A. No.

4 “Q. How come?

5 “A. I don’t want to talk about that.

6 “Q. Okay. So you don’t want to answer the question about [the dog]?

7 “A. Yes. Nothing about [the dog].

8 “Q. Is there anybody else that you don’t want to talk about?

9 “A. Yeah.

10 “Q. Who?

11 “A. Huh-uh. Nobody.

12 “Q. Nobody.

13 “A. No.

14 “Q. So since [the dog] isn’t part of your family anymore, are there other
15 people that aren’t part of your family ... anymore?

16 “A. I want to go. I want to go.

17 “Q. Okay. Now, I won’t ask you about them right now, but did something
18 happen that makes it hard for you to talk about?

19 “A. I don’t want to.

20 “Q. You just have to answer yes or no.

21 “A. Stop, please.

22 “Q. Okay.

23 “A. I don’t want to anymore.”⁸ (Boldface omitted.)

24 Wayt briefly changed topics. The following exchange then occurred:

25 “Q. Okay. So I’m just going to ask you a few other questions and then
26 we’ll try to wrap it up. Okay?

27 “A. Okay.

28 ⁸ The record indicates that the dog belongs to defendant.

1 “Q. I know that there’s some things that you don’t want to talk about
2 because you told me that, right?

3 “A. Yeah.

4 “Q. And when you say you don’t want to talk about it, is it because – why
5 don’t you want to talk about it?

6 “A. I don’t want to talk about it.

7 “Q. Okay.

8 “A. Please. I don’t want to talk about it.

9 “Q. Okay. I’m not going to – I won’t ask you about it just yet. I want to
10 ask you why not –

11 “A. I want to go home.

12 “Q. You want to go home?

13 “A. Uh-huh. I don’t want to.

14 “Q. Are you scared to talk about it?

15 “A. Uh-huh.

16 “Q. Are you scared that something bad is going to happen if you talk
17 about it?

18 “A. I really want to go home. [¶] ... [¶]

19 “Q..... [¶] Okay, so can you just tell me besides [the dog], who’s not in
20 your family anymore?

21 “A. Huh-uh. No.” (Boldface omitted.)

22 The court interjected:

23 “Ms. Wayt, I’ve seen enough. [¶] ... [¶] ... So we’re going to take a quick
24 recess and I need for the jury to go back into the jury room, and we’re
25 going to try a different procedure.”

26 After the jurors exited the courtroom, the following colloquy transpired between
27 the court and Sarsfield:

28 “THE COURT: [¶] ... [A]t this point it’s clear to me this witness will
not testify in the presence of [defendant]. The body language, when she
would roll herself up almost into a ball, shake her head vigorously. She
does not want to be here, so I’m not even sure she’ll testify under 1347
given what’s going on here, but that’s what we’re going to do [¶] ... [¶]

“MR. SARSFIELD: ... [¶] ... [¶] Yes, it’s certainly true that [S.M.] was
behaving in a way that Your Honor described on the witness stand and
was distressing for all to see, but we don’t know whether that’s because of

1 the presence of the defendant, or from our point of view, that the witness
2 has been coached and coerced by her mother into saying things that are
3 not true. We believe that is an alternative explanation as to her behavior
4 and that would be explored prior to making a 1347 order.

5 “Additionally, because the Court denied the earlier 1470 motions, that
6 essentially resets the clock, and we’re entitled to notice and opportunity to
7 be heard on the grounds of – the alleged grounds for the basis of the
8 motion.

9 “THE COURT: I will make two points, number one, when your client was
10 out of the courtroom and she came in, she didn’t have any problem being
11 in here. She got on the witness stand. She felt – appeared to be very much
12 at ease. In fact, when she left, she was skipping. The only thing that
13 changed between when she was in here 30 minutes ago and when she’s in
14 here right now is the presence of your client. And the fact that you were
15 put on notice on Friday of last week that they intended to proceed this
16 way, I denied it because they didn’t make a clear showing, but I told you
17 you were on a short leash. If they made the showing at the hearing when
18 she testified, I intended to grant it, so don’t say that you don’t have notice
19 because that’s not accurate, Counsel.

20 “MR. SARSFIELD: Well, actually, we would be given opportunity to
21 question the child in regards to the 1347 ourselves, and we’ve been denied
22 that because it is entirely possible that Ms. Melo can talk to her and get her
23 to admit that her mother is pressuring her. That would explain all of this.

24 “THE COURT: You can do that by way of closed circuit TV.

25 “MR. SARSFIELD: At that point the bell has already been rung because
26 the Court has already instituted the mechanism for testimony, which we
27 believe is a violation of the confrontation laws.

28 “THE COURT: Have you been in the courtroom and saw her? She won’t
answer any question. Do you think she’s going to answer Ms. Melo’s
questions? She won’t answer with Ms. Wayt, and they obviously have
some kind of relationship. You have to be on another planet to think that
she’s going to answer Ms. Melo’s questions.

“MR. SARSFIELD: Well, personal assertions aside, I have been in the
courtroom, Your Honor, and she answered a great deal of information. She
talked about her dog, her cat. She talked about her teacher. She was
responsive to many, many questions.

“Essentially, the only questions that she didn’t answer was when Ms.
Wayt was going down the road of, who else had you lived with at some
previous time, or words to that effect. That’s when the child began to
manifest some difficulty and there are multiple explanations as to why that
might be, one of which, admittedly, is that the defendant could be guilty,
but another one is that the mother, which we believe to be the case, is
pressuring her to essentially commit perjury by proxy and we’re entitled to
examine on that issue.

“THE COURT: The only questions she answered were fluff questions. She answered no substantive questions so your objection is noted. File your writ.”

iii. Second day of trial

On August 9, 2018, outside the presence of the jury and before S.M. testified via closed-circuit television, the court remarked:

“I’m looking at [section] 1347. All right. As to the order allowing 1347 procedures, the Court will make – in addition to all the comments I made yesterday under 1347, looks like ... I have to make five different findings outside the presence of the jury. I’m making a brief statement on the record in support of this order that the minor attempted to testify yesterday. She came – well, I’ll just incorporate all the findings I made yesterday, but it’s clear to me she will not testify in this matter while the defendant is in the courtroom. Between the testimony of the mother when we did the in limine motions and [Evidence Code section] 402 hearings about her talking about suicide and all the other things when she found out she was going to have to testify against her father, loves her father, doesn’t want to be the one responsible for sending him to jail, and her total meltdown yesterday on the witness stand where she rolled up, pulled her legs up and wouldn’t say anything other than ‘I want my mommy,’ and, ‘I don’t want to be here,’ the Court is absolutely clear that she will not testify in front of her father in this proceeding. So that is why I’m allowing the 1347 procedure.”

b. Pertinent law

“ ‘The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, [citation], provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” ... [I]t guarantees a defendant’s right to confront those “who ‘bear testimony’ ” against him.’ [Citation.]” (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1281 (*Powell*)). “The confrontation clause not only affords defendants the right to personally examine adverse witnesses, it also ‘“(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of truth’; [and] (3) permits the jury that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.” [Citation.] [¶] The combined effect of these elements of confrontation ... serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. [Citations.]’ ” (*In re Ruedas* (2018) 23 Cal.App.5th 777, 786, quoting *Maryland v. Craig* (1990) 497 U.S. 836, 845-846 (*Craig*)).

The confrontation right “is not so absolute ... that it always requires the accuser and accused to be in the same room.” (*Powell, supra*, 194 Cal.App.4th at p. 1281.) “ ‘[A] defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where

1 the reliability of the testimony is otherwise assured.’ ” (*People v. Arredondo*
2 (2019) 8 Cal.5th 694, 701 (*Arredondo*), quoting *Craig, supra*, 497 U.S. at p. 850.)

3 “[T]he United States Supreme Court held that ‘a State’s interest in the physical
4 and psychological well-being of child abuse victims may be sufficiently important
5 to outweigh, at least in some cases, a defendant’s right to face his or her accusers
6 in court.’ ” (*Powell, supra*, 194 Cal.App.4th at p. 1281, quoting *Craig, supra*, 497
7 U.S. at p. 853.) “[U]pon ‘an adequate showing of necessity, the state interest in
8 protecting child witnesses from the trauma of testifying in a child abuse case is
9 sufficiently important to justify the use of a special procedure that permits a child
10 witness in such cases to testify at trial against a defendant in the absence of face-
11 to-face confrontation with the defendant.’ ” (*Arredondo, supra*, 8 Cal.5th at p.
12 701, quoting *Craig, supra*, at p. 855.) “ ‘[T]he requisite finding of necessity must
13 ... be a case-specific one: The trial court must hear evidence and determine
14 whether use of the [alternative] procedure is necessary to protect the welfare of
15 the particular child witness who seeks to testify. [Citations.]’ ” (*Arredondo, supra*,
16 at p. 702, quoting *Craig, supra*, at pp. 855-856.) In addition, “[a]n adequate
17 showing that the defendant’s presence may cause emotional trauma is required:
18 ‘The trial court must ... find that the child witness would be traumatized, not by
19 the courtroom generally, but by the presence of the defendant.’ ” (*Powell, supra*,
20 at p. 1283, quoting *Craig, supra*, at p. 856.)

21 “ ‘[W]here necessary to protect a child witness from trauma that would be caused
22 by testifying in the physical presence of the defendant, at least where such trauma
23 would impair the child’s ability to communicate, the Confrontation Clause does
24 not prohibit use of a procedure that, despite the absence of face-to-face
25 confrontation, ensures the reliability of the evidence by subjecting it to rigorous
26 adversarial testing and thereby preserves the essence of effective confrontation.’ ”
27 (*Arredondo, supra*, 8 Cal.5th at pp. 701-702, quoting *Craig, supra*, 497 U.S. at p.
28 857.) A procedure may provide sufficient assurances where it preserves the other
elements of the confrontation right, e.g., “ ‘[t]he child witness must be competent
to testify and must testify under oath’ ”; “ ‘the defendant retains full opportunity
for contemporaneous cross-examination’ ”; and “ ‘the judge, jury, and defendant
are able to view ... the demeanor (and body) of the witness as he or she testifies.’ ”
(*Arredondo, supra*, at p. 701, quoting *Craig, supra*, at p. 851; accord, *People v.*
Bharth (2021) 68 Cal.App.5th 801, 815; see *Craig, supra*, at p. 851 [“Although
we are mindful of the many subtle effects face-to-face confrontation may have on
an adversary criminal proceeding, the presence of these other elements of
confrontation – oath, cross-examination, and observation of the witness’ demeanor
– adequately ensures that the testimony is both reliable and subject to rigorous
adversarial testing in a manner functionally equivalent to that accorded live, in-
person testimony.”].)

“In section 1347, the Legislature sought to make closed-circuit television
testimony available to child witnesses under circumstances that, in the
lawmakers’ view, would preserve a defendant’s Sixth Amendment confrontation
rights as outlined in *Craig*.” (*Powell, supra*, 194 Cal.App.4th at p. 1282.) Section
1347, subdivision (a) provides:

“It is the intent of the Legislature in enacting this section to provide the
court with discretion to employ alternative court procedures to protect the
rights of a child witness, the rights of the defendant, and the integrity of
the judicial process. In exercising its discretion, the court necessarily will
be required to balance the rights of the defendant or defendants against the
need to protect a child witness and to preserve the integrity of the court’s

truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in an individual case present compelling evidence of the need to use these alternative procedures.”

Section 1347, subdivision (b) provides in pertinent part:

“Notwithstanding any other law, the court in a criminal proceeding, upon written notice by the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the course of the proceeding on the court’s own motion, may order that the testimony of a minor 13 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television, if the court makes all of the following findings:

“(1) The minor’s testimony will involve a recitation of the facts of any of the following: [¶] (A) An alleged sexual offense committed on or with the minor. [¶] ... [¶]

“(2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (E), inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit testimony is used. [¶] (A) Testimony by the minor in the presence of the defendant would result in the child suffering serious emotional distress so that the child would be unavailable as a witness. [¶] ... [¶]

“In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor’s refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary to obtain the minor’s testimony.

“(3) The equipment available for use of closed-circuit television would accurately communicate the image and demeanor of the minor to the judge, jury, defendant or defendants, and attorneys.”

c. Standard of review

“In accordance with th[e] statutory language [of section 1347, subdivision (a)], the applicable standard of review for the trial court’s order allowing defendant’s daughter to testify via closed-circuit television is abuse of discretion.” (*Powell, supra*, 194 Cal.App.4th at p. 1283.) “[I]n determining whether the court abused its discretion, we look for substantial evidence in support of its finding.” (*Id.* at p. 1284, fn. 6; see *People v. Aispuro* (2007) 157 Cal.App.4th 1509, 1511 [“For evidence to be ‘substantial’ it must be of ponderable legal significance, reasonable in nature, credible and of solid value.”].) “[W]hen reviewing a [finding] under the substantial evidence standard, ‘an appellate court should defer to the factual determinations made by the trial court’ [Citations.]” (*People v. Vivar* (2021) 11 Cal.5th 510, 528, fn. 7.)

1
2 **d. Analysis**

3 In the instant case, at a pretrial hearing on the prosecution's section 1347 motion,
4 Ashley described S.M.'s alarming reactions to the mere idea of testifying against
5 defendant, including throwing temper tantrums, threatening suicide, and inflicting
6 self-harm. She testified that S.M. still loved and missed defendant and feared that
7 her testimony would lead to her father's imprisonment. Ashley worried that S.M.
8 would "breakdown" if she had to testify in defendant's proximity. Although the
9 court gave "great weight" to Ashley's testimony and remarked that it "could see
10 where this could be a situation causing [S.M.] serious emotional distress," it
11 denied the motion without prejudice because it "c[ould]n't impose the restrictions
12 or the procedures set up under [section 1347]" "until [it] kn[e]w for certain" that
13 defendant's presence would traumatize S.M. and "c[ould]n't make that final
14 determination yet." The court informed the parties that it would "have a very short
15 leash" at trial and order the use of closed-circuit television if S.M. "will not even
16 enter the courtroom," "comes in here and won't take the oath," "[i]s just going to
17 sit here and sob," and/or "[i]s a hysterical mess." In settling on this arrangement,
18 the court expressly recognized its obligation to balance defendant's confrontation
19 right against the need to protect S.M.'s welfare. (See § 1347, subd. (a).)

20 Before the commencement of trial, the court became aware that S.M. refused to
21 enter the courtroom due to defendant's presence. In attempting to "avert the
22 [section] 1347 aspect of this trial," it had the bailiff relocate defendant to a
23 holding cell "behind [a] closed door" for approximately five minutes to let S.M.
24 "come in and at least look at the courtroom" and develop "enough confidence" to
25 testify. During this period, the court observed that S.M., who was accompanied by
26 a CASA representative, "didn't have any problem being in here"; "got on the
27 witness stand" and "appeared to be very much at ease"; and exited the room
28 "skipping." However, when trial commenced and the prosecution called S.M. as
its first witness, S.M. once again refused to enter the courtroom. Defense Counsel
Sarsfield attested that he heard "an adult female voice" outside the courtroom
saying that S.M. was "scared." Following a recess and some coaxing by Deputy
District Attorney Wayt, S.M. took the witness stand with the CASA
representative by her side. However, on direct examination, she continually stated
that she "want[ed] [her] mommy" and wanted to go home and was nonresponsive
to questions relating to defendant. The court observed that S.M. "would roll
herself up almost into a ball" and "shake her head vigorously." It halted the
examination and called another recess. Outside the presence of the jury, the court
ordered the use of closed-circuit television. Based on Ashley's testimony at the
motion hearing and its own observations of S.M. before and during trial, the court
found by clear and convincing evidence that the child would be traumatized by
defendant's presence. It rejected Sarsfield's assertion that S.M.'s behavior could
just as likely be attributed to being "coached and coerced by her mother into
saying things that are not true."

24 We find no abuse of discretion regarding the manner in which the court
25 determined that use of closed-circuit television was appropriate. While it initially
26 denied the prosecution's section 1347 motion (without prejudice), the court
27 judiciously planned for S.M.'s potential "meltdown" on the witness stand and
28 informed the parties of his intent to order the use of closed-circuit television if
that contingency came to pass. We note that the language of section 1347,
subdivision (b) explicitly contemplates orders made "during the course of the
[criminal] proceeding." (Cf. *Powell, supra*, 194 Cal.App.4th at p. 1278 ["A trial
court abuses its discretion when its ruling falls outside the bounds of reason"].)

Before the start of trial on day one, S.M. exhibited an unwillingness to testify because of defendant's presence. The court temporarily removed defendant from the courtroom to allow S.M. (with the CASA representative) to visit and acclimate to the setting, an approach that seemed effective. She left the courtroom without incident and defendant was subsequently brought back in. However, when the prosecution called S.M. to the witness stand, she was apparently petrified and refused to enter the courtroom. She was somehow persuaded to take the stand, but her pleas and body language made evident her inability to testify in front of defendant. Substantial evidence, i.e., Ashley's motion hearing testimony and the court's observations of S.M. before and during trial, supported the case-specific findings that S.M. would be traumatized by a face-to-face confrontation with defendant and use of closed-circuit television was necessary to protect her welfare. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 [substantial evidence may consist of trial court's own observations].)

On appeal, defendant asserts that "expert testimony in a separate hearing is generally required" (italics omitted) before a court can conclude that "the child would suffer emotional trauma if forced [to] testify in [the accused]'s presence." Nothing on the face of section 1347 supports this claim. (See *People v. Boyd* (1979) 24 Cal.3d 285, 294 ["[W]hen the Legislature intends otherwise, it expresses its purpose in unmistakable words."].)

Defendant mentions Evidence Code section 240, which reads in pertinent part:

"(a) ... '[U]navailable as a witness' means that the declarant is any of the following: [¶] ... [¶] (3) Dead or unable to attend or to testify at the hearing because of then-existing physical or mental illness of infirmity. [¶] ... [¶]

"(c) Expert testimony that establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term 'expert' means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of [Evidence Code] section 1010.⁹

"The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary."

"The court's role in construing a statute is to 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citations.] In determining the Legislature's intent, a court looks first to the words of the statute. [Citation.] '[I]t is the language of the statute itself that has successfully braved the legislative gauntlet.' [Citation.] [¶] When looking to the words of the statute, a court gives the language its usual, ordinary meaning. [Citations.] If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs. [Citations.]" (*People v. Snook* (1997) 16 Cal.4th 1210, 1215.) Here, subdivision (c) of Evidence Code section 240 states that expert testimony "may" constitute a sufficient showing of unavailability. "Absent any indicia of a contrary legislative intent, the word 'shall' is ordinarily construed as

⁹ Subdivisions (b), (c), and (e) of Evidence Code section 1010 refer to licensed psychologists, licensed clinical social workers engaged in applied psychotherapy of a nonmedical nature, and licensed marriage and family therapists, respectively.

mandatory, whereas ‘may’ is ordinarily construed as permissive. [Citation.] This is especially so where both ‘shall’ and ‘may’ are used in the same statute. [Citations.]” (*In re J.N.* (2006) 138 Cal.App.4th 450, 457, fn. 4; see *People v. Alcala* (1992) 4 Cal.4th 742, 780 [rejecting the defendant’s contention that a witness’s unavailability on the basis of mental infirmity could be established only by expert medical evidence and not by the testimony of said witness].) We are also unpersuaded by the cases cited in defendant’s brief, which either (1) predated the enactment of section 1347, which took effect on May 20, 1985 (*Seering v. Department of Social Services* (1987) 194 Cal.App.3d 298, 306, fn. 3); (2) are from out of state and have no binding effect on California courts (see *People v. Troyer* (2011) 51 Cal.4th 599, 610); (3) were factually inapposite; and/or (4) did not stand for the proposition that section 1347 findings must be premised on expert testimony.

Myers, 2021 WL 6050630, at *3–13 (footnotes in original).

The Sixth Amendment’s Confrontation Clause, made applicable to the states by the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403 (1965), provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,” U.S. Const. amend. VI. “[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.” Coy v. Iowa, 487 U.S. 1012, 1016 (1988). The Supreme Court “ha[s] never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial.” Maryland v. Craig, 497 U.S. 836, 844 (1990).

[I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Craig, 497 U.S. at 855. “The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify.” Id. “The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.” Id. at 856. “Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, i.e., more than ‘mere nervousness or excitement or some reluctance to testify[.]’” Id.

///

1 The Court finds that the appellate court’s denial of the Confrontation Clause claim was
 2 not objectively unreasonable. The trial court heard evidence at a pretrial hearing on the
 3 prosecution’s section 1347 motion. The trial court also personally observed S.M., noting that
 4 when S.M. was brought into the courtroom outside Petitioner’s presence, “she didn’t have any
 5 problem being in here. She got on the witness stand. She felt – appeared to be very much at ease.
 6 In fact, when she left, she was skipping.” (5 RT 180–81.) In contrast, when S.M. was called to
 7 the witness stand, “she would roll herself up almost into a ball, shake her head vigorously,” and
 8 the “only thing that changed . . . is the presence of” Petitioner. (5 RT 179, 181.) The trial court
 9 heard evidence, determined that S.M. would be traumatized by the presence of Petitioner, and
 10 found that the emotional distress suffered by S.M. in the presence of Petitioner was more than *de*
 11 *minimis*—meeting the requirements of Craig with respect to the finding of necessity.

12 Petitioner appears to argue that to satisfy “the *Craig* standard” “there must be a specific
 13 finding that one-way CCTV is necessary to protect the child witness and obtain the testimony
 14 rather than two-way CCTV.” (ECF No. 26 at 15.) Although that may be required under
 15 California Penal Code section 1347,¹⁰ such a finding is not required by Craig or federal
 16 constitutional law. In fact, the Supreme Court specifically “decline[d] to establish, as a matter of
 17 federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-
 18 way television procedure,” such as a requirement to “explore less restrictive alternatives to the
 19 use of the one-way closed circuit television procedure.” Craig, 497 U.S. at 860.

20 If the child witness “testified under oath, w[as] subject to full cross-examination, and
 21 w[as] able to be observed by the judge, jury, and defendant as they testified, we conclude that, to
 22 the extent that a proper finding of necessity has been made, the admission of such testimony
 23 would be consonant with the Confrontation Clause.” Craig, 497 U.S. at 857. Here, S.M. testified
 24 under oath, was subject to cross-examination, and was able to be observed by the judge, jury, and

25 _____
 26 ¹⁰ To the extent Petitioner asserts that the trial court failed to comply with California Penal Code section 1347, the
 27 Court finds that such a claim is an issue of state law that is not cognizable in federal habeas corpus. See Wilson v.
 28 Corcoran, 562 U.S. 1, 5 (2010) (per curiam) (“[I]t is only noncompliance with federal law that renders a State’s
 criminal judgment susceptible to collateral attack in the federal courts.”); Estelle v. McGuire, 502 U.S. 62, 67–68
 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law
 questions.”)

Petitioner as she testified. Petitioner contends that any cross-examination was rendered “essentially meaningless.” (ECF No. 1 at 66.) However, “the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original).

Petitioner has not demonstrated that “no ‘fairminded juris[t]’ could have reached the same judgment as the state court.” Shinn v. Ramirez, 596 U.S. 366, 378 (2022) (alteration in original) (quoting Harrington, 562 U.S. at 102). Accordingly, the Court finds that the state court’s rejection of the Confrontation Clause claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of fact. The decision was not “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. Therefore, Petitioner is not entitled to habeas relief on his first claim, and it should be denied.

B. Due Process and Fair Trial

In his second claim for relief, Petitioner asserts that the trial court violated his right to due process and a fair trial with respect to the following aspects of its handling of S.M. as a witness:

when it failed to follow the procedures set forth in Craig, *supra*, and California Penal Code section 1347; denied Petitioner an opportunity to determine whether S.M. should testify at all at trial because she was an unavailable witness (*Cal. Evid. Code* § 240(a)(3), (6) and (c)), or not competent to testify (*Cal. Evid. Code* § 701, *subd.* (a)(1), (2)), before ruling whether she should testify via CCTV; denied Petitioner’s request for discovery of the identities and reports of the counsel’s or therapists treating S.M. to determine the availability and competency as a witness and to determine why S.M. could not testify in court;¹¹ compelled

¹¹ A petitioner in state custody who is proceeding with a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Duncan v. Henry, 513 U.S. 364, 365 (1995); Picard v. Connor, 404 U.S. 270, 276 (1971). To provide the highest state court the necessary opportunity, the petitioner must “fairly present” the claim with “reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief.” Duncan, 513 U.S. at 365; Gray v. Netherland, 518 U.S. 152, 162-63 (1996). “Fair presentation requires that the petitioner ‘describe in the state proceedings both the operative facts and the federal legal theory on which his claim is based so that the state courts have a ‘fair opportunity’ to apply controlling legal principles to the facts bearing upon his constitutional claim.’” Davis v. Silva, 511 F.3d 1005, 1009 (9th Cir. 2008) (citation omitted). To the extent Petitioner asserts a fair trial claim with respect to the denial of an opportunity to determine whether S.M. should testify at all at trial because she was an unavailable witness or not competent to testify and the denial of Petitioner’s discovery request, the Court previously found these alleged errors were “not

S.M. to testify before the jury to determine her availability and whether she should testify via CCTV; and failed to declare a mistrial after S.M.'s two emotional outbursts in front of the jury.

(ECF No. 1 at 28.) Respondent argues that the state court was not objectively unreasonable in rejecting the fair trial claim. (ECF No. 23 at 34.)

The California Court of Appeal denied the fair trial claim in a reasoned opinion. The California Supreme Court summarily denied Petitioner's petition for review. As federal courts review the last reasoned state court opinion, the Court will "look through" the summary denial and examine the decision of the California Court of Appeal. See Wilson, 584 U.S. at 125.

In denying the fair trial claim, the California Court of Appeal stated:

Incongruously, defendant—who sought to maintain a physical, face-to-face confrontation with S.M. by virtue of his opposition to the prosecution's section 1347 motion—suggests that the court should not have had S.M. testify in the courtroom "because witnessing the emotional state of an eight year old child on the witness stand repeatedly calling out for her mommy, expressing fear, and literally begging to go home, forever tainted this jury from the inception of trial thereby fundamentally and prejudicially altering the integrity of the trial and the due process to which [he] was entitled." Defendant is not entitled to "have his cake and eat it too." (*People v. Borland* (1996) 50 Cal.App.4th 124, 127.)¹²

Myers, 2021 WL 6050630, at *14 (footnote in original).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment," such as the Confrontation Clause. Strickland v. Washington, 466 U.S. 668, 684–85 (1984). Therefore, to the extent Petitioner's fair trial claim is based on the procedure used by the trial court regarding S.M.'s testimony, the Court finds that the state court was not objectively unreasonable in denying the claim for the reasons set forth in section IV(A), *supra*. See Caplin & Drysdale v. United States, 491 U.S. 617, 633 (1989) (stating the Court is

mentioned at all in the petition for review filed in the California Supreme Court." (ECF No. 19 at 6.) The Court cannot grant habeas relief on unexhausted claims. See 28 U.S.C. § 2254(b)(1).

¹² Having examined the merits, we need not address (1) the Attorney General's claim of forfeiture; or (2) defendant's claim of ineffective assistance of counsel, which is premised on a finding of forfeiture.

1 “not sure that” a Fifth Amendment argument “adds anything to petitioner’s Sixth Amendment
2 claim” or that “the Fifth Amendment provides some added protection not encompassed in the
3 Sixth Amendment’s more specific provisions”).

4 With respect to the trial court’s failure to declare a mistrial after S.M.’s emotional
5 testimony in the courtroom, the Supreme Court has “explained that trial judges may declare a
6 mistrial ‘whenever, in their opinion, taking all the circumstances into consideration, there is a
7 manifest necessity’ for doing so,” or “when there is a ‘high degree’ of necessity.” Renico v. Lett,
8 559 U.S. 766, 773–74 (2010) (some internal quotation marks omitted) (first quoting United
9 States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); and then quoting Arizona v. Washington,
10 434 U.S. 497, 506 (1978)). “The decision to declare a mistrial is left to the ‘sound discretion’ of
11 the judge, but ‘the power ought to be used with the greatest caution, under urgent circumstances,
12 and for very plain and obvious causes.’” Renico, 559 U.S. at 774 (quoting Perez, 22 U.S. (9
13 Wheat.) at 580). “Because judicial application of a general standard ‘can demand a substantial
14 element of judgment,’ the more general the rule provided by the Supreme Court, the more
15 latitude the state courts have in reaching reasonable outcomes in case-by-case determinations.”
16 Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010) (quoting Yarborough v. Alvarado, 541
17 U.S. 652, 664 (2004)). “In turn, the state courts’ greater leeway in reasonably applying a general
18 rule translates to a narrower range of decisions that are objectively unreasonable under AEDPA.”
19 Cheney, 614 F.3d at 995. Accord Renico, 559 U.S. at 776 (“Because AEDPA authorizes federal
20 courts to grant relief only when state courts act *unreasonably*, it follows that ‘[t]he more general
21 the rule’ at issue—and thus the greater the potential for reasoned disagreement among fair-
22 minded judges—‘the more leeway [state] courts have in reaching outcomes in case-by-case
23 determinations.’” (quoting Yarborough, 541 U.S. at 664)).

24 Here, apart from S.M.’s testimony, the other evidence admitted at trial included S.M.’s
25 CART interview in which she stated that Petitioner made her “suck on” his “pee pee” one time,
26 tried to force her to do it “lots of times,” and touched her “pee pee” over her clothes multiple
27 times, telling her “[i]t feels good” but “to keep it secret,” (2 CT 425–26, 430–31; 6 RT¹³ 475–

28 ¹³ “RT” refers to the Reporter’s Transcript on Appeal lodged by Respondent. (ECF No. 24.)

77); S.M.’s mother testimony about S.M.’s disclosures that Petitioner touched S.M. inappropriately, gesturing that Petitioner had rubbed her vagina, and that Petitioner “tried to make her do this,” gesturing “[w]ith a hand in a circular motion moving back and forth towards the mouth,” (6 RT 355–56); and one image of child pornography and eighty-one images of child exploitation and child erotica found on Petitioner’s computer, (8 RT 794–95, 812–22). Additionally, the jury was specifically instructed on how to evaluate a child’s testimony and explicitly told not to let bias or sympathy influence their decision. (2 CT 540, 521.) “[U]nder Supreme Court precedent, a jury is presumed to follow the trial court’s instructions.” Deck v. Jenkins, 814 F.3d 954, 979 (9th Cir. 2016) (citing Weeks v. Angelone, 528 U.S. 225, 234 (2000)). Petitioner presents no evidence suggesting that the jury departed from the trial court’s instructions. In light of the other evidence admitted at trial and the trial court’s instructions, and given that a “narrower range of decisions . . . are objectively unreasonable under AEDPA,” Cheney, 614 F.3d at 995, due to the general standard governing mistrials, the state court was not objectively unreasonable in denying the fair trial claim based on the trial court’s failure to declare a mistrial after S.M.’s emotional testimony in the courtroom.

Further, to the extent Petitioner asserts that S.M.’s emotional testimony in the courtroom was so prejudicial as to violate due process, the Supreme Court recently clarified that “clearly established law provide[s] that the Due Process Clause forbids the introduction of evidence so unduly prejudicial as to render a criminal trial fundamentally unfair” based on its decision in Payne v. Tennessee, 501 U.S. 808 (1991). Andrew, 2025 WL 247502, at *5. In so concluding, the Supreme Court noted that “[g]eneral legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court” and acknowledged that “[a]lthough this Court has not previously relied on Payne to invalidate a conviction for improperly admitted prejudicial evidence . . . ‘certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.’” Andrew, 2025 WL 247502, at *4 (quoting White v. Woodall, 572 U.S. 415, 427 (2014)). The Ninth Circuit has held that “[o]nly if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must

‘be of such quality as necessarily prevents a fair trial.’” Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991) (quoting Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986)). See Kipp v. Davis, 971 F.3d 939, 956 (9th Cir. 2020) (“[W]e have found no due process violation where there *were* permissible inferences that the jury could draw from the challenged evidence.”).

In light of the other evidence admitted at trial, the trial court’s instructions regarding evaluation of a child’s testimony, nothing in the record suggesting that the jury drew impermissible conclusions from S.M.’s emotional testimony, and given that a “narrower range of decisions . . . are objectively unreasonable under AEDPA,” Cheney, 614 F.3d at 995, due to the general legal principles governing due process protections against unduly prejudicial evidence, the state court was not objectively unreasonable in denying a due process claim.

“[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one,” Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986), and Petitioner has not demonstrated that “no ‘fairminded juris[t]’ could have reached the same judgment as the state court,” Shinn, 596 U.S. at 378 (alteration in original) (quoting Harrington, 562 U.S. at 102). Accordingly, the Court finds that the state court’s rejection of the fair trial/due process claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of fact. The decision was not “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. Therefore, Petitioner is not entitled to habeas relief on his second claim, and it should be denied.

V.

ORDER & RECOMMENDATION

Based on the foregoing, the Court HEREBY ORDERS that:

1. The findings and recommendation issued on July 24, 2024 (ECF No. 30) is VACATED;
- and
2. Petitioner’s request for oral argument (ECF No. 29) is DENIED.

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1 Further, the Court HEREBY RECOMMENDS that the petition for writ of habeas corpus
2 be DENIED.

3 This Findings and Recommendation is submitted to the assigned United States District
4 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
5 Rules of Practice for the United States District Court, Eastern District of California. Within
6 **FOURTEEN (14) days** after service of the Findings and Recommendation, any party may file
7 written objections with the Court, **limited to fifteen (15) pages in length, including any**
8 **exhibits**. Such a document should be captioned “Objections to Magistrate Judge’s Findings and
9 Recommendation.” Replies to the objections shall be served and filed within fourteen (14) days
10 after service of the objections. The assigned District Judge will then review the Magistrate
11 Judge’s ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file
12 objections within the specified time may waive the right to appeal the District Court’s order.
13 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d
14 1391, 1394 (9th Cir. 1991)).

15 IT IS SO ORDERED.

16 Dated: February 10, 2025



17 STANLEY A. BOONE
18 United States Magistrate Judge
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Anthony James Myers v. Luis Garnica

Petition for Certiorari to the United States Court of Appeals
For the Ninth Circuit (No. 25-6780)

Appendix E

United States District Court Magistrate's Report,
dated July 24, 2024

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ANTHONY JAMES MYERS,

Petitioner,

v.

BRYAN D. PHILLIPS, et al.,

Respondents.

Case No. 1:23-cv-00409-JLT-SAB-HC

FINDINGS AND RECOMMENDATION
RECOMMENDING DENIAL OF PETITION
FOR WRIT OF HABEAS CORPUS

ORDER DENYING PETITIONER'S
REQUEST FOR ORAL ARGUMENT

(ECF No. 29)

Petitioner, represented by counsel, is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

I.

BACKGROUND

On August 16, 2018, Petitioner was found guilty by a jury in the Tulare County Superior Court of multiple sex crimes against three minor victims. (3 CT¹ 593–631; ECF No. 1 at 10–11.²) On October 12, 2018, Petitioner was sentenced to an imprisonment term of 225 years to life plus 13 years. (3 CT 698–700, 705–06; ECF No. 1 at 11.) On December 21, 2021, the California Court of Appeal, Fifth Appellate District, stayed the sentence imposed on count 10 and affirmed the judgment in all other respects. People v. Myers, No. F078318, 2021 WL 6050630, at *14 (Cal. Ct. App. Dec. 21, 2021). On March 16, 2022, the California Supreme Court denied Petitioner's petition for review. (LDs³ 25, 26.) Petitioner did not file any state post-conviction collateral challenges. (ECF No. 1 at 13.)

¹ "CT" refers to the Clerk's Transcript on Appeal lodged by Respondent. (ECF No. 24.)

² Page numbers refer to the ECF pagination stamped at the top of the page.

³ "LD" refers to the documents lodged by Respondent. (ECF No. 24.)

On March 19, 2023, Petitioner, through counsel, filed a federal petition for writ of habeas corpus in this Court. (ECF No. 1.) The petition raised the following claims for relief: (1) violation of Petitioner’s right to confrontation; (2) violation of Petitioner’s right to a fair trial; and (3) cumulative error. (ECF No. 1.) On May 12, 2023, Respondent filed a motion to dismiss the petition because the cumulative error claim was unexhausted. (ECF No. 13.) On October 31, 2023, the Court granted Respondent’s motion to dismiss in part and dismissed the cumulative error claim without prejudice. (ECF No. 21.) On December 26, 2023, Respondent filed an answer. (ECF No. 23.) Petitioner filed a reply and requested oral argument. (ECF Nos. 28, 29.)

II.

STATEMENT OF FACTS⁴

I. Prosecution’s case-in-chief

a. *Testimony of Ashley*

Ashley married defendant in August 2004. In 2008, she discovered child pornography on their computer. Ashley confronted defendant, who claimed that “someone had hacked into [the] computer and put some spyware, malware and all kinds of stuff on it” She “didn’t know any better” and believed him. In 2009, Ashley gave birth to their daughter S.M. In 2016, the couple separated and shared child custody.

In June 2017, Ashley discovered adult pornography on S.M.’s tablet computer. She spoke to her daughter about “good touch, bad touch” and asked, “Has anyone ever touched you inappropriately?” S.M. replied that “her daddy did,” gesturing that defendant had rubbed her vagina “to help her sleep.” She also made a motion with her hand “moving back and forth towards the mouth” and indicated that he “tried to make her do this.” When Ashley asked S.M. how she came across the pornographic material, S.M. replied that she “watch[ed] daddy watch that on TV.”

At trial, Ashley denied telling S.M. or any else to falsely accuse defendant of sexual misdeeds.

b. S.M.

i. June 21, 2017 CART⁵ interview

S.M., then seven years old, told the forensic interviewer that defendant “d[id] gross stuff to [her].” Once, he forced her to “suck” his “pee pee,” i.e., penis. He attempted this “lots of times.” Defendant also touched S.M.’s “pee pee,” i.e., vagina, at least four times. He told her that “ ‘[i]t feels good’ ” but “to keep it secret.”

⁴ The Court relies on the California Court of Appeal’s December 21, 2021 opinion for this summary of the facts of the crime. *See Vasquez v. Kirkland*, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

⁵ Child Abuse Response Team.

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ii. Trial testimony

S.M., then eight years old, testified via closed-circuit television. She “d[id]n’t like” talking about defendant and “d[id]n’t know” how she felt toward him. Something unpleasant had happened in his bedroom that S.M. did not want to partake in, but she could not recall the details because her memory was “[s]crambled.” She confirmed that defendant touched her body but could not elaborate because “[t]hat part is hard to explain.” When S.M. first disclosed the incident to Ashley, she told her the truth.

S.M. was both “[r]eally mad” and “sad” to testify. She was also scared that “[defendant]’s going to say mean stuff to [her].” Before S.M. testified, she had spoken with Ashley, who had told her to tell the truth on the witness stand.

c. *Testimony of M.W.*

M.W. was 15 years old when she visited her cousin Ashley and defendant for about a one-week period in the summer of 2014. One night, she experienced anxiety and went outside to calm herself down. Defendant joined M.W. and the two went for a walk. During the stroll, he “pushed [her] up against [a] fence,” “pinned down” her arms, and asked “if he could kiss [her].” Although M.W. “told him no,” defendant kissed her on the lips. He also groped her breasts. On the way back home, defendant asked M.W. if she “wanted to let him eat [her] out” and other “disgusting things.”

Two more incidents occurred in M.W.’s bedroom. The first time, while she was sleeping, defendant “spoon[ed]” her, i.e., “[her] back was up against his front and he had his leg over [her hip].” He placed his hand underneath her shirt and groped her chest and then placed his hand underneath her pants and touched her vagina. When defendant tried to put his hand underneath M.W.’s underwear, he complained that she “didn’t shave” her pubic hair and called her “disgusting.” The second time, M.W. “woke up to [defendant] jacking off in [her] face.” He “asked [her] to suck his cock” and “jack him off with [her] hands,” but she refused. Before leaving, defendant ejaculated on M.W.’s knee and said, “Thank you.”

The last incident took place in the kitchen. While M.W. was “making something to eat,” defendant “lifted [her] up,” “pushed [her] up against the counter,” and “grabbed [her] vagina.” She felt his erection pressed against her inner thigh. Defendant placed his hand underneath M.W.’s shirt and bra and fondled her breasts. He also kissed her neck and face. M.W. “told [defendant] to stop” and “leave [her] alone” and tried to push him off, but to no avail. Thereafter, he asked her “if [she] liked it,” “if [she] wanted to do it again,” and “if he could eat [her] out.”

d. *Testimony of A.P.*

A.P., Ashley’s sister, was five years old when she first met defendant in 2004. She encountered him on a consistent basis between the ages of five and 17. During that period, defendant sexually abused A.P. “about 20 times.” Each episode adhered to a “basic routine”: he would kiss her mouth and try to put his tongue inside, rub her vagina, force his penis into her mouth, and then “say some weird shit like, ‘good job.’ ” Sometimes, defendant kissed A.P.’s stomach and tried to kiss her vagina. Occasionally, he would attempt to insert his fingers

1 and/or his penis into her vagina without success. Defendant advised A.P. that “if
2 [she] ever told anybody,” he would testify in court that “[she] wanted it all.”

3 At trial, A.P. detailed some of the incidents. The earliest one occurred when she
4 was five or six years old. A.P. had gone to bed “knocked out” after undergoing
5 dental surgery. In the middle of the night, she woke up and observed defendant
6 touching her vagina with his hand over her shorts and “running his penis along
7 [her] stomach and leg area.” He pressed her head down, inserted his penis into her
8 mouth for “a couple minutes,” and ejaculated. On another occasion, A.P. and
9 defendant were in the living room when he kissed her neck and face and touched
10 her vagina with his hand and penis. When he could not insert his penis into her
11 vagina, he forced it into her mouth. Another time, defendant attempted to insert
12 his penis into A.P.’s vagina. When she “started raising [her] voice,” he stopped
13 and told her that “he just loves [her]” and “wasn’t trying to rape [her].” When
14 A.P. was nine or 10 years old, defendant rubbed her vagina with his hand and
15 tried to insert his penis into her vagina. Failing to do so, he forced his penis into
16 her mouth. The last incident occurred when A.P. was a teenager. Defendant
17 dragged her upstairs and the molestation “happened really fast.”

18 **e. Arrest and search**

19 On July 10, 2017, law enforcement apprehended defendant at his residence,
20 conducted a search of the premises, and seized a computer. A forensic
21 examination of the machine uncovered a user account belonging to “Anthony
22 M.”; software for a “Tor browser,” which “tries to mask [the user’s] IP address”
23 and allows him or her to find pornography and other illicit material on the “dark
24 web”; and one image of child pornography and 81 images of “child exploitation
25 or child erotica” in the hard drive’s unallocated space. The Tor browser was last
26 accessed by “Anthony M.” on July 5, 2017.

27 **II. Defense’s case-in-chief**

28 **a. Testimony of defendant**

Defendant denied touching S.M. in an inappropriate manner and believed that she
had been pressured by Ashley to falsely accuse him thereof. He also denied
molesting M.W. and A.P. and downloading the images found on the confiscated
computer.

b. Dr. Tiffany Grant

Dr. Grant, a psychologist, reviewed the transcript of S.M.’s June 21, 2017 CART
interview and opined that the interviewer asked leading questions.

Myers, 2021 WL 6050630, at *1–3 (footnote in original).

III.

STANDARD OF REVIEW

Relief by way of a petition for writ of habeas corpus extends to a person in custody
pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws
or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor,

529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the U.S. Constitution. The challenged convictions arise out of the Tulare County Superior Court, which is located within the Eastern District of California. 28 U.S.C. § 2241(d).

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). The instant petition was filed after the enactment of AEDPA and is therefore governed by its provisions.

Under AEDPA, relitigation of any claim adjudicated on the merits in state court is barred unless a petitioner can show that the state court’s adjudication of his 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.

28 U.S.C. § 2254(d); Harrington v. Richter, 562 U.S. 86, 97–98 (2011); Lockyer v. Andrade, 538 U.S. 63, 70–71 (2003); Williams, 529 U.S. at 413.

As a threshold matter, this Court must “first decide what constitutes ‘clearly established Federal law, as determined by the Supreme Court of the United States.’” Lockyer, 538 U.S. at 71 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is “clearly established Federal law,” this Court must look to the “holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as of the time of the relevant state-court decision.” Williams, 529 U.S. at 412. “In other words, ‘clearly established Federal law’ under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.” Id. In addition, the Supreme Court decision must “‘squarely address [] the issue in th[e] case’ or establish a legal principle that ‘clearly extend[s]’ to a new context to the extent required by the Supreme Court in . . . recent decisions”; otherwise, there is no clearly established Federal law for purposes of review under AEDPA. Moses v. Payne, 555 F.3d 742, 754 (9th Cir. 2009) (quoting Wright v. Van Patten, 552 U.S. 120, 125 (2008)); Panetti v. Quarterman, 551 U.S. 930 (2007); Carey v.

Musladin, 549 U.S. 70 (2006). If no clearly established Federal law exists, the inquiry is at an end and the Court must defer to the state court’s decision. Musladin, 549 U.S. 70; Wright, 552 U.S. at 126; Moses, 555 F.3d at 760.

If the Court determines there is governing clearly established Federal law, the Court must then consider whether the state court’s decision was “contrary to, or involved an unreasonable application of, [the] clearly established Federal law.” Lockyer, 538 U.S. at 72 (quoting 28 U.S.C. § 2254(d)(1)). “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” Williams, 529 U.S. at 412–13; see also Lockyer, 538 U.S. at 72. “The word ‘contrary’ is commonly understood to mean ‘diametrically different,’ ‘opposite in character or nature,’ or ‘mutually opposed.’” Williams, 529 U.S. at 405 (quoting Webster’s Third New International Dictionary 495 (1976)). “A state-court decision will certainly be contrary to [Supreme Court] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases.” Id. If the state court decision is “contrary to” clearly established Supreme Court precedent, the state decision is reviewed under the pre-AEDPA de novo standard. Frantz v. Hazey, 533 F.3d 724, 735 (9th Cir. 2008) (en banc).

“Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Williams, 529 U.S. at 413. “[A] federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411; see also Lockyer, 538 U.S. at 75–76. The writ may issue only “where there is no possibility fair minded jurists could disagree that the state court’s decision conflicts with [the Supreme Court’s] precedents.” Richter, 562 U.S. at 102. In other words, so long as fair minded jurists could disagree on the correctness of the state court’s decision, the decision cannot be considered unreasonable. Id. If the Court determines that the state court decision is objectively unreasonable, and the error is not

1 structural, habeas relief is nonetheless unavailable unless the error had a substantial and injurious
2 effect on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

3 The Court looks to the last reasoned state court decision as the basis for the state court
4 judgment. Wilson v. Sellers, 584 U.S. 122, 125 (2018); Stanley v. Cullen, 633 F.3d 852, 859 (9th
5 Cir. 2011). If the last reasoned state court decision adopts or substantially incorporates the
6 reasoning from a previous state court decision, this Court may consider both decisions to
7 ascertain the reasoning of the last decision. Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir.
8 2007) (en banc). “When a federal claim has been presented to a state court and the state court has
9 denied relief, it may be presumed that the state court adjudicated the claim on the merits in the
10 absence of any indication or state-law procedural principles to the contrary.” Richter, 562 U.S. at
11 99. This presumption may be overcome by a showing “there is reason to think some other
12 explanation for the state court’s decision is more likely.” Id. at 99–100 (citing Ylst v.
13 Nunnemaker, 501 U.S. 797, 803 (1991)).

14 Where the state courts reach a decision on the merits but there is no reasoned decision, a
15 federal habeas court independently reviews the record to determine whether habeas corpus relief
16 is available under § 2254(d). Stanley, 633 F.3d at 860; Himes v. Thompson, 336 F.3d 848, 853
17 (9th Cir. 2003). “Independent review of the record is not de novo review of the constitutional
18 issue, but rather, the only method by which we can determine whether a silent state court
19 decision is objectively unreasonable.” Himes, 336 F.3d at 853. While the federal court cannot
20 analyze just what the state court did when it issued a summary denial, the federal court must
21 review the state court record to determine whether there was any “reasonable basis for the state
22 court to deny relief.” Richter, 562 U.S. at 98. This Court “must determine what arguments or
23 theories . . . could have supported, the state court’s decision; and then it must ask whether it is
24 possible fairminded jurists could disagree that those arguments or theories are inconsistent with
25 the holding in a prior decision of [the Supreme] Court.” Id. at 102.

26 ///

27 ///

28 ///

IV.

REVIEW OF CLAIMS

A. Confrontation Clause

In his first claim for relief, Petitioner asserts that the trial court violated his right to confrontation under the Sixth Amendment when it failed to follow the procedures set forth in Maryland v. Craig, 497 U.S. 836 (1990), and California Penal Code section 1347. (ECF No. 1 at 14.) Respondent argues that the state court’s rejection of the Confrontation Clause claim was not objectively unreasonable. (ECF No. 23.)

The California Court of Appeal denied the claim in a reasoned opinion. The California Supreme Court summarily denied Petitioner’s petition for review. As federal courts review the last reasoned state court opinion, the Court will “look through” the summary denial and examine the decision of the California Court of Appeal. See Wilson, 584 U.S. at 125.

In denying the Confrontation Clause claim, the California Court of Appeal stated:

I. Section 1347

a. Background

i. Motion and hearing

On July 27, 2018, the prosecution filed a motion to allow S.M. to testify via closed-circuit television pursuant to section 1347. On August 2, 2018, the defense filed its opposition.

On August 6, 2018, the court conducted an Evidence Code section 402 hearing. The prosecution called Ashley to the witness stand. She testified that when she first informed S.M. a few months earlier about testifying against defendant, S.M. “immediately started crying and throwing a fit.” The matter “got dropped” until court proceedings “started coming closer and closer.” Starting around the end of June 2018, S.M. exhibited a drastic change in behavior. Whenever the topic of testifying against defendant was raised, she would threaten to kill herself, “drop on the floor and throw fits,” and strike her head with “both of her hands,” “against the wall,” “against the bed railing,” or “wherever.” S.M. revealed that she hit herself “because it blocks out” “having to testify against [defendant]”; still “loves him and misses him”; and was “afraid that she’s going to put him in jail.” Ashley felt that S.M. would “breakdown” if she had to testify in defendant’s presence. On the other hand, Ashley believed that S.M. would act differently if she were placed in a separate room because defendant “won’t be right there in front of her” and “that pressure of thinking that she’s going to be putting him in jail” “won’t be on her.”

After Ashley’s testimony, the following colloquy transpired between the court, Defense Counsel John Sarsfield, and Deputy District Attorney Chelsea Wayt:

1
2 “THE COURT: I don’t know if you want to present any expert testimony,
but here’s a thought running through my mind.

3 “We can do this one of two ways. One, we can try to have [S.M.] testify in
4 here, but if she won’t testify, then I want the whole thing set up so we can
immediately move to the second phase, which would be the closed circuit
5 television under [section] 1347, but, quite frankly, if that happens I think
that would be a worse situation for the defense, but I’m going to – I give
6 great weight to the fact that [Ashley] is scared for [S.M.’s] mental health,
but I mean, if you want to call an expert – you have a doctor here or a
7 counselor here,⁶ I’m willing to hear what they have to say, but my
thinking is, okay, well, we can get started and we can try, but if she melts
8 down in front of this jury here on this – from the witness stand and she
won’t answer anything, I’m simply going to go into the 1347 mode, then
9 I’ll remove her from the courtroom. We’ll set it up at some other place.

10 “We’ll do the closed circuit TV, but how does that help your case?

11 “MR. SARSFIELD: I understand what you’re saying. Could we take, like,
a five-minute break to confer with Dr. Grant?

12 “THE COURT: Yes....

13 “MR. SARSFIELD: Thank you.

14 “(Recess taken.)

15 “THE COURT: All right. Counsel, where are we?

16 “MR. SARSFIELD: So I understand where the Court is going with that. I
17 think procedurally we have to be clear because there’s the pending
[section] 1347 motion, so what I would suggest would be that the Court
18 deny it without prejudice and then we can proceed forward with what the
Court suggested might happen....

19 “If you’re inclined to grant their motion, but simply not give them the
20 remedy that they’re requesting, then I would offer Dr. Grant’s testimony
in an offer of proof.

21 “She would simply say that you cannot assess somebody’s psychological,
22 emotional or mental status based upon what we witnessed here today from
[Ashley]. That’s essentially all Dr. Grant would say, but if the Court
23 denies their motion without prejudice, would [*sic*] leave to refile. As
circumstances warrant, I think we’re going and we can start tomorrow.

24 “THE COURT: Well, here’s the way I see the 1347.

25 “Certainly, it’s a – the minor’s testimony involves an alleged sexual
26 offense committed against the minor, that the testimony by the minor in
the presence of the defendant – this is where I’m having my difficulty –
27 the statute says ‘would’ and I see it as ‘could’ result in the child suffering
serious emotional distress. So the child would essentially be unavailable as

28 ⁶ Dr. Grant, the defense’s expert witness (see *ante*, at p. 7), was present at the motion hearing.

1 a witness. I'm not convinced that it would result there yet, but my finding
2 is that it could.

3 "Now the mother is scared about the victim testifying in front of the
4 defendant. It's too much pressure on her. She's talked about committing
5 suicide now, acting out in a very self-destructive manner, hurting herself,
6 loves her dad, misses him, somehow has put this all on her that if he can't
7 come home she's going to be afraid. She's the one that would put him in
8 jail forever, so I could see where this could be a situation causing the
9 minor serious emotional distress. But based upon what I've heard, I can't
10 say definitely that it would result, but I'm going to have a very short leash.
11 [¶] ... [¶]

12 "... I'm going to have a very short leash on this. If [S.M.] will not even
13 enter the courtroom, I'm going to find – I want it set up for when she is
14 going to be called as a witness because I don't think she's going to testify.
15 I think she's going to come up here – if she even comes in here, she's just
16 going to sit here and sob and I think that's what's going to happen, and if
17 that does happen or she won't even take the oath, I'm going to find her
18 unavailable for purposes of this section and we're going to go right into
19 the other section, but at this point I can't say that I find that this will
20 happen.

21 "I'm finding in all probability it will happen, but I can't say for certain it
22 will, and until I know for certain then I can't impose the restrictions or the
23 procedures set up under this code, but I want it set up because I think
24 that's exactly what's going to happen.

25 "We're going to have to break the minute she's called and take her to
26 another room, whenever you have that set up or where you plan to do this.
27 Hopefully we have another courtroom or something that we can do this, or
28 somebody's office. So we have three, four cameras and the monitor in
here and then we're going to move right into that situation. I'm going to
be pretty liberal about the interpretation on behalf of [S.M.]. I don't want
to traumatize this girl.

"Now, certainly [defendant]'s looking at life in prison so he has some
rights too, and I have to try to balance these rights, and I can't make that
final determination yet. [¶] ... [¶]

"MR. SARSFIELD: So procedurally – I hate to be the procedural horse,
but procedurally, is the Court going to grant their motion or deny their
motion without prejudice?

"THE COURT: I'm denying their motion at this point.

"MR. SARSFIELD: Thank you.

"THE COURT: But it's subject to a very, very short leash in terms of what
happens if this victim [S.M.] – alleged victim [S.M.], if she won't even
come in the courtroom, if she's a hysterical mess, if she comes in here and
won't take the oath, it's not going to take much for me to say we're going
to do this other procedure.

1 “MS. WAYT: And just to be super clear and prevent the defense from not
2 having an opportunity to present any evidence, would the testimony from
3 a doctor change the Court’s opinion of having a very short leash regarding
4 the 1347 motion, or are you satisfied with it ‘could,’ and if it does, then it
5 ‘would’, versus needing a doctor to say that you can’t determine her
6 mental well-being?

7 “THE COURT: No. Your first statement.

8 “MS. WAYT: Okay. I know they have their doctor here. I didn’t know if
9 you wanted to hear testimony.

10 “MR. SARSFIELD: In light of the Court’s ruling, I don’t think we need to
11 do that.”

12 **ii. First day of trial**

13 On August 8, 2018, prior to the start of trial, the following colloquy transpired
14 between the court, Defense Counsel Marguerite Melo, and Deputy District
15 Attorney Wayt:

16 “MS. MELO: [¶] ... [T]he discussions we’ve been having with respect
17 to the videotape equipment and [S.M.] coming into the courtroom. I
18 understand that the Court is going to force my client to be outside of her
19 presence for her to come into the courtroom. I’m objecting to this. I
20 believe that my client is entitled to see all the proceedings that occur here
21 and that’s part of those proceedings. He’s entitled to see how this witness
22 reacts upon entering the courtroom and he’s allowed to be here to see this.
23 [¶] ... [¶]

24 “THE COURT: All right. As far as the situation is I’m still trying to avert
25 the 1347 aspect of this trial. I’ve been informed that [S.M.] [¶] ... [¶] ... [i]s
26 down – on the second floor, the witness coordinator’s office, and is
27 refusing to come up here because she knows the defendant, Mr. Myers, is
28 here. Her fears are certainly understandable to me and so at a break or off
the record I’m going to ask that Mr. Myers step out into the foyer area
here behind the closed door and allow [S.M.] to come in and at least look
at the courtroom. It is my hope that that would give her enough confidence
then to bring Mr. Myers back in, have her try to testify here in the
courtroom.

“Now, if that doesn’t work, then we’re going to do the 1347 proceedings.
So I note your objection, but this is going to take all of five seconds and
it’s while we’re off the record. The jury will not be here. They will not see
any of this.

“Ms. Wayt?

“MS. WAYT: Yes, it’s my understanding that she’s outside the courtroom
and that’s what I’m trying to do is circumvent having to use the 1347.

“THE COURT: So over Ms. Melo’s objection, Deputy ... , would you
simply take him to the holding cell and this will be something for about
ten seconds. Thank you. [¶] ... [¶] Let’s bring [S.M.] in.

1 “Let the record reflect that [S.M.] has been here in the courtroom.

2 “MS. WAYT: The victim advocate from the District Attorney’s office
3 as well as CASA⁷ advocate was also present.

4 “THE COURT: Let’s bring Mr. Myers back out. This whole situation took
5 less than five minutes. Fair enough?

6 “MS. MELO: Yes.

7 “THE COURT: Mr. Myers has rejoined us. Anything else we need to take
8 up before I bring the jury? ...

9 “MS. MELO: Nothing to put on the record, Your Honor.

10 “MS. WAYT: I think we can proceed.”

11 The jurors entered the courtroom and were preinstructed. After its opening
12 statement, the prosecution called S.M. as its first witness. Thereafter, the
13 following colloquy transpired between the court and the attorneys:

14 “MS. MELO: Objection, Your Honor. The entire theater that’s going on
15 out there.

16 “MS. WAYT: At this point I don’t believe she’s willing to come into the
17 courtroom. I don’t know – if I can have a few minutes to see if I can try.

18 “THE COURT: Take a few minutes. I’m going to have to conduct a
19 couple things outside your presence so I need for you to retire to the jury
20 room while we take up these preliminary matters. [¶] ... [¶]

21 “(Break in proceedings.)

22 “MR. SARSFIELD: As an offer, somebody, I don’t know if it was the
23 mother of the witness, was heard outside the doors of the courtroom
24 saying something to the effect, ‘She’s scared, she’s scared, she’s scared,’
25 that needs to be noted in the record.

26 “THE COURT: Well, I didn’t hear that. Did you hear that, Ms. Wayt?

27 “MS. WAYT: I was so concentrated on her. She had her feet planted. She
28 was on the ground. She wasn’t coming in.

“MR. SARSFIELD: As an officer of the Court I will swear under penalty
of perjury that’s what I heard.

“THE COURT: I’m just saying I didn’t hear it.

“MS. WAYT: I will say that the mother was not present right there. The
person that was right there was the advocate from CASA. The mom was
down the hall. She’s been instructed to be down the hall. And then her
grandmother is here, but I think she was just trying to hold her hand.
Honestly, I wasn’t listening. I didn’t – I was listening to her. She said, ‘I

⁷ Court Appointed Special Advocate.

1 don't want to go in there. I don't want to go in there.' Would it be possible
2 if I suggest maybe she come in and get seated before we bring the jury
out?

3 "THE COURT: Absolutely.

4 "MS. WAYT: I'll try that. [¶] ... [¶]

5 "THE COURT: All right. We've been in recess for about ten minutes.

6 "What happened, for the record, is that Ms. Wayt indicated she was going
7 to call [S.M.], went outside to get her. Next thing I know there was some
8 type of commotion as the doors opened up. Some words were spoken. I
didn't hear them. Counsel indicated there was words to the effect of, 'I'm
scared, I'm scared.'

9 "Is that right, Counsel?

10 "MR. SARSFIELD: Yes, Your Honor, spoken by an adult female voice.

11 "THE COURT: So we have sent the jury into the jury room. We're
12 meeting outside of the presence of the jury. I've sent Ms. Wayt out to try
to find out how we're going to proceed.

13 "Bring me up to date.

14 "MS. WAYT: Your Honor, my – one of the victim advocates went
15 downstairs to grab, like, a little, like, color changing ball that she can hold
16 onto, you know, maybe distract her a little bit during – while she's up
there and not focus on what's happening. She's coming back up.

17 "And then [S.M.] said she'd like to try to come back in, and we'd ask that
18 the advocate – the CASA advocate be able to sit up there with her and
we'll try to do this and then bring the jury out.

19 "THE COURT: Any thoughts, Counsel?

20 "MS. MELO: We'll see what happens.

21 "THE COURT: Okay.

22 "MS. WAYT: As soon as they get back I'll bring her in so we can get
situated."

23 S.M. and the jury entered the courtroom, respectively. On direct examination, the
24 following exchange occurred:

25 "Q. Hi, [S.M.]. I know, I know you want your mom.

26 "A. I want my mommy. [¶] ... [¶]

27 "Q. Here's the microphone.

28 "A. I want my mommy.

1 “Q. I know. It’s not fun to be in here, right?
2 “A. I don’t want to. I want my mommy. Please.
3 “Q. I’m just going to ask you a few questions.
4 “A. No, I don’t want to do that.
5 “Q. I know it’s not that fun to be in here, right?
6 “A. I don’t want to.
7 “Q. Can you try to take a really deep breath for me? [¶] How come you
8 don’t want to be in here?
9 “A. I don’t want to be in here.
10 “Q. Are you scared?
11 “A. I want my mommy.
12 “Q. Have you ever been in a room like this before?
13 “A. I want my mommy. I don’t want to be here. Please, don’t let me.
14 “Q. Can I just ask you a few questions and then we’ll get out of here[?] It’s some pretty easy questions like, how old are you?” (Boldface omitted.)
15 S.M. answered questions about her ability and willingness to testify truthfully as
16 well as her age, birthday, grade, school, extracurricular activities, family
17 members, and pets. The following exchange occurred when the prosecutor
18 inquired about a family dog:
19 “Q. Did you ever have a dog?
20 “A. Yes.
21 “Q. What kind of dog did you have?
22 “A. English Mastiff. [¶] ... [¶]
23 “Q. Okay. What happened to [the dog]?
24 “A. He got – I don’t know. I don’t want to tell.
25 “Q. How come?
26 “A. I just don’t want to. I just don’t want to.
27 “Q. And how come you don’t want to talk about [the dog]?
28 “A. Because I don’t want to.
“Q. Where does [the dog] live?

1 "A. I don't want to talk about it.
2 "Q. Okay. Why don't you want to talk about where [the dog] lives?
3 "A. Because I don't want to talk about it.
4 "Q. Does it make you sad to talk about it?
5 "A. Yeah.
6 "Q. How come it makes you sad to talk about it?
7 "A. I don't want – I don't know. Stop asking me such hard questions. [¶]
8 ... [¶]
9 "Q. What kind of stuff do you do with [the dog]?
10 "A. He's not there anymore.
11 "Q. He's not in your family anymore?
12 "A. Yeah.
13 "Q. How does that make you feel that he's not in your family anymore?
14 "A. Very sad.
15 "Q. Do you love [the dog]?
16 "A. Yes.
17 "Q. Do you miss [the dog]?
18 "A. Yes.
19 "Q. Where does [the dog] live now?
20 "A. I don't want to talk about that. [¶] ... [¶]
21 "Q. Okay. Do you think you'll get to see [the dog] some day?
22 "A. No.
23 "Q. How come?
24 "A. I don't want to talk about that.
25 "Q. Okay. So you don't want to answer the question about [the dog]?
26 "A. Yes. Nothing about [the dog].
27 "Q. Is there anybody else that you don't want to talk about?
28 "A. Yeah.

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“Q. Who?

“A. Huh-uh. Nobody.

“Q. Nobody.

“A. No.

“Q. So since [the dog] isn’t part of your family anymore, are there other people that aren’t part of your family ... anymore?

“A. I want to go. I want to go.

“Q. Okay. Now, I won’t ask you about them right now, but did something happen that makes it hard for you to talk about?

“A. I don’t want to.

“Q. You just have to answer yes or no.

“A. Stop, please.

“Q. Okay.

“A. I don’t want to anymore.”⁸ (Boldface omitted.)

Wayt briefly changed topics. The following exchange then occurred:

“Q. Okay. So I’m just going to ask you a few other questions and then we’ll try to wrap it up. Okay?

“A. Okay.

“Q. I know that there’s some things that you don’t want to talk about because you told me that, right?

“A. Yeah.

“Q. And when you say you don’t want to talk about it, is it because – why don’t you want to talk about it?

“A. I don’t want to talk about it.

“Q. Okay.

“A. Please. I don’t want to talk about it.

“Q. Okay. I’m not going to – I won’t ask you about it just yet. I want to ask you why not –

“A. I want to go home.

⁸ The record indicates that the dog belongs to defendant.

1 “Q. You want to go home?
2 “A. Uh-huh. I don’t want to.
3 “Q. Are you scared to talk about it?
4 “A. Uh-huh.
5 “Q. Are you scared that something bad is going to happen if you talk
6 about it?
7 “A. I really want to go home. [¶] ... [¶]
8 “Q..... [¶] Okay, so can you just tell me besides [the dog], who’s not in
9 your family anymore?
10 “A. Huh-uh. No.” (Boldface omitted.)
11 The court interjected:
12 “Ms. Wayt, I’ve seen enough. [¶] ... [¶] ... So we’re going to take a quick
13 recess and I need for the jury to go back into the jury room, and we’re
14 going to try a different procedure.”
15 After the jurors exited the courtroom, the following colloquy transpired between
16 the court and Sarsfield:
17 “THE COURT: [¶] ... [A]t this point it’s clear to me this witness will
18 not testify in the presence of [defendant]. The body language, when she
19 would roll herself up almost into a ball, shake her head vigorously. She
20 does not want to be here, so I’m not even sure she’ll testify under 1347
21 given what’s going on here, but that’s what we’re going to do [¶] ... [¶]
22 “MR. SARSFIELD: ... [¶] ... [¶] Yes, it’s certainly true that [S.M.] was
23 behaving in a way that Your Honor described on the witness stand and
24 was distressing for all to see, but we don’t know whether that’s because of
25 the presence of the defendant, or from our point of view, that the witness
26 has been coached and coerced by her mother into saying things that are
27 not true. We believe that is an alternative explanation as to her behavior
28 and that would be explored prior to making a 1347 order.
“Additionally, because the Court denied the earlier 1470 motions, that
essentially resets the clock, and we’re entitled to notice and opportunity to
be heard on the grounds of – the alleged grounds for the basis of the
motion.
“THE COURT: I will make two points, number one, when your client was
out of the courtroom and she came in, she didn’t have any problem being
in here. She got on the witness stand. She felt – appeared to be very much
at ease. In fact, when she left, she was skipping. The only thing that
changed between when she was in here 30 minutes ago and when she’s in
here right now is the presence of your client. And the fact that you were
put on notice on Friday of last week that they intended to proceed this
way, I denied it because they didn’t make a clear showing, but I told you
you were on a short leash. If they made the showing at the hearing when

1 she testified, I intended to grant it, so don't say that you don't have notice
2 because that's not accurate, Counsel.

3 "MR. SARSFIELD: Well, actually, we would be given opportunity to
4 question the child in regards to the 1347 ourselves, and we've been denied
5 that because it is entirely possible that Ms. Melo can talk to her and get her
6 to admit that her mother is pressuring her. That would explain all of this.

7 "THE COURT: You can do that by way of closed circuit TV.

8 "MR. SARSFIELD: At that point the bell has already been rung because
9 the Court has already instituted the mechanism for testimony, which we
10 believe is a violation of the confrontation laws.

11 "THE COURT: Have you been in the courtroom and saw her? She won't
12 answer any question. Do you think she's going to answer Ms. Melo's
13 questions? She won't answer with Ms. Wayt, and they obviously have
14 some kind of relationship. You have to be on another planet to think that
15 she's going to answer Ms. Melo's questions.

16 "MR. SARSFIELD: Well, personal assertions aside, I have been in the
17 courtroom, Your Honor, and she answered a great deal of information. She
18 talked about her dog, her cat. She talked about her teacher. She was
19 responsive to many, many questions.

20 "Essentially, the only questions that she didn't answer was when Ms.
21 Wayt was going down the road of, who else had you lived with at some
22 previous time, or words to that effect. That's when the child began to
23 manifest some difficulty and there are multiple explanations as to why that
24 might be, one of which, admittedly, is that the defendant could be guilty,
25 but another one is that the mother, which we believe to be the case, is
26 pressuring her to essentially commit perjury by proxy and we're entitled to
27 examine on that issue.

28 "THE COURT: The only questions she answered were fluff questions.
She answered no substantive questions so your objection is noted. File
your writ."

29 **iii. Second day of trial**

30 On August 9, 2018, outside the presence of the jury and before S.M. testified via
31 closed-circuit television, the court remarked:

32 "I'm looking at [section] 1347. All right. As to the order allowing 1347
33 procedures, the Court will make – in addition to all the comments I made
34 yesterday under 1347, looks like ... I have to make five different findings
35 outside the presence of the jury. I'm making a brief statement on the
36 record in support of this order that the minor attempted to testify
37 yesterday. She came – well, I'll just incorporate all the findings I made
38 yesterday, but it's clear to me she will not testify in this matter while the
defendant is in the courtroom. Between the testimony of the mother when
we did the in limine motions and [Evidence Code section] 402 hearings
about her talking about suicide and all the other things when she found out
she was going to have to testify against her father, loves her father, doesn't
want to be the one responsible for sending him to jail, and her total

meltdown yesterday on the witness stand where she rolled up, pulled her legs up and wouldn't say anything other than 'I want my mommy,' and, 'I don't want to be here,' the Court is absolutely clear that she will not testify in front of her father in this proceeding. So that is why I'm allowing the 1347 procedure."

b. Pertinent law

" 'The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, [citation], provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." ... [I]t guarantees a defendant's right to confront those "who 'bear testimony' " against him.' [Citation.]" (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1281 (*Powell*)). "The confrontation clause not only affords defendants the right to personally examine adverse witnesses, it also ' "(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." [Citation.] "[¶] The combined effect of these elements of confrontation ... serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. [Citations.]' " (*In re Ruedas* (2018) 23 Cal.App.5th 777, 786, quoting *Maryland v. Craig* (1990) 497 U.S. 836, 845-846 (*Craig*)).

The confrontation right "is not so absolute ... that it always requires the accuser and accused to be in the same room." (*Powell, supra*, 194 Cal.App.4th at p. 1281.) " '[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.' " (*People v. Arredondo* (2019) 8 Cal.5th 694, 701 (*Arredondo*), quoting *Craig, supra*, 497 U.S. at p. 850.)

"[T]he United States Supreme Court held that 'a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.' " (*Powell, supra*, 194 Cal.App.4th at p. 1281, quoting *Craig, supra*, 497 U.S. at p. 853.) "[U]pon 'an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.' " (*Arredondo, supra*, 8 Cal.5th at p. 701, quoting *Craig, supra*, at p. 855.) " '[T]he requisite finding of necessity must ... be a case-specific one: The trial court must hear evidence and determine whether use of the [alternative] procedure is necessary to protect the welfare of the particular child witness who seeks to testify. [Citations.]' " (*Arredondo, supra*, at p. 702, quoting *Craig, supra*, at pp. 855-856.) In addition, "[a]n adequate showing that the defendant's presence may cause emotional trauma is required: 'The trial court must ... find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.' " (*Powell, supra*, at p. 1283, quoting *Craig, supra*, at p. 856.)

“ ‘[W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child’s ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.’ ” (*Arredondo, supra*, 8 Cal.5th at pp. 701-702, quoting *Craig, supra*, 497 U.S. at p. 857.) A procedure may provide sufficient assurances where it preserves the other elements of the confrontation right, e.g., “ ‘[t]he child witness must be competent to testify and must testify under oath’ ”; “ ‘the defendant retains full opportunity for contemporaneous cross-examination’ ”; and “ ‘the judge, jury, and defendant are able to view ... the demeanor (and body) of the witness as he or she testifies.’ ” (*Arredondo, supra*, at p. 701, quoting *Craig, supra*, at p. 851; accord, *People v. Bharth* (2021) 68 Cal.App.5th 801, 815; see *Craig, supra*, at p. 851 [“Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation – oath, cross-examination, and observation of the witness’ demeanor – adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony.”].)

“In section 1347, the Legislature sought to make closed-circuit television testimony available to child witnesses under circumstances that, in the lawmakers’ view, would preserve a defendant’s Sixth Amendment confrontation rights as outlined in *Craig*.” (*Powell, supra*, 194 Cal.App.4th at p. 1282.) Section 1347, subdivision (a) provides:

“It is the intent of the Legislature in enacting this section to provide the court with discretion to employ alternative court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant or defendants against the need to protect a child witness and to preserve the integrity of the court’s truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in an individual case present compelling evidence of the need to use these alternative procedures.”

Section 1347, subdivision (b) provides in pertinent part:

“Notwithstanding any other law, the court in a criminal proceeding, upon written notice by the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the course of the proceeding on the court’s own motion, may order that the testimony of a minor 13 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television, if the court makes all of the following findings:

“(1) The minor’s testimony will involve a recitation of the facts of any of the following: [¶] (A) An alleged sexual offense committed on or with the minor. [¶] ... [¶]

“(2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (E), inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit testimony is used. [¶] (A) Testimony by the minor in the presence of the defendant would result in the child suffering serious emotional distress so that the child would be unavailable as a witness. [¶] ... [¶]

“In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor’s refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary to obtain the minor’s testimony.

“(3) The equipment available for use of closed-circuit television would accurately communicate the image and demeanor of the minor to the judge, jury, defendant or defendants, and attorneys.”

c. Standard of review

“In accordance with th[e] statutory language [of section 1347, subdivision (a)], the applicable standard of review for the trial court’s order allowing defendant’s daughter to testify via closed-circuit television is abuse of discretion.” (*Powell, supra*, 194 Cal.App.4th at p. 1283.) “[I]n determining whether the court abused its discretion, we look for substantial evidence in support of its finding.” (*Id.* at p. 1284, fn. 6; see *People v. Aispuro* (2007) 157 Cal.App.4th 1509, 1511 [“For evidence to be ‘substantial’ it must be of ponderable legal significance, reasonable in nature, credible and of solid value.”].) “[W]hen reviewing a [finding] under the substantial evidence standard, ‘an appellate court should defer to the factual determinations made by the trial court’ [Citations.]” (*People v. Vivar* (2021) 11 Cal.5th 510, 528, fn. 7.)

d. Analysis

In the instant case, at a pretrial hearing on the prosecution’s section 1347 motion, Ashley described S.M.’s alarming reactions to the mere idea of testifying against defendant, including throwing temper tantrums, threatening suicide, and inflicting self-harm. She testified that S.M. still loved and missed defendant and feared that her testimony would lead to her father’s imprisonment. Ashley worried that S.M. would “breakdown” if she had to testify in defendant’s proximity. Although the court gave “great weight” to Ashley’s testimony and remarked that it “could see where this could be a situation causing [S.M.] serious emotional distress,” it denied the motion without prejudice because it “c[ould]n’t impose the restrictions or the procedures set up under [section 1347]” “until [it] kn[e]w for certain” that defendant’s presence would traumatize S.M. and “c[ould]n’t make that final determination yet.” The court informed the parties that it would “have a very short leash” at trial and order the use of closed-circuit television if S.M. “will not even enter the courtroom,” “comes in here and won’t take the oath,” “[i]s just going to sit here and sob,” and/or “[i]s a hysterical mess.” In settling on this arrangement, the court expressly recognized its obligation to balance defendant’s confrontation right against the need to protect S.M.’s welfare. (See § 1347, subd. (a).)

Before the commencement of trial, the court became aware that S.M. refused to enter the courtroom due to defendant's presence. In attempting to "avert the [section] 1347 aspect of this trial," it had the bailiff relocate defendant to a holding cell "behind [a] closed door" for approximately five minutes to let S.M. "come in and at least look at the courtroom" and develop "enough confidence" to testify. During this period, the court observed that S.M., who was accompanied by a CASA representative, "didn't have any problem being in here"; "got on the witness stand" and "appeared to be very much at ease"; and exited the room "skipping." However, when trial commenced and the prosecution called S.M. as its first witness, S.M. once again refused to enter the courtroom. Defense Counsel Sarsfield attested that he heard "an adult female voice" outside the courtroom saying that S.M. was "scared." Following a recess and some coaxing by Deputy District Attorney Wayt, S.M. took the witness stand with the CASA representative by her side. However, on direct examination, she continually stated that she "want[ed] [her] mommy" and wanted to go home and was nonresponsive to questions relating to defendant. The court observed that S.M. "would roll herself up almost into a ball" and "shake her head vigorously." It halted the examination and called another recess. Outside the presence of the jury, the court ordered the use of closed-circuit television. Based on Ashley's testimony at the motion hearing and its own observations of S.M. before and during trial, the court found by clear and convincing evidence that the child would be traumatized by defendant's presence. It rejected Sarsfield's assertion that S.M.'s behavior could just as likely be attributed to being "coached and coerced by her mother into saying things that are not true."

We find no abuse of discretion regarding the manner in which the court determined that use of closed-circuit television was appropriate. While it initially denied the prosecution's section 1347 motion (without prejudice), the court judiciously planned for S.M.'s potential "meltdown" on the witness stand and informed the parties of his intent to order the use of closed-circuit television if that contingency came to pass. We note that the language of section 1347, subdivision (b) explicitly contemplates orders made "during the course of the [criminal] proceeding." (Cf. *Powell, supra*, 194 Cal.App.4th at p. 1278 ["A trial court abuses its discretion when its ruling falls outside the bounds of reason"].) Before the start of trial on day one, S.M. exhibited an unwillingness to testify because of defendant's presence. The court temporarily removed defendant from the courtroom to allow S.M. (with the CASA representative) to visit and acclimate to the setting, an approach that seemed effective. She left the courtroom without incident and defendant was subsequently brought back in. However, when the prosecution called S.M. to the witness stand, she was apparently petrified and refused to enter the courtroom. She was somehow persuaded to take the stand, but her pleas and body language made evident her inability to testify in front of defendant. Substantial evidence, i.e., Ashley's motion hearing testimony and the court's observations of S.M. before and during trial, supported the case-specific findings that S.M. would be traumatized by a face-to-face confrontation with defendant and use of closed-circuit television was necessary to protect her welfare. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 [substantial evidence may consist of trial court's own observations].)

On appeal, defendant asserts that "expert testimony in a separate hearing is generally required" (*italics omitted*) before a court can conclude that "the child would suffer emotional trauma if forced [to] testify in [the accused]'s presence." Nothing on the face of section 1347 supports this claim. (See *People v. Boyd* (1979) 24 Cal.3d 285, 294 ["[W]hen the Legislature intends otherwise, it expresses its purpose in unmistakable words."].)

Defendant mentions Evidence Code section 240, which reads in pertinent part:

“(a) ... ‘[U]navailable as a witness’ means that the declarant is any of the following: [¶] ... [¶] (3) Dead or unable to attend or to testify at the hearing because of then-existing physical or mental illness of infirmity. [¶] ... [¶]

“(c) Expert testimony that establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term ‘expert’ means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of [Evidence Code s]ection 1010.⁹

“The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.”

“The court’s role in construing a statute is to ‘ascertain the intent of the Legislature so as to effectuate the purpose of the law.’ [Citations.] In determining the Legislature’s intent, a court looks first to the words of the statute. [Citation.] ‘[I]t is the language of the statute itself that has successfully braved the legislative gauntlet.’ [Citation.] [¶] When looking to the words of the statute, a court gives the language its usual, ordinary meaning. [Citations.] If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs. [Citations.]” (*People v. Snook* (1997) 16 Cal.4th 1210, 1215.) Here, subdivision (c) of Evidence Code section 240 states that expert testimony “may” constitute a sufficient showing of unavailability. “Absent any indicia of a contrary legislative intent, the word ‘shall’ is ordinarily construed as mandatory, whereas ‘may’ is ordinarily construed as permissive. [Citation.] This is especially so where both ‘shall’ and ‘may’ are used in the same statute. [Citations.]” (*In re J.N.* (2006) 138 Cal.App.4th 450, 457, fn. 4; see *People v. Alcala* (1992) 4 Cal.4th 742, 780 [rejecting the defendant’s contention that a witness’s unavailability on the basis of mental infirmity could be established only by expert medical evidence and not by the testimony of said witness].) We are also unpersuaded by the cases cited in defendant’s brief, which either (1) predated the enactment of section 1347, which took effect on May 20, 1985 (*Seering v. Department of Social Services* (1987) 194 Cal.App.3d 298, 306, fn. 3); (2) are from out of state and have no binding effect on California courts (see *People v. Troyer* (2011) 51 Cal.4th 599, 610); (3) were factually inapposite; and/or (4) did not stand for the proposition that section 1347 findings must be premised on expert testimony.

Myers, 2021 WL 6050630, at *3–13 (footnotes in original).

The Sixth Amendment’s Confrontation Clause, made applicable to the states by the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403 (1965), provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses

⁹ Subdivisions (b), (c), and (e) of Evidence Code section 1010 refer to licensed psychologists, licensed clinical social workers engaged in applied psychotherapy of a nonmedical nature, and licensed marriage and family therapists, respectively.

1 against him,” U.S. Const. amend. VI. “[T]he Confrontation Clause guarantees the defendant a
 2 face-to-face meeting with witnesses appearing before the trier of fact.” Coy v. Iowa, 487 U.S.
 3 1012, 1016 (1988). The Supreme Court “ha[s] never held, however, that the Confrontation
 4 Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses
 5 against them at trial.” Maryland v. Craig, 497 U.S. 836, 844 (1990).

6 [I]f the State makes an adequate showing of necessity, the state interest in
 7 protecting child witnesses from the trauma of testifying in a child abuse case is
 8 sufficiently important to justify the use of a special procedure that permits a child
 witness in such cases to testify at trial against a defendant in the absence of face-
 to-face confrontation with the defendant.

9 Craig, 497 U.S. at 855. “The requisite finding of necessity must of course be a case-specific one:
 10 The trial court must hear evidence and determine whether use of the one-way closed circuit
 11 television procedure is necessary to protect the welfare of the particular child witness who seeks
 12 to testify.” Id. “The trial court must also find that the child witness would be traumatized, not by
 13 the courtroom generally, but by the presence of the defendant.” Id. at 856. “Finally, the trial
 14 court must find that the emotional distress suffered by the child witness in the presence of the
 15 defendant is more than *de minimis*, *i.e.*, more than ‘mere nervousness or excitement or some
 16 reluctance to testify[.]’” Id.

17 The Court finds that the appellate court’s denial of the Confrontation Clause claim was
 18 not objectively unreasonable. The trial court heard evidence at a pretrial hearing on the
 19 prosecution’s section 1347 motion. The trial court also personally observed S.M., noting that
 20 when S.M. was brought into the courtroom outside Petitioner’s presence, “she didn’t have any
 21 problem being in here. She got on the witness stand. She felt – appeared to be very much at ease.
 22 In fact, when she left, she was skipping.” (5 RT 180–81.) In contrast, when S.M. was called to
 23 the witness stand, “she would roll herself up almost into a ball, shake her head vigorously,” and
 24 the “only thing that changed . . . is the presence of” Petitioner. (5 RT 179, 181.) The trial court
 25 heard evidence, determined that S.M. would be traumatized by the presence of Petitioner, and
 26 found that the emotional distress suffered by S.M. in the presence of Petitioner was more than *de*
 27 *minimis*—meeting the requirements of Craig with respect to the finding of necessity.

28 ///

Petitioner appears to argue that to satisfy “the *Craig* standard” “there must be a specific finding that one-way CCTV is necessary to protect the child witness and obtain the testimony rather than two-way CCTV.” (ECF No. 26 at 15.) Although that may be required under California Penal Code section 1347,¹⁰ such a finding is not required by *Craig* or federal constitutional law. In fact, the Supreme Court specifically “decline[d] to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure,” such as a requirement to “explore less restrictive alternatives to the use of the one-way closed circuit television procedure.” *Craig*, 497 U.S. at 860.

If the child witness “testified under oath, w[as] subject to full cross-examination, and w[as] able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.” *Craig*, 497 U.S. at 857. Here, S.M. testified under oath, was subject to cross-examination, and was able to be observed by the judge, jury, and Petitioner as she testified. Petitioner contends that any cross-examination was rendered “essentially meaningless.” (ECF No. 1 at 66.) However, “the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original).

Petitioner has not demonstrated that “no ‘fairminded juris[t]’ could have reached the same judgment as the state court.” *Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (alteration in original) (quoting *Harrington*, 562 U.S. at 102). Accordingly, the Court finds that the state court’s rejection of the Confrontation Clause claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of fact. The decision was not “so lacking in justification that there was an error well understood

¹⁰ To the extent Petitioner asserts that the trial court failed to comply with California Penal Code section 1347, the Court finds that such a claim is an issue of state law that is not cognizable in federal habeas corpus. See *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) (“[I]t is only noncompliance with federal law that renders a State’s criminal judgment susceptible to collateral attack in the federal courts.”); *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”)

and comprehended in existing law beyond any possibility for fairminded disagreement.” Richter, 562 U.S. at 103. Therefore, Petitioner is not entitled to habeas relief on his first claim, and it should be denied.

B. Due Process and Fair Trial

In his second claim for relief, Petitioner asserts that the trial court violated his right to due process and a fair trial with respect to the following aspects of its handling of S.M. as a witness:

when it failed to follow the procedures set forth in *Craig*, supra, and California Penal Code section 1347; denied Petitioner an opportunity to determine whether S.M. should testify at all at trial because she was an unavailable witness (*Cal. Evid. Code* § 240(a)(3), (6) and (c)), or not competent to testify (*Cal. Evid. Code* § 701, subd. (a)(1), (2)), before ruling whether she should testify via CCTV; denied Petitioner’s request for discovery of the identities and reports of the counsel’s or therapists treating S.M. to determine the availability and competency as a witness and to determine why S.M. could not testify in court;¹¹ compelled S.M. to testify before the jury to determine her availability and whether she should testify via CCTV; and failed to declare a mistrial after S.M.’s two emotional outbursts in front of the jury.

(ECF No. 1 at 28.) Respondent argues that the state court was not objectively unreasonable in rejecting the fair trial claim. (ECF No. 23 at 34.)

The California Court of Appeal denied the fair trial claim in a reasoned opinion. The California Supreme Court summarily denied Petitioner’s petition for review. As federal courts review the last reasoned state court opinion, the Court will “look through” the summary denial and examine the decision of the California Court of Appeal. See Wilson, 584 U.S. at 125.

In denying the fair trial claim, the California Court of Appeal stated:

Incongruously, defendant—who sought to maintain a physical, face-to-face confrontation with S.M. by virtue of his opposition to the prosecution’s section 1347 motion—suggests that the court should not have had S.M. testify in the

¹¹ A petitioner in state custody who is proceeding with a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). A petitioner can satisfy the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider each claim before presenting it to the federal court. *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 276 (1971). To provide the highest state court the necessary opportunity, the petitioner must “fairly present” the claim with “reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief.” *Duncan*, 513 U.S. at 365; *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). “Fair presentation requires that the petitioner ‘describe in the state proceedings both the operative facts and the federal legal theory on which his claim is based so that the state courts have a “fair opportunity” to apply controlling legal principles to the facts bearing upon his constitutional claim.’” *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008) (citation omitted). To the extent Petitioner asserts a fair trial claim with respect to the denial of an opportunity to determine whether S.M. should testify at all at trial because she was an unavailable witness or not competent to testify and the denial of Petitioner’s discovery request, the Court previously found these alleged errors were “not mentioned at all in the petition for review filed in the California Supreme Court.” (ECF No. 19 at 6.) The Court cannot grant habeas relief on unexhausted claims. See 28 U.S.C. § 2254(b)(1).

courtroom “because witnessing the emotional state of an eight year old child on the witness stand repeatedly calling out for her mommy, expressing fear, and literally begging to go home, forever tainted this jury from the inception of trial thereby fundamentally and prejudicially altering the integrity of the trial and the due process to which [he] was entitled.” Defendant is not entitled to “have his cake and eat it too.” (*People v. Borland* (1996) 50 Cal.App.4th 124, 127.)¹²

Myers, 2021 WL 6050630, at *14 (footnote in original).

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. The rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process.” Chambers v. Mississippi, 410 U.S. 284, 294 (1973). “The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment,” such as the Confrontation Clause. Strickland v. Washington, 466 U.S. 668, 684–85 (1984). Therefore, to the extent Petitioner’s fair trial claim is based on the procedure used by the trial court regarding S.M.’s testimony, the Court finds that the state court was not objectively unreasonable in denying the claim for the reasons set forth in section IV(A), *supra*. See Caplin & Drysdale v. United States, 491 U.S. 617, 633 (1989) (stating the Court is “not sure that” a Fifth Amendment argument “adds anything to petitioner’s Sixth Amendment claim” or that “the Fifth Amendment provides some added protection not encompassed in the Sixth Amendment’s more specific provisions”).

With respect to the trial court’s failure to declare a mistrial after S.M.’s emotional testimony in the courtroom, the Supreme Court has “explained that trial judges may declare a mistrial ‘whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity’ for doing so,” or “when there is a ‘high degree’ of necessity.” Renico v. Lett, 559 U.S. 766, 773–74 (2010) (some internal quotation marks omitted) (first quoting United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824); and then quoting Arizona v. Washington, 434 U.S. 497, 506 (1978)). “The decision to declare a mistrial is left to the ‘sound discretion’ of the judge, but ‘the power ought to be used with the greatest caution, under urgent circumstances,

¹² Having examined the merits, we need not address (1) the Attorney General’s claim of forfeiture; or (2) defendant’s claim of ineffective assistance of counsel, which is premised on a finding of forfeiture.

and for very plain and obvious causes.” Renico, 559 U.S. at 774 (quoting Perez, 22 U.S. (9 Wheat.) at 580). “Because judicial application of a general standard ‘can demand a substantial element of judgment,’ the more general the rule provided by the Supreme Court, the more latitude the state courts have in reaching reasonable outcomes in case-by-case determinations.” Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). “In turn, the state courts’ greater leeway in reasonably applying a general rule translates to a narrower range of decisions that are objectively unreasonable under AEDPA.” Cheney, 614 F.3d at 995. Accord Renico, 559 U.S. at 776 (“Because AEDPA authorizes federal courts to grant relief only when state courts act *unreasonably*, it follows that ‘[t]he more general the rule’ at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—the more leeway [state] courts have in reaching outcomes in case-by-case determinations.” (quoting Yarborough, 541 U.S. at 664)).

Here, apart from S.M.’s testimony, the other evidence admitted at trial included S.M.’s CART interview in which she stated that Petitioner made her “suck on” his “pee pee” one time, tried to force her to do it “lots of times,” and touched her “pee pee” over her clothes multiple times, telling her “[i]t feels good” but “to keep it secret,” (2 CT 425–26, 430–31; 6 RT¹³ 475–77); S.M.’s mother testimony about S.M.’s disclosures that Petitioner touched S.M. inappropriately, gesturing that Petitioner had rubbed her vagina, and that Petitioner “tried to make her do this,” gesturing “[w]ith a hand in a circular motion moving back and forth towards the mouth,” (6 RT 355–56); and one image of child pornography and eighty-one images of child exploitation and child erotica found on Petitioner’s computer, (8 RT 794–95, 812–22). Additionally, the jury was specifically instructed on how to evaluate a child’s testimony and explicitly told not to let bias or sympathy influence their decision. (2 CT 540, 521.) “[U]nder Supreme Court precedent, a jury is presumed to follow the trial court’s instructions.” Deck v. Jenkins, 814 F.3d 954, 979 (9th Cir. 2016) (citing Weeks v. Angelone, 528 U.S. 225, 234 (2000)). Petitioner presents no evidence suggesting that the jury departed from the trial court’s instructions. In light of the other evidence admitted at trial and the trial court’s instructions, and

¹³ “RT” refers to the Reporter’s Transcript on Appeal lodged by Respondent. (ECF No. 24.)

1 given that a “narrower range of decisions . . . are objectively unreasonable under AEDPA” due to
 2 the general standard governing mistrials, the state court was not objectively unreasonable in
 3 denying the fair trial claim based on the trial court’s failure to declare a mistrial after S.M.’s
 4 emotional testimony in the courtroom.

5 Further, to the extent Petitioner asserts that S.M.’s emotional testimony in the courtroom
 6 was so prejudicial as to violate due process, the Court finds Petitioner is not entitled to habeas
 7 relief. “[T]he admission of evidence in state court is not subject to federal habeas review unless
 8 the admission of the testimony was arbitrary or fundamentally unfair.” Drayden v. White, 232
 9 F.3d 704, 710 (9th Cir. 2000) (internal quotation marks omitted) (quoting Colley v. Sumner, 784
 10 F.2d 984, 990 (9th Cir. 1986)). “Although the [Supreme] Court has been clear that a writ should
 11 be issued when constitutional errors have rendered the trial fundamentally unfair, it has not yet
 12 made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due
 13 process violation sufficient to warrant issuance of the writ.” Holley v. Yarborough, 568 F.3d
 14 1091, 1101 (9th Cir. 2009) (internal citation omitted). Accord Walden v. Shinn, 990 F.3d 1183,
 15 1204 (9th Cir. 2021). “Absent such ‘clearly established Federal law,’ we cannot conclude that
 16 the state court’s ruling was an ‘unreasonable application.’” Holley, 568 F.3d at 1101 (quoting
 17 Musladin, 549 U.S. at 77).¹⁴

18 “[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one,”
 19 Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986), and Petitioner has not demonstrated that “no
 20 ‘fairminded juris[t]’ could have reached the same judgment as the state court,” Shinn, 596 U.S.
 21 at 378 (alteration in original) (quoting Harrington, 562 U.S. at 102). Accordingly, the Court finds
 22 that the state court’s rejection of the fair trial claim was not contrary to, or an unreasonable
 23 application of, clearly established federal law, nor was it based on an unreasonable determination
 24 of fact. The decision was not “so lacking in justification that there was an error well understood
 25 and comprehended in existing law beyond any possibility for fairminded disagreement.” Richter,

26
 27 ¹⁴ Although circuit caselaw is not governing law under AEDPA, this Court must follow Ninth Circuit precedent that
 28 has determined what federal law is clearly established. Byrd v. Lewis, 566 F.3d 855, 860 n.5 (9th Cir. 2009). See
Campbell v. Rice, 408 F.3d 1166, 1170 (9th Cir. 2005) (en banc) (Ninth Circuit “precedents may be pertinent to the
 extent that they illuminate the meaning and application of Supreme Court precedents.”).

562 U.S. at 103. Therefore, Petitioner is not entitled to habeas relief on his second claim, and it should be denied.

V.

RECOMMENDATION & ORDER

Based on the foregoing, the Court HEREBY RECOMMENDS that the petition for writ of habeas corpus be DENIED.

Further, the Court HEREBY ORDERS that Petitioner's request for oral argument (ECF No. 29) is DENIED.

This Findings and Recommendation is submitted to the assigned United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within **FOURTEEN (14) days** after service of the Findings and Recommendation, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within fourteen (14) days after service of the objections. The assigned District Judge will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: July 24, 2024


UNITED STATES MAGISTRATE JUDGE

Anthony James Myers v. Luis Garnica

Petition for Certiorari to the United States Court of Appeals
For the Ninth Circuit (No. 25-6780)

Appendix F

California Statutes:
Cal. Evid Code, §§ 240, 710;
Cal. Penal Code, § 1347

Section 240. "Unavailable as a witness"

Library:	California Evidence Code
Edition:	2026
Currency:	Current through the 2026 Legislative Session.
Citation:	Ca. Evid. Code § 240
Year:	2026

vLex Document Id: VLEX-1103412682

Link: <https://app.vlex.com/vid/section-240-unavailable-as-1103412682>

(a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

- (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
- (2) Disqualified from testifying to the matter.
- (3) Dead or unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity.
- (4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
- (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.
- (6) Persistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony that establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

Cite as Ca. Evid. Code § 240

History: Amended by Stats 2010 ch 537 (AB 1723), s 1, eff. 1/1/2011.

Section 701. Witness incapable of being understood

Library:	California Evidence Code
Edition:	2026
Currency:	Current through the 2026 Legislative Session.
Citation:	Ca. Evid. Code § 701
Year:	2026

vLex Document Id: VLEX-1103412837

Link: <https://app.vlex.com/vid/section-701-witness-incapable-1103412837>

(a) A person is disqualified to be a witness if he or she is:

- (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or
- (2) Incapable of understanding the duty of a witness to tell the truth.

(b) In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness.

Cite as Ca. Evid. Code § 701

History: Amended by Stats. 1985, Ch. 884, Sec. 2.

Ca. Pen. Code § 1347 Alternative Court Procedures Involving a Child Witness

Library:	California Codes
Edition:	2026
Currency:	Current through the 2026 Legislative Session.
Citation:	Ca. Pen. Code § 1347
Year:	2026

vLex Document Id: VLEX-1103776760

Link: <https://app.vlex.com/vid/ca-pen-code-1103776760>

(a) It is the intent of the Legislature in enacting this section to provide the court with discretion to employ alternative court procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising its discretion, the court necessarily will be required to balance the rights of the defendant or defendants against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. This discretion is intended to be used selectively when the facts and circumstances in an individual case present compelling evidence of the need to use these alternative procedures.

(b) Notwithstanding any other law, the court in a criminal proceeding, upon written notice by the prosecutor made at least three days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled, or during the course of the proceeding on the court's own motion, may order that the testimony of a minor 13 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of closed-circuit television, if the court makes all of the following findings:

(1) The minor's testimony will involve a recitation of the facts of any of the following:

- (A) An alleged sexual offense committed on or with the minor.
- (B) An alleged violent felony, as defined in subdivision (c) of Section 667.5.
- (C) An alleged felony offense specified in Section 273a or 273d of which the minor is a victim.

(2) The impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (E), inclusive, is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness unless closed-circuit testimony is used.

- (A) Testimony by the minor in the presence of the defendant would result in the child suffering serious emotional distress so that the child would be unavailable as a witness.
- (B) The defendant used a deadly weapon in the commission of the offense.
- (C) The defendant threatened serious bodily injury to the child or the child's family, threatened incarceration or deportation of the child or a member of the child's family, threatened removal of the child from the child's family, or threatened the dissolution of the child's family in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding, or to prevent the minor from reporting the alleged sexual offense, or from assisting in criminal prosecution.
- (D) The defendant inflicted great bodily injury upon the child in the commission of the offense.
- (E) The defendant or his or her counsel behaved during the hearing or trial in a way that caused the minor to be unable to continue his or her testimony.

In making the determination required by this section, the court shall consider the age of the minor, the relationship between the minor and the defendant or defendants, any handicap or disability of the minor, and the nature of the acts charged. The minor's refusal to testify shall not alone constitute sufficient evidence that the special procedure described in this section is necessary to obtain the minor's testimony.

(3) The equipment available for use of closed-circuit television would accurately communicate the image and demeanor of the minor to the judge, jury, defendant or defendants, and attorneys.

(c) If the court orders the use of closed-circuit television, two-way closed-circuit television shall be used, except that if the impact on the minor of one or more of the factors enumerated in subparagraphs (A) to (E), inclusive, of paragraph (2) of subdivision (b), is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness even if two-way closed-circuit television is used, one-way closed-circuit television may be used. The prosecution shall give the defendant or defendants at least 30 days' written notice of the prosecution's intent to seek the use of one-way closed-circuit television, unless the prosecution shows good cause to the court why this 30-day notice requirement should not apply.

(d)

(1) The hearing on a motion brought pursuant to this section shall be conducted out of the presence of the jury.

(2) Notwithstanding Section 804 of the Evidence Code or any other law, the court, in determining the merits of the motion, shall not compel the minor to testify at the hearing, nor shall the court deny the motion on the ground that the minor has not testified.

(3) In determining whether the impact on an individual child of one or more of the five factors enumerated in paragraph (2) of subdivision (b) is so substantial that the minor is unavailable as a witness unless two-way or one-way closed-circuit television is used, the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present. The defendant or defendants shall not be present. The court shall conduct the questioning of the minor and shall not permit the prosecutor or defense counsel to examine the minor. The prosecutor and defense counsel shall be permitted to submit proposed questions to the court prior to the session in chambers. Defense counsel shall be afforded a reasonable opportunity to consult with the defendant or defendants prior to the conclusion of the session in chambers.

(e) When the court orders the testimony of a minor to be taken in another place outside of the courtroom, the court shall do all of the following:

(1) Make a brief statement on the record, outside of the presence of the jury, of the reasons in support of its order. While the statement need not include traditional findings of fact, the reasons shall be set forth with sufficient specificity to permit meaningful review and to demonstrate that discretion was exercised in a careful, reasonable, and equitable manner.

(2) Instruct the members of the jury that they are to draw no inferences from the use of closed-circuit television as a means of facilitating the testimony of the minor.

(3) Instruct respective counsel, outside of the presence of the jury, that they are to make no comment during the course of the trial on the use of closed-circuit television procedures.

(4) Instruct the support witness, outside of the presence of the jury, that he or she is not to coach, cue, or in any way influence or attempt to influence the testimony of the minor.

(5) Order that a complete record of the examination of the minor, including the images and voices of all persons who in any way participate in the examination, be made and preserved as a video recording in addition to being stenographically recorded. The video recording shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant or defendants, and his or her attorney during ordinary business hours. The video recording shall be destroyed after five years have elapsed from the date of entry of judgment. If an appeal is filed, the video recording shall not be destroyed until a final judgment on appeal has been ordered. A video recording that is taken pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the witness. This subdivision does not affect the provisions of subdivision (b) of Section 868.7.

(f) When the court orders the testimony of a minor to be taken in another place outside the courtroom, only the minor, a support person designated pursuant to Section 868.5, a nonuniformed bailiff, any technicians necessary to operate the closed-circuit equipment, and, after consultation with the prosecution and the defense, a representative appointed by the court, shall be physically present for the testimony. A video recording device shall record the image of the minor and his or her testimony, and a separate video recording device shall record the image of the support person.

(g) When the court orders the testimony of a minor to be taken in another place outside the courtroom, the minor shall be brought into the judge's chambers prior to the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor, and defense counsel. A support person for the minor shall also be present. This meeting shall be for the purpose of explaining the court process to the child and to allow the attorneys an opportunity to establish rapport with the child to facilitate later

questioning by closed-circuit television. No participant shall discuss the defendant or defendants or any of the facts of the case with the minor during this meeting.

(h) When the court orders the testimony of a minor to be taken in another place outside the courtroom, nothing in this section prohibits the court from ordering the minor to be brought into the courtroom for a limited purpose, including the identification of the defendant or defendants as the court deems necessary.

(i) The examination shall be under oath, and the defendant or defendants shall be able to see and hear the minor witness, and if two-way closed-circuit television is used, the defendant's image shall be transmitted live to the witness.

(j) Nothing in this section affects the disqualification of witnesses pursuant to Section 701 of the Evidence Code.

(k) The cost of examination by contemporaneous closed-circuit television ordered pursuant to this section shall be borne by the court out of its existing budget.

(l) Nothing in this section shall be construed to prohibit a defendant from being represented by counsel during any closed-circuit testimony.

History: Amended by Stats 2015 ch 155 (SB 176),s 1, eff. 1/1/2016.

Amended by Stats 2014 ch 160 (AB 1900),s 3, eff. 1/1/2015.

Amended by Stats 2005 ch 480 (SB 138),s 1, eff. 1/1/2006

Amended by Stats 2000 ch 207 (SB 1715) s 2, eff. 1/1/2001.

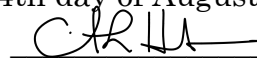
Cite as: Ca. Pen. Code § 1347

Proof of Service

On August 14, 2026, I served (1) the *Petitioner's Motion to Proceed In Forma Pauperis*; (2) supporting *Affidavit or Declaration of Anthony Myers*; and (3) *Petition for Certiorari to the Ninth the Circuit Court of Appeals (No. 25-6780) in Myers v. Garnica* on the opposition party, LUIS GARNICA, through his Attorney of Record in the circuit court, via email and the United States Postal Service, in a postage prepaid envelope, addressed as follows:

**Attorney General of the State of California,
Attention: D.A.G. Charity Whitney
2550 Mariposa Mall, Rm. 5090,
Fresno, CA 93721
Email: Charity.Whitney@doj.ca.gov**

I, CHRISTOPHER L. HABERMAN, swear that the above and foregoing is true and correct under penalty of perjury under the laws of the United States this 14th day of August, 2026 at Visalia, California.



CHRISTOPHER L. HABERMAN