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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff,** **vs.** **John Yablonsky** **Defendant.**	**CASE NO. FSB1104036** **NOTICE OF MOTION FOR CONTINUANCE; DECLARATION IN SUPPORT OF MOTION PURSUANT TO PENAL CODE §1050**

TO: CLERK OF THE COURT, THE HONORABLE JAMES TAYLOR, DEFENDANT VIA MAIL AND HAND DELIVERY:

PLEASE TAKE NOTICE THAT on JUNE 27, 2025, at 8:30AM, in Department V-3, the People will move the court to grant a continuance of the hearing set for June 27, 2025, and that the continuance to a date and time agreeable to DEFENDANT of no less than eight weeks.

This motion is based on this notice, the pleadings, files and records in this action, and the declaration filed in support of this motion, and on evidence that may be addressed at the hearing on the motion.

Dated: June 23, 2025

Michael Fermin
Chief Assistant District Attorney

DECLARATION OF MICHAEL FERMIN:

I, Michael Fermin, do hereby declare:

That I am a Deputy District Attorney for the above-named plaintiff;

That this case is presently set for hearing pursuant to Penal Code section 1172.6, on June 27, 2025;

I previously filed my opposition to the defendant's motion pursuant to Penal Code section 1170.95 on January 26, 2024;

That a continuance of the hearing to September 19, 2025 is necessary because:

Subsequent to the filing of my opposition, the defendant has filed myriad motions which do not fall within the purview of Penal Code section 1172.6;

Additionally, many of the arguments made in this subsequent briefing by the defendant were made in prior state and federal claims post conviction, including but not limited to: *People v. Yablonsky* (2013) 2013 WL 6271920, Fourth District Court of Appeal, Division 2, *Yablonsky v. Montgomery* (2016) 2016 WL 807960, United States District Court, C.D. California, *Yablonsky v. Ramos* (2018) 2018 WL 1358161, Fourth District Court of Appeal, Division 2, *Yablonsky v. Canty* (2019) 2019 WL 3492488, Fourth District Court of Appeal, Division 2. Additionally, some of the briefing comes from the seven Writ of Habeas Corpus Filings with the Court (WHCJS1600370, WHCJS1700062, WHCJS1800338, WHCSS1100559, WHCSS1200311, WHCSB2300326, and WHCSB2500124).

That the myriad motions do not fall within the ambit of Penal Code section 1172.6, I nevertheless feel compelled to answer them in before the court makes a ruling on the prima facie determination else the court loses jurisdiction on the issue if the court were to rule against the defendant on his petition.

I will need additional time to review all his filings, compare them with the court opinions previously made on the case (and attached hereto), and respond to each motion.

That I was neither the trial deputy nor litigant in those matters, additional time is needed for me to address them.

Executed this 23rd day of June, 2025 at San Bernardino, California.

I declare under penalty of perjury that the foregoing is true and correct of my own knowledge.

Michael Fermin
Chief Assistant District Attorney

SAN BERNARDINO COUNTY
OFFICE OF THE DISTRICT ATTORNEY
PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss. **FVI900518**
COUNTY OF SAN BERNARDINO)

Kimberly Fuller says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is 303 W. Third St, San Bernardino CA 92415.

That on June 23, 2025, I served the within:

NOTICE OF MOTION FOR CONTINUANCE; DECLARATION IN SUPPORT OF MOTION PURSUANT TO PENAL CODE §1050

on interested parties by sending a copy thereof via **U.S. Mail**, addressed as follows:

John Yablonsky – Booking #2309342444
West Valley Detention Center
9500 Etiwanda Avenue
Rancho Cucamonga, CA 91739

I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on June 23, 2025.

Kimberly Fuller, Declarant

2018 WL 1358161
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Fourth District, Division 2, California.

John Henry YABLONSKY, Plaintiff and Appellant,
v.
Michael RAMOS, et al., Defendants and Respondents.

E065773
|
Filed 3/16/2018

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed. (Super.Ct.No. CIVDS1506664)

Attorneys and Law Firms

John Henry Yablonsky, in pro. per., for Plaintiff and Appellant.

Michelle D. Blakemore and Jean–Rene Basle, County Counsel, Matthew J. Marnell, Deputy County Counsel, for Defendants and Respondents.

OPINION

MILLER, Acting P. J.

***1** Plaintiff and appellant John Yablonsky was found guilty of the first degree murder of Rita Cobb. In September 1985, Cobb was discovered nude and strangled by a hanger in her bedroom. A DNA sample taken from her vagina was matched to Yablonsky's DNA in 2009. Yablonsky was sentenced to life without the possibility of parole. Yablonsky's conviction was affirmed on appeal by this court in 2013. (*People v. Yablonsky* (Dec. 4, 2013, E055840) [nonpub. opn.] [2013 Cal.App.Unpub. LEXIS 8800, 2013 WL 6271920].)[1] Review was denied by the California Supreme Court in 2014. Yablonsky's habeas corpus petitions filed in the state courts attacking his conviction were unsuccessful and he remained incarcerated.

On December 24, 2015, he filed his first amended complaint against defendants and respondents Michael Ramos, David Sanders and John Thomas (collectively, Defendants) on the grounds of negligence, professional negligence and violation of his federal Constitutional rights.[2] Ramos, who at the time of Plaintiff's conviction was the District Attorney of San Bernardino County; Sanders, who represented Yablonsky at his trial; and Thomas, who was the deputy district attorney who prosecuted Yablonsky's case, filed a demurrer. Yablonsky's request for a continuance to file opposition to the demurrer was denied.

The trial court granted the demurrer finding that the causes of action against Ramos and Thomas were all based on their actions prosecuting Yablonsky and they were immune pursuant to Government Code section 821.6. The trial court also granted the demurrer as to Sanders on the ground that each of the causes of action alleged against him were based on malpractice and Yablonsky had failed to show that he had obtained the required postconviction relief required to bring a malpractice claim.

Yablonsky filed this appeal appearing to argue that the trial court erred by denying his request for a continuance to oppose the demurrer and that the demurrer should have been denied.

FACTUAL AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

In September 1985, Rita Cobb's decomposing body was found by her son in her bedroom in her Lucerne Valley home. She was nude and had been strangled by a hanger. No suspect was found at the time. Semen was found in her vagina. DNA tests were performed on the semen in 1999 but no match was found. In 2003, the DNA was once again tested and at some point matched to Yablonsky. In 2009, Yablonsky was interviewed. He lived in Long Beach but advised interviewing San Bernardino County Sheriff's Detectives Rob Alexander and Greg Myler that in 1985, he and his wife rented a back house on Cobb's property in Lucerne Valley. When Yablonsky denied having sexual relations with Cobb, or any type of intimate relationship with her, he was arrested for her murder. (*People v. Yablonsky*, *supra*, E055840 at pp. *2–4.)

B. PROCEDURAL HISTORY

1. *BACKGROUND*

***2** Yablonsky was found guilty of first degree murder and sentenced to life without the possibility of parole. In his first appeal in this court, he raised several issues, including that he was denied his right to present third-party culpability evidence and evidence regarding Cobb's promiscuous lifestyle; the exclusion of evidence that a person named William Backhoff had been bragging about murdering Cobb in 1988; the trial court erred by denying his motion for new trial based on ineffective assistance of counsel; instructional error; and improper denial of his motion to recuse the San Bernardino County District Attorney's office and denial of his request to change venue. He sought the change of venue and recusal on the ground that prior to his trial, Ramos had sent out fliers in connection with his reelection campaign with Yablonsky's photograph, stating he had finally been caught due to the cold case division started by Ramos. Yablonsky's conviction was affirmed and review in the California Supreme Court was denied. His state court habeas petitions attacking his conviction were also denied.

On February 3, 2015, Yablonsky filed a federal civil rights complaint pursuant to Title 42 United States Code section 1983 in *Yablonsky v. Ramos, et. al.*, case No. CV15–00197. He brought the action against Defendants due to illegal interrogation, use of altered evidence, and based on Ramos sending out the offending fliers. His causes of action were based on violations of his Fourth, Fifth, Sixth and Fourteenth Amendment rights. The federal court dismissed the first complaint with leave to amend on the grounds that to the extent his claims implicated the validity of his conviction, they were barred based on his conviction not being first overturned, and many of the persons named were entitled to immunity.

Yablonsky filed an amended complaint. The federal court issued an order that the gravamen of his claims in the amended complaint was that he was wrongfully convicted of Cobb's murder; specifically, the claims that Ramos tainted the jury pool by sending out fliers, the admission of altered evidence and Sanders's failure to adequately defend him. The federal court ruled that unless Yablonsky could show reversal of his conviction, he could not bring the Title 42 United States Code section 1983 action. Yablonsky was admonished that if he did not file a timely third amended complaint, the action would be dismissed with prejudice.

On November 25, 2015, Yablonsky moved to have the entire action in federal court dismissed without prejudice. He claimed that he had a stroke on October 11, 2015, and that he was having vision problems. He would be unable to timely file a third amended complaint. The motion was granted on December 3, 2015.

2. *COMPLAINT AND FIRST AMENDED COMPLAINT*

Yablonsky filed his original complaint in the trial court on May 11, 2015. He named Michael Ramos, John Thomas, John Doe, Robert Alexander, Greg Myler, David Sanders and Captain Wickham. A demurrer was filed on September 3, 2015, arguing it was not timely based on the requirement that notice be given to the County before such an action could be filed and then a timely filed complaint must be filed. Yablonsky filed opposition on October 21, 2015. After a hearing conducted on November 30, 2015, the trial court sustained the demurrer on the ground that Yablonsky's claims appeared to be time barred unless Yablonsky could plead facts to support a delay in filing. Yablonsky was given 30 days to file an amended complaint.

On December 24, 2015, Yablonsky filed his first amended complaint (FAC). He stated that his causes of action were for "CIVIL RIGHTS LOSS." He sought $500,000,000 in damages. He named as respondents Michael Ramos, prosecutor; David Sanders, his counsel; Geoffery Canty, legal counsel; Phil Zywiciel, legal counsel; Mark Shoup, legal counsel; Robert Alexander, San Bernardino County Sheriff's Detective; Greg Myler, sheriff's detective; Don Boldt; Captain Wickham; "Defendant sheriff of the county (john doe)"; and John Thomas.

In the first portion of the FAC, he set forth facts showing his diligence in bringing the claims. He insisted he was never given all of the records in the case and could not bring the claims until he obtained the necessary records. He also attached a declaration in support of tolling under Code of Civil Procedure section 338, subdivisions (d) and 340.6, subdivision (3) and numerous exhibits in regard to his diligence in bringing the action.

***3** As for the facts, Yablonsky alleged that on March 8, 2009, Detective Alexander, assisted by Detective Myler, interrogated Yablonsky in his home. They then transported him to the local police station where they continued their interrogation. They arrested Yablonsky. After the interrogation, the recordings were transcribed at the direction of Thomas. Yablonsky stated the transcriptions were altered numerous times by Alexander at the direction of Thomas. Ramos and Sanders assisted or were aware of the alterations.

Yablonsky's legal counsel—Sanders, Shoup, Canty and Zywiciel—hid the changes to the transcript from him. Canty, who first represented him, hid evidence from him despite Yablonsky asking for all of the discovery. Sanders, his second counsel, also hid discovery from him against the rules of professional conduct. This included information regarding William Backhoff who Yablonsky claimed was the true killer. Sanders also withheld reports from him. Yablonsky alleged that Shoup was the supervisor of Sanders and instructed his attorneys. Zywiciel had represented Yablonsky when Sanders got ill.

Yablonsky further claimed that Sanders failed to conduct appropriate investigation into the DNA evidence including a red hair found on Cobb's body and DNA on cigarette butts in the house; and investigate further defense witnesses. Sanders rested the case without Yablonsky making a decision whether to testify.

Yablonsky further alleged that Ramos was the District Attorney for the San Bernardino County District Attorney's Office. John Thomas was the deputy district attorney assigned to Yablonsky's case. Ramos, prior to Yablonsky's trial, printed flyers to be distributed to residents of San Bernardino County where he was running for reelection as district attorney. The flyers depicted a photograph of Yablonsky along with the information that a suspect was arrested in the cold case involving Cobb. It extolled Ramos's efforts in the cold case division and that Cobb's family would finally have closure. Sanders did not adequately address the issue prior to Yablonsky's trial.

Yablonsky's first cause of action for "to be secure in person" and "negligence" was against Detectives Myler and Alexander. Yablonsky alleged they improperly interrogated him. This violated his state and federal Constitutional rights. He continued to suffer irreparable harm due to the actions of Myler and Alexander.

Yablonsky's second cause of action was for negligence. It named Detectives Myler and Alexander, sheriff of the San Bernardino County Sheriff's office, Thomas, Sanders, Ramos and Shoup. They violated his Fifth and Fourteenth Amendment rights against self "compulsion," due process and equal protection. They also violated his rights under the state Constitution. The violation was based on the presentation of the interrogation to the jury, which caused him irreparable harm.

Yablonsky's third cause of action was for negligence and "right of access to court." He named Sanders, Shoup, Captain Wickham and Boldt. His First, Sixth and Fourteenth Amendment rights under the federal Constitution were violated and his state Constitutional rights were violated. The jail officials blocked access to his attorney and other public officials. Sanders and Shoup were aware of the restrictions and did not try to remedy the situation. Yablonsky would continue to suffer his loss of rights.

Yablonsky's fourth cause of action was for "negligence, false light, libel [and] equal protection of the laws." Yablonsky alleged violations of his Fourteenth Amendment rights under the federal Constitution and the equal protection clause. He also raised violations of his state Constitutional rights. This cause of action was based on Ramos distributing flyers to voters in his campaign depicting Yablonsky's photograph and stating he had been arrested for Cobb's murder. Yablonsky would continue to suffer a loss of his rights.

***4** Yablonsky's fifth cause of action was based on negligence, professional negligence and right to an impartial jury. He named Defendants, Shoup and Detective Alexander. He alleged violations of his Fifth, Sixth and Fourteenth Amendment rights under the federal Constitution and his state Constitutional rights. He alleged that by Ramos sending out the flyers, his rights to an impartial jury were violated. Sanders and Shoup violated his rights by scheduling a trial in front of a biased jury.

Yablonsky's sixth cause of action was for negligence, professional negligence, due process of law and equal protection. He alleged violations of the Fifth and Fourteenth Amendments of the federal Constitution and the California Constitution. He named Defendants, Shoup and Detective Alexander. He alleged fabrications of evidence.

Yablonsky's seventh cause of action was for negligence, professional negligence, right of access to counsel and equal protections of laws. He alleged violations of the Fifth, Sixth and Fourteenth Amendment under the federal Constitution and under the state Constitution. He named Shoup, Sanders, Canty and Zywiciel. This cause of action related to the failure to advise Yablonsky of all of the discovery in the case. His counsel violated rules of professional conduct and caused him irreparable harm, including his loss of rights.

Yablonsky then provided a list of Penal Code and Evidence Code violations committed by Defendants.

3. *DEMURRER*

On January 21, 2016, Defendants filed a demurrer to the FAC. They alleged that all of the causes of action were barred under the doctrine of judicial estoppel. Yablonsky had pursued the same claims in the federal court and twice had his complaint dismissed by the federal court. Yablonsky then dismissed his action in the federal court prior to filing a third amended complaint advising the federal court that he was too sick to pursue the matter. Defendants further alleged that all of the causes of action were uncertain as it was not clear whether they arose from a civil rights action under Title 42 United States Code section 1983 or a state tort action.

Defendants also contended that any action under Title 42 United States Code section 1983, and any state negligence claim, should be dismissed as Yablonsky had not shown by sufficient facts that his conviction was reversed on appeal or otherwise reversed. This was an element of both of these types of claims. His claims were not cognizable. Yablonsky's claims of professional negligence were not cognizable because he had to prove exoneration by postconviction relief as an element of the cause of action. Further, any causes of action against the prosecutors of his case lacked merit because under both state and federal law they were entitled to immunity.

On January 21, 2016, along with the demurrer, Defendants submitted a request for judicial notice of the filing of the civil rights complaint and amendments pursuant to Title 42 United States Code section 1983 by Yablonsky in the federal court. On February 3, 2016, Yablonsky filed an intent to oppose defendants' demurrer. No opposition was filed.

On February 22, 2016, Yablonsky filed a request for a continuance to file his opposition to March 29, 2016. He stated he had limited access to the law library and his vision problems made it difficult to review materials.

C. RULING

The matter was heard on February 29, 2016. The trial court stated that it had considered the demurrer of Defendants to the FAC. The court had read the moving papers and the "opposition." Yablonsky inquired about the continuance requested. The trial court denied the motion for continuance. Yablonsky argued that he had only just started researching his opposition to the demurrer but due to his vision problems was having trouble completing his opposition. Yablonsky insisted that the opposition he intended to file would cause the trial court to overrule the demurrer. The trial court stated, "Thank you very much, Mr. Yablonsky. Anything else?" Yablonsky stated there was nothing else. The matter was submitted.

***5** The court's written ruling was as follows: "The Court SUSTAINS the demurrers of Mr. Ramos and Mr. Thomas to the First Amended Complaint (FAC), without leave to amend, on the ground that plaintiff's causes of action alleged against those defendants are based on their actions in initiating and prosecuting the criminal action against plaintiff and those defendants are thus immune from liability pursuant to Government Code section 821.6. The Court SUSTAINS Mr. Sander's demurrer to the FAC, without leave to amend, on the ground that each of the causes of action alleged against Mr. Sanders sound in malpractice and plaintiff fails to show that he has obtained the required post-conviction relief." Judgment was entered dismissing the case on March 18, 2016.

On March 4, 2016, Yablonsky filed a motion to reconsider the ruling on the demurrer. He argued that judicial estoppel did not apply to the case because he was addressing different state and federal actions. Further, the prosecutors did not have immunity for their actions. The trial court also erred by refusing to grant his request for a continuance to file the opposition.

On March 16, 2016, Defendants filed opposition to the motion for reconsideration. Defendants stated it was not clear if Yablonsky was seeking reconsideration of the denial of his request for a continuance, which was filed on February 22, 2016, or whether he was seeking reconsideration of the demurrer. The motion for reconsideration should be denied. Yablonsky failed to present valid evidence that the continuance should have been granted. He argued he had suffered a stroke but provided no medical evidence. Further, he presented no new evidence that would support reconsidering the demurrer.

On March 28, 2016, Yablonsky filed a reply to the opposition. He contended he should have been granted a continuance to file opposition to the demurrer because he needed more time to research. He claimed to have limited access to the law library and suffered from double vision requiring more time to review documents.

On April 14, 2016, Yablonsky filed his notice of appeal. Based on Yablonsky filing his notice of appeal, the motion for reconsideration was stayed pending appeal.

DISCUSSION

Yablonsky entitles his appeal "Plaintiffs appeal regarding ruling of demurrer filed by said defendants Ramos, Thomas, Sanders of hearing date February 29, 2017 sustaining demurrer without allowing Plaintiff opportunity to file opposition." Most of Yablonsky's brief is unintelligible. However, it does appear he is arguing that the fact he was granted the opportunity to file the FAC included that he had a right to file his opposition. This appears to be an argument that the trial court erred by denying a continuance to file his opposition.

In addition, it appears Yablonsky is arguing Ramos violated his rights guaranteed under the federal Constitution and state statutes by mailing out fliers with his photograph and altering evidence of the interrogation transcripts. Ramos set Yablonsky's trial date to assist Ramos in his election campaign. Thomas violated Yablonsky's federal Constitutional rights and state statutes by altering the interrogation transcripts. Finally, Sanders committed professional negligence by lying about discovery, hiding evidence, and working with the State to alter evidence and keep records from Yablonsky. Yablonsky contends that these parties were not immune from civil liabilities. His argument regarding Title 42 United States Code section 1983 contains numerous misspellings and is incoherent.

A. DENIAL OF CONTINUANCE

Yablonsky appears to contend that the trial court erred by failing to grant his continuance to file opposition to the demurrer. We review the trial court's decision to grant or deny a continuance for abuse of discretion. (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1395.) To obtain a continuance, a party must show good cause. (*Cotton v. StarCare Medical Group, Inc.* (2010) 183 Cal.App.4th 437, 444.)

***6** The trial court did not abuse its discretion in denying Yablonsky's continuance. Yablonsky provided no evidence of his medical condition or what he would present in his opposition. Yablonsky had complained about his medical problems in the federal court in November 2015 insisting he could not file a third amended complaint, but in December 2015, he was able to file the FAC. No good cause for a continuance was shown by Yablonsky. The trial court could decide the case based on the allegations in the FAC and the demurrer without his opposition.

B. GRANT OF DEMURRER

When the trial court has sustained a demurrer without leave to amend, the appellate court will assume as true all facts that may be implied or inferred from those expressly alleged, to determine whether they state a cause of action on any available legal theory. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Although we accept as true all facts properly pled in the complaint, we do not assume the truth of "contentions, deductions or conclusions of law." (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We review the demurrer rulings on a de novo basis. (*Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1363.)

Absent a reasonable possibility that any pleading defects can be cured by amendment, the trial court does not abuse its discretion by denying leave to amend. (*Aubry v. Tri–City Hospital Dist., supra*, 2 Cal.4th at p. 967.) Appellant carries the burden of proving an amendment would cure any defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

Initially, the demurrer was appropriately granted under Code of Civil Procedure section 430.10, subdivision (f), which provides, "The pleading is uncertain. As used in this subdivision, 'uncertain' includes ambiguous and unintelligible." Yablonsky's entire FAC was unintelligible. Although Yablonsky alleged that his causes of action were based on negligence, professional negligence, and violations of his federal Constitutional rights, he provided nothing to support recovery on such theories. The trial court could grant the demurrer based on it being unable to understand the claims raised by Yablonsky.

To the extent that Yablonsky was raising claims that his civil rights were violated, e.g., claims under Title 42 United States Code section 1983, he was not entitled to relief and the trial court did not err by dismissing the FAC without leave to amend. Title 42 United States Code section 1983 provides in pertinent part that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

In *Heck v. Humphrey* (1994) 512 U.S. 477, 486 through 487, the court held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus.... Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Similarly, the California Supreme Court has held, "a state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 893.)

*7 Here, Yablonsky failed to establish that his conviction had been overturned or that if he was successful his conviction would be invalidated. As such, his claims under Title 42 United States Code section 1983 were properly dismissed without leave to amend.

Moreover, to the extent he was raising negligence claims under state law, Ramos and Thomas, as prosecutors, were entitled to immunity. In order for Yablonsky to prevail on his negligence causes of action, he must show that Defendants owed him a legal duty, that they breached that duty, and the breach was a proximate or legal cause of his injuries. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.) Government Code section 821.6 provides, "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." "[Government Code s]ection 821.6 covers the initiation or prosecution of judicial or administrative proceedings where the target may or may not be a state employee. The policy behind section 821.6 is to encourage fearless performance of official duties. [Citations.] State officers and employees are encouraged to investigate and prosecute matters within their purview without fear of reprisal from the person or entity harmed thereby. Protection is provided even when official action is taken maliciously and without probable cause." (*Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1424.)

Government Code section 821.6 is not limited to "conduct occurring during formal proceedings." (*Javor v. Taggert* (2002) 98 Cal.App.4th 795, 808.) " '[I]t also extends to actions taken in preparation for formal proceedings. Because investigation is "an essential step" toward the institution of formal proceedings, it "is also cloaked with immunity." ' " (*Ibid.*) "Under California law the immunity statute is given an 'expansive interpretation' in order to best further the rationale of the immunity, that is, to allow the free exercise of the prosecutor's discretion and protect public officers from harassment in the performance of their duties." (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1292.)

Thomas, who was the prosecuting attorney, clearly was entitled to immunity for claims that he altered transcripts or withheld evidence. Ramos was the District Attorney of San Bernardino County, and as such, was Thomas's supervisor. Claims that the transcripts were altered was clearly within Government Code section 821.6. Broadly interpreting Government Code section 821.6, the fliers were reasonably related to Yablonsky's prosecution as the cold case division was used to initiate the prosecution against Yablonsky. Ramos was entitled to immunity. As such, no negligence claim would be successful.

Yablonsky cites to *Imbler v. Pachtman* (1976) 424 U.S. 409 to support his claim that the prosecutor was not entitled to immunity. This case does not support his claim as the plaintiff in that case had been granted postconviction relief by having his petition for writ of habeas corpus granted. (*Id.* at p. 415.)

To the extent that Yablonsky is claiming malpractice or professional negligence on Sanders's part, he also has failed to show he achieved a reversal of his conviction as required. " ' "[P]ermitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit by his own fraud, or to take advantage of his own wrong, or to found [a] claim upon his iniquity, or to acquire property by his own crime." ' " (*Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 537.) Further, " 'allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict.' " (*Ibid.*) "Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss." (*Id.* at p. 539.)

***8** Yablonsky has not shown that he obtained a reversal of his conviction. As such, he cannot show that he could allege a proper cause of action of malpractice or professional negligence against Sanders.

As stated, it is Yablonsky's burden to prove an amendment would cure any defect. (*Schifando v. City of Los Angeles, supra,* 31 Cal.4th at p. 1081.) Here, Yablonsky has not met his burden of showing how he could amend his FAC to allege a cognizable claim. He certainly was unable to amend his complaint filed on identical grounds in the federal court to raise a cognizable claim. As such, the trial court properly granted the demurrer without leave to amend.

DISPOSITION

The grant of the demurrer without leave to amend is affirmed. The parties are to bear their own costs on appeal.

We concur:

CODRINGTON, J.

SLOUGH, J.

All Citations

Not Reported in Cal.Rptr., 2018 WL 1358161

Footnotes

1 We take judicial notice of the opinion and record in case No. E055840.

2 Defendants are represented by San Bernardino County Counsel. Although Yablonsky named other persons in his action, the only persons who filed a demurrer were Ramos, Thomas and Sanders. Yablonsky only appeals the grant of the demurrer, which he acknowledges was filed only by Defendants. We need only be concerned with Defendants.

2016 WL 807960
Only the Westlaw citation is currently available.
United States District Court, C.D. California.

John Henry YABLONSKY, Petitioner,

v.

Warren L. MONTGOMERY, Warden,[1] Respondent.

Case No. EDCV
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-
01877
-
PA
(DTB)
|
Signed 01/14/2016

Attorneys and Law Firms

John Henry Yablonsky, Calipatria, CA, pro se.

David Delgado-Rucci, Kevin R. Vienna, CAAG – Office of the Attorney General, San Diego, CA, for Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

THE HONORABLE DAVID T. BRISTOW, UNITED STATES MAGISTRATE JUDGE

***1** This Report and Recommendation is submitted to the Honorable Percy Anderson, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05–07 of the United States District Court for the Central District of California.

PROCEEDINGS

On September 4, 2014, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Pet.") in the Eastern District of California, together with a Memorandum of Points and Authorities ("Pet.Mem.") and Attachments ("Pet. Att."). On September 8, 2014, the matter was transferred to the Central District of California. In accordance with the Court's Order Requiring Response to Petition, and after one extension of time, respondent filed an Answer to Petition for Writ of Habeas Corpus ("Ans.") on November 6, 2014, along with a supporting Memorandum of Points and Authorities ("Ans. Mem."). On February 5, 2015, after four extensions of time, petitioner filed his Reply ("Reply") thereto.

Thus, this matter is now ready for decision. For the reasons discussed hereafter, the Court recommends that the Petition be denied.[2]

PROCEDURAL HISTORY

In September 1985, Rita Cobb ("Cobb") was murdered at her home in Lucerne Valley, California. (1 Reporter's Transcript on Appeal ["RT"] 213; 2 RT 480.) The crime went unsolved at that time.

Years later, based on DNA evidence, petitioner was interviewed regarding the murder and on August 6, 2009, the District Attorney of San Bernardino County charged petitioner with the 1985 murder and alleged he committed the murder while engaged in the commission of and/or attempted commission of rape. (1 Clerk's Transcript on Appeal ["CT"] 52–53.) On February 3, 2011, a San Bernardino County Superior Court jury found petitioner guilty of first degree murder. The jury also found true the allegation that the murder was committed while petitioner was engaged in the commission of and/or attempted commission of rape. (1 CT 231–32.) On February 24, 2012, the trial court sentenced petitioner to state prison for the indeterminate term of life without the possibility of parole. (2 CT 413.)

Prior to filing an appeal of his conviction and sentence, petitioner filed a habeas petition in the San Bernardino County Superior Court on June 21, 2012, raising claims generally corresponding to Grounds One Through Seven, Ten through Fifteen, Eighteen through Twenty, Twenty–Six,[3] Twenty–Seven, Twenty–Eight, and Thirty of the Petition herein. (Respondent's Notice of Lodgment ["Lodgment"] No. 6.) The Superior Court requested an informal response to certain claims and requested briefing on whether the petition should be stayed pending resolution of petitioner's appeal. (Lodgment Nos. 7, 9.) In response to the Superior Court's orders, the parties filed their informal briefs. (Lodgment Nos. 8, 10, 11.) On June 12, 2013, the Superior Court declined to stay the proceedings. (Lodgment No. 12.) On July 12, 2013, the Superior Court denied the petition, concluding that it lacked jurisdiction to consider some of the claims and determining that petitioner was not entitled to habeas relief on the remaining claims. (Lodgment No. 13.)

***2** On February 23, 2012, petitioner filed a habeas petition in the California Court of Appeal, raising a claim unrelated to those asserted in the Petition herein. (Lodgment No. 14.) That petition was denied on March 1, 2012. (Lodgment No. 15.)

Petitioner then appealed his conviction and sentence to the California Court of Appeal raising, *inter alia,* claims generally corresponding to Grounds Thirty–Two through Forty, and Forty–Two[4] of the Petition herein. (Lodgment No. 16.) In an unpublished decision issued on December 4, 2013, the Court of Appeal struck a parole revocation fine and otherwise affirmed the judgment in all other respects. (Lodgment No. 19.) Petitioner's ensuing Petition for Review to the California Supreme Court raising the same claims was summarily denied without comment or citation to authority on March 12, 2014. (Lodgment Nos. 20, 21.)

Meanwhile, on December 16, 2013, petitioner filed a habeas petition in the California Court of Appeal, raising claims generally corresponding to Grounds One through Thirty–One of the Petition herein. (Lodgment No. 22.) That petition was denied on January 14, 2014. (Lodgment No. 23.) Finally, petitioner filed a habeas petition in the California Supreme Court on May 1, 2014, raising claims corresponding to those raised in the Petition herein, which was denied on July 16, 2014, without comment or citation to authority. (Lodgment Nos. 24, 25.)

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

Since petitioner is challenging the sufficiency of the evidence to support his conviction, the Court has independently reviewed the state court record. *See* *Jones* v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997).[5] Based on its review, the Court adopts the following summary from the "Facts" section of the California Court of Appeal opinion as a fair and accurate summary of the evidence presented at trial (Lodgment No. 19 at 3–5 (footnote omitted)):

This case involves the September 1985 murder of Rita Cobb. [Petitioner] was arrested for that crime in March 2009, after a sample of his deoxyribonucleic acid (DNA) matched DNA from sperm cells found in a vaginal swab taken from Rita Cobb's body following her apparent murder in 1985. [Petitioner's] DNA, and the fact that when interviewed by law enforcement officers [petitioner] admitted he knew Rita Cobb but denied having had sex with her, is the evidence that connects [petitioner] with the murder and therefore is the evidence on which the jury relied to find [petitioner] guilty. [¶] That Rita Cobb was murdered is undisputed. Her son, Daryl Kraemer, and his girlfriend, found Cobb's nude, decomposing body on the bed in the bedroom of her Lucerne Valley home. A wire coat hanger was wrapped tightly around her neck and knotted on the side. Marshall Franey, a San Bernardino County Deputy Coroner assigned to investigate the death, estimated, based on the moderate decomposition of the body, that Rita Cobb died at least two days before her body was discovered. [¶] Dr. George Saukel, the forensic pathologist who performed the autopsy on Rita Cobb's body, confirmed Franey's estimate regarding the time of death. He concluded Cobb's death had been caused by both manual strangulation, as evidenced by fractures to bones in Cobb's neck, and ligature strangulation, as evidenced by a wire coat hanger wrapped tightly and twisted twice around Cobb's neck. Dr. Saukel also found sperm cells in Rita Cobb's vagina. Based on the condition of those cells, Dr. Saukel estimated sexual intercourse could have occurred as much as a day and one-half before Cobb's death, or postmortem. [¶] DNA analysis of the sperm cells was performed in 1999. San Bernardino County Deputy Sheriff's Criminalist Donald Jones testified based on his analysis of the DNA results that the sperm cells were from a single donor. Jones compared the DNA from the sperm cells to other DNA obtained from 16 blood samples apparently taken from the crime scene, and also obtained from known donors. Those comparisons did not produce a match. [¶] In January 2003, another criminalist employed by the San Bernardino County Sheriff's Department conducted a more sophisticated analysis of the sperm and semen contained in the vaginal swab from Rita Cobb. This second analysis produced a complete DNA profile of 13 markers which then was entered into a nationwide database, CODIS DNA. Some years later, the criminalist was notified that the sample she had entered matched [petitioner]. [¶] Based on the DNA match, on March 8, 2009, two San Bernardino County Sheriff's detectives contacted [petitioner] at his home in Long Beach and questioned him about Rita Cobb. [Petitioner] acknowledged that he knew Cobb, because he had rented the "back house" on her property, and lived there with his wife and young son for about six to nine months. Cobb lived in a second house on the same property. [Petitioner] and his family moved out around April 1985. [Petitioner] described his relationship with Cobb as that of landlord and tenant. He denied having any form of social relationship with Cobb. Over the course of the interview, which began at [petitioner's] home, then moved to the local police station, the detectives asked [petitioner] three different times whether he had a sexual relationship with Cobb. Each time [petitioner] said no. At the conclusion of the interview, the detectives arrested [petitioner]. [¶] The detectives obtained a buccal swab, i.e., cells from the cheek, inside [petitioner's] mouth. A DNA analysis of the buccal cells confirmed [petitioner's] DNA matched the DNA obtained from the sperm and semen recovered from the vaginal swab taken from Rita Cobb. [¶] Rita Cobb was last seen alive on Friday, September 20, 1985, at a social gathering at the home of her friends, John and Francesca. Cobb drank alcohol most of the evening. She appeared more intoxicated than usual by the time she got ready to leave around 10 or 11 p.m. Bruce Nash offered to drive Cobb home. He testified Cobb declined the offer. However, John recalled Nash did drive Cobb home in her own car, and Nash's girlfriend followed in Nash's car. [¶] Daryl Kraemer had not been able to reach his mother by telephone over the weekend of September 21 and 22. On Monday he called her work, and learned Cobb had not come in, so he and his girlfriend drove to Cobb's home. They discovered her body around 11:30 a.m. and called authorities.

PETITIONER'S CLAIMS HEREIN

*3 1. The District Attorney committed prosecutorial misconduct by using petitioner's case in a re-election campaign and expressing opinions of guilt while the case was calendared. (Pet. at 14.)[6]

2. The transcript of an interview between petitioner and law enforcement was altered and doctored. (Pet. at 16.)

3. The prosecutor committed misconduct by misstating facts during an in-limine hearing as to third-party culpability. (Pet. at 17.)

4. The prosecutor committed misconduct by presenting false testimony from Alexander. (Pet. at 19.)

5. The prosecutor committed misconduct by presenting false testimony from Bruce Nash ("Nash"). (Pet. at 24.)

6. The prosecutor committed misconduct by presenting false testimony from John Sullivan ("Sullivan"). (Pet. at 26.)

7. The prosecutor committed misconduct by presenting false testimony from Daryl Kraemer ("Kraemer"). (Pet. at 27.)

8. There was cumulative error based on the multiple instances of prosecutorial misconduct. (Pet. at 28–29.)

9. Trial counsel rendered ineffective assistance by failing to object to the false statements made by the prosecutor during the in-limine hearing. (Pet. at 30.)

10. Trial counsel rendered ineffective assistance by failing to object to the false statements of Alexander. (Pet. at 31.)

11. Trial counsel rendered ineffective assistance by failing to object to the false statements of Nash. (Pet. at 33.)

12. Trial counsel rendered ineffective assistance by failing to object to the false statements of Sullivan. (Pet. at 34.)

13. Trial counsel rendered ineffective assistance by failing to object to the false statements of Kraemer. (Pet. at 35.)

14. Trial counsel rendered ineffective assistance by failing to turn over to petitioner all discovery in the case. (Pet. at 36–37.)

15. Trial counsel rendered ineffective assistance by failing to investigate DNA evidence found on the victim. (Pet. at 38.)

16. Trial counsel rendered ineffective assistance by failing to investigate DNA evidence found on a desk blotter. (Pet. at 40.)

17. Trial counsel rendered ineffective assistance by failing to verify and authenticate DNA on a watchband pin. (Pet. at 41–42.)

18. Trial counsel rendered ineffective assistance by failing to verify and authenticate DNA of a red hair found on the victim. (Pet. at 43.)

19. Trial counsel rendered ineffective assistance by failing to investigate potential prosecution witness Lori Kaye Amaro ("Amaro"). (Pet. at 44.)

20. Trial counsel rendered ineffective assistance by failing to investigate potential prosecution witness Sun Kye ("Kye"). (Pet. at 45.)

21. Trial counsel rendered ineffective assistance by failing to serve the California Attorney General's Office with a copy of the recusal motion. (Pet. at 47.)

22. Trial counsel rendered ineffective assistance by failing to perfect a motion for a continuance. (Pet. at 48.)

23. Trial counsel rendered ineffective assistance by failing to subpoena Holly and Linda Mitchell as witnesses. (Pet. at 49.)

24. Trial counsel rendered ineffective assistance by intentionally misstating facts during a *Marsden*[7] hearing. (Pet. at 50.)

***4** 25. There was cumulative error based on the multiple instances of ineffective assistance of counsel. (Pet. at 52.)

26. Trial counsel, the prosecutor, and Alexander conspired to present altered evidence to the jury. (Pet. at 54.)

27. Petitioner's interview with detectives violated his *Miranda*[8] rights. (Pet. at 56.)

28. The trial court erred by permitting the prosecution of petitioner on less than proof beyond a reasonable doubt. (Pet. at 58–59.)

29. The trial court violated the Confrontation Clause by sustaining the prosecutor's objection during cross-examination of a witness. (Pet. at 60.)

30. The trial court erred in denying petitioner's request to represent himself for purposes of filing a writ of mandamus. (Pet. at 61.)

31. The county jail terminated petitioner's communications with counsel. (Pet. at 63.)

32. The felony-murder instruction was improper. (Pet. at 64.)

33. The trial court violated petitioner's due process rights by excluding evidence regarding the murder of Helen Brooks ("Brooks"). (Pet. at 66.)

34. The trial court violated petitioner's due process rights by excluding evidence regarding the victim's promiscuity. (Pet. at 68.)

35. The trial court violated petitioner's due process rights by excluding third party culpability evidence and evidence regarding the victim's promiscuity. (Pet. at 70.)

36. The trial court violated petitioner's due process rights by excluding evidence that the victim intended to go to a bar after she left the Sullivan residence. (Pet. at 72.)

37. The trial court violated petitioner's due process rights by admitting evidence of two prior rape allegations. (Pet. at 73.)

38. The trial court erred by ordering the jury to continue its deliberations after the jury foreperson revealed that the majority of the jurors were in favor of a guilty verdict. (Pet. at 75.)

39. The trial court erred in questioning the jury foreperson and instructing the jury to continue deliberations in the absence of petitioner's trial counsel. (Pet. at 76.)

40. The trial court violated petitioner's due process rights by denying his motion for new trial. (Pet. at 78.)

41. Trial counsel rendered ineffective assistance by failing to move for a change of venue. (Pet. at 80.)

42. The trial court erred by denying petitioner's recusal motion. (Pet. at 82.)

STANDARD OF REVIEW

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

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

***5** Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *see also* *Howes v. Fields*, 565 U.S. ____, 132 S.Ct. 1181, 1187, 182 L.Ed.2d 17 (2012); *Greene v. Fisher*, 565 U.S. ____, 132 S.Ct. 38, 44, 181 L.Ed.2d 336 (2011); *Carey v. Musladin*, 549 U.S. 70, 74, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006).

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

State court decisions that are not "contrary to" Supreme Court law may only be set aside on federal habeas review "if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.' " *Packer*, 537 U.S. at 11 (citing 28 U.S.C. § 2254(d) and adding emphasis). A state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. *See* *Williams*, 529 U.S. at 406–10, 413 (e.g., the rejected decision may state *Strickland* rule correctly but apply it unreasonably); *Woodford v. Visciotti*, 537 U.S. 19, 24–27, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." *Visciotti*, 537 U.S. at 24–27; *Williams*, 529 U.S. at 413. An "unreasonable application" is different from an erroneous or incorrect one. *See* *Williams*, 529 U.S. at 409–11; *see also*

Visciotti, 537 U.S. at 25; *Bell v. Cone*, 535 U.S. 685, 699, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). "To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' " *Metrish v. Lancaster*, 569 U.S. ____, 133 S.Ct. 1781, 1786–87, 185 L.Ed.2d 988 (2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)). Moreover, as the Supreme Court held in *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits."

***6** In *Richter*, 562 U.S. at 99, the Supreme Court held that a summary denial order will be presumed to be a merits determination "in the absence of any indication or state-law procedural principles to the contrary." The Supreme Court further held that the AEDPA standard of review applies to such summary denial orders. *See* *id.* at 98.[9] "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.; see also* *Pinholster*, 563 U.S. at 187 ("Section 2254(d) applies even where there has been a summary denial."). "A habeas court must determine what arguments or theories could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Pinholster*, 563 U.S. at 188 (quoting *Richter*, 562 U.S. at 102 (internal quotation marks and alterations omitted)). As such, "when the state court does not supply reasoning for its decision," the federal court must conduct an "independent review of the record and ascertain whether the state court's decision was objectively unreasonable." *Walker v. Martel*, 709 F.3d 925, 939 (9th Cir. 2013) (internal quotation marks and citation omitted); *see also* *Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014).

Here, Grounds Thirty–Two through Forty, and Forty–Two of the Petition were addressed on the merits by the California Court of Appeal on direct appeal in a reasoned decision rejecting the claims. The California Supreme Court denied petitioner's Petition for Review raising these claims without comment or citation to authority. In such circumstances, the Court will "look through" the unexplained California Supreme Court decision to the last reasoned decision as the basis for the state court's judgment, in this case, the Court of Appeal decision. *See* *Ylst v. Nunnemaker*, 501 U.S. 797, 803–04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."); *see also* *Johnson v. Williams*, 568 U.S. ____, 133 S.Ct. 1088, 1094 n.1, 185 L.Ed.2d 105 (2013) (noting that the Ninth Circuit, consistent with *Ylst*, "look[ed] through" the California Supreme Court's summary denial of a petition for review and examined the court of appeal's opinion).[10] Similarly, petitioner's claims in Grounds Two, Four through Seven, Ten through Fifteen, Eighteen through Twenty, and Twenty–Six were rejected on the merits by the San Bernardino County Superior Court on habeas review, but without comment or citation to authority by the California Court of Appeal and California Supreme Court. As such, the Court "looks through" these unexplained decisions to the Superior Court opinion.

With respect to the remaining claims, petitioner raised each of these claims in his habeas petition to the California Supreme Court, which, as explained, was denied without comment or citation to authority. As such, as to these claims, the Court must conduct an independent review of the record and determine whether the state court's decision was objectively unreasonable.[11]

DISCUSSION

I. *Petitioner is not entitled to habeas relief on his prosecutorial misconduct claims.*

*7 In Grounds One though Eight of the Petition, petitioner raises claims of prosecutorial misconduct. In particular, petitioner alleges that the prosecutor committed misconduct by: (1) Altering the transcript of the interview between petitioner and detectives; [12] (2) misstating facts in a pre-trial hearing; and (3) permitting witnesses to falsely testify. Petitioner further maintains that the District Attorney used petitioner's case in his re-election campaign and expressed opinions of guilt while the case was pending and that the cumulative errors based on the multiple instances of misconduct violated the Fifth, Sixth, and Fourteenth Amendments. As explained below, petitioner is not entitled to habeas relief on any of his prosecutorial misconduct claims. [13]

A. *Applicable legal authority*

To prevail on a claim of prosecutorial misconduct, the alleged misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Jones v. Ryan*, 691 F.3d 1093, 1102 (9th Cir. 2012) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)). "To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (internal quotation marks and citation omitted). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Phillips*, 455 U.S. at 219. Additionally, habeas relief is not warranted unless the misconduct "had substantial and injurious effect or influence in determining the jury's verdict." *Sechrest v. Ignacio*, 549 F.3d 789, 808 (9th Cir. 2008) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 622, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)); *see also Wood v. Ryan*, 693 F.3d 1104, 1113 (9th Cir. 2012).

B. *Use of petitioner's case in re-election campaign*

In Ground One, petitioner contends that the District Attorney committed misconduct by using petitioner's case in his re-election campaign and expressing / / / opinions of guilt before trial by sending campaign flyers to registered voters mentioning his case. (Pet. at 14; Pet. Mem. at 12–17.)

On August 6, 2009, an Information was filed, charging petitioner with murder and further alleging that the murder was committed while he was engaged in the commission of and/or attempted commission of rape. (1 CT 52–53.) Meanwhile, District Attorney Michael Ramos ("Ramos") was running for re-election, and prior to the primary election in June 2010, Ramos's campaign sent out a campaign flyer, in which petitioner's face, name, and case were included. (1 CT 98, 129.) The flyer stated that petitioner was charged with murder for the 1985 slaying of Cobb, and included the following quote from Ramos (1 CT 106 (emphasis omitted)):

> ***8** A case is never cold to the family of a murder victim. That's why I have worked with the Sheriff to start the Cold Case Unit. Using DNA evidence, we have filed murder charges in 19 cold cases. Twenty five years after the crime, Rita Cobb's family will have closure.

On June 28, 2010, petitioner filed a civil lawsuit against Ramos, alleging that he intentionally tainted the jury pool by mailing this flyer to all potential jurors in the area. (1 CT 99.) As a result of petitioner's lawsuit, petitioner alleged that he was subjected to severe harassment in the county jail. (*Id.*)

In his criminal case, petitioner's counsel moved to recuse the San Bernardino County District Attorney's Office, similarly arguing that Ramos had intentionally tainted the jury pool by his conduct while campaigning for re-election. (1 CT 97-107.) This motion was denied on October 8, 2010 and voir dire commenced on January 19, 2011. (1 CT 148; 1 RT 48.) Petitioner's counsel asked

the prospective jurors about the campaign flyer. A couple of the jurors indicated that they had seen the flyer. One stated that he ripped it up, and could not recall seeing the side with petitioner's photograph. (Reporter's Augmented Transcript on Appeal ["Aug. RT"] 113–14.) Another prospective juror stated that she saw the flyer, but that she could put aside what she had seen. (Aug. RT 164–66.) A third prospective juror stated that when petitioner's counsel showed the flyer, it jogged his memory of seeing something in the paper "about a criminal accused being featured in a political flyer, but [he did not] really know much about it passed that." (Aug. RT 169.)

Here, even assuming, without deciding, that Ramos may have engaged in misconduct by using petitioner's picture and pending criminal trial in his re-election campaign, petitioner has failed to demonstrate that he was prejudiced. Petitioner has not presented any evidence that the campaign flyer sent out approximately seven months before trial commenced had a substantial and injurious effect or influence in determining the jury's verdict. There is no evidence that any of the jurors were influenced or biased by the flyer. Indeed, the few prospective jurors that had seen the flyer could not recall the details and/or stated that they could put aside what they had seen. Petitioner has presented no evidence demonstrating otherwise.

Under the circumstances, the Court concludes that the state courts' rejection of this claim was not objectively unreasonable. Petitioner is not entitled to habeas relief on this claim.

C. *Alteration of transcript*

In Ground Two, petitioner contends that the transcript of his March 8, 2009 interview with sheriff detectives was altered and doctored. (Pet. at 16; Pet. Mem. at 18–24.) According to petitioner, the altered version of the transcript omitted: (1) Several conversations between the detectives and petitioner's wife; (2) attempts to terminate the interview; (3) petitioner's offer of a non-custodial place to resume the questions about his sexual involvement with the victim; (4) petitioner's repeated concerns that the detectives believed he was a suspect; and (5) the detectives' insistence that the interview be continued at the police station. (Pet. at 16; Pet. Mem. at 21.)[14] Petitioner raised a similar claim in his habeas petition to the San Bernardino County Superior Court, which rejected the claim, concluding that "[c]onclusory allegations unsupported by facts stated with particularity do not warrant habeas corpus relief.... Petitioner's contention about the altered recordings do not meet his pleading burden." (Lodgment No. 13 at 5.)

***9** Petitioner has not presented any evidence that relevant portions of the recording were deleted or that the prosecutor engaged in misconduct. The record reflects that petitioner's counsel and the prosecutor conferred and agreed on redactions, and a redacted version of the recording was played for the jury. (2 RT 453–55, 509–10.) The jury was instructed that the transcript was not evidence and that it was only being provided to help the jurors understand the taped conversation. (2 RT 509.) After the recording was played for the jury, petitioner's counsel objected to a statement that he had requested be redacted, which was inadvertently included, i.e., that after showing petitioner a picture of the victim, the detectives stated that they could see how it tore his stomach up. (2 RT 528.)[15] Other than that statement, petitioner's counsel indicated that the redactions were "very well done." (2 RT 531.)

Further, petitioner has failed to demonstrate that the redactions (or other alleged alterations) had a substantial and injurious effect or influence in determining the jury's verdict. First, with respect to the alleged omission of conversations between the detectives and petitioner's wife, petitioner's repeated concerns that the detectives believed he was a suspect, and his offer to continue the interview at another location, petitioner has not explained how playing these portions of the interview to the jury would have assisted his defense. Petitioner does not identify any relevant discussions between his wife and detectives, and instead appears to contend that his wife's presence during the interview at his home was the reason why he denied any sexual relationship with the victim. However, the transcript did reflect that his wife was present during the interview at his home, and even when she was not present at the police station, he continued to deny any type of relationship with Cobb. (*See, e.g.*, 2 CT 493, 516, 528, 533, 576–77.)[16] The transcript also included petitioner's statements that the detectives were scaring him and that he thought the detectives believed he committed the murder. (2 CT 536–37, 583.)

Relatedly, to the extent petitioner contends that his attempts to terminate the interview were deleted and that the detectives insisted that the interview be continued at the police station, the record shows that petitioner agreed to go to the police station voluntarily and even went in a separate car. (2 CT 528–29.) At the police station, the detectives advised petitioner that he was "free to leave at anytime that [he] want[ed]" and that he was not under arrest. (2 CT 537.)

Based on the foregoing, the state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim.

D. *Misstatement during in-limine hearing*

In Ground Three, petitioner contends that, during a pre-trial hearing regarding the introduction of third party culpability evidence, the prosecutor misstated that he did not investigate the murder of Brooks at the time of the Cobb investigation. Petitioner maintains that Alexander did, in fact, investigate the cases at the same time, which was demonstrated by his emails. (Pet. at 17; Pet. Mem. at 25–28.)

***10** Petitioner has not provided a pinpoint citation to the record where he alleges that the prosecutor made a misstatement, and the Court otherwise concludes that there is no evidence of any misstatements regarding this subject matter. Prior to trial, petitioner's counsel sought to introduce an anonymous call from the WeTip hotline, in which the caller indicated that a person named "Randolf," apparently referring to George Randolph (also known as William Backhoff ("Backhoff")), was at a party bragging to people that he had murdered Cobb. (1 RT 16.)[17] The trial court denied petitioner's motion on the ground that there was no foundation for its admission: "We don't know who it was" that made the call; "[w]e don't know what the person's motivation was"; "[w]e have absolutely no way of determining that the person who called and left the anonymous tip was right"; and there was nothing to indicate that the statement was reliable. (1 RT 18, 24–25.)

Thereafter, during a break in the testimony of criminalist Donald Jones ("Jones") regarding DNA evidence, the prosecutor explained that there was an unsolved homicide case regarding Brooks and that a different DNA profile was obtained in that case. Because the victim was similarly aged to Cobb and the murder was committed in the same general area a few months before Cobb's murder, the prosecutor's office thought that "it would be good for [petitioner's counsel] to come over and look at the file." The prosecutor made the entire file available for defense counsel's review, and petitioner's counsel "spent pretty much an entire day looking through the file and taking notes." (1 RT 273–74.)[18]

Petitioner's counsel then argued that the two crimes were "in many respects almost identical" and that initially, the sheriff's department treated the two cases as if they had been committed by the same person and he requested to ask Jones and "some of the others" about the Brooks case. (1 RT 274–75.) The prosecutor objected on the basis of relevance, explaining that there was no evidence linking someone involved in the Brooks murder to Cobb's murder. (1 RT 275.) The trial court requested the parties to provide authority supporting their positions. (1 RT 276.)

The following day, petitioner's counsel reasserted his request to introduce evidence regarding the Brooks case and the prosecutor again opposed the request. (2 RT 277–78.) The trial court denied the request under Cal. Evid.Code § 352, concluding that such evidence was more prejudicial than probative, unduly consumptive of court time, and likely to confuse the jury. (2 RT 278.)

Based on the foregoing, there is nothing in the record to suggest that the prosecutor engaged in misconduct. The prosecutor provided the Brooks file to petitioner's counsel and counsel repeatedly requested to introduce third party culpability evidence. To the extent that petitioner may be contending that this evidence was not provided in a timely manner, he was not prejudiced. After being provided with the Brooks file, petitioner's counsel sought to introduce evidence of that case, and expressly argued that the two cases were initially investigated as though they were committed by the same person. The trial court denied that request. Petitioner has not explained how this request would have been granted had this argument been raised at an earlier time.

Accordingly, the state courts' rejection of this claim was not objectively unreasonable. Petitioner is not entitled to habeas relief on this claim.

E. *False testimony*

In Grounds Four through Seven, petitioner contends that the prosecutor committed misconduct by presenting the false testimony of Alexander, Nash, Sullivan, and Kraemer. (Pet. at 19, 24, 26–27; Pet. Mem. at 29–47.)

***11** In order to prevail on a prosecutorial misconduct claim premised on the alleged presentation of false evidence, petitioner must establish that his conviction was obtained by the use of perjured testimony that the prosecutor knew at the time to be false or later discovered to be false and allowed to go uncorrected. *See* *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *see also* *Carothers v. Rhay*, 594 F.2d 225, 229 (9th Cir. 1979); *Pavao v. Cardwell*, 583 F.2d 1075, 1077 (9th Cir. 1978) (per curiam) (noting that petitioner "was required to allege facts showing that there was a knowing use of the perjured testimony by the prosecution"). Due process protects against the admission of false evidence, "whether it be by document, testimony, or any other form of admissible evidence." *Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005) (en banc). Where false evidence is presented to the jury, the conviction will be reversed where: (1) "[T]he prosecution knowingly presented false evidence or testimony at trial;" and (2) "it was material, that is, there is a reasonable likelihood that the false evidence or testimony could have affected the judgment of the jury." *See* *Morris v. Ylst*, 447 F.3d 735, 743 (9th Cir. 2006); *see also* *Jackson v. Brown*, 513 F.3d 1057, 1071–72 (9th Cir. 2008). Mere inconsistencies in testimony are insufficient to establish that the testimony was perjured, *see* *United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997); *United States v. Zuno–Arce*, 44 F.3d 1420, 1423 (9th Cir. 1995) (as amended), or that the prosecutor knowingly used perjured testimony, *see, e.g.*, *United States v. Sherlock*, 962 F.2d 1349, 1364 (9th Cir. 1992) (as amended); *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). Further, "[t]here is no violation of due process resulting from prosecutorial non-disclosure of false testimony if defense counsel is aware of it and fails to object." *Routly v. Singletary*, 33 F.3d 1279, 1286 (11th Cir. 1994) (per curiam).

The San Bernardino County Superior Court rejected a similar claim on habeas review, concluding, in relevant part, as follows (Lodgment No. 13 at 7):

> *Petitioner's claim fails because he has not shown that any of the evidence introduced was false. Respondent concedes that there were some inconsistencies regarding what certain witnesses remembered, such as Bruce Nash's and John Sullivan's recollection of who the victim had been with and her movements the night [of] September 20, 1985. Inconsistent evidence, however, is not synonymous with false evidence, even if the inconsistencies diminish a witness's credibility. (In re Roberts (2003) 29 Cal.4th 726, 742–743.) Petitioner's assessment of the impact of those inconsistencies does not demonstrate that false evidence was used at trial.*

1. *Detective Alexander*

On cross-examination, Alexander testified that he was familiar with the entire investigation that had been done up to 2009; all of the reports he knew of were in his possession; he knew that there was no evidence that petitioner's fingerprints were found at Cobb's house; and he was not sure whether there were any fingerprints developed. (2 RT 517–18.) Petitioner's counsel

asked Alexander whether he read the fingerprint reports, to which Alexander responded that he "probably did, but [he did not] remember all of the names." (2 RT 518.) Petitioner appears to contend that Alexander must have been lying when he said that he did not remember the names on the fingerprint reports because there were only two names, Cobb and Joseph Saunders ("Saunders"). (Pet. at 19; Pet. Mem. at 31.)

The Court concurs with the finding and conclusion of the Superior Court that there is no evidence that Alexander falsely testified. Alexander acknowledged that there was no evidence that petitioner's fingerprints were found at Cobb's house. However, Alexander did not testify that no fingerprints were found, only that he was "not sure if there were any fingerprints developed" and he could not remember the details of the fingerprint report. Although it may be that the list of names on the fingerprint report was short, it does not establish that Alexander necessarily remembered those names or the results thereof. Further, the fingerprint report, which was included in the Clerk's Transcript, does not merely contain two names. The report, consisting of two pages, included a summary of fourteen latent prints found at Cobb's residence and a list of six individuals whose fingerprints were compared. (2 CT 370–71.) Based on the foregoing, petitioner has failed to show any false testimony, let alone that the prosecutor knew the evidence to be false and failed to correct it. [19]

2. *Bruce Nash*

***12** Petitioner contends that Nash committed perjury because his trial testimony was inconsistent with his prior statements. Cobb was last seen alive at a social gathering hosted by Sullivan. Petitioner claims that Nash falsely testified at trial when he stated that he believed that Cobb was heading home after the party because he had previously told detectives that she intended to go to a bar after the party. (Pet. at 24.)

Nash testified at trial that he could not recall whether he or Cobb left the party first. He did recall that he offered her a ride home, but she declined. (2 RT 412–14, 417.) When asked whether she was in the process of getting ready to go home, Nash testified, "I don't remember. I believe so." He further testified that he did not remember seeing her leave "to go to her house." (2 RT 417.) To the extent that Nash previously told detectives that she intended to go to a bar, the Court finds that this minor inconsistency does not constitute perjury and as such, is insufficient to warrant habeas relief. Nash acknowledged that the events of that evening were more fresh in his memory when he was interviewed by the police in 1985 than when he testified in January of 2011. (2 RT 410.)

Further, it is unlikely that testimony regarding where she said she was going would have been admitted. On cross-examination, petitioner's counsel asked Nash whether Cobb indicated she was going somewhere other than home after the party, to which the prosecutor objected on hearsay grounds. (2 RT 415.) The trial court then conducted a side-bar discussion regarding the relevance of this line of questioning and petitioner's counsel responded that it was relevant because she had told him that she was going to a bar. Following further argument, the trial court sustained the objection. (2 RT 417.)

As such, petitioner is not entitled to habeas relief on this claim.

3. *John Sullivan*

Petitioner contends that Sullivan's testimony was inconsistent with his prior statements regarding Cobb's presence at his home on September 20, 1985. Petitioner maintains that Sullivan had made statements over the years that he had fallen asleep before Cobb left the party. In 2009, Sullivan told detectives that he saw Nash and Cobb leave the party and Nash gave her a ride home. (Pet. at 26; Pet. Mem. at 42.) Sullivan testified to this at trial. (2 RT 428, 432.)

While there were discrepancies between Sullivan's earlier statements and his trial testimony, as described, mere inconsistencies are insufficient to establish a violation under *Napue.* Upon the prosecutor's questioning, Sullivan acknowledged at trial that his

testimony on this issue was inconsistent with his prior statement to the police in 1985. (2 RT 430.) On this record, the Court has no basis for finding that the prosecutor knowingly presented false evidence to obtain petitioner's conviction.

4. *Daryl Kraemer*

Petitioner contends that Kraemer falsely testified because he failed to testify that his relationship with his mother was estranged and caustic, and instead, implied that they had a normal relationship. (Pet. at 27.) Again, the Court finds that any inconsistency is immaterial. Kraemer testified that he had not seen his mother for approximately a month to one and a half months before her death and that the last time he saw her they had "a pretty good argument." (1 RT 107, 141–42.) He further acknowledged that they had good times and bad times. (1 RT 104.) The Court finds there is no a reasonable likelihood that this minor issue could have affected the judgment of the jury. *See* *Morris*, 447 F.3d at 743.

***13** In sum, the state courts' rejection of petitioner's prosecutorial misconduct claims based on allegedly false testimony was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on these claims.

F. *Cumulative error*

In Ground Eight, petitioner contends that the cumulative effect of the misconduct identified above violated the Fifth, Sixth, and Fourteenth Amendments. (Pet. at 28.)

"Cumulative error applies where, 'although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.' " *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002) (as amended) (quoting *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996)); *see also* *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) ("[T]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal.").

Here, the Court has considered and rejected all of petitioner's prosecutorial misconduct claims, including his claim regarding the alteration of the transcript. None of these alleged claims evaluated singularly, or *in toto,* constitute constitutional error. Thus, petitioner's cumulative error claim must fail as well. *See* *Mancuso*, 292 F.3d at 957 ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation").

Accordingly, the state courts' rejection of this claim was not objectively unreasonable. Petitioner is not entitled to habeas relief on this claim.

II. *Petitioner is not entitled to habeas relief on his ineffective assistance of counsel claims.*

Petitioner alleges numerous claims of ineffective assistance of counsel in Grounds Nine through Twenty–Five and in Ground Forty–One of the Petition. Petitioner alleges that his trial counsel rendered ineffective assistance by failing to: (1) Object to false statements (Grounds Nine through Thirteen); (2) turn over all discovery to petitioner (Ground Fourteen); (3) investigate DNA evidence (Grounds Fifteen through Eighteen); (4) investigate witnesses (Grounds Nineteen and Twenty); (5) serve the California Attorney General's Office with a copy of the recusal motion (Ground Twenty–One); (6) perfect a motion for a continuance (Ground Twenty–Two); (7) subpoena witnesses (Ground Twenty–Three); and (8) move for a change of venue (Ground Forty–One). Petitioner further contends that his trial counsel rendered ineffective assistance by misstating facts during a *Marsden* hearing (Ground Twenty–Four) and "through cumulative errors" in violation of the Sixth Amendment (Ground Twenty–Five). As explained below, petitioner is not entitled to habeas relief on any of his ineffective assistance of counsel claims.

A. *Applicable legal authority*

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court held that there are two components to an ineffective assistance of counsel claim: "[D]eficient performance" and "prejudice."

"Deficient performance" in this context means unreasonable representation falling below professional norms prevailing at the time of trial. *Strickland*, 466 U.S. at 688–89. To show "deficient performance," petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689–90. Further, petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. The Court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Id.* The Supreme Court in *Strickland* recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Accordingly, to overturn the strong presumption of adequate assistance, petitioner must demonstrate that "the challenged action cannot reasonably be considered sound trial strategy under the circumstances of the case." *Lord v. Wood*, 184 F.3d 1083, 1085 (9th Cir. 1999). [20]

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

In *Richter*, the Supreme Court reiterated that the AEDPA requires an additional level of deference to a state court decision rejecting an ineffective assistance of counsel claim. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard." *Richter*, 562 U.S. at 101. "Under § 2254(d), a habeas court must determine what arguments or theories supported or ... could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 102. As the Supreme Court observed in *Richter (id.* at 105):

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

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

B. *Failure to object to false statements by the prosecutor*

***15** In Ground Nine, petitioner contends that his trial counsel rendered ineffective assistance by failing to object to allegedly false statements made by the prosecutor during a pre-trial hearing. (Pet. at 30.) This claim relates to the allegations that, despite claims to the contrary, the prosecution's lead investigator had been investigating both this case and the Brooks murder. (*Id.*)

As previously explained, there is no merit to this claim, and as such, petitioner's counsel was not ineffective in failing to object. *See James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994); *see also Shah v. United States*, 878 F.2d 1156, 1162 (9th Cir. 1989) (failure to raise meritless legal argument does not constitute ineffective assistance of counsel). Accordingly, the state courts' rejection of this claim was not objectively unreasonable and petitioner is not entitled to habeas relief on this claim.

C. *Failure to object to false statements by witnesses*

In Grounds Ten through Thirteen, petitioner contends that his trial counsel was ineffective for failing to object to the allegedly "false" testimony identified above with respect to Alexander, Nash, Sullivan, and Kraemer. (Pet. at 31–35.)

The San Bernardino County Superior Court rejected a similar claim on habeas review, concluding, in pertinent part, as follows (Lodgment No. 13 at 9):

> *Respondent has alleged, and petitioner does not dispute, that each of the witnesses testified at trial. Whether those witnesses could have been asked additional questions is beside the point. It bears emphasizing that counsel's performance is presumed to be competent. (People v. Lewis (2001) 25 Cal.4th 610, 674.) Petitioner has not overcome that presumption. A failure to object to even inadmissible evidence is ultimately a tactical decision. (People v. Rodrigues (1994) 8 Cal.4th 1060, 1121.) Here, petitioner has not shown that any objections would have even been successful, and attorney was not required to raise objections which would have been futile. (People v. Gutierrez (2009) 45 Cal.4th 789, 804–805.) Ultimately, the criticisms levied by petitioner go to the particular tactical decisions made by trial counsel over the course of the trial. Given the "great deference" afforded to those tactical decisions (People v. Farnam (2002) 28 Cal.4th 107, 148), petitioner has not established he received ineffective assistance of counsel.*

Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689; *Wildman v. Johnson*, 261 F.3d 832, 838 (9th Cir. 2001). The relevant inquiry "is not whether another lawyer, with the benefit of hindsight,

would have acted differently, but whether 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' " *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998) (as amended) (quoting *Strickland*, 466 U.S. at 687). In the present case, the Court concurs with the finding of the Superior Court that petitioner has not established ineffective assistance of counsel. With respect to Alexander's testimony regarding the fingerprint report and Nash's testimony regarding where the victim told him she was going after the party, trial counsel did attempt to inquire further into this testimony. During Alexander's cross-examination, petitioner's trial counsel attempted to ask him whether one of the glasses in the kitchen had a fingerprint on it, but the trial court sustained the prosecutor's objection. (2 RT 518.) Similarly, when trial counsel attempted to ask Nash whether the victim had told him she intended to go to a bar after the party, the trial court again sustained the prosecutor's objection. (2 RT 415, 417.) Further, with respect to Sullivan's testimony regarding whether he fell asleep before the victim left the party, as previously explained, he expressly acknowledged that his testimony was inconsistent with his prior statement. Thus, trial counsel could have strategically decided not to further press this issue. Petitioner's trial counsel similarly could have strategically decided not to further question Kraemer regarding his relationship with his mother as this line of questioning may have antagonized the jury, or been interpreted as insensitive, considering Cobb was his mother and this issue was not material.

***16** As such, the state courts' rejection of these claims was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on these claims.

Finally, in Ground Ten, petitioner contends that his trial counsel was ineffective in failing to object to Alexander's testimony regarding the accuracy of the transcript of petitioner's interview with detectives. (Pet. at 31.) Petitioner concedes that this claim is unexhausted. (*Id.*) Nevertheless, "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). A federal court may deny an unexhausted claim on the merits "only when it is perfectly clear that the applicant does not raise even a colorable federal claim." *Cassett v. Stewart*, 406 F.3d 614, 623–24 (9th Cir. 2005). Here, the Court concludes that petitioner has not raised a colorable claim. As explained above, petitioner has not presented any evidence that relevant portions of the recording were deleted or that he was prejudiced by the agreed-upon redactions. Petitioner's trial counsel expressly agreed to the redactions that were made, with one exception which was accidentally played in front of the jury. As such, no habeas relief is warranted on this claim, as it is perfectly clear that petitioner does not raise a colorable federal claim. *Cone v. Bell*, 556 U.S. 449, 472, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) (review is *de novo* when a state court has not reached the merits of a claim); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002).[21]

D. *Failure to turn over discovery to petitioner*

In Ground Fourteen, petitioner contends that his trial counsel rendered ineffective assistance by failing to release and disclose all discovery in the case. (Pet. at 36.) Petitioner maintains that, "[d]uring the entire representation," he requested to see the evidence in this case. (*Id.*) According to petitioner, his trial counsel initially gave him 300 pages of discovery and told him that was all there was. Petitioner argues that this was the basis of his decisions regarding whether to borrow money to retain private counsel, to proceed in *pro per*, to enter a plea, and to make "reasonable decisions to his defense." (*Id.*) Based on the discovery provided by counsel, petitioner concluded that there was no need to hire an expert and experienced counsel and decided to remain represented by the public defender. Thereafter, when trial started, petitioner observed four binders of paperwork on the defense table, and when he asked his counsel about these documents, his counsel told him this was the evidence in the case. (*Id.*) Petitioner maintains that his trial counsel told him that he did not need to see the other evidence "because it had no value to [his] case." Petitioner apparently wrote down some of the information contained in the documents. After trial, he was allegedly provided an additional 1300 pages of documents. (*Id.*) After later being appointed conflict counsel, he was advised that there was over 4000 pages of discovery in this case. After writing to the bar association, he purportedly received another 1400 pages

of documents. (*Id.* at 37.) According to petitioner, had he seen all of the discovery in the beginning, he would have "begged or borrowed" money to hire "competent counsel" and would not have allowed his counsel to continue representing him. (*Id.*)

***17** Petitioner, however, has not identified any specific discovery that was not provided, other than sheer numbers of pages. Although Pet. Att. K purports to be a list of the evidence provided to petitioner after trial, it is unclear from the attached documents what evidence was purportedly withheld until after trial. Further, petitioner's counsel disputed petitioner's allegations that he had not provided petitioner with the discovery at a *Marsden* hearing. Petitioner's counsel stated that petitioner initially requested copies of all statements. He had believed that prior counsel had given petitioner discovery. He then reviewed all the discovery, and made copies of all the statements for petitioner. (4/15/11 Supplemental Reporter's Transcript on Appeal ["4/15/11 Supp. RT"] 15.) According to petitioner's trial counsel, petitioner did not request the forensic materials, which comprised almost a thousand pages. Later, after he was convicted, petitioner made another request, asking for all the discovery because he wanted to provide it to his appellate counsel, which counsel provided. (4/15/11 Supp. RT 16.)

Further, even assuming petitioner's allegations are true, petitioner has failed to demonstrate prejudice. Not only has he failed to demonstrate he would have hired another attorney, such as a declaration from an attorney indicating that he was ready and willing to handle petitioner's case, petitioner has failed to demonstrate that there is a reasonable probability that, but for counsel's failure to turn over such documents, the result of the proceeding would have been different. As explained further below, the case against petitioner was strong. DNA evidence matching petitioner's DNA profile was obtained from vaginal swabs of the victim. Petitioner does not cite to any evidence in this discovery that would have changed the result.

As such, the Court concludes that the state courts' rejection of this claim was not objectively unreasonable and petitioner is not entitled to habeas relief on this claim.

E. *Failure to investigate DNA evidence.*

In Grounds Fifteen through Eighteen, petitioner contends that his trial counsel rendered ineffective assistance by failing to investigate DNA evidence found on the victim (Ground Fifteen) and on a desk blotter (Ground Sixteen);[22] and failing to investigate a watchband pin (Ground Seventeen) and red hair found on the victim for DNA evidence (Ground Eighteen). (Pet.38–43.)

1. *Relevant factual background*

Jones responded to the crime scene in 1985, and described items found there, including a watchband pin found near the victim's head. (1 RT 254–55.) He collected vaginal swabs from the victim and samples from a felt pad, all of which contained sperm cells. The results of the DNA typing indicated that it was the same donor for the felt pad as for the vaginal swabs. (1 RT 260, 263, 267–70; 2 RT 283–84, 286–87.) He did not conduct any DNA testing of the watchband pin and acknowledged that hair could be tested if it had a "good root." (*See* 2 RT 297, 313.)

Jones also testified that it is best to collect sperm as soon as possible. However, he could not estimate how long the sperm had been present, but did not think that the intercourse with the victim was days earlier. (2 RT 315–17.) He also could not say whether the intercourse was consensual. (2 RT 318.) The lack of seminal fluid in the panties found in the victim's room suggested that they were not worn after sexual intercourse. (2 RT 311.)

Thereafter, criminalist Monica Siewertsen ("Siewertsen") testified that she analyzed the vaginal swabs and was able to obtain full DNA profiles for the sperm and non-sperm fractions. (2 RT 328, 338, 341.) The sperm fraction came from a single male donor, and constituted a "very rare" typing profile. (2 RT 346–47.)

Criminalist Susan Anderson ("Anderson") testified that she served as the crime laboratory's administrator for CODIS, the DNA database maintained by the FBI. (2 RT 355.) The vaginal swab sample profile was added to the CODIS system in 2003, and some time thereafter, she was advised of a "hit" within the CODIS system to a profile from petitioner. (2 RT 381.) Her laboratory asked for a "reference sample" for petitioner, which was later obtained. (*Id.*) Petitioner's sample matched the DNA profile from the samples taken from the vaginal swabs and felt pad. (2 RT 360–71.)

2. *San Bernardino County Superior Court decision*

***18** The San Bernardino County Superior Court rejected a similar claim directed at the failure to investigate DNA evidence on habeas review, concluding, in relevant part, as follows (Lodgment No. 13 at 5–6):

> *Petitioner admits in his reply that, "Yes, my DNA was at the scene...." He also admits that he had sex with the victim, though he states that it was consensual sex that occurred over a day before she was killed. He speculates that additional testing could have been conducted or additional questions asked that would have shown that another man's DNA was also present, but even if that were true (and it bears repeating that there is nothing in the petition or exhibits demonstrating that to be so), petitioner still would have been faced with evidence that he had sex with the victim. Additional expert testimony would not have been reasonably probably to change the result.*

3. *Analysis*

Petitioner has failed to meet either prong of *Strickland's* two-part test. First, given the DNA evidence against petitioner, petitioner's trial counsel could have strategically decided not to conduct any further DNA testing for fear that the result would have been inculpatory. *See* *Richter*, 562 U.S. at 107–08 (counsel's decision not to call blood evidence experts reasonable, where proposed evidence "carried its own serious risks" of demonstrating falsity of petitioner's account of the crime); *Grisby v. Blodgett*, 130 F.3d 365, 372–73 (9th Cir. 1997) (counsel made reasonable strategic decision not to test blood found at crime scene for fear the test results might inculpate petitioner); *Mack v. Sisto*, 2012 WL 3018205, at *13 (C.D. Cal. May 9, 2012) (counsel could have made a reasonable strategic decision that performing blood and fingerprint tests on knife found at crime scene would be "too risky" "since petitioner's fingerprints or DNA might be found"), *Report and Recommendation accepted* by 2012 WL 3018159 (C.D.Cal. July 23, 2012); *Zuniga v. Small*, 2009 WL 3164895, at *20 (C.D.Cal. Sept. 27, 2009) ("[P]etitioner's trial counsel could have reasonably concluded that testing a box cutter was too risky because of the possibility that petitioner's fingerprints or DNA would be found."). Indeed, in his closing argument, petitioner's trial counsel emphasized that the police "[d]idn't bother testing the watchband pin for DNA even though this is one of the only pieces of evidence of a struggle." (3 RT 619.)

Additionally, petitioner has not provided any evidence to suggest that the DNA testing would have linked another individual to the murder. Petitioner's conclusory allegations, without more, are insufficient to warrant habeas relief. *See* *Bragg v. Galaza*, 242 F.3d 1082, 1088–89 (9th Cir. 2001) (mere speculation that further investigation might lead to evidence helpful to petitioner was insufficient "to demonstrate ineffective assistance of counsel for failure to investigate"); *Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995) ("It is well-settled that '[c]onclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief.' " (citation omitted)); *James*, 24 F.3d at 26 (rejecting ineffective assistance of counsel claim based on unsupported allegations and noting that "[c]onclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief").

***19** As such, the state courts' rejection of these claims was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on these claims.

F. *Failure to investigate potential witnesses*

In Grounds Nineteen and Twenty, petitioner contends that his trial counsel was ineffective in failing to investigate Amaro and Kye (also known as Kye S. Kwon and Kye Sun Delgado), who had previously accused petitioner of rape. (Pet. at 44–45.)

1. *Relevant factual background*

During a pre-trial hearing, petitioner's counsel raised a concern that, if his client testified, the prosecutor intended to call as rebuttal witnesses two women who, in 1981 and 1996, claimed that petitioner raped them. (1 RT 26.) The prosecutor confirmed that he did not intend to call these witnesses in his case-in-chief, but would be waiting until petitioner took the stand. Petitioner's counsel moved to exclude evidence regarding these two prior incidents, arguing, *inter alia,* that neither case was ever prosecuted, the cases were not comparable to the current offense, and the evidence would be prejudicial. (1 RT 27–29, 79.)

With respect to the 1981 incident, petitioner maintained that he had gone into a bar where he was approached by a prostitute and her pimp. After she gave him a price, he said no. Later, the prostitute motioned for him to follow her into the restroom, where she offered to have sex with him for $20.00. After he gave her the money and they had sex, her pimp demanded $60.00. (1 RT 29.)

In contrast, the prosecutor stated that the victim in that case would testify that petitioner followed her into the restroom, pushed her, said he "wanted to fuck her," and if she made any noise, he would hit her. At that time, he reached into his pocket and pulled out a knife and held it to the victim's throat. He then forced her to have sex with him in the restroom. (1 RT 30–31.)

With respect to the 1996 incident, petitioner maintained that he was living with a woman and decided to move out. Thereafter, the woman invited petitioner over, they had sex, and petitioner began moving out. He was then approached by the police, who stated that she claimed he raped her. The district attorney decided not to file charges and a short time later, petitioner got a restraining order against this woman. (1 RT 41.) The prosecutor stated that the victim gave an entirely different story, alleging that petitioner entered the residence and told her he was "addicted to" her and that he would kill her if she did not do what he wanted. He allegedly threatened her with a Taser and raped her. (1 RT 43.)

The prosecutor argued that petitioner denied having sex with Cobb when he was initially interviewed, and then intended to testify at trial that the sex was consensual. According to the prosecutor, these two prior cases were probative of petitioner's credibility as a witness and whether he raped Cobb. (1 RT 31–32.) The prosecutor explained that it was the People's position that if he killed the victim while having sex with her or that the purpose of killing the victim was because he wanted to rape her, then that would be the reason why he would say "no" he did not have sex with her. (1 RT 32–34.) Petitioner's counsel argued that, under *People v. Story,* 45 Cal.4th 1282, 91 Cal.Rptr.3d 709 (2009), the evidence should be excluded because the allegations were not similar to the present case, the offered evidence was only relevant to the special circumstance allegation, the degree of certainty of commission of the other alleged crimes was "modest at best," they were remote in time, neither case involved a criminal prosecution, it would lead to confusion, and it would be prejudicial. (1 RT 79–85.)

***20** Following further argument, the trial court concluded that the two prior incidents would be admissible. (1 RT 93–94.) However, because petitioner did not testify, evidence regarding these prior incidents was not presented to the jury.

2. *San Bernardino County Superior Court*

On collateral review, the San Bernardino County Superior Court considered and rejected a similar claim, concluding that this claim failed because petitioner had "not shown what further investigation would have revealed, or how it would have changed the trial's outcome. (*In re Hardy, supra,* 41 Cal.4th at p. 1025.)" (Lodgment No. 13 at 9.)

3. *Analysis*

As the Supreme Court recognized in *Strickland,* trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *See* *Strickland,* 466 U.S. at 691; *see also* *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir. 1994) ("[C]ounsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client." (emphasis in original)). "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466 U.S. at 691; *see also Cox v. Del Papa,* 542 F.3d 669, 679 (9th Cir. 2008); *Reynoso v. Giurbino,* 462 F.3d 1099, 1114 (9th Cir. 2006). "[A] lawyer who fails adequately to investigate and introduce ... [evidence] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *See* *Duncan v. Ornoski,* 528 F.3d 1222, 1234 (9th Cir. 2008) (quoting *Hart v. Gomez,* 174 F.3d 1067, 1070 (9th Cir. 1999) (as amended)) (alterations in original); *Reynoso,* 462 F.3d at 1112; *Avila v. Galaza,* 297 F.3d 911, 919 (9th Cir. 2002). However, the duty to investigate and prepare a defense does not require that every conceivable witness be interviewed. *See* *Hendricks v. Calderon,* 70 F.3d 1032, 1040 (9th Cir. 1995) (as amended). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland,* 466 U.S. at 690; *see also Siripongs v. Calderon,* 133 F.3d 732, 736 (9th Cir. 1989). Further, such claims "must be considered in light of the strength of the government's case." *Bragg,* 242 F.3d at 1088.

Here, petitioner has not shown that trial counsel did not investigate petitioner's contentions, and strategically decide not to raise further argument on the issue. Neither of the witnesses testified and other than conclusory assertions, petitioner has not sufficiently explained how conducting a further investigation would have assisted in his defense or otherwise raised a sufficient doubt as to undermine confidence in the verdict. Petitioner's trial counsel presented his version of the 1981 and 1996 incidents and vigorously argued for their exclusion for impeachment purposes. However, despite his efforts, the trial court concluded that such evidence would be admissible. Petitioner has failed to show what additional evidence could have been uncovered that would have changed the result of this proceeding.

***21** Accordingly, the Court concludes that the state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim.

G. *Failure to perfect the recusal motion*

In Ground Twenty–One, petitioner contends that his trial counsel was ineffective in failing to perfect a recusal motion. Specifically, petitioner contends that his counsel filed a motion to recuse the San Bernardino County District Attorney's Office because of the campaign flyer, but failed to serve the California Attorney General's Office. According to petitioner, had counsel done so, the Attorney General's Office "would have shown there existed severe conflict." (Pet. at 47.)

This claim is entirely speculative. The trial court considered and denied the recusal motion, finding no conflict of interest. (1 CT 148; Augmented Clerk's Transcript on Appeal ["Aug. CT"] 16.) There is no evidence that the result would have been different had the Attorney General's Office weighed in. Petitioner merely speculates, without any evidentiary support, that the Attorney General's Office would have filed an opposition supporting his position, and does not articulate specific arguments the Attorney General's Office would have made that would have changed the result of the proceeding. *See Jones,* 66 F.3d at 205. Under the circumstances, the Court concludes that the state courts' rejection of this claim was not objectively unreasonable. Petitioner is not entitled to habeas relief on this claim.

H. *Failure to perfect motion for continuance*

In Ground Twenty–Two, petitioner contends that his trial counsel provided ineffective assistance by failing to perfect a motion to continue trial. Petitioner argues that his counsel made a request to the prosecution for the contact information of state witnesses, Amaro and Kye, and that Alexander complied with this request on January 13, 2011. At that time, the case was scheduled for trial readiness on January 14, 2011.[23] Petitioner argues that, although petitioner's counsel prepared a motion for a continuance, he inadvertently wrote the wrong name and case number, and the motion was denied. According to petitioner, rather than orally requesting the continuance, trial counsel instead indicated that he was ready to proceed with trial without an investigation of the witnesses. (Pet. at 48; Pet Mem. at 127.)

Even assuming petitioner's trial counsel failed to perfect a motion for a continuance, trial counsel nevertheless indicated on January 14, 2011 that he was ready for trial. (1 CT 177.) Petitioner has not presented any evidence to the contrary. Further, as previously explained with respect to these witnesses, there has been no showing that counsel did not investigate petitioner's version of the facts by the time this issue came up several days later. Additionally, petitioner has not shown that there is a reasonable probability that, had his counsel requested a continuance, such continuance would have been granted *and* the result of the proceeding would have been different. Petitioner has not explained how a continuance to further investigate these witnesses would have assisted in his defense or otherwise raised a sufficient doubt as to undermine confidence in the verdict. Accordingly, the Court concludes that the state courts' rejection of this claim is not objectively unreasonable and petitioner is not entitled to habeas relief on this claim.

I. *Failure to subpoena Holly and Linda Mitchell*

***22** In Ground Twenty–Three, petitioner contends that his trial counsel rendered ineffective assistance by failing to subpoena his ex-wife, Holly Mitchell, and her mother, Linda Mitchell. (Pet. at 49.) Petitioner argues that he told his counsel about these witnesses, and even drafted subpoenas, but no subpoenas were served and the witnesses did not testify. Petitioner contends that his ex-wife could have verified that, during the relevant time frame, they were expecting a baby and that she had gone to her mother and grandparents's house the week the crime occurred. His former mother-in-law could have testified that petitioner came to Downey, where she apparently lived at that time,[24] several times around the time of the pregnancy, and "quite possibly" been at her house when the crime took place. (*Id.*)

Ineffective assistance of counsel claims based upon uncalled witnesses are not favored in habeas corpus petitions "because the presentation of witness testimony is essentially strategy and thus within trial counsel's domain, and that speculations as to what these witnesses would have testified is too uncertain." *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985); *see also Lord,* 184 F.3d at 1095 ("Few decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial."). In order to show ineffective assistance of counsel based on the failure to call a witness, the defendant must show that the particular witness was willing to testify, *see United States v. Harden,* 846 F.2d 1229, 1231–32 (9th Cir. 1988); what his or her testimony would have been, *see United States v. Berry,* 814 F.2d 1406, 1409 (9th Cir. 1987); and that his or her testimony would have been sufficient to create a reasonable probability that the jury would have had a reasonable doubt as to guilt, *see Tinsley v. Borg,* 895 F.2d 520, 532 (9th Cir. 1990). Generally, this requires the submission

of affidavits from the witnesses themselves. *See* *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000); *Harden*, 846 F.2d at 1231–32 (denying ineffective assistance of counsel claim based on failure to call a witness because "[t]here is no evidence in the record which establishes that [the witness] would [have] testif[ied]").

Here, again, there has been no showing that counsel did not investigate petitioner's version of the facts and strategically decide not to present these witnesses. Indeed, petitioner's counsel explained during a *Marsden* hearing that his investigator spoke to petitioner's ex-wife and that he believed his investigator spoke with every person that petitioner thought they should talk to. (4/15/11 Supp. RT 16–17.)

Additionally, petitioner's contentions are based solely on his own self-serving statements, without any evidentiary support that either of these witnesses were available to testify and would have assisted in his defense. Petitioner has not presented a single affidavit from either witness verifying that they were willing to testify or what they would have testified. Nor has petitioner shown that their testimony would have been sufficient to create a reasonable doubt as to guilt. Petitioner argues that these witnesses could have testified that he was visiting his ex-mother-in-law's house around the time of the crime. However, he does not indicate that these witnesses could affirmatively provide an alibi, and only speculates that he "possibly" could have been at the mother-in-law's house at the time of the murder.

As such, the state courts' rejection of this claim was not objectively unreasonable and petitioner is not entitled to habeas relief on this claim.

J. *Misstatements during Marsden hearing*

***23** In Ground Twenty–Four, petitioner contends that his trial counsel rendered ineffective assistance by intentionally misstating facts during a *Marsden* hearing. In particular, petitioner maintains that his trial counsel made misrepresentations regarding the following: (1) How many times he visited petitioner in jail; (2) whether Judge Nakata had told counsel that there was insufficient evidence to hold petitioner; (3) that he had given petitioner the evidence in the case; (4) how much time petitioner would have to decide whether to testify; and (5) whether the trial court had told counsel that petitioner should not testify. (Pet. at 50.)

1. *Relevant factual background*

Following trial, but before sentencing, on April 15, 2011, the trial court held a hearing regarding petitioner's *Marsden* motion. Petitioner was provided an opportunity to explain why the court should grant his motion. Petitioner argued, *inter alia,* that from the beginning of the case, his counsel had always cut him short and never wanted to discuss any of the context of the case; he asked his counsel for all of the discovery, with the exception of the forensic reports, and all he received was 300 pages of documents and then later provided 1300 pages of documents after trial; after filing a motion under Cal.Penal Code § 995 before Judge Nakata, defense counsel did not want to pursue it even though Judge Nakata stated that he was willing to dismiss the case for lack of evidence and petitioner's counsel instead stipulated that evidence did, in fact, exist; his counsel told him that the trial court had indicated that it was in his best interest not to testify; and he was told he would have three days to decide whether to testify, and then 30 minutes later, his counsel announced that the defense rested. (4/15/11 Supp. RT 2–8.)

Petitioner's trial counsel was given an opportunity to respond. He stated that the trial court never told him that it was in petitioner's best interest not to testify and he did not relay such a message to petitioner; he met with petitioner more often than any other client he had; he met him approximately four or five times at West Valley Detention Center and a number of times in the courtroom; he never walked out of a meeting with petitioner unless petitioner said they did not have anything else to discuss; he gave petitioner all of the discovery he had initially requested and, then after petitioner was convicted, he made a separate request for discovery and counsel again copied all of the discovery; he did not know what petitioner was talking about in terms of the §

995 motion, but thought it was "preposterous" that Judge Nakata said that he was going to grant the motion and that this did not happen; and he gave petitioner advice on testifying, but told him that it was ultimately his decision. (4/15/11 Supp. RT 8, 13–19.)

Thereafter, the *Marsden* motion was continued, and ultimately denied. (4/15/11 Supp. RT 20; April 22, 2011 Supplemental Reporter's Transcript ["4/22/11 Supp. RT"] 14.) The trial court gave more weight to defense counsel on the issue of credibility and concluded that petitioner's trial counsel "did the best he could with the case that he had." (4/22/11 Supp. RT 13.)

2. *Analysis*

"The Supreme Court has held that a defendant is entitled to counsel who 'function[s] in the active role of an advocate.' " *Plumlee v. Masto*, 512 F.3d 1204, 1211 (9th Cir. 2008) (en banc) (citation omitted, alteration in original). Here, petitioner has not demonstrated that his attorney failed to satisfy this obligation or acted unreasonably under *Strickland*.

First, with respect to petitioner's claim that trial counsel misrepresented the number of times he visited with petitioner, petitioner has failed to present any evidence to support his contention, let alone present any competent evidence showing what additional information would have been adduced had counsel met with him more frequently, and his conclusory allegations are insufficient to warrant habeas relief. *See Jones*, 66 F.3d at 205. As petitioner's counsel explained during the *Marsden* hearing, he thought that his investigator spoke with every person that petitioner identified and during trial, petitioner provided him hundreds of questions to ask the witnesses, and counsel read all of these notes. (4/15/11 Supp. RT 17–18.) Petitioner's trial counsel further explained that, during his meetings with petitioner, he did not leave until petitioner indicated that he did not have anything else to discuss. (4/15/11 Supp. RT 15.) Accordingly, the Court concludes that petitioner has failed to demonstrate ineffective assistance of counsel on this basis.

***24** Second, with respect to the § 995 motion, petitioner misrepresents the hearing on this matter. Petitioner's trial counsel presented the motion. At the time, the trial court had the preliminary hearing transcript, but did not have a copy of the stipulation referenced in the transcript regarding a DNA record. (1 RT 2.) The prosecutor indicated that he believed the stipulation stated that the results from the vaginal swabs taken from the victim matched petitioner's DNA. (1 RT 3.) In the absence of such evidence, the trial court stated that it did not see a link between petitioner and the case. (1 RT 2.) The trial court continued the matter in order to provide the parties an opportunity to obtain the stipulation. (1 RT 3.) Thereafter, the trial court was provided the DNA reports of the criminalists. Based on a review of those documents and the preliminary hearing transcript, the trial court concluded that there was sufficient evidence to support the charges against petitioner and denied the motion. (1 RT 4–5.) As such, petitioner's trial counsel did not misstate the facts, and petitioner has failed to demonstrate ineffective assistance based on such representations.

Third, the Court has previously discussed the issue regarding the discovery provided to petitioner. Even assuming petitioner's allegations are true, petitioner has failed to demonstrate prejudice. The evidence against petitioner was strong and petitioner has not shown that there is a reasonable probability that, but for counsel's failure to turn over such documents, the result of the proceeding would have been different. Nor has he shown that had trial counsel conceded during the hearing that some documents were not provided to him, the trial court would have granted his post-trial *Marsden* motion. As explained, the trial court concluded that petitioner's trial counsel "did the best he could with the case that he had." (4/22/11 Supp. RT 13.)

Finally, with respect to petitioner's contentions that trial counsel misstated facts regarding petitioner's right to testify, the Court concludes that petitioner's allegations are belied by the record. The trial court expressly and repeatedly advised petitioner that the right to testify or not to testify is a right held by him, and not by his counsel. Petitioner indicated that he understood this right. (2 RT 497–99.) Thereafter, when the defense rested, petitioner did not object or otherwise alert the trial court that he desired to testify or that he did not understand that right. (2 RT 523.) *See United States v. Nohara*, 3 F.3d 1239, 1244 (9th Cir. 1993) ("When a defendant is silent in the face of his attorney's decision not to call him as a witness, he has waived his right

to testify."). Aside from petitioner's own self-serving statements made after the trial was over, there is no evidence to support his contention that he was misled about his right to testify. The Court concludes that petitioner's allegations that his counsel made misrepresentations regarding his right to testify are insufficient to demonstrate ineffective assistance.

Accordingly, the state courts' rejection of this claim is not objectively unreasonable and petitioner is not entitled to habeas relief on this claim.

K. *Failure to move for a change of venue*

In Ground Forty–One, petitioner contends that his trial counsel was ineffective in failing to move for a change of venue because of the media coverage on this case, including the campaign flyer. (Pet. at 80.)[25]

During the April 22, 2011 hearing on the *Marsden* motion, petitioner's trial counsel explained that he had filed a motion for change of venue, but after voir dire, he concluded that the motion was without merit, and withdrew it. (4/22/11 Supp. RT 11.)

Petitioner has failed to show that counsel should have requested a change of venue, or that such a request, if made, would have been meritorious. A criminal defendant has a Sixth Amendment right to a fair trial by an impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Mancuso*, 292 F.3d at 949. Thus, pretrial publicity requires a change of venue when "the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime" or "voir dire reveals that the jury pool harbors 'actual partiality or hostility [against the defendant] that [cannot] be laid aside.' " *See Hayes v. Ayers*, 632 F.3d 500, 508 (9th Cir. 2011) (quoting *Harris v. Pulley*, 885 F.2d 1354, 1361–63 (9th Cir. 1989) (as amended)) (alteration in original).

***25** Here, petitioner has not presented any evidence demonstrating that the trial was saturated with prejudicial and inflammatory media publicity about the murder. Petitioner submits newspaper clippings, many of which are undated or have a handwritten date. However, most of these articles are primarily factual accounts of the crime and the DNA results leading to arrest and do not contain overly inflammatory rhetoric. *See Murphy*, 421 U.S. at 802 (rejecting contention that pretrial publicity was inflammatory where the news articles were "largely factual in nature"). Several others relate to petitioner's own lawsuit against Ramos based on the campaign flyer. (*See, e.g.*, 2 CT 399, 403.) Further, most of the articles with dates (mostly handwritten) relating to the actual case were published more than a year before the trial commenced in January 2011. (*See, e.g.*, 2 CT 400 (3/11/09), 401–02 (3/11/09, 10/24/09), 409 (10/24/09).) Other articles only briefly mentioning the case or relating to petitioner's lawsuit were published several months before the trial. (*See also* 2 CT 399 (article regarding petitioner's lawsuit against district attorney), 403 (9/15/10 article regarding petitioner's lawsuit against the district attorney), 410 (6/21/10 article briefly mentioning petitioner's case in article regarding DNA evidence); *see also* Pet. Att. A12 (9/9/10 article included at 2 CT 399).)[26] Petitioner also refers to a blog post by Ramos's opponent dated May 19, 2010 regarding the campaign flyer. (2 CT 412.) However, there is no evidence that this blog was widely disseminated—there were no follow-up comments—or that it influenced the jury pool.

Further, there is no evidence that the publicity from this case prejudiced the potential jurors and petitioner has not offered any evidence that the jurors could not, or did not, remain impartial during his trial. For instance, one prospective juror who recalled seeing something in the newspaper regarding the case stated that she could ignore what she had read in the newspaper and thought she could be a fair juror. (Aug. RT 77.)

As such, petitioner has not demonstrated that a motion for a change of venue would have had a reasonable chance of success, much less a reasonable probability of changing the outcome of the proceedings. Accordingly, the Court concludes that petitioner

has not shown that his counsel's failure to request a change of venue constituted deficient performance and prejudiced petitioner's trial. *See* *James*, 24 F.3d at 27 ("Counsel's failure to make a futile motion does not constitute ineffective assistance of counsel."). The state courts' rejection of this claim was not objectively unreasonable and petitioner is not entitled to habeas relief on this claim.

L. *Cumulative error*

Finally, petitioner claims that trial counsel rendered ineffective assistance "through cumulative errors." (Pet. at 52.) As explained, cumulative error applies where, "although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." *Mancuso*, 292 F.3d at 957 (quoting *Frederick*, 78 F.3d at 1381). Here, as discussed above, the Court has considered and rejected all of petitioner's ineffective assistance claims on the merits. None of the alleged errors rise to the level of a constitutional error. Thus, petitioner's cumulative error claim must fail as well. *See* *Mancuso*, 292 F.3d at 957.

III. *Petitioner is not entitled to habeas relief on his conspiracy claim.*

In Ground Twenty–Six of the Petition, petitioner contends that his trial counsel, the prosecutor, and Alexander conspired to alter the transcript of the interview between petitioner and detectives. (Pet. at 54.)

Petitioner raised a similar claim on collateral review before the San Bernardino County Superior Court. The Superior Court rejected the claim, concluding that, "[b]ecause [petitioner] has not shown how a more complete recording could have changed the trial court's outcome, or how trial counsel's actions could have obtained such a recording, his claim fails. (*Strickland v. Washington, supra,* 466 U.S. at p. 697.) Furthermore, petitioner's conclusory allegations about his counsel conspiring to alter evidence do not warrant habeas corpus relief. (*People v. Duvall, supra,* 9 Cal.4th at p. 474; *In re* *Swain, supra,* 34 Cal.2d at p. 304.)" (Lodgment No. 13 at 89.)

***26** The Court concurs with the finding and conclusion of the Superior Court that petitioner's claim is conclusory and insufficient to warrant habeas relief. *Jones*, 66 F.3d at 204. Petitioner has not presented any evidence to establish an alleged agreement between his trial counsel, the prosecutor, and Alexander to violate petitioner's rights. As previously explained, the prosecutor and trial counsel conferred regarding redactions to the recording, and petitioner has failed to show that any relevant, probative portions of the recording were redacted, prejudicing petitioner.

The state courts' rejection of this claim was neither not contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim.

IV. *Petitioner is not entitled to habeas relief on his claim alleging a violation of his Miranda rights.*

In Ground Twenty–Seven of the Petition, petitioner contends that his March 8, 2009 interview with the detectives violated his *Miranda* rights. (Pet. at 56.) Petitioner maintains that he was not advised of his *Miranda* rights and he tried to end the interview, but the detectives insisted that the interview be continued at the police station and he could not leave. As previously explained, petitioner maintains that the transcript of this interview was altered. (*Id.*)

Although this claim was raised in his habeas petition before the San Bernardino County Superior Court, the Superior Court concluded that it did not have jurisdiction to consider this claim. The Superior Court, however, otherwise concluded that his conclusory allegations about "altered" evidence did not warrant habeas relief. (Lodgment No. 13 at 7–8.)

A. *Relevant factual background*

Petitioner was interviewed by Detectives Alexander and Greg Myler on March 8, 2009. Initially, the interview was conducted at petitioner's home and thereafter, the detectives asked if they could continue the interview at another, more private location outside the presence of petitioner's wife. (2 CT 478, 528.) Petitioner's wife drove petitioner, with the detectives following in a separate vehicle, to the Signal Hill Police Station. (2 CT 529, 531.) At the police station, petitioner was advised that he was free to leave at anytime and he was not under arrest. (2 CT 537.) Petitioner voluntarily continued with the interview. At the end of the interview, petitioner was placed under arrest for the murder of Cobb. (2 CT 590.)

B. *Applicable legal authority and analysis*

It is well established that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda* 384 U.S. at 444. These "procedural safeguards" require that a person in custody:

> Be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479. The Supreme Court in *Miranda* stated that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444; *see also* *Fields,* 132 S.Ct. at 1189 (" 'custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion" (quotation marks in original)).

***27** The Supreme Court has said that "[t]he *Miranda* custody inquiry is an objective test." *Yarborough v. Alvarado,* 541 U.S. 652, 667, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). "Although the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving of *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (per curiam) (quoting *Oregon v. Mathiason,* 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam)). To determine whether a person was "in custody" for *Miranda* purposes, a reviewing court must examine all of the circumstances surrounding the interrogation. *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (per curiam); *see also Stanley v. Schriro,* 598 F.3d 612, 618 (9th Cir. 2010) (court looks to "the totality of the circumstances" to answer custody question). Two discrete inquiries are essential to the *Miranda* custody determination: First, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt that he was not at liberty to terminate the interrogation and leave. *Thompson v. Keohane,* 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' " *Id.* (citations omitted, alteration in original). Factors relevant to determining how a suspect would have gauged his "freedom of movement" include: (1) The location of the questioning, (2) its duration, (3) the statements made during the interview, (4) the presence or absence of physical restraints during the questioning, and (5) whether the interviewee was released at the end of the questioning. *Fields,* 132 S.Ct. at 1189.

However, "[d]etermining whether an individual's freedom of movement was curtailed ... is simply the first step in the analysis, not the last." *Fields,* 132 S.Ct. at 1189–90 ("the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody" (citation omitted)). The Supreme Court has said that "[n]ot all restraints on freedom of

movement amount to custody for purposes of *Miranda*." *Id.* at 1189. As the Supreme Court explained, "[w]e have 'decline[d] to accord talismanic power' to the freedom-of-movement inquiry, and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*. *Id.* at 1189–90 (internal citation omitted); *see also* *Behler*, 463 U.S. at 1124 (person is not in *Miranda* custody simply because court concludes the questioning occurred in a coercive environment; police are required to give *Miranda* warnings only where there has been such a restriction on a person's freedom as to render him "in custody" for *Miranda* purposes).

Because the *Miranda* custody test is an objective test, "the subjective views harbored by either the interrogating officers or the person being questioned" are irrelevant. *See* *Stansbury*, 511 U.S. at 323; *see also* *Yarborough*, 541 U.S. at 662–63. "The test, in other words, involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning." *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011) (citation omitted).

Here, the state courts could have reasonably determined that petitioner was not in custody for *Miranda* purposes. The detectives first made contact with petitioner at his house, where petitioner voluntarily spoke to them. (2 CT 478.) He was not placed under arrest, and no restraints were used. The conversation was congenial and took place in front of petitioner's wife. (*See* 2 CT 493, 516–17, 527–28.) Thereafter, the detectives asked petitioner whether they could go to the police station to speak more privately, "kind of away from [his] wife," to which petitioner voluntarily agreed. (2 CT 528.) Petitioner and his wife took their own car to the police station, and stopped for gas along the way. (2 CT 531.) Once at the station, petitioner was expressly advised that he was free to leave and that he was not under arrest. (2 CT 537.) Such advisements suggest that the questioning was noncustodial. *See* *Mathiason*, 429 U.S. at 495; *United States v. Crawford*, 372 F.3d 1048, 1059–60 (9th Cir. 2004) (en banc). Further, there is no evidence that he was handcuffed, locked in the interview room, or otherwise prevented from leaving. The interview then continued at the police station. Although petitioner was ultimately arrested at the end of the interview, the other circumstances support the finding that he was not in custody. *See Smith v. Clark*, 612 F. App'x 418, 420 (9th Cir. 2015) (although the petitioner was not released at the end of the questioning, numerous other circumstances supported the view that the interview could fairly be deemed investigative rather than custodial). While petitioner disputes whether he had to go to the police station and whether he was free to leave, petitioner has not presented any evidence in support of these contentions, other than his self-serving statements that the transcript of the interview was altered.[27]

***28** Accordingly, based on a consideration of the totality of the circumstances, the Court concludes that the state courts' rejection of this claim was not objectively unreasonable. Petitioner is not entitled to habeas relief on this claim.

V. *Petitioner is not entitled to habeas relief on his insufficiency of the evidence claim.*

In Ground Twenty–Eight of the Petition, petitioner contends that the trial court erred in prosecuting him on less than proof beyond a reasonable doubt. (Pet. at 58.) As best the Court can glean from the allegations of the Petition, petitioner appears to be asserting an insufficiency of the evidence claim.

A. *Applicable legal authority*

The California standard for determining the sufficiency of the evidence to support a conviction has been held by the California Supreme Court to be identical to the federal standard enunciated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *See* *People v. Johnson*, 26 Cal.3d 557, 576, 162 Cal.Rptr. 431 (1980). Under this standard, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original); *see also* *Parker v. Matthews*, 567 U.S. ____, 132 S.Ct. 2148, 2152, 183 L.Ed.2d 32 (2012) (per curiam). In making this determination, the reviewing court "must respect the province of the jury to determine the credibility of

witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." *Walters*, 45 F.3d at 1358; *see also* *Cavazos v. Smith*, 565 U.S. ____, 132 S.Ct. 2, 6, 181 L.Ed.2d 311 (2011) (per curiam) (*Jackson* "instructs that a reviewing court 'faced with a record of historical facts that support conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.' " (quoting *Jackson*, 443 U.S. at 326)). Further, the AEDPA requires an additional degree of deference to a state court's resolution of an insufficiency of the evidence claim. *See* *Coleman v. Johnson*, 566 U.S. –, 132 S.Ct. 2060, 2062, 182 L.Ed.2d 978 (2012) (per curiam) ("*Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference."). Consequently, habeas relief is not warranted unless "the state court's application of the *Jackson* standard [was] 'objectively unreasonable.' " *Juan H. v. Allen*, 408 F.3d 1262, 1275 n.13 (9th Cir. 2005) (as amended); *see also* *Coleman*, 132 S.Ct. at 2062; *Smith*, 132 S.Ct. at 4. Finally, "the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n.16; *Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004).

B. *Analysis*

Here, the Court concludes that there was substantial evidence supporting the jury's verdict finding petitioner guilty of first degree murder with the special allegation that the crime was committed while petitioner was engaged in the commission of and/or attempted commission of rape. (1 CT 231–32.) The evidence established that, when Cobb was found, she was lying on the bed, naked, with her legs spread apart, as though someone "had sex with her." (1 RT 118, 177, 195; 2 RT 438.) A white cloth was on her face, which may have been used as a gag. (1 RT 233; 2 RT 442, 444.) The evidence also established that she was strangled and a wire coat hanger was found wrapped tightly around her neck. (1 RT 238; 2 RT 444–45, 464–65, 480–81.) From these circumstances, a jury reasonably could have concluded that the perpetrator murdered Cobb in the commission of a rape or attempted rape.

***29** The evidence also supported the finding that petitioner was the perpetrator. Jones testified that he collected two vaginal swabs from Cobb and samples from a felt pad found at the scene, all of which contained sperm cells. (1 RT 260, 263, 267–70; 2 RT 283–84, 286–87; *see also* 2 RT 471.) The DNA profile of the sperm cells extracted from the vaginal swabs and the felt pad matched petitioner's DNA profile across all locations. (1 RT 262–63; 2 RT 338, 341, 345–47, 360–71, 382, 506.) Siewertsen calculated the statistical analysis as to the male profile obtained from the vaginal swabs and concluded that the DNA profile was "very rare," with for example, a random match probability of roughly one in 1.9 quadrillion Caucasian males. (2 RT 345–46.) Criminalist Susan Anderson calculated that one would expect to find the particular DNA profile obtained from the felt pad in less than one in 190 trillion Caucasian males, once within a population of 11 quadrillion African–American males, and once within a population of 32 trillion Southwestern Hispanic males. (1 RT 365-67.)

Further, when asked during his interview whether he had been intimate with Cobb, petitioner denied it. (2 CT 517, 520–21, 576–577.) Petitioner appears to contend that the reason he lied about his sexual involvement with Cobb was because his wife was in the room. (Pet. Mem. at 165.) However, petitioner's wife was not with him at the police station and he still did not admit that he had any type of relationship with Cobb. (*See* 2 CT 576–77.)

Accordingly, after viewing the evidence presented at trial in the light most favorable to the prosecution, and presuming that the jury resolved all conflicting inferences from the evidence against petitioner, the Court finds that a rational jury could have found beyond a reasonable doubt that petitioner was guilty of first degree murder with the special allegation that the murder was committed while he was engaged in the commission of and/or attempted commission of rape and petitioner's attempt to re-argue the evidence adduced at trial does not alter this conclusion. *See* *Walters*, 45 F.3d at 1358. Based on the foregoing, the state courts' rejection of petitioner's insufficiency of the evidence claim was not objectively unreasonable. Petitioner is not entitled to habeas relief on his insufficiency of the evidence claim.

VI. ***Petitioner is not entitled to habeas relief on his evidentiary error claims.***

In Grounds Twenty–Nine and Thirty–Three through Thirty–Six of the Petition, petitioner contends that the trial court erred in excluding evidence. (Pet. at 60, 6672.)

Preliminarily, to the extent that petitioner may be claiming that the trial court's alleged evidentiary errors violated state law, such claims are not cognizable on federal habeas review. *See* 28 U.S.C. § 2254(a); *Jammal*, 926 F.2d at 919 (federal habeas courts "do not review questions of state evidence law"); *see also* *McGuire*, 502 U.S. at 67–68; *Phillips*, 455 U.S. at 221.

The Supreme Court has held that the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *See* *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Id.* (citations and internal quotation marks omitted)). But, having the opportunity to present a complete defense does not provide a criminal defendant with license to present any evidence he pleases. *See* *Moses*, 555 F.3d at 757 (" '[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions,' such as evidentiary and procedural rules" (citation omitted)). The defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L. Ed.2d 297 (1973); *see also* *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) ("The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." (citation omitted, alteration in original)); *Crane v. Kentucky*, 476 U.S. 683, 689–90, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) ("the Constitution leaves to the judges ... 'wide latitude' to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.' " (citation omitted)). Further, habeas relief is not warranted unless the error had a substantial and injurious effect or influence in determining the jury's verdict. *See* *Fry v. Pliler*, 551 U.S. 112, 122, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007); *see also* *Brecht*, 507 U.S. at 637–38; *Slovik v. Yates*, 556 F.3d 747, 755 (9th Cir. 2009).

A. *Nash's testimony*

***30** As previously explained, petitioner's trial counsel attempted to elicit testimony from Nash that Cobb had told him that she intended to go to a bar after the party. (2 RT 415.) The prosecutor objected on hearsay grounds. (*Id.*) During a side-bar discussion, petitioner's trial counsel argued that such evidence was relevant. The trial court sustained the objection. (2 RT 416–17.)

In Ground Twenty–Nine, petitioner contends that the trial court's decision violated the Confrontation Clause and in Ground Thirty–Six, petitioner contends that it violated his due process rights. (Pet. at 60, 72.) Petitioner raised a similar due process claim in the California Court of Appeal on direct appeal. The Court of Appeal found that the trial court erred in excluding the testimony, but concluded that the error was harmless because "[d]efense counsel effectively argued to the jury that someone other than [petitioner] could have killed Rita Cobb." (Lodgment No. 19 at 17.) The Court of Appeal explained (*id.*):

> *Although we conclude the trial court erred in excluding Nash's testimony regarding Rita Cobb's statement of intent, that error requires reversal only if it was prejudicial, i.e., if it is reasonably probable the jury would have reached a result more favorable to defendant if Cobb's statement had been admitted into evidence at trial. (Evid.Code, § 354.) Defense counsel effectively argued to the jury that someone other than [petitioner] could have killed Rita Cobb. According to the forensic evidence, Cobb died no later than*

> *noon on Saturday but she could have had sex as much as a day and a half before her death. Therefore, she could have had sex with A on Thursday night but then have been killed by B sometime after that. Defense counsel noted there was no evidence to show Cobb had been sexually assaulted. [Petitioner] also argued that Joe Saunders, whose fingerprints were found on a glass in Cobb's kitchen, could have killed Rita Cobb. The excluded evidence does not add anything to petitioner's argument.*

The Court concurs with the finding of the California Court of Appeal that even assuming, without deciding, that the trial court erred in excluding this inquiry, petitioner was not prejudiced. As the Court of Appeal noted, petitioner's trial counsel argued in his closing argument that an unidentified third person could have killed Cobb after she engaged in sexual intercourse with petitioner. (3 RT 626, 642.) The pathologist testified that Cobb died at least two days before the body was discovered and she could have had sex as much as a day and a half before her death. (2 RT 464, 491.) Petitioner's counsel highlighted that there were at least 16 other people whose DNA was tested, but merely because there was no match, they were not even brought in for questioning. (3 RT 619–20.) Petitioner's counsel also referenced Saunders, another individual who was at the party the last night Cobb was seen and argued that / / / there was no evidence that he did not kill her. (3 RT 623–24, 626.) He further argued that petitioner had no motive to rape or kill Cobb. (3 RT 636.)

As the Court of Appeal noted, however, evidence that Cobb may have intended to go to a bar after the party or that she did go to a bar does not add anything or strengthen the defense's theory. Merely because she may have gone to a bar after the party does not demonstrate that petitioner did not commit the murder.

***31** The Court concludes that the state courts' rejection of petitioner's claims was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on either claim.

B. *Evidence of the Brooks homicide*

In Ground Thirty–Three, petitioner contends that the trial court erred in excluding "evidence of third party culpability of perpetrator." In particular, petitioner contends that the trial court erred in excluding evidence regarding the Brooks murder because it was "identical in nature," committed in the exact "same profiled behavior," in the same general location, close in time, in the same style, and the victims had "the same lifestyles" and were in the same age bracket. (Pet. at 66.)

The California Court of Appeal rejected this claim on direct appeal, concluding as follows (Lodgment No. 19 at 7–10 (footnotes omitted)):

> *During trial, defense counsel informed the court that he intended to question various witnesses, including the criminologist, about the apparent rape and murder of Helen Brooks, an unsolved homicide defense counsel claimed "is in many respects almost identical to the Rita Cobb case." Defense counsel could not (or at least did not) identify specific similarities but stated "there's so many ways these two cases are similar [and] because of that for the first two or three years after September 23rd of 1985, the sheriff's department treated the two cases as if they had been committed by the same person." The prosecutor objected on the basis of relevance because there was no evidence to link the person who killed Helen Brooks to the Rita Cobb murder. The trial court agreed and ruled the evidence inadmissible not only because it was not relevant but also because it was likely to confuse the jury. [¶] "In general, third party culpability evidence is admissible if it 'rais[es] a reasonable doubt of defendant's guilt.' [Citation.] This does not mean, however, that no reasonable limits apply. Evidence that another person had 'motive or opportunity' to commit the charged crime, or had some 'remote' connection to the victim or crime scene,*

is not sufficient to raise the requisite reasonable doubt. [Citation.] Under [People v.] Hall [(1986) 41 Cal.3d 826, 833] and its progeny, third party culpability evidence is relevant and admissible only if it succeeds in 'linking the third person to the actual perpetration of the crime.' [Citations.]" (People v. DePriest (2001) 42 Cal.4th 1, 43.) We review a trial court's rulings on the admissibility of evidence under the abuse of discretion standard. (People v. Waidla (2000) 22 Cal.4th 699, 724.)[¶] [Petitioner] describes the evidence regarding Helen Brooks as "reverse other crime evidence," in that it showed [petitioner] had not committed the other crime because his DNA did not match DNA obtained from Brooks. [Petitioner] argues that if the two crimes are closely similar, and [petitioner] was not the perpetrator of one of the crimes, "this constituted powerful circumstantial evidence that he was not the perpetrator in the other case, either." In other words, [petitioner] claims the person who killed Helen Brooks must have been the person who also killed Rita Cobb, and therefore the Brooks homicide is circumstantial evidence of third party culpability in the Cobb homicide. [¶] There are several defects in [petitioner's] argument, the first of which is his premise that the person who raped Helen Brooks also was the person who killed her. As [petitioner] argued in his own defense in this case, that premise is not necessarily true. The killer might not have been the rapist; two different people could have been involved. Therefore, the absence of [petitioner's] DNA in the Brooks case does not eliminate him from the pool of people who might have killed her. [¶] The second defect in [petitioner's] argument is that even if we were to accept his initial premise, [petitioner] did not establish the factual similarities between the Cobb and Brooks crimes. He showed only that both crimes involved older women who lived in the Lucerne Valley, and who were killed in the summer of 1985. In challenging the trial court's ruling, [petitioner] claims he made an offer of proof that the Brooks and Cobb homicides were "in many respects almost identical." Defense counsel did make that statement, but he did not support that claim with any factual details about the Brooks homicide. In arguing the issue on appeal, [petitioner] cites to a police report included in his motion for new trial. That police report was not before the trial court when it ruled on the admissibility of the Brooks crime. Moreover, the police report, which lists several unsolved homicides involving older women, only discloses that on July 5, 1985, 63–year old Helen Brooks was apparently killed and her body was found in an apartment located on Highway 18, in Apple Valley. [Petitioner] also made an offer of proof that DNA obtained in the Brooks case did not match [petitioner's] DNA, and therefore [petitioner] was eliminated as a suspect in that case. The prosecutor had told the trial court about the Helen Brooks case, in the course of putting on the record that he had made parts of the file in that case available to defense counsel. In describing the case to the trial court, the prosecutor said Brooks had been raped and murdered. Neither defense counsel's statement nor the facts contained in the record on appeal establish that the DNA obtained in the Brooks case was obtained from a vaginal swab of the victim. The record on appeal does not include any other details about that crime, such as how Brooks was killed or where and how her body was found. Absent those details, [petitioner] failed to link the person who killed Helen Brooks with the homicide of Rita Cobb. [¶] We also do not accept [petitioner's] assertion that the trial court precluded his attorney from making the necessary offer of proof. But even if we agreed, and thus excused the oversight in this case, the additional evidence [petitioner] would have cited is the evidence we have recounted above. That evidence does not make the connection between the two crimes. Similarly, we do not share [petitioner']s view that on appeal we must accept his offer of proof as true. [Petitioner] not only has failed to cite any authority that supports this assertion, the truth of his offer of proof is not supported by the facts he cites in the appellate record. [¶] For each of the reasons discussed, we conclude [petitioner] failed to establish the requisite link between the perpetrator of the Brooks homicide and the homicide of Rita Cobb. Therefore, [petitioner] failed to show the Brooks homicide was relevant and could raise a reasonable doubt about his guilt in this case. Consequently, we must conclude the trial court did not abuse its discretion by ruling that evidence inadmissible at trial.

*32 The Court concurs with the findings and conclusion of the California Court of Appeal. Petitioner asserts, without any citation to the record, that during pre-trial arguments, his trial counsel sought to incorporate third-party culpability evidence that the person who raped and killed Brooks also killed Cobb. (Pet. at 66.) During a pre-trial hearing regarding admission of third party culpability evidence, the trial court asked petitioner's counsel, "other than motive and opportunity, what third party culpability evidence is there?" (1 RT 15.) Petitioner's trial counsel responded that he did not have "any right now as to any particular person." (*Id.*) Later, during a break in the testimony of Jones, petitioner's trial counsel indicated that he would like to ask Jones and some of the other witnesses about the Brooks case because this case was "in many respects almost identical to the Rita Cobb case," although he could not give "a list right now" of how they were similar. (1 RT 274.) As respondent notes, petitioner's contention that the Brooks murder was committed by the same person is based on pure speculation. Further, the Court agrees with the Court of Appeal that the absence of petitioner's DNA in the Brooks case does not eliminate him as a suspect. The Court agrees with the trial court's analysis that introduction of evidence regarding the Brooks case did not tend to exonerate petitioner, except for possibly leading to confusion. (2 RT 278.) Based on the foregoing, the Court concludes that the state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim.

C. *Exclusion of evidence regarding Cobb's lifestyle*

In Ground Thirty–Four, petitioner contends that the trial court erred in excluding evidence that Cobb was sexually involved with numerous individuals in the community. According to petitioner, there were statements from co-workers that she was sexually involved with several men at work; bartenders that admitted to being sexually involved with her and others that had seen her being picked up by "anybody"; her son stated that she was known to date men; her closest friends said she was a lonely woman and dated often; and FBI reports stated that she was sexually involved with a variety of people. Petitioner argues that the evidence was that "she had so many sexual encounters and persons she dated, it was EXTREMELY difficult to keep track." (Pet. at 68.)

On direct appeal, the California Court of Appeal rejected a similar claim as follows (Lodgment No. 19 at 10–12):

> *Citing the forensic evidence, specifically the evidence that sexual intercourse between [petitioner] and Cobb could have occurred as much as a day and a half before Cobb's death, [petitioner] intended to show Cobb dated many different men. That evidence would support the further argument that any one of the many men she dated could have killed her after [petitioner] and Cobb had sex. To that end, defense counsel told the trial court he wanted to have "the jury understand, as everyone else in those–in 1985 understood, that Ms. Cobb did have a number of gentleman [sic] of different ages, and she entertained them at her residence. She invited them to be there, and it was not uncommon for her to have male guests at home." The prosecutor objected on the ground such evidence was inadmissible character evidence. The trial court ruled the evidence was not relevant and excluded it. In doing so the court noted [petitioner] had established through the testimony of Rita Cobb's son and his wife that Ms. Cobb dated and had people over to her house. Although defense counsel protested "there was more," presumably meaning he had additional questions he wanted to ask those two witnesses on that subject, the trial court denied that request and reaffirmed its ruling. [¶] Although described as character evidence, the evidence in question is in fact evidence of third party culpability, i.e., evidence that one of the men Rita Cobb was dating or had dated could have been the person who killed her. Once again, [petitioner] failed to make the necessary offer of proof, [petitioner's] contrary claim notwithstanding. [Petitioner] claimed Rita Cobb was known to date many men, and to have them over to her house. However, he did not offer any facts to support that assertion. On appeal, he cites facts set out in his pretrial motion to dismiss. [Petitioner] did not rely on those facts in arguing the admissibility of the evidence to the trial court, and did not refer to the pretrial motion in arguing the existence and admissibility of evidence regarding what we will refer to as the victim's lifestyle. [Petitioner] also cites a police report included in his motion for new trial. Because that motion was not filed until after trial, the trial court could not have considered the police*

report. [Petitioner] claims the trial court "was probably already familiar" with that police report because in an unreported meeting in chambers, the attorneys and the trial court purportedly discussed witness statements contained in that police report. The trial court might have known about the police report but that fact is not obvious from the record. Therefore, we cannot say the police report was part of the record at the time the trial court ruled the evidence about Rita Cobb's lifestyle was inadmissible to prove third party culpability. [¶] As previously discussed, "[t]hird party culpability evidence is admissible if it is capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability.... [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.' [Citations.]" (People v. Page (2008) 44 Cal.4th 1, 38.).[¶] Evidence the victim had dated many different men, or even that she was inclined to pick up men at local bars, does not even rise to the level of evidence of motive or opportunity to kill the victim. The conclusion one of those men killed Rita Cobb is rank speculation, rather than a logical inference drawn from circumstantial evidence. Without some fact that tends to link one of those men to the crime, the challenged evidence was not relevant. Therefore, the trial court did not abuse its discretion by excluding that evidence at trial. (People v. Waidla, supra, 22 Cal.4th at p. 724.)

***33** As the Court of Appeal noted, petitioner's trial counsel requested to introduce additional evidence that Cobb entertained men at her home without making any offer of proof regarding any additional evidence on this issue, including that she engaged in such conduct during the relevant time frame. Petitioner's trial counsel argued that he wanted the jury to understand that Cobb had dated a number of gentleman of different ages and she entertained them at her residence. (2 RT 279.) The prosecutor objected on the basis of improper character evidence and relevance, to which petitioner's counsel responded that "if we had a person that never had anybody at her house. Then if you have someone at her house, it means a lot more." (*Id.*) The trial court commented that defense counsel had asked Cobb's son about whether she dated and had people over. Petitioner's counsel indicated that he desired to ask Cobb's son and daughter-in-law additional questions on this topic, but did not otherwise provide any facts in support of this contention. On this basis, the trial court concluded that counsel had established enough "for whatever you needed to" and that the prosecutor had not attempted to establish that Cobb was someone who did not engage "with any kind of social intercourse." (2 RT 279–80.)

During the cross-examination of Cobb's son, Kraemer, petitioner's trial counsel elicited testimony that Cobb liked to date and attempted to elicit further testimony that she dated fairly often and had dated people she had not known long. (1 RT 152.) Additional questions on this topic without any further specifics, would have been cumulative and irrelevant. Even assuming that petitioner's counsel intended to offer the additional evidence cited in the Petition, petitioner has made no showing that any of these witnesses were willing to testify or how their testimony would have assisted the defense. Harden, 846 F.2d at 1231–32; Tinsley, 895 F.2d at 532. As the Court of Appeal noted, petitioner theorizes that one of these other men that Cobb entertained killed her. However, petitioner's claim is based on mere speculation without any supporting facts linking any of these unidentified men to the crime. As such, the proffered evidence was not relevant.

The state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim.

D. *Exclusion of WeTip hotline report*

As previously explained, prior to trial, petitioner's counsel sought to introduce an anonymous call from the WeTip hotline, in which the caller indicated that a person named "Randolf," referring to Backhoff, was at a party bragging to people that he had

murdered Cobb. (1 RT 16; 2 CT 379.) The trial court denied petitioner's motion, concluding: "We don't know who it was" that made the call; "[w]e don't know what the person's motivation was"; "[w]e have absolutely no way of determining that the person who called and left the anonymous tip was right"; and there was nothing to indicate that the statement was reliable. (1 RT 18.) The trial court also considered the issue under federal law, and concluded, *inter alia,* that the probative value and reliability were "very low," and the information could not be evaluated by the trier of fact. (1 RT 19–22.)

In Ground Thirty–Five, petitioner contends that the trial court erred in excluding evidence of the WeTip call. (Pet. at 70.)[28] The California Court of Appeal rejected this claim on direct appeal, concluding as follows (Lodgment No. 19 at 1315):

> *[Petitioner] contends he was denied his right under the federal constitution to present a defense because the trial court excluded not only [evidence regarding Cobb's lifestyle] but also evidence that in August 1988 the San Bernardino County Sheriff's Department received an anonymous tip, through WeTip, Inc., that William Backhoff had been at a party where he had been bragging about having strangled, raped, and mutilated Rita Cobb about three years earlier. Backhoff said he had picked up the victim at the bar called Zodiac, and when the victim said she was turned off sexually to him, Backhoff bragged that he strangled her until she "turned black" and then described further crimes against the victim after she was dead. [¶] [Petitioner] points out Backhoff had a connection to Rita Cobb, which [petitioner] set out in his motion to dismiss based on a violation of his right to a speedy trial. According to [petitioner], two days after Rita Cobb's body was found, Backhoff showed up claiming he had heard they were looking for him. At that time, Backhoff acknowledged he had dated the victim and been to her house, but said he had never had sex with her. Three years later, presumably in response to the WeTip report, a deputy sheriff again contacted Backhoff. This time he repeatedly stated he had not done anything wrong. Backhoff later committed suicide. [¶] The trial court ruled the WeTip report was inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter stated. (Evid.Code, § 1200.) Hearsay evidence is generally inadmissible. (Ibid.) The statement reported to WeTip would be hearsay if [petitioner] offered it to prove the truth of what Backhoff said, i.e., that he killed Rita Cobb. If the statement were offered to show what if anything the sheriff's department did in response to the WeTip report, the report and its content is not hearsay. [Petitioner] however did not offer the statement for its nonhearsay purpose. Instead, he contends the trial court violated his due process right to present a defense by excluding the hearsay statement from evidence. [¶] [Petitioner] relies on Chambers v. Mississippi (1973) 410 U.S. 284 (Chambers) to support his claim that hearsay evidence is admissible if its exclusion would deprive defendant of his right to present a defense. Our state Supreme Court explained in People v. Ayala (2000) 23 Cal.4th 225, that Chambers is limited to the specific facts of that case: " 'Few rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations.] [But i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' [Citation.] Thus, '[a] defendant does not have a constitutional right to the admission of unreliable hearsay statements.' [Citations.] Moreover, both we (People v. Hawthorne (1992) 4 Cal.4th 43, 56[ ])and the United States Supreme Court (United States v. Scheffer (1998) 523 U.S. 303, 316[ ]) have explained that Chambers is closely tied to the facts and the Mississippi evidence law that it considered. Chambers is not authority for the result defendant urges here." (Id. at p. 269.)[¶] The trial court did not violate [petitioner's] due process right to present a defense by excluding the WeTip report. That report not only was hearsay, it was also provided by an unreliable anonymous source. We*

> *cannot say the trial court abused its discretion by excluding that report from evidence at trial. (People v. Waidla, supra, 22 Cal.4th at p. 724.)*

***34** As explained, a defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers,* 410 U.S. at 302. Here, the proffered evidence constituted inadmissible hearsay, provided by an unreliable source and which could not be authenticated. *See Egelhoff,* 518 U.S. at 42; *Crane,* 476 U.S. at 689. The trial court had no way of verifying the anonymous caller's representation or motive for making such a call. Further, as the trial court explained, Backhoff could not be interviewed since he had committed suicide years earlier. Like the other alleged third party culpability evidence, petitioner made no showing before the trial court linking Backhoff to Cobb's murder. Although petitioner refers to DNA evidence found at Cobb's house, Backhoff admitted to being there weeks earlier, and there was no evidence actually linking him to her death. Again, petitioner merely speculates that Backhoff may have murdered Cobb without any specific factual support.

As such, the state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim.

VII. ***Petitioner is not entitled to habeas relief on his Faretta claim.***

After trial, petitioner was appointed conflict counsel for purposes of evaluating and preparing a motion for new trial based on ineffective assistance of counsel. This motion was later denied. (3 RT 699, 704, 708–09.) Petitioner then requested to proceed in *pro per* for purposes of filing a writ of mandamus to challenge the trial court's ruling on the motion for new trial. (3 RT 709, 711–13.) The trial court denied the motion because it was unreasonably delayed. (3 RT 713.) In Ground Thirty of the Petition, petitioner contends that this decision violated his right to self-representation. (Pet. at 61.)

In *Faretta v. California,* 422 U.S. 806, 832, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the Supreme Court held that a criminal defendant has a federal constitutional right of self-representation. But, as the Supreme Court recognized in *Faretta,* the right to self-representation is not absolute. *See Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 161, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000). Not only must the waiver of the right to counsel be "knowing, voluntary, and intelligent," *Iowa v. Tovar,* 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004), the request must be unequivocal, timely, and not for purposes of delay. *Stenson v. Lambert,* 504 F.3d 873, 882 (9th Cir. 2007); *Hirschfield v. Payne,* 420 F.3d 922, 926 (9th Cir. 2005); *United States v. Erskine,* 355 F.3d 1161, 1167 (9th Cir. 2004); *see also Martinez,* 528 U.S. at 162.

Here, as the trial court properly concluded, petitioner's request was untimely. Petitioner's request was made after trial, the announcement of the verdict, the denial of the *Marsden* motion, and after the pronouncement of judgment had been continued to provide petitioner with an opportunity to file the motion for a new trial. (*See* 3 RT 691.) The request was made over a year after the verdict had been read, and was made solely for the purpose of filing a writ of mandamus on appeal.[29] As such, the state courts' rejection of this claim was not objectively unreasonable. Petitioner is not entitled to habeas relief on this claim.

VIII. ***Petitioner is not entitled to habeas relief on his claim directed at the county jail.***

In Ground Thirty–One of the Petition, petitioner contends that the county jail terminated his communications with his trial counsel over a year before trial because of his civil lawsuit against the San Bernardino County District Attorney and in violation of his Sixth Amendment rights. (Pet. at 63.) Petitioner maintains that the only access he had to communicate with his counsel was in the courtroom. (*Id.*)

***35** In support of his claim, petitioner cites to a brief he submitted to the trial court on December 8, 2010, prior to the commencement of trial, which was denied on December 16, 2010. In this request, petitioner sought an order releasing official visit restrictions, the appointment of a legal runner, and transportation to civil proceedings. (1 CT 153–67.) Petitioner alleged in a conclusory fashion that he was seeking, *inter alia,* an order "safeguard[ing]" his right to access his counsel and argued that custodial officers denied official visits, interfered with the legal mail process, and limited access to the phones. (1 CT 166.) However, it appears that petitioner was primarily seeking relief in his civil action, and he did not identify any specific instances in which he was prohibited from meeting with his trial counsel in his criminal case. Even assuming that this request related to his criminal action, petitioner's allegations in this request as well as in the Petition are vague and conclusory. *See* *James,* 24 F.3d at 26 ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief."). As explained, petitioner does not identify a single specific instance in which the county jail interfered with his communications with his counsel, and trial counsel raised no such similar objections. Rather, as previously explained, petitioner's counsel represented that he met with petitioner multiple times in the West Valley Detention Center, and never identified a limitation imposed by the jail on these meetings. (*See* 4/15/11 Supp. RT 14.)

As such, petitioner's conclusory and unsupported claim alleging interference with his right to communicate with counsel must be rejected.[30] The state courts' rejection of this claim was not objectively unreasonable and petitioner is not entitled to habeas relief on this claim.

IX. ***Petitioner is not entitled to habeas relief on his instructional error claim.***

In Ground Thirty–Two of the Petition, petitioner contends that the instruction on felony-murder was erroneous. Petitioner argues that the trial court failed to instruct the jury that it had to find he had an "intent to kill" in addition to having the intent to commit rape. According to petitioner, because the crime was committed in 1985, the trial court was required to instruct the jury in accordance with then-existing jury instructions. (Pet. at 64.)

To merit federal habeas relief based on an instructional error, petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *See* *McGuire,* 502 U.S. at 72 (citation omitted); *see also* *Waddington v. Sarausad,* 555 U.S. 179, 191, 129 S.Ct. 823, 172 L.Ed.2d 532 (2009); *Henderson v. Kibbe,* 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). Instructional errors must be considered in the context of the instructions as a whole and the trial record. *McGuire,* 502 U.S. at 72; *Kibbe,* 431 U.S. at 156; *Cupp v. Naughten,* 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). Where the petitioner alleges that the jury instruction was inadequate or incomplete, the burden on the petitioner is "especially heavy." *Kibbe,* 431 U.S. at 155 ("An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law."); *Hendricks v. Vasquez,* 974 F.2d 1099, 1106 (9th Cir. 1992) (as amended) ("Where the alleged error is the failure to give an instruction the burden on the petitioner is 'especially heavy.' "). Further, habeas relief is warranted only where the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Hedgpeth v. Pulido,* 555 U.S. 57, 58, 61–62, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008) (per curiam) (quoting *Brecht,* 507 U.S. at 623); *see also* *Clark v. Brown,* 450 F.3d 898, 905 (9th Cir. 2006) (as amended).

A. *The California Court of Appeal decision*

On direct appeal, the California Court of Appeal held, and the Attorney General conceded, that the trial court's instruction on the felony-murder special circumstance was incorrect because it did not include the requirement of intent to kill. (Lodgment No. 19 at 23.) Nevertheless, the Court of Appeal concluded that this error was harmless. The Court of Appeal explained, in relevant part, as follows (*id.* at 2425):

***36** *The issue we must resolve is whether the instructional error was harmless. "The determination of whether Carlos error is harmless 'depends on application of the harmless-beyond-a-reasonable-doubt standard of Chapman v. California (1967) 386 U.S. 18, 24[ ].' [Citation.] In other words, 'error in failing to instruct that a special circumstance contains a requirement of the intent to kill is harmless when "the evidence of defendant's intent to kill . was overwhelming, and the jury could have had no reasonable doubt on that matter.' " [Citation.]" (People v. Haley (2004) 34 Cal.4th 283, 310 (Haley).) [¶] The evidence of intent to kill in this case is overwhelming. The only issue at trial was the identity of the person who killed Cobb. According to the forensic pathologist, Rita Cobb died as the result of both manual and ligature strangulation. [Petitioner] wrapped his hands around Cobb's throat, as evidenced by the fracture of the hyoid bone and voice box cartilage in her neck. [Petitioner] then also strangled Cobb with a wire coat hanger, which he wrapped twice around her neck and tightened by twisting. That in our view is overwhelming evidence of intent to kill such that the trial court's error in failing to instruct the jury on that element of the felony-murder special circumstance was harmless beyond a reasonable doubt. [¶] In arguing the error was prejudicial, [petitioner] points to evidence that a pair of white shorts that could have been used as a gag had been found on or near Rita Cobb's face when her body was discovered. [Petitioner] claims the evidence that he might have used a gag shows he only intended to keep Cobb from screaming, and therefore failure to instruct on intent to kill was not harmless beyond a reasonable doubt. In Haley, supra, 34 Cal.4th 283, which [petitioner] cites to support this claim, the defendant said he only pressed a pillow down over the victim's face to keep her from screaming after she interrupted him committing a burglary, and that she was alive when he left. (Id. at pp. 310–311.) The forensic evidence and the defendant's statement to the police were both consistent with the defendant's claim. (Id. at p. 311.) Therefore, the court concluded the evidence of intent to kill was not overwhelming and the instructional error was prejudicial. (Id. at p. 312.)[¶] Unlike Haley, the evidence in this case shows [petitioner] not only used his hands to strangle Cobb but he also used a wire coat hanger, and possibly also used a gag. That evidence overwhelmingly supports a finding of intent to kill. Therefore, we conclude the trial court's instructional error was harmless beyond a reasonable doubt. (Haley, supra, 34 Cal.4th at p. 310.)*

B. *Analysis*

Here, the Court concludes that the California Court of Appeal did not apply harmless error review in an objectively unreasonable manner. Mitchell v. Esparza, 540 U.S. 12, 18, 124 S.Ct. 7, 157 L.Ed.2d 263 (2003) (per curiam) (explaining that when a state court determines that an error is harmless, federal habeas relief is appropriate only if the state court applied harmless error review in an objectively unreasonable manner); Inthavong v. Lamarque, 420 F.3d 1055, 1058–59 (9th Cir. 2005); Medina v. Hornung, 386 F.3d 872, 878–79 (9th Cir. 2004) (as amended); *see also* Hedgpeth, 555 U.S. at 61 (holding that "harmless-error analysis applies to instructional errors so long as the error at issue does not categorically ' "vitiat[e] *all* the jury's findings." ' " (alteration and emphasis in original, citations omitted)). As the Court of Appeal noted, the evidence of intent to kill in petitioner's case was overwhelming. Cobb was found with a wire coat hanger wrapped twice tightly around her neck. (2 RT 464–65.) According to the pathologist, Cobb died of ligature strangulation, with evidence of possible manual strangulation. (2 RT 481.) The pathologist testified that when there is a suspicion that there may have been ligature or manual strangulation, he will examine various components of the larynx or that hold the larynx and tongue in place. When someone has been strangled, there will be injuries to these structures. In this case, Cobb's hyoid bone, along with several other structures,

were fractured, signaling a forceful injury. (2 RT 474–75, 477.) Such manner of killing demonstrated a deliberate plan to kill Cobb. *See* *People v. Hovarter*, 44 Cal.4th 983, 1020, 81 Cal.Rptr.3d 299 (2008) ("Ligature strangulation is in its nature a deliberate act." (citation omitted)).

The Court concludes that the state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Accordingly, petitioner is not entitled to habeas relief on this claim.

X. ***Petitioner is not entitled to habeas relief on his claim regarding the admissibility of the prior rape allegations.***

In Ground Thirty–Seven of the Petition, petitioner contends that the trial court erred in "admitting two prior rape allegations" for which petitioner had been arrested, but never charged. (Pet. at 73.) As previously explained, during a pre-trial hearing, petitioner's counsel sought to exclude evidence regarding the two prior rape allegations by Amaro and Kye as impeachment evidence. Following argument, the trial court concluded that such evidence was admissible and could be used to impeach petitioner. (1 RT 94.) Petitioner did not testify at trial, so these prior rape allegations were never actually used to impeach him.

***37** The California Court of Appeal considered petitioner's claim on direct appeal, but concluded that, because he did not testify, this claim was not preserved for review and the evidence was not presented at trial. (Lodgment No. 19 at 21.) In response to petitioner's contention that the threat of this evidence being presented is what made him decide not to testify, the Court of Appeal explained "that is precisely the rational of the rule: '[I]f the defendant does not testify, any possible harm from the trial court's ruling is wholly speculative.' " (*People v. Ledesma, supra*, 39 Cal.4th at p. 731–732.)" (*Id.* at 23.)

In *Luce v. United States*, 469 U.S. 38, 41–43, 105 S.Ct. 460, 464, 83 L.Ed.2d 443 (1984), the Supreme Court held, in the context of a federal rule of procedure, that in order to preserve an objection to a trial court's ruling that a prior conviction could be admitted, a defendant must actually testify at trial. As the Supreme Court explained, without the defendant's testimony, a court's ability to review any harm is handicapped and speculative because preliminary rulings are subject to change and what the State would seek to introduce is uncertain until the defendant's testimony is known. *See* *id.* at 41–42. The Court went on to explain that "[e]ven if these difficulties could be surmounted, the reviewing court would still face the question of harmless error," and thus, requiring a defendant to testify would enable the reviewing court to determine the impact any erroneous impeachment had in light of the record as a whole. *Id.* at 42. Here, petitioner did not testify and the evidence was not presented to the jury. As such, in accordance with *Luce*, petitioner waived any federal constitutional claim he might have had regarding the trial court's ruling permitting impeachment with the prior rape allegations. *Galindo v. Ylst*, 971 F.2d 1427, 1429 (9th Cir. 1992) (per curiam) (applying *Luce* in the context of a habeas petition).

Accordingly, the state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim. *See, e.g., Sapp v. Ryan*, 2009 WL 8406770, at *10–11 (D. Ariz. Oct. 20, 2009) (rejecting claim that the trial court erred in ruling that the petitioner could be impeached with a prior bad act if he chose to testify), *Report and Recommendation accepted* by 2011 WL 4104872 (D.Ariz. Sept. 15, 2011).

XI. ***Petitioner is not entitled to habeas relief on his claim that the trial court coerced the jury.***

In Ground Thirty–Eight of the Petition, petitioner contends that the trial court violated his due process rights by ordering the jury to continue deliberations even though the jury foreperson revealed that the majority was in favor of a guilty verdict. (Pet. at 75.) Petitioner further maintains that his stand-in counsel was ineffective in failing to investigate the issue, move for a mistrial, object, or otherwise seek to mitigate the damage. (Pet. Mem. at 241.)

A. *Relevant factual background*

The jury began deliberations on the afternoon of Monday, January 31, 2011. (3 RT 664.) On the afternoon of February 2, 2011, the jury notified the bailiff that they were deadlocked. (3 RT 668–69.) The trial court brought in the jury and asked the jury foreperson, "without telling me who's for conviction and who's for acquittal, can you tell me what the split is?" (3 RT 670.) The jury foreperson responded that it was "currently" split eight for guilty and four for acquittal. (*Id.*) After telling the jury foreperson that it was going to ignore the numbers for each side, the trial court inquired regarding the jury foreperson's use of the word "currently." The jury foreperson indicated that "[h]onestly, there has been progress pretty much all the time" and explained that "what it was on Monday, changed on Tuesday, and changed today." (3 RT 671.) The trial court asked the jury foreperson what it was that made him think no further progress could be made, to which the jury foreperson explained that "[e]ach juror has indicated that they're solid in their position." (*Id.*) In response to the trial court's inquiry as to whether the jury was "hopelessly deadlocked," the jury foreperson stated that he thought that "the only thing that might change would be the count through further discussion." (*Id.*) The trial court suggested that, since it was 3:00 p.m., the jury be excused for the day and then "talk to each other" the following morning. The trial court explained that it would not keep the jurors there unless the jurors felt like they were making progress. The trial court then asked the jury foreperson if he thought that was possible, to which he responded, "I think it's possible." (3 RT 672.) Thereafter, the trial court recessed the jury's deliberations for the evening and asked the jury to resume deliberations the following morning. (*Id.*) The trial court told the jurors if they decided within a half hour after resuming deliberations that they could not reach an agreement, the court would understand and they would "talk again." (*Id.*)

***38** The following afternoon, on February 3, 2011, the jury reached a verdict. (3 RT 676–77.)

B. The California Court of Appeal decision

The California Court of Appeal rejected a similar claim on direct appeal, concluding, in pertinent part, as follows (Lodgment No. 19 at 25-28 (footnote omitted)):

> *At the outset we note [petitioner] did not object when the trial court, after hearing the claim they were deadlocked, ordered the jurors to stop their deliberations for the day and return the following morning to continue deliberating. His failure to object arguably waives the issue for review on appeal. (People v. Neufer (1994) 3 0 Cal.App.4th 244, 254.) However, because [petitioner] also claims he was denied the effective assistance of counsel as a result of counsel's failure to object, we will address the merits of his claim. [¶] "The applicable legal principles are well established. Under section 1140, the trial court is precluded from discharging the jury without reaching a verdict unless both parties consent or 'unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.' We have explained that '[the] determination whether there is reasonable probability of agreement rests in the sound discretion of the trial court. [Citation.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." [Citation.]' [Citations.]" (People v. Sheldon (1989) 48 Cal.3d 935, 959; see also People v. Neufer, supra, 30 Cal.App.4th at p. 254.)[¶] The trial court in this case did not make any coercive remarks or engage in any other conduct directed at persuading the minority jurors to change their minds or acquiesce to the majority view. After questioning the foreperson, who confirmed the jurors had made progress toward reaching a unanimous verdict each day of their deliberations, the trial court simply ordered the jurors to return the following morning and "talk to each other." The court added it would not require the jurors to stay unless they felt like they were making progress. In arguing the trial court's action was coercive, [petitioner] cites the foreperson's statement, when asked why he believed the jury was deadlocked, that "[e]ach juror has indicated [that] they're solid in their position." The cited fact is the essence of a deadlocked jury; it adds nothing to the analysis. Moreover, as [petitioner]*

acknowledges, the foreperson also volunteered his view that further discussion might change the count. [Petitioner] also contends the trial court, before ordering the jurors to continue deliberating, should have instructed the jurors according to CALCRIM No. 3551 not to change their positions just because their opinion is different from that of other jurors or just because other jurors want them to change. [Petitioner] acknowledges that neither his attorney, nor the prosecutor asked for the instruction. [Petitioner] does not cite any authority to show the trial court should have given the instruction sua sponte. Instead, he relies on People v. Keenan (1988) 46 Cal.3d 478, in which the Supreme Court cited the fact the trial court had given such an admonition as additional support for the conclusion the jury's verdict was not the result of coercion. (Id. at p. 534.) The trial court's failure to give such an instruction in this case does not alter our conclusion the trial court did not coerce the jurors to reach a verdict of guilt. [¶] Because the trial court's actions were not coercive, there was no reason for [petitioner's] trial counsel to object to the trial court's order directing the jurors to continue deliberating. In other words, [petitioner] has failed to show trial counsel's performance was deficient. Absent such a showing, [petitioner] cannot establish he was denied the effective assistance of counsel. (Strickland v. Washington (1984) 466 U.S. 668, 687 [defendant must show both deficient performance and resulting prejudice].)

C. *Applicable legal authority*

***39** "Any criminal defendant ... being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241, 108 S.Ct. 546, 98 L. Ed.2d 568 (1988); *Parker v. Small*, 665 F.3d 1143, 1147 (9th Cir. 2011) (per curiam) ("Clearly established federal law provides that '[a]ny criminal defendant ... being tried by a jury is entitled to the uncoerced verdict of that body.' " (quoting *Lowenfield*)); *Smith v. Curry*, 580 F.3d 1071, 1073 (9th Cir. 2009). "Whether the comments and conduct of the state trial judge infringed [a] defendant's due process right to an impartial jury and fair trial turns upon whether 'the trial judge's inquiry would be likely to coerce certain jurors into relinquishing their views in favor of reaching a unanimous decision.' " *Jiminez v. Myers*, 40 F.3d 976, 979 (9th Cir. 1994) (per curiam) (as amended) (quoting *Locks v. Sumner*, 703 F.2d 403, 406 (9th Cir. 1983)). However, "[a] supplemental jury charge to encourage a deadlocked jury to try to reach a verdict is not coercive per se." *Parker*, 665 F.3d at 1147 (citing *Allen v. United States*, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896)). In considering a claim of jury coercion, the reviewing court must consider the totality of the circumstances and decide whether the trial court's actions and statements were coercive. *Parker*, 665 F.3d at 1147 ("[W]hen faced with a claim of jury coercion, a reviewing court must 'consider the supplemental charge given by the trial court "in its context and under all the circumstances." ' " (quoting *Lowenfield*, 484 U.S. at 237); *Jiminez*, 40 F.3d at 980; *Locks*, 703 F.2d at 406–07.

D. *Analysis*

Here, considering the totality of the circumstances, the Court concludes that the jury was not improperly coerced. The trial court's inquiry and subsequent was neutral and did not urge any of the jurors to change their votes. The trial court merely sought to find out whether further deliberations would be helpful. After the jury foreperson, who had prior jury experience, indicated that there had been daily progress in the deliberations and that further discussion might help, the trial court recessed for the day and asked the jury to resume deliberations the following morning. (3 RT 671-72.) The trial court explained that it would not keep the jurors there unless the jurors felt like they were making progress. The trial court told the jurors if they decided within a half hour after resuming deliberations that they could not reach an agreement, the court would understand and that they would "talk again." (*Id.*) The instruction simply encouraged all jurors to continue deliberating. The trial court did not single out any jurors in the minority and instruct only those jurors to consider whether their views were reasonable in light of the views of the jurors in the majority.

Additionally, the jury's continued deliberations after receiving the trial court's instruction also weighs against a finding of coercion. The jury came back the following morning, and deliberated for most of the day before reaching a guilty verdict. (1 CT 239–40.) *See, e.g., United States v. Easter,* 66 F.3d 1018, 1023 (9th Cir. 1995) (finding no coercion where jury deliberated for two and half hours after *Allen* charge); *United States v. Beattie,* 613 F.2d 762, 766 (9th Cir. 1980) (finding three and a half hours of additional deliberation to be a relevant factor in finding no coercion). Although petitioner contends that the following day, the jury was deadlocked three more times and told to continue deliberating (Pet. at 75), there is no evidence in the record to support this contention. Petitioner cites to Pet. Att. V, which includes nine documents, none of which support his contention. To the extent petitioner is citing to the February 3, 2011 Minute Order, this minute order merely reflects that the jury was given three breaks that day. (*See* Pet. Att. V2.)

Moreover, the fact that the trial court knew the numerical breakdown on the voting by the jury does not render its instruction coercive. To be sure, the trial court expressly instructed the jury foreperson not to reveal which way the jury was split on the question of petitioner's guilt and did not inquire as to who was the minority jurors. Although the Supreme Court in *Brasfield v. United States,* 272 U.S. 448, 47 S. Ct. 135, 71 L.Ed. 345 (1926) concluded that an inquiry into the numerical breakdown was per se prejudicial, the Supreme Court has distinguished that case as an instance in which the Supreme Court was exercising its supervisory powers rather than reviewing state proceedings on habeas corpus. *See Lowenfield,* 484 U.S. at 239– 40; *see also Bell v. Uribe,* 748 F.3d 857, 867 (9th Cir. 2014) (as amended) ("in *Brasfield,* the Court prohibited jury polling under its inherent supervisory authority over the federal judiciary and not because of any particular constitutional imperative"), *cert. denied,* 135 S.Ct. 1545 (2015); *Brewer v. Hall,* 378 F.3d 952, 956 (9th Cir. 2004) ("the Court relied entirely on its supervisory powers over other federal courts; its analysis did not encompass constitutional considerations"); *Locks,* 703 F.2d at 405 ("Neither the Supreme Court nor this circuit has held that the rule in *Brasfield* is a necessary component of one's Sixth Amendment right to an impartial jury, applicable to the state courts by virtue of the Fourteenth Amendment"). As such, *Brasfield* is not dispositive in this case.

***40** Additionally, because the Court concludes that the jury was not impermissibly coerced, petitioner's stand-in counsel did not render ineffective assistance by failing to raise this meritless issue. *See James,* 24 F.3d at 27.

The Court concludes that the state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim. [31]

XII. ***Petitioner is not entitled to habeas relief on his claim that the trial court improperly proceeded in the absence of his trial counsel.***

On the day that the jury notified the trial court that they were deadlocked, petitioner's trial counsel was out sick and stand-in counsel appeared on his behalf. (3 RT 668, 670.) In Ground Thirty–Nine of the Petition, petitioner contends that his due process rights were violated when the trial court questioned the jury foreperson and ordered the jury to resume deliberations in the absence of his trial counsel. (Pet. at 76.)

On direct appeal, the California Court of Appeal rejected petitioner's corresponding claim, concluding as follows (Lodgment No. 19 at 28 (footnote omitted)):

> *[Petitioner] also contends the trial court violated his Sixth Amendment right to representation by counsel because his trial attorney was not present when the trial court questioned the foreperson and ordered the jurors to resume deliberating. [Petitioner] does not dispute that he was represented*

> *by an attorney specially appearing on behalf of his trial attorney, who was ill. Instead [petitioner] questions whether so-called "stand-in counsel" was adequately prepared to represent him during the discussion. [¶] [Petitioner] did not object in the trial court to his trial attorney's absence, or to stand-in counsel representing him, or to the trial court responding to the jury's declaration they were deadlocked. Therefore, [petitioner] has not preserved this issue for review on appeal. (People v. Roldan (2005) 35 Cal.4th 646, 729, overruled on other grounds in People v. Doolin (2009) 45 Cal.4th 390, 421.) Moreover, because he did not object, [petitioner']s assertions regarding stand-in counsel's ability to represent him are purely speculation. Because [petitioner] was represented by counsel, and he did not object to that representation, we must reject his Sixth Amendment claim in this appeal.*

First, as the Court of Appeal noted, petitioner did not object to stand-in counsel representing him and there is no evidence to suggest that stand-in counsel was unaware of the underlying facts or trial record. Further, as explained, there was no merit to petitioner's claim that the trial court coerced the jury and thus, any objection would have been futile. Nor has petitioner shown that had his trial counsel been present, he would have addressed the issue differently, or that the result of the proceeding would have been different.[32] In light of the foregoing, petitioner has not shown that stand-in counsel's performance was deficient or that he would have received a more favorable verdict if his trial counsel had been present. The state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim.

XIII. *Petitioner is not entitled to habeas relief on his claim directed at the denial of his new trial motion.*

***41** As explained, petitioner was appointed conflict counsel for the purpose of evaluating and preparing a motion for new trial based on ineffective assistance of counsel. Petitioner's appointed conflict counsel thereafter filed a motion for new trial based on ineffective assistance of counsel. He asserted that trial counsel failed to: (1) Investigate DNA evidence; (2) acquire evidence of Cobb's disposition for promiscuity and demeanor when intoxicated; (3) investigate the silver Pinto parked in front of Cobb's house; (4) present evidence regarding Saunders "as a person of interest"; (5) present evidence that Robert M. Edwards could have been a suspect; (6) further investigate Backhoff as a suspect; (7) request a continuance after obtaining contact information for Amaro and Kye; and (8) file a motion for change of venue. (2 CT 307–23.) The trial court denied the motion for new trial, first concluding that it did not observe petitioner's trial counsel do anything "which appeared to be ineffective or incompetent." The trial court further concluded that it did not find that petitioner's trial counsel's performance "either fell below the standard of practice or that he was in any way incompetent or ineffective" and did not find "any showing that had [counsel] handled the case in some alternative manner that is [sic] reasonably probable that a more favorable result would have been obtained." (3 RT 708–09.) In Ground Forty of the Petition, petitioner contends that the trial court violated his due process rights by denying his new trial motion. (Pet. at 78.)

A. *The California Court of Appeal decision*

The California Court of Appeal rejected this claim on direct appeal, reasoning as follows (Lodgment No. 19 at 17–21):

> *[Petitioner] moved for a new trial on the ground he had been denied the effective assistance of counsel. The trial court denied his motion. [Petitioner] contends the trial court erroneously relied solely on trial counsel's performance in court as the basis for denying his new trial motion. According to [petitioner] that is an error of law that we independently review. We disagree. [¶] The trial court did cite trial counsel's courtroom performance at the hearing on [petitioner's] new trial motion. From that [petitioner] would have us conclude the trial court only considered that performance and did not consider the purported omissions set out in his new trial motion. We do not share [petitioner's] interpretation of the trial court's*

statement. But even if we did conclude the trial court only considered defense counsel's performance in court, we nevertheless would conclude the trial court did not err in denying [petitioner's] new trial motion. [¶] " 'A new trial may be granted where the trial court finds that the defendant received ineffective assistance of counsel. [Citations.] To prevail on this ground, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." [Citations.]' [Citation.]" (People v. Callahan (2004) 124 Cal.App.4th 198, 212.)[¶] [Petitioner] did not make the required showing. [Petitioner] asserted in his motion for new trial that his trial attorney did not properly investigate and prepare for trial and that he failed to make several motions. Among other things, [petitioner] argued his trial attorney failed to investigate and pursue evidence that would have established a connection between the murder of Rita Cobb and Helen Brooks: In particular, [petitioner] argued that he and the person who killed Helen Brooks have the same rare blood type, one that is found in less than two percent of the population. Unfortunately, Mr. Smith, the attorney who prepared and filed [petitioner's] new trial motion, did not support that assertion with a citation to any of the evidence submitted in support of the motion, or any evidence contained in the trial court record. Therefore, neither the trial court nor this court can determine whether that assertion is accurate. [¶] Mr. Smith also asserted trial counsel was ineffective because he did not retain an expert to review the forensic evidence and to testify at trial. According to the evidence submitted in support of his motion, trial counsel did contact an expert and obtained a cost estimate of $3,300 to review the evidence. The record does not disclose whether trial counsel actually retained this or any other expert witness. It discloses only that trial counsel did not present expert testimony at trial. Absent a contrary showing by [petitioner], we must assume trial counsel's decision was sound trial strategy. (People v. Dennis (1998) 17 Cal.4th 468, 541.) Because [petitioner] did not show in his new trial motion that expert testimony would have been beneficial to [him], he has not shown trial counsel's decision was incorrect. (Ibid.) [¶] Mr. Smith also argued in the new trial motion that trial counsel was ineffective because he failed to have DNA analysis conducted of hairs that were recovered from Rita Cobb's body and the bed where her body was found. According to the new trial motion one hair included a root that could have been analyzed for DNA. That hair was "completely different, color wise and lengthwise as to [defendant's] hair type." DNA analysis of the hair could have produced a profile of someone other than [petitioner]. Here again, the record does not show whether trial counsel requested a DNA analysis of the hair; it shows only that such evidence was not presented at trial. [¶] Mr. Smith also faulted trial counsel for not conducting an extensive investigation of various witnesses, identified in a motion to dismiss, who knew Rita Cobb and could have testified about her lifestyle, specifically that she was known to date and have sex with many different men. As previously discussed, trial counsel attempted to present evidence regarding the victim's social and sex habits at trial, but the trial court excluded that evidence. [¶] Mr. Smith also argued that trial counsel was ineffective because he did not pursue a connection between Robert Mark Edwards, a suspect in what he claims is a similar unsolved murder committed in May 1986. Law enforcement officers eliminated Edwards as a suspect because they concluded he was incarcerated at the time Rita Cobb was murdered. However, the evidence shows Edwards was not incarcerated until December 1985; Cobb was killed two months earlier in September. Moreover, the police report indicates Edwards was incarcerated from December 1985 to December 1986, which if correct means he also could not have committed a murder in May 1986. Once again, Mr. Smith showed only that trial counsel did not present evidence at trial regarding the investigation of Edwards as a suspect in this case. [¶] Similarly, in arguing trial counsel was ineffective because he did not investigate or present evidence regarding the sheriff's investigation of Joe Saunders and William Backhoff as suspects in the murder of Rita Cobb, Mr. Smith did not submit any evidence to show the results of such investigations. The record shows only that trial counsel did not present that evidence at trial. [¶] We will not recount the other ways in which [petitioner] claimed his trial attorney's

> *representation was deficient because [petitioner] did not present sufficient evidence in his motion for new trial to support such a finding. Absent additional evidence, such as a declaration from trial counsel, we cannot determine whether [petitioner's] trial attorney failed to conduct the requisite investigation and preparation, or whether he did so and obtained evidence unfavorable to [petitioner]. In short we simply cannot determine from this record whether trial counsel's representation was deficient. Because [petitioner] failed to establish the first prong of his ineffective assistance of counsel claim the trial court properly denied [petitioner's] motion for new trial.*

B. *Applicable legal authority and analysis*

***42** Preliminarily, whether a state court erroneously denied a motion for a new trial is an issue of state law. *See McGuire*, 502 U.S. at 67–68. It is well settled that a federal habeas court does not have the authority to review a state's application of its own laws. *See Jackson v. Ylst*, 921 F.2d 882, 885 (9th Cir. 1990). Instead, a habeas court's function is "to determine whether the prisoner's constitutional or other federal rights have been violated." *Id.* (citing *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984)). Thus, petitioner's claim concerning the denial of his motion for a new trial warrants habeas relief only to the extent that the ineffective assistance of counsel claims upon which the motion was predicated has merit.

Here, the Court concludes that the state court's rejection of petitioner's ineffective assistance of counsel claims asserted in his motion for a new trial was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court.

First, as previously explained, there is no merit to petitioner's claims regarding the failure to: Investigate DNA evidence, investigate Amaro and Kye, request a continuance, or pursue a motion for change of venue. As such, petitioner's claim challenging the trial court's failure to grant his motion for a new trial on these bases similarly fails.

Petitioner also has not demonstrated that his counsel performed deficiently by failing to obtain further evidence regarding Cobb's promiscuity or behavior when intoxicated. As the Court of Appeal noted, petitioner's trial counsel attempted to present evidence regarding the victim's social and sexual habits at trial, but the trial court excluded that evidence. Further, as noted, petitioner has not presented any supporting evidence to link any of Cobb's potential partners with her murder.

With respect to the remaining contentions, petitioner has not presented any evidence that his trial counsel did not investigate the Pinto or other potential suspects and strategically decide not to present such evidence because the evidence was unfavorable or did not assist in the defense. "When ... the conduct complained of was a conscious and apparently informed choice between alternatives, a tactical judgment will almost never be overturned on habeas corpus." *Carter v. Holt*, 817 F.2d 699, 701 (11th Cir. 1987); *see also Mancuso*, 292 F.3d at 954 (explaining that the petitioner must overcome "the presumption that, under the circumstances, the challenged action might be considered sought trial strategy" (citation omitted)). Further, like petitioner's other contentions, petitioner's allegations are based on speculation and petitioner has not provided any factual evidence demonstrating a link between these potential suspects and Cobb's murder.

Accordingly, petitioner is not entitled to habeas relief on this claim.

XIV. *Petitioner is not entitled to habeas relief on his claim directed at the denial of his recusal motion.*

In Ground Forty–Two of the Petition, petitioner contends that the trial court erred in denying his motion for recusal of the San Bernardino County District Attorney's Office. (Pet. at 82.)[33]

As previously explained, petitioner's counsel moved to recuse the San Bernardino County District Attorney's Office months after the June 2010 election, on September 28, 2010, arguing that Ramos had intentionally tainted the jury pool by his conduct while campaigning for re-election. (1 CT 97–107.) Petitioner argued that Ramos had implied that petitioner had already been convicted, singled him out, and did not treat him in an even-handed fashion. (1 CT 102.) It appears that there was no reporter's transcript of the hearing, either because the notes were accidently destroyed as indicated by respondent (Ans. Mem. at 154) or because the hearing was held in chambers, off the record, as indicated by petitioner. (Reply at 75.) In any event, the parties prepared a settled statement regarding the hearing, which was signed by the trial court. (Aug. CT 10, 14.) According to the settled statement, the trial court did not find a conflict of interest under Cal.Penal Code § 1424 and thus, petitioner had not met his burden of proof. The trial court denied the motion. (1 CT 148; Aug. CT 16.)

A. *The California Court of Appeal decision*

***43** The California Court of Appeal rejected this claim on direct appeal, reasoning, in pertinent part, as follows (Lodgment No. 19 at 30–33 (footnote omitted)):

> *The pertinent legal principals are set out in section 1424, which as [petitioner] correctly points out, includes both the substantive and procedural rules pertinent to a motion to disqualify the district attorney's office. First, [petitioner's] moving papers must set out the grounds upon which disqualification is sought and must include affidavits that set out the facts that support the asserted grounds. (§ 1424, subd. (a)(1).) In order to prevail, the defendant must show the conflict of interest is of such a nature as to "render it unlikely that the defendant would receive a fair trial." (Ibid.) The Supreme Court has construed section 1424 "as establishing a two-part test: (i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting? Thus, while a 'conflict' exists whenever there is a 'reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner,' the conflict is disabling only if it is 'so grave as to render it unlikely that defendant will receive fair treatment.' [Citation.]" (People v. Eubanks (1996) 14 Cal.4th 580, 594.) "[T]he potential for prejudice to the defendant–the likelihood that the defendant will not receive a fair trial–must be real, not merely apparent, and must rise to the level of a likelihood of unfairness." (Id. at p. 592.) In other words, the defendant must show more than the appearance of a conflict or impartiality; the defendant must show an actual likelihood of unfair treatment. (Spaccia v. Superior Court (2012) 209 Cal.App.4th 93, 104; People v. Vasquez (2006) 39 Cal.4th 47, 59.) "Where, as here, a defendant seeks to recuse not just an individual prosecutor but also an entire prosecuting office, he must make an especially persuasive' showing. [Citation.]" (People v. Gamache (2010) 48 Cal.4th 347, 361.) "On review of the trial court's denial of a recusal motion, '[o]ur role is to determine whether there is substantial evidence to support the [trial court's factual] findings [citation], and, based on those findings, whether the trial court abused its discretion in denying the motion." [Citations.]" (People v. Vasquez, supra, 39 Cal.4th at p. 56.)[¶] [Petitioner] did not make the required showing in the trial court. [Petitioner's] only claim in his recusal motion was that as a result of singling [petitioner] out in his campaign literature, the district attorney effectively committed himself to obtaining a conviction in [petitioner's] case. [Petitioner] did not cite any examples in his moving papers of how the prosecutor's commitment to a conviction might result in unfair treatment to [petitioner]. Instead [petitioner] submitted his own declaration in which he stated that in June 2010, after the district attorney's campaign literature was mailed to voters, [petitioner] filed a civil action against the district attorney. Within 24 hours after filing that lawsuit, [petitioner] claims he was "subjected to intense harassment in the West Valley Detention Center, including, but not limited to, repeated and prolonged searches of [his] cell, having [his] court materials thrown about the cell and disorganized, having legal mail compromised, and the*

repeated denial of [his] court ordered right to use the law library." [¶] [Petitioner's] suggestion that the sheriff's actions are somehow attributable to the district attorney is based on speculation, not fact. [Petitioner] failed to establish in the trial court that a conflict existed because he failed to show a real potential for unfair treatment. [¶] [Petitioner] argues in his opening brief that the district attorney had an intense personal stake in the outcome of [petitioner's] trial, as a result of which there was a strong risk [petitioner] would not be treated evenhandedly. Assuming this argument is implicit in the one [petitioner] actually made in his trial court moving papers, and assuming further the trial court abused its discretion in denying [petitioner's] recusal motion, we nevertheless would conclude the error is harmless. [¶] Where the defendant does not seek review by extraordinary writ of the trial court's denial of a section 1424 motion, reversal on appeal is required only if the defendant shows actual prejudice, i.e., it is reasonably probable a result more favorable to the appealing party would have been reached absent the error. (People v. Vasquez, supra, 39 Cal.4th at pp. 66–71; People v. Watson (1956) 46 Cal.2d 818, 836.) [¶] [Petitioner] argues the trial court's presumed error was prejudicial because [petitioner] was forced to ask about the district attorney's campaign mailer during jury selection, and also because the deputy district attorney who actually tried the case was "likely" precluded from negotiating any plea to a lesser charge. [¶] [Petitioner's] second argument is obviously speculation. Moreover, nothing in the district attorney's campaign flyer suggested the district attorney was committed to convicting [petitioner] of first degree murder with the rape special circumstance. As quoted previously, the flyer stated only that [petitioner] had been charged with murder in the 1985 death of Rita Cobb, as a result of which her family would get closure. The mere existence of the campaign flyer does not support a conclusion [petitioner] was denied the opportunity to negotiate a guilty plea to a lesser charge. [¶] [Petitioner's] need to question prospective jurors about the district attorney's campaign material in an election that occurred six months before trial also does not demonstrate prejudice. That need is not the result of a purported conflict on the part of the district attorney's office. [Petitioner] conducted that questioning presumably to obtain a jury comprised of people who would be fair and impartial. Although [petitioner] contends he was forced to expose the entire prospective jury pool to the district attorney's campaign flyer, that decision was not the result of the district attorney's purported conflict of interest. Moreover, by asking about the campaign flyer during voir dire, [petitioner] presumably obtained a fair and impartial jury, i.e., one comprised of jurors who said they were not affected by the flyer and would base their verdicts only on the evidence presented in court. [¶] In short, [petitioner] has failed to show it is reasonably probable he would have received a more favorable result in this case if the trial court had granted [petitioner's] section 1424 motion and the entire district attorney's office had been recused. Because he has not shown prejudice, we must conclude that even if the trial court had abused its discretion in denying his motion, that purported error is harmless in this case.

B. *Analysis*

***44** Although the Supreme Court has noted that, in some circumstances, prosecutorial decisions may raise constitutional issues, *see* Marshall v. Jerrico, 446 U.S. 238, 249–50, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980) (explaining that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions"), petitioner has not identified, and the Court is not aware, of any clearly established Supreme Court precedent requiring recusal under circumstances like those presented in this case, *i.e.*, where the district attorney referenced petitioner's case, name, and picture in a campaign flyer seven months before trial. In light of the absence of Supreme Court authority, it cannot be said that the state courts' denial of this claim was contrary to, or involved an unreasonable application of, clearly established federal law. *See* Musladin, 549 U.S. at 74.

Further, petitioner has failed to demonstrate that the failure to recuse the San Bernardino County District Attorney's Office negatively affected his case. As the Court of Appeal noted, petitioner's purported need to question the prospective jurors about the campaign flyer does not demonstrate prejudice and by doing so, petitioner "presumably obtained a fair and impartial jury." There is nothing to suggest otherwise.

Additionally, to the extent petitioner may be asserting that he was precluded from negotiating a plea because the District Attorney's personal stake in the outcome of the case (*see* Pet. Mem. at 255), this contention is based on mere speculation. Petitioner has not presented any evidence that the prosecutor was precluded from offering a plea deal because of the campaign flyer. Thus, petitioner has not demonstrated that he was prejudiced by the allegedly erroneous denial of his motion to recuse the District Attorney's Office. *See* *Brecht*, 507 U.S. at 637; *Pruitt v. Virga*, 2014 WL 5320398, at *4 (C.D.Cal. Aug. 22, 2014), *Report and Recommendation accepted* by 2014 WL 5320399 (C.D.Cal. Oct. 16, 2014).

The state courts' rejection of this claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief on this claim.

XV. ***Petitioner is not entitled to habeas relief to the extent he is asserting an actual innocence claim.***

Although petitioner has not asserted a freestanding actual innocence claim, he asserts throughout the Petition that he is actually and factually innocent. (*See, e.g.*, Pet. at 3; Pet. Mem. at 272.) The Court briefly addresses this contention in an abundance of caution.

It remains an open question whether freestanding claims of actual innocence can provide the basis for federal habeas relief. *See* *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009); *see also* *House v. Bell*, 547 U.S. 518, 554–55, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). Assuming such a claim existed, "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Herrera v. Collins*, 506 U.S. 390, 417, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The Ninth Circuit has explained that to be entitled to relief, the petitioner must "go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476–77 (9th Cir. 1997) (en banc).

Here, even assuming that such a claim is cognizable in a non-capital case, petitioner has failed to satisfy the high standard for asserting such a claim. Petitioner's contentions are largely premised on unsupported claims that evidence was falsified and that someone else murdered Cobb, all of which have previously been discussed and rejected herein. Further, as previously explained, substantial DNA evidence was presented supporting his conviction. As such, petitioner is not entitled to relief on this claim. [34]

XVI. ***Petitioner is not entitled to an evidentiary hearing.***

***45** Petitioner also requests an evidentiary hearing. (Pet. at 84.) However, in *Pinholster*, the Supreme Court held that the AEDPA requires federal courts to evaluate the reasonableness of state court decisions on the basis of the record before the state court. 563 U.S. at 181–85. The Supreme Court reasoned that the "backward-looking language" of Section 2254(d)(1) "requires an examination of the state-court decision at the time it was made," and thus, the record under review must be "limited to the record in existence at that same time *i.e.*, the record before the state court." *Id.* at 182. Accordingly, under *Pinholster*, petitioner is not entitled to an evidentiary hearing.

Further, the Court has been able to resolve all of petitioner's claims by reference to the state court record. "It is axiomatic that when issues can be resolved by reference to the state court record, an evidentiary hearing becomes nothing more than a futile exercise." *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998).

Accordingly, the Court recommends that petitioner's request for an evidentiary hearing be denied.[35]

RECOMMENDATION

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

All Citations

Not Reported in Fed. Supp., 2016 WL 807960

Footnotes

1 Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, and Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts, Warren L. Montgomery, the Warden of Calipatria State Prison, in Calipatria, California, where petitioner currently is incarcerated, is hereby substituted as the proper respondent in this case.

2 It appears that respondent did not receive a copy of petitioner's Attachments. (Ans. Mem. at 1 n.1.) However, because the Court recommends that the Petition be denied, additional briefing from respondent to address these Attachments is unnecessary.

3 In the Superior Court, petitioner argued that his trial counsel rendered ineffective assistance by conspiring to alter evidence generally, but did not identify the prosecutor or Detective Robert Alexander ("Alexander) as members of the conspiracy.

4 As explained below, the claim raised in Ground Forty–One of the Petition is factually distinct from the claim raised in his direct appeal related to a motion for change of venue.

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

6 The Court shall refer to the Electronic Case Filing ("ECF") page numbers for ease of reference.

7 *People v. Marsden*, 2 Cal.3d 118, 84 Cal.Rptr. 156 (1970).

8 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

9 However, the Supreme Court did not state in *Richter* that it was overruling any existing Supreme Court jurisprudence. For example, under existing Supreme Court jurisprudence, when a state court in a reasoned decision denies an ineffective assistance of counsel claim without ever reaching the issue of prejudice, the AEDPA does not circumscribe federal habeas review of the prejudice issue, which is considered de novo. *See* *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L. Ed.2d 471 (2003). Similarly, when a state court in a reasoned decision denies an ineffective assistance claim without ever reaching the issue of deficient performance, the deficient performance issue is reviewed de novo. *See* *Porter v. McCollum*, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam).

10 Additionally, "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." *Williams*, 133 S.Ct. at 1096.

11 Grounds One, Three, Twenty–Seven, Twenty–Eight, and Thirty were denied on state collateral review by the California Supreme Court without a reasoned opinion. Although the state high court's silent denial came after the Superior Court denied these claims on procedural grounds (*see* Lodgment No. 13), "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, 562 U.S. at 99. Petitioner has failed to overcome that presumption here because he has not made a showing that "some other explanation for the [California Supreme Court] decision is more likely." *Id.* at 99–100. As a result, AEDPA's deferential standard also applies to these claims. *Id.*; *Pinholster*, 563 U.S. at 187. Further, even reviewing these claims *de novo*, the Court concludes that petitioner is not entitled to habeas relief for the reasons explained below. *Berghuis v. Thompkins*, 560 U.S. 370, 390, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).

12 The Court concurs with respondent that the legal theory for petitioner's claim regarding the alteration of the transcript of his interview with detectives is vague and conclusory. As best the Court can glean from the allegations of the Petition, it appears that petitioner is essentially contending that the prosecutor committed misconduct by presenting the transcript that was allegedly altered. (*See* Pet. Mem. at 19.)

13 To the extent petitioner's claims are premised on a violation of state law (see, e.g., Pet. Mem. at 19, 22, 30), such claims are not cognizable on federal habeas review. *See* 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); *see also* *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991) (federal habeas courts "do not review questions of state evidence law").

14 Petitioner further alleges in his conspiracy claim in Ground Twenty–Six that the deleted portions of the transcript included a reference that he had a dark blue Pinto. (*See* Pet. at 54.) Contrary to petitioner's contention, however, the transcript of the interview did include his statement that he had owned a dark blue Pinto. (*See* 2 CT 506.)

15 Petitioner's counsel requested that the trial court instruct the jury to disregard this statement. (2 RT 529.) The trial court declined to give defense counsel's proposed instruction (3 RT 545), and instead, instructed the jury that "[s]ometimes the police intentionally lie or make things up when they're talking to defendants" and "what's important is not what the police officer says except to the extent that it helps you understand the defendant's answer." (3 RT 549.)

16 Petitioner remarried in the intervening years after Cobb's murder. (*See,* e.g., 2 CT 490, 500, 514.)

17 It appears that this issue was initially discussed off the record. (1 RT 15– 16.)

18 Earlier in the proceedings, the prosecutor mentioned the DNA evidence in the Brooks case and that he had permitted petitioner's trial counsel to review the file, but the trial court interrupted him, requesting that the hearing, at that time, be limited to motion matters. (1 RT 94–95.)

19 Although not asserted in the Petition, petitioner also contends in his Memorandum of Points and Authorities that Alexander falsely testified by stating that the transcript of the redacted recording was accurate. (Pet. Mem. at 30.) Again, such claim is without merit as his trial counsel agreed to the redactions and petitioner has not shown that there is a reasonable likelihood that Alexander's testimony or the redactions could have affected the judgment of the jury.

20 Because the standard for "deficient performance" is an objective one, a reviewing court is not confined to evidence of counsel's subjective state of mind, "[a]lthough courts may not indulge [in] '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *See Richter,* 562 U.S. 109 (emphasis in original).

21 In his Memorandum of Points and Authorities, petitioner appears to further allege that his counsel rendered ineffective assistance by failing to further investigate whether Kraemer contaminated the crime scene, the calls he purportedly received from Cobb prior to her death, his conviction for manufacturing methamphetamine, the property owned by Cobb, and the possibility of a relationship between Kraemer and Robert M. Edwards. (Pet. Mem. at 84.) This claim is unexhausted and in any event, fails to state a colorable claim. There is no evidence that petitioner's counsel did not investigate this line of inquiry and tactically decide not to inquire further. Petitioner's conclusory allegations that additional evidence may have been discovered is based on mere speculation and insufficient to warrant habeas relief.

22 As best the Court can glean, petitioner is referring to a felt pad that tested positive for semen. (*See, e.g.,* Reply at 17.)

23 Petitioner indicates January 2014. The Court assumes that this was a typographical mistake, given that the trial was conducted in 2011.

24 During petitioner's interview with detectives, he indicated that his ex-mother-in-law lived in Lynwood. (2 CT 515.)

25 Although petitioner raised a claim regarding a change of venue in his direct appeal, that claim was factually distinct. In that claim, petitioner alleged that his trial counsel should have filed a change of venue motion because, as a result of the campaign flyer, defense counsel had to show all of the prospective jurors the flyer, thereby, tainting the entire venire. (Lodgment No. 16 at 133–39.)

26 Petitioner also cites to a August 15, 2010 article referencing his civil lawsuit action Ramos (Pet. Att.A9), although it is unclear whether this document was before the state court.

27 To the extent petitioner contends that he invoked his *Miranda* rights during the interview, and prior to his arrest at the conclusion of the interview, *Miranda* rights do not "vest" until a suspect is in custody; and the Supreme Court has never held that a person can invoke the rights anticipatorily. *McNeil v. Wisconsin,* 501 U.S. 171, 182 n.3, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) ("We have never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation' "); *United States v. Hines,* 963 F.2d 255, 256 (9th Cir. 1992) (per curiam) ("[T]he Fifth Amendment right to counsel under *Miranda* does not vest until a defendant is taken into custody. Therefore, if [the defendant] was not in custody during [an] interview, the reference to his lawyer at that time cannot be considered an invocation of *Miranda* rights." (internal citations omitted)).

28 To the extent petitioner also maintains that Backhoff's DNA was found at the crime scene that Backhoff admitted to the police he had seen Cobb two weeks before her death, and that he approached the police after the homicide was reported, stating that he had heard the sheriff's department was looking for him (Pet. at 70), petitioner has not provided

any cite to the record where petitioner's counsel sought to admit this evidence prior to or during trial and the Court has found no such reference. Petitioner also reasserts his claim that the trial court erred in excluding evidence of Cobb's "promiscuity," which, as explained above, lacks merit.

29 Respondent further argues that petitioner did not need permission to file a petition for writ of mandamus, since he could have filed such a petition on his own. (Pet. Mem. at 94.)

30 Petitioner also purports to cite to his trial counsel's notes, and specifically to a handwritten, undated notation stating, "Jail did suspend[ ] all authorized legal visits [¶] Christopher Warner—Civil Judge." (Pet. Mem. at 184; Pet. Att. P1.) These handwritten notes have not been authenticated, and there has been no showing that they were previously presented to the state court. As such, the Court does not find this evidence persuasive.

31 Petitioner also appears to speculate that his trial counsel was not present when the two jury questions were discussed. (Pet. Mem. at 242.) This claim is belied by the record, which reflects otherwise. (1 CT 209.)

32 To the extent petitioner also maintains that it was improper for the trial court to ask stand-in counsel's opinion on whether further argument would be useful (*see* Pet. at 76; Reply at 148), petitioner misstates the record. Rather, after the jurors were dismissed for the day, the prosecutor asked whether, if the jurors continued to have issues, further argument would help. (3 RT 674.) The trial court instructed the prosecutor to remind the court the following day if that was something the prosecutor wanted to do, but that petitioner's counsel needed to be present for that discussion. (3 RT 674–75.)

33 To the extent that petitioner contends that the trial court erred under state law, such claim is not cognizable on federal habeas review. *See* 28 U.S.C. § 2254(a); *McGuire*, 502 U.S. at 67–68.

34 Petitioner also appears to assert another cumulative error claim. (Pet. Mem. at 264.) Again, the Court has considered and rejected all of petitioner's claims. None of these alleged claims evaluated singularly, or *in toto,* constitute constitutional error. Thus, petitioner's cumulative error claim fails as well.

35 Further, to the extent petitioner has submitted documents in support of his Petition that were not before the state court and/or is seeking to expand the record to assert a new, unexhausted claim based on such evidence, the Court may not consider such documents and denies his request to expand the record to assert such new claim. *Pinholster*, 563 U.S. at 181; *see also* 28 U.S.C. § 2254(b).

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Court of Appeal,
Fourth District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,

v.

John Henry YABLONSKY, Defendant and Appellant.

E055840

Filed December 4, 2013

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed as modified. (Super.Ct.No. FVI900518)

Attorneys and Law Firms

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Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

McKINSTER, J.

*1 A jury found defendant and appellant, John Henry Yablonsky (defendant), guilty of first degree murder (Pen. Code, § 187, subd. (a))[1] in connection with the death by strangulation of Rita Cobb, and also found true the special circumstance allegation that defendant committed the murder during the commission of a rape (§ 261). After denying defendant's motion for new trial, the trial court sentenced defendant to state prison for the indeterminate term of life in prison without the possibility of parole.

Defendant raises various claims of error in this appeal, the details of which we recount below in our discussion of those claims. In general, defendant challenges the trial court's rulings on the admissibility of evidence, the effect of which defendant claims deprived him of his constitutional right to present a defense, and the quality of representation afforded him by his trial counsel, the effect of which defendant contends deprived him of his constitutional right to the effective assistance of counsel. We do not share defendant's view. With the exception of defendant's claim of sentencing error, which the Attorney General concedes, we conclude either error did not occur, or if it did, it was harmless. Therefore, we will affirm the judgment after modifying defendant's sentence by striking the parole revocation restitution fine.

FACTS

This case involves the September 1985 murder of Rita Cobb. Defendant was arrested for that crime in March 2009, after a sample of his deoxyribonucleic acid (DNA) matched DNA from sperm cells found in a vaginal swab taken from Rita Cobb's body following her apparent murder in 1985. His DNA, and the fact that when interviewed by law enforcement officers defendant admitted he knew Rita Cobb but denied having had sex with her, is the evidence that connects defendant with the murder and therefore is the evidence on which the jury relied to find defendant guilty.

That Rita Cobb was murdered is undisputed. Her son, Daryl Kraemer, and his girlfriend, found Cobb's nude, decomposing body on the bed in the bedroom of her Lucerne Valley home. A wire coat hanger was wrapped tightly around her neck and knotted on the side. Marshall Franey, a San Bernardino County Deputy Coroner assigned to investigate the death, estimated, based on the moderate decomposition of the body, that Rita Cobb died at least two days before her body was discovered.

Dr. George Saukel, the forensic pathologist who performed the autopsy on Rita Cobb's body, confirmed Franey's estimate regarding the time of death. He concluded Cobb's death had been caused by both manual strangulation, as evidenced by fractures to bones in Cobb's neck, and ligature strangulation, as evidenced by a wire coat hanger wrapped tightly and twisted twice around Cobb's neck. Dr. Saukel also found sperm cells in Rita Cobb's vagina. Based on the condition of those cells, Dr. Saukel estimated sexual intercourse could have occurred as much as a day and one-half before Cobb's death, or postmortem.

*2 DNA analysis of the sperm cells was performed in 1999. San Bernardino County Deputy Sheriff's criminalist Donald Jones testified based on his analysis of the DNA results that the sperm cells were from a single donor. Jones compared the DNA from the sperm cells to other DNA obtained from 16 blood samples apparently taken from the crime scene, and also obtained from known donors. Those comparisons did not produce a match.

In January 2003, another criminalist employed by the San Bernardino County Sheriff's Department conducted a more sophisticated analysis of the sperm and semen contained in the vaginal swab from Rita Cobb. This second analysis produced a complete DNA profile of 13 markers which then was entered into a nationwide database, CODIS DNA. Some years later,[2] the criminalist was notified that the sample she had entered matched defendant.

Based on the DNA match, on March 8, 2009, two San Bernardino County Sheriff's detectives contacted defendant at his home in Long Beach and questioned him about Rita Cobb. Defendant acknowledged that he knew Cobb, because he had rented the "back house" on her property, and lived there with his wife and young son for about six to nine months. Cobb lived in a second house on the same property. Defendant and his family moved out around April 1985. Defendant described his relationship with Cobb as that of landlord and tenant. He denied having any form of social relationship with Cobb. Over the course of the interview, which began at defendant's home, then moved to the local police station, the detectives asked defendant three different times whether he had had a sexual relationship with Cobb. Each time defendant said no. At the conclusion of the interview, the detectives arrested defendant.

The detectives obtained a buccal swab, i.e., cells from the cheek, inside defendant's mouth. A DNA analysis of the buccal cells confirmed defendant's DNA matched the DNA obtained from the sperm and semen recovered from the vaginal swab taken from Rita Cobb.

Rita Cobb was last seen alive on Friday, September 20, 1985, at a social gathering at the home of her friends, John and Francesca. Cobb drank alcohol most of the evening. She appeared more intoxicated than usual by the time she got ready to leave around 10 or 11 p.m. Bruce Nash offered to drive Cobb home. He testified Cobb declined the offer. However, John recalled Nash did drive Cobb home in her own car, and Nash's girlfriend followed in Nash's car.

Daryl Kraemer had not been able to reach his mother by telephone over the weekend of September 21 and 22. On Monday he called her work, and learned Cobb had not come in, so he and his girlfriend drove to Cobb's home. They discovered her body around 11:30 a.m. and called authorities.

Additional facts will be recounted below as pertinent to the issues defendant raises on appeal.

1.

ADMISSIBILITY OF THIRD PARTY CULPABILITY EVIDENCE

Defendant did not put on a defense. He had intended to present evidence to show someone other than he had killed Rita Cobb. To that end he planned to introduce evidence about another unsolved homicide in which 63–year–old Helen Brooks had been killed in Apple Valley a few months before Rita Cobb was killed and DNA evidence from that crime did not match defendant's DNA. He also intended to present evidence to show Rita Cobb had a reputation for dating many different men, a penchant defendant describes as "extraordinary promiscuity," any one of whom could have killed her. The trial court excluded evidence of the Helen Brooks murder and Rita Cobb's reputation, and also sustained the prosecutor's hearsay and relevance objections when defense counsel asked Bruce Nash whether Rita Cobb had indicated she intended to go to a bar when she left the gathering at John and Francesca's house on Friday night. The trial court also excluded, on the basis of hearsay, evidence that in 1988, three years after Rita Cobb's murder and long before defendant became a suspect, the sheriff's department received a report from WeTip that an anonymous caller reported hearing William Backhoff bragging at a party that he had killed Rita Cobb.

*3 Defendant contends the trial court's rulings are erroneous and collectively had the effect of preventing him from presenting a defense in violation of his due process right to a fair trial. Although a close issue, we disagree for reasons we now explain.

A. Helen Brooks Homicide

During trial, defense counsel informed the court that he intended to question various witnesses, including the criminologist, about the apparent rape and murder of Helen Brooks, an unsolved homicide defense counsel claimed "is in many respects almost identical to the Rita Cobb case." Defense counsel could not (or at least did not) identify specific similarities but stated "there's so many ways these two cases are similar [and] because of that for the first two or three years after September 23rd of 1985, the sheriff's department treated the two cases as if they had been committed by the same person." The prosecutor objected on the basis of relevance because there was no evidence to link the person who killed Helen Brooks to the Rita Cobb murder. The trial court agreed and ruled the evidence inadmissible not only because it was not relevant but also because it was likely to confuse the jury.

"In general, third party culpability evidence is admissible if it 'rais[es] a reasonable doubt of defendant's guilt.' [Citation.] This does not mean, however, that no reasonable limits apply. Evidence that another person had 'motive or opportunity' to commit the charged crime, or had some 'remote' connection to the victim or crime scene, is not sufficient to raise the requisite reasonable doubt. [Citation.] Under [*People v.*] *Hall* [(1986) 41 Cal.3d 826, 833] and its progeny, third party culpability evidence is relevant and admissible only if it succeeds in 'linking the third person to the actual perpetration of the crime.' [Citations.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 43.) We review a trial court's rulings on the admissibility of evidence under the abuse of discretion standard. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

Defendant describes the evidence regarding Helen Brooks as "reverse other crime evidence," in that it showed defendant had not committed the other crime because his DNA did not match DNA obtained from Brooks. Defendant argues that if the two crimes are closely similar, and defendant was not the perpetrator of one of the crimes, "this constituted powerful circumstantial evidence that he was not the perpetrator in the other case, either." In other words, defendant claims the person who killed Helen Brooks must have been the person who also killed Rita Cobb, and therefore the Brooks homicide is circumstantial evidence of third party culpability in the Cobb homicide.

There are several defects in defendant's argument, the first of which is his premise that the person who raped Helen Brooks also was the person who killed her. As defendant argued in his own defense in this case, that premise is not necessarily true. The killer might not have been the rapist; two different people could have been involved. Therefore, the absence of defendant's DNA in the Brooks case does not eliminate him from the pool of people who might have killed her.

The second defect in defendant's argument is that even if we were to accept his initial premise, defendant did not establish the factual similarities between the Cobb and Brooks crimes. He showed only that both crimes involved older women who lived in the Lucerne Valley, and who were killed in the summer of 1985. In challenging the trial court's ruling, defendant claims he made an offer of proof that the Brooks and Cobb homicides were "in many respects almost identical." Defense counsel did make that statement, but he did not support that claim with any factual details about the Brooks homicide. In arguing the issue on appeal, defendant cites to a police report included in his motion for new trial. That police report was not before the trial court when it ruled on the admissibility of the Brooks crime. Moreover, the police report, which lists several unsolved homicides involving older women, only discloses that on July 5, 1985, 63–year–old Helen Brooks was apparently killed and her body was found in an apartment located on Highway 18, in Apple Valley.

*4 Defendant also made an offer of proof that DNA obtained in the Brooks case did not match defendant's DNA, and therefore defendant was eliminated as a suspect in that case. The prosecutor had told the trial court about the Helen Brooks case, in the course of putting on the record that he had made parts of the file in that case available to defense counsel. In describing the case to the trial court, the prosecutor said Brooks had been raped and murdered. Neither defense counsel's statement nor the facts contained in the record on appeal establish that the DNA obtained in the Brooks case was obtained from a vaginal swab of the victim. The record on appeal does not include any other details about that crime, such as how Brooks was killed or where and how her body was found. Absent those details, defendant failed to link the person who killed Helen Brooks with the homicide of Rita Cobb. [3]

We also do not accept defendant's assertion that the trial court precluded his attorney from making the necessary offer of proof. But even if we agreed, and thus excused the oversight in this case, the additional evidence defendant would have cited is the evidence we have recounted above. That evidence does not make the connection between the two crimes. Similarly, we do not share defendant's view that on appeal we must accept his offer of proof as true. Defendant not only has failed to cite any authority that supports this assertion, [4] the truth of his offer of proof is not supported by the facts he cites in the appellate record.

For each of the reasons discussed, we conclude defendant failed to establish the requisite link between the perpetrator of the Brooks homicide and the homicide of Rita Cobb. Therefore, defendant failed to show the Brooks homicide was relevant and could raise a reasonable doubt about his guilt in this case. Consequently, we must conclude the trial court did not abuse its discretion by ruling that evidence inadmissible at trial.

B. Rita Cobb's Lifestyle

Citing the forensic evidence, specifically the evidence that sexual intercourse between defendant and Cobb could have occurred as much as a day and a half before Cobb's death, defendant intended to show Cobb dated many different men. That evidence would support the further argument that any one of the many men she dated could have killed her after

defendant and Cobb had sex. To that end, defense counsel told the trial court he wanted to have "the jury understand, as everyone else in those—in 1985 understood, that Ms. Cobb did have a number of gentleman [*sic*] of different ages, and she entertained them at her residence. She invited them to be there, and it was not uncommon for her to have male guests at home." The prosecutor objected on the ground such evidence was inadmissible character evidence. The trial court ruled the evidence was not relevant and excluded it. In doing so the court noted defendant had established through the testimony of Rita Cobb's son and his wife that Ms. Cobb dated and had people over to her house. Although defense counsel protested "there was more," presumably meaning he had additional questions he wanted to ask those two witnesses on that subject, the trial court denied that request and reaffirmed its ruling.

*5 Although described as character evidence, the evidence in question is in fact evidence of third party culpability, i.e., evidence that one of the men Rita Cobb was dating or had dated could have been the person who killed her. Once again, defendant failed to make the necessary offer of proof, defendant's contrary claim notwithstanding. Defendant claimed Rita Cobb was known to date many men, and to have them over to her house. However, he did not offer any facts to support that assertion. On appeal, he cites facts set out in his pretrial motion to dismiss. Defendant did not rely on those facts in arguing the admissibility of the evidence to the trial court, and did not refer to the pretrial motion in arguing the existence and admissibility of evidence regarding what we will refer to as the victim's lifestyle. Defendant also cites a police report included in his motion for new trial. Because that motion was not filed until after trial, the trial court could not have considered the police report. Defendant claims the trial court "was probably already familiar" with that police report because in an unreported meeting in chambers, the attorneys and the trial court purportedly discussed witness statements contained in that police report. The trial court might have known about the police report but that fact is not obvious from the record. Therefore, we cannot say the police report was part of the record at the time the trial court ruled the evidence about Rita Cobb's lifestyle was inadmissible to prove third party culpability.

As previously discussed, "[t]hird party culpability evidence is admissible if it is 'capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability.... [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.' [Citations.]" (*People v. Page* (2008) 44 Cal.4th 1, 38.)

Evidence the victim had dated many different men, or even that she was inclined to pick up men at local bars, does not even rise to the level of evidence of motive or opportunity to kill the victim. The conclusion one of those men killed Rita Cobb is rank speculation, rather than a logical inference drawn from circumstantial evidence. Without some fact that tends to link one of those men to the crime, the challenged evidence was not relevant. Therefore, the trial court did not abuse its discretion by excluding that evidence at trial. (*People v. Waidla, supra,* 22 Cal.4th at p. 724.)

C. WeTip Report

Defendant contends he was denied his right under the federal constitution to present a defense because the trial court excluded not only the previously noted evidence but also evidence that in August 1988 the San Bernardino County Sheriff's Department received an anonymous tip, through WeTip, Inc., that William Backhoff had been at a party where he had been bragging about having strangled, raped, and mutilated Rita Cobb about three years earlier. Backhoff said he had picked up the victim at the bar called Zodiac, and when the victim said she was turned off sexually to him, Backhoff bragged that he strangled her until she "turned black" and then described further crimes against the victim after she was dead.

Defendant points out Backhoff had a connection to Rita Cobb, which defendant set out in his motion to dismiss based on a violation of his right to a speedy trial. According to defendant, two days after Rita Cobb's body was found, Backhoff

showed up claiming he had heard they were looking for him. At that time, Backhoff acknowledged he had dated the victim and been to her house, but said he had never had sex with her. Three years later, presumably in response to the WeTip report, a deputy sheriff again contacted Backhoff. This time he repeatedly stated he had not done anything wrong. Backhoff later committed suicide.

The trial court ruled the WeTip report was inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter stated. (Evid. Code, § 1200.) Hearsay evidence is generally inadmissible. (*Ibid.*) The statement reported to WeTip would be hearsay if defendant offered it to prove the truth of what Backhoff said, i.e., that he killed Rita Cobb. If the statement were offered to show what if anything the sheriff's department did in response to the WeTip report, the report and its content is not hearsay. Defendant however did not offer the statement for its nonhearsay purpose. Instead, he contends the trial court violated his due process right to present a defense by excluding the hearsay statement from evidence.

***6** Defendant relies on *Chambers v. Mississippi* (1973) 410 U.S. 284 (*Chambers*) to support his claim that hearsay evidence is admissible if its exclusion would deprive defendant of his right to present a defense. Our state Supreme Court explained in *People v. Ayala* (2000) 23 Cal.4th 225, that *Chambers* is limited to the specific facts of that case: " 'Few rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations.] [But i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' [Citation.] Thus, '[a] defendant does not have a constitutional right to the admission of unreliable hearsay statements.' [Citations.] Moreover, both we (*People v. Hawthorne* (1992) 4 Cal.4th 43, 56 [ ]) and the United States Supreme Court (*United States v. Scheffer* (1998) 523 U.S. 303, 316[ ]) have explained that *Chambers* is closely tied to the facts and the Mississippi evidence law that it considered. *Chambers* is not authority for the result defendant urges here." (*Id.* at p. 269.)

The trial court did not violate defendant's due process right to present a defense by excluding the WeTip report. That report not only was hearsay, it was also provided by an unreliable anonymous source. We cannot say the trial court abused its discretion by excluding that report from evidence at trial. (*People v. Waidla, supra,* 22 Cal.4th at p. 724.)

D. Victim's Hearsay Statement

Defendant contends the trial court erred by sustaining the prosecutor's hearsay objection when defense counsel asked Bruce Nash if Rita Cobb indicated when she left John and Francesca's house on the night of September 20 she was going somewhere other than home. Defense counsel argued the statement was relevant because Nash would testify, after Cobb declined his offer to drive her home, she said she was going to a bar. The trial court was of the view the statement was hearsay and irrelevant. Trial counsel did not address the hearsay issue. On appeal, defendant argues Cobb's statement to Nash was admissible under *People v. Alcalde* (1944) 24 Cal.2d 177, and Evidence Code section 1250, as a statement of Cobb's intent or statement of mind. We agree with defendant.

The Supreme Court held in *People v. Alcalde, supra,* 24 Cal.2d 177, the murder victim's statement she was going out with Frank was admissible as a statement of her future intent which in turn is circumstantial evidence she acted in accordance with that intent. (*Id.* at pp. 187–188.) As the Supreme Court explained in *People v. Jones* (1996) 13 Cal.4th 535, "the Legislature enacted Evidence Code section 1250, which provides in relevant part that 'evidence of a statement of the declarant's then existing state of mind ... is not made inadmissible by the hearsay rule when ... [t]he evidence is offered to prove or explain acts or conduct of the declarant.' The legislative history of section 1250 makes it clear that this provision specifically was intended, in part, to codify the *Alcalde* decision. [Citation.]" (*Id.* at p. 548.) In short, " 'a statement of the declarant's intent to do certain acts is admissible to prove that he did those acts. [Citation.]' [Citation.]" (*People v. Chambers* (1982) 136 Cal.App.3d 444, 452, citing 7 Cal. Law Revision Com. Rep. (1965) p. 1235.)

Although admissible as a statement of intent, a trial court may exercise discretion under Evidence Code section 1252 to exclude such a statement if the trial court finds "the statement was made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code, § 1252.) The Attorney General argues the trial court exercised that discretion in this case because Cobb was drunk at the time she made the statement, and in any event there was no evidence to show she actually went to a bar.

The trial court, in ruling the statement inadmissible, did not consider whether Cobb was drunk at the time she made the statement. Instead, the trial court focused on defense counsel's failure to cite an exception to the hearsay rule. Absent such an exception, the trial court viewed Cobb's statement as unreliable hearsay. The exception, as previously noted, is Evidence Code section 1250.

*7 The trial court did question the relevance of Cobb's statement that she was going to a bar, because several witnesses apparently had testified they did not see her at a bar on the night in question. The trial court's relevance analysis is incorrect. Cobb's statement is relevant. Whether she actually went to a bar was an issue for the jury to decide. Cobb could have driven to a bar and been waylaid by someone in the parking lot. Or she could have gone to a bar other than the one the witnesses had patronized on the night in question. Whether Cobb actually went to a bar rather than home was relevant to the defense that someone other than defendant killed Cobb. Defendant argued as much in his closing argument.

Although we conclude the trial court erred in excluding Nash's testimony regarding Rita Cobb's statement of intent, that error requires reversal only if it was prejudicial, i.e., if it is reasonably probable the jury would have reached a result more favorable to defendant if Cobb's statement had been admitted into evidence at trial. (Evid. Code, § 354.) Defense counsel effectively argued to the jury that someone other than defendant could have killed Rita Cobb. According to the forensic evidence, Cobb died no later than noon on Saturday but she could have had sex as much as a day and a half before her death. Therefore, she could have had sex with A on Thursday night but then have been killed by B sometime after that. Defense counsel noted there was no evidence to show Cobb had been sexually assaulted. Defendant also argued that Joe Saunders, whose fingerprints were found on a glass in Cobb's kitchen, could have killed Rita Cobb. The excluded evidence does not add anything to defendant's argument.

Accordingly, we conclude the trial court's error in excluding the victim's statement she intended to go to a bar rather than home was harmless.

2.

NEW TRIAL MOTION

Defendant moved for a new trial on the ground he had been denied the effective assistance of counsel. The trial court denied his motion. Defendant contends the trial court erroneously relied solely on trial counsel's performance in court as the basis for denying his new trial motion. According to defendant that is an error of law that we independently review. We disagree.

The trial court did cite trial counsel's courtroom performance at the hearing on defendant's new trial motion. From that defendant would have us conclude the trial court only considered that performance and did not consider the purported omissions set out in his new trial motion. We do not share defendant's interpretation of the trial court's statement.

But even if we did conclude the trial court only considered defense counsel's performance in court, we nevertheless would conclude the trial court did not err in denying defendant's new trial motion.

" 'A new trial may be granted where the trial court finds that the defendant received ineffective assistance of counsel. [Citations.] To prevail on this ground, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." [Citations.]' [Citation.]" (*People v. Callahan* (2004) 124 Cal.App.4th 198, 212.)

Defendant did not make the required showing. Defendant asserted in his motion for new trial that his trial attorney did not properly investigate and prepare for trial and that he failed to make several motions. Among other things, defendant argued his trial attorney failed to investigate and pursue evidence that would have established a connection between the murder of Rita Cobb and Helen Brooks. In particular, defendant argued that he and the person who killed Helen Brooks have the same rare blood type, one that is found in less than two percent of the population. Unfortunately, Mr. Smith, the attorney who prepared and filed defendant's new trial motion, did not support that assertion with a citation to any of the evidence submitted in support of the motion, or any evidence contained in the trial court record. Therefore, neither the trial court nor this court can determine whether that assertion is accurate.

***8** Mr. Smith also asserted trial counsel was ineffective because he did not retain an expert to review the forensic evidence and to testify at trial. According to the evidence submitted in support of his motion, trial counsel did contact an expert and obtained a cost estimate of $3,300 to review the evidence. The record does not disclose whether trial counsel actually retained this or any other expert witness. It discloses only that trial counsel did not present expert testimony at trial. Absent a contrary showing by defendant, we must assume trial counsel's decision was sound trial strategy. (*People v. Dennis* (1998) 17 Cal.4th 468, 541.) Because defendant did not show in his new trial motion that expert testimony would have been beneficial to defendant, he has not shown trial counsel's decision was incorrect. (*Ibid.*)

Mr. Smith also argued in the new trial motion that trial counsel was ineffective because he failed to have DNA analysis conducted of hairs that were recovered from Rita Cobb's body and the bed where her body was found. According to the new trial motion one hair included a root that could have been analyzed for DNA. That hair was "completely different, color wise and lengthwise as to [defendant's] hair type." DNA analysis of the hair could have produced a profile of someone other than defendant. Here again, the record does not show whether trial counsel requested a DNA analysis of the hair; it shows only that such evidence was not presented at trial.

Mr. Smith also faulted trial counsel for not conducting an extensive investigation of various witnesses, identified in a motion to dismiss, who knew Rita Cobb and could have testified about her lifestyle, specifically that she was known to date and have sex with many different men. As previously discussed, trial counsel attempted to present evidence regarding the victim's social and sex habits at trial, but the trial court excluded that evidence.

Mr. Smith also argued that trial counsel was ineffective because he did not pursue a connection between Robert Mark Edwards, a suspect in what he claims is a similar unsolved murder committed in May 1986. Law enforcement officers eliminated Edwards as a suspect because they concluded he was incarcerated at the time Rita Cobb was murdered. However, the evidence shows Edwards was not incarcerated until December 1985; Cobb was killed two months earlier in September. Moreover, the police report indicates Edwards was incarcerated from December 1985 to December 1986, which if correct means he also could not have committed a murder in May 1986. Once again, Mr. Smith showed only that trial counsel did not present evidence at trial regarding the investigation of Edwards as a suspect in this case.

Similarly, in arguing trial counsel was ineffective because he did not investigate or present evidence regarding the sheriff's investigation of Joe Saunders and William Backhoff as suspects in the murder of Rita Cobb, Mr. Smith did not submit any evidence to show the results of such investigations. The record shows only that trial counsel did not present that evidence at trial.

We will not recount the other ways in which defendant claimed his trial attorney's representation was deficient because defendant did not present sufficient evidence in his motion for new trial to support such a finding. Absent additional evidence, such as a declaration from trial counsel, we cannot determine whether defendant's trial attorney failed to conduct the requisite investigation and preparation, or whether he did so and obtained evidence unfavorable to defendant. In short we simply cannot determine from this record whether trial counsel's representation was deficient. Because defendant failed to establish the first prong of his ineffective assistance of counsel claim the trial court properly denied defendant's motion for new trial.

3.

EVIDENCE OF PRIOR RAPE CLAIMS

*9 Defendant contends the trial court erred when it ruled, if defendant testified at trial, the court would permit the prosecutor to present evidence under Evidence Code section 1108 that two women claimed defendant had raped them, one in 1982 and the other in 1996. Defendant did not testify at trial and as a result the women did not testify.

Because he did not testify, this claim is not preserved for review on appeal. "It is well established that the denial of a motion to exclude impeachment evidence is not reviewable on appeal if the defendant subsequently declines to testify. (See *Luce v. United States* (1984) 469 U.S. 38 [ ] (*Luce*) [denial of in limine motion to preclude impeachment of the defendant with a prior conviction is not reviewable on appeal if the defendant did not testify]; *People v. Collins* (1986) 42 Cal.3d 378, 383–388 [ ] (*Collins*) [prospectively adopting the *Luce* rule].)" (*People v. Ledesma* (2006) 39 Cal.4th 641, 731.)

Defendant contends this case is distinguishable from *Collins,* and that the issue is preserved even though he did not testify. We cannot see the distinction. During the in limine hearing in this case the prosecutor expressed the opinion that under Evidence Code section 1108, he could introduce the testimony of the two women who claimed to have been raped by defendant in his case-in-chief, but he chose, as a "tactical decision," not to introduce the evidence until defendant testified. Defendant did not testify, so the evidence was not introduced at trial.

In arguing the issue is preserved despite his failure to testify, defendant relies on *People v. Gonzalez* (2006) 38 Cal.4th 932 and *People v. Brown* (1996) 42 Cal.App.4th 461 [Fourth Dist., Div. 2] and he faults respondent for not addressing those cases. Neither case is relevant. In *Gonzalez,* the issue was whether the trial court erred when it refused the defendant's request for disclosure of the evidence the prosecutor intended to use to impeach two defense witnesses. The Supreme Court held the issue involved the defendant's right to discovery and therefore was preserved for review on appeal, even though the witnesses did not testify. (*Gonzalez,* at pp. 955–960.) In *Brown,* the defendant claimed the impeachment evidence was obtained in violation of his Sixth Amendment right to counsel and this court held that when the issue is purely one of law concerning a constitutional right, the defendant need not testify to preserve the claim of error. (*Brown,* at p. 471.) Defendant does not claim he was denied discovery, nor does he claim a constitutional violation. Instead he contends simply that the trial court abused its discretion when it ruled the impeachment evidence was admissible.

Because defendant did not testify, the prior rape evidence was not presented at trial. Defendant contends the threat of the evidence being presented is what made him decide not to testify, and therefore was prejudicial. But that is precisely the rationale of the rule: "[I]f the defendant does not testify, any possible harm from the trial court's ruling is wholly speculative." (*People v. Ledesma, supra,* 39 Cal.4th at p. 731–732.) We simply cannot see how this case is distinguishable from *Collins,* notwithstanding defendant's contrary assertion.

4.

INSTRUCTIONAL ERROR

Defendant contends, and the Attorney General concedes, the trial court's instruction on the felony-murder special circumstance was incorrect because it did not include the requirement of intent to kill. In 1983, the Supreme Court held in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, intent to kill is an element of the felony-murder special circumstance. The Supreme Court overruled *Carlos* in 1987 in *People v. Anderson* (1987) 43 Cal.3d 1104, 1147, and held that intent to kill must be proven only if the defendant is an aider and abettor. Because the crime here occurred in 1985, *Carlos* applies. (*People v. Wharton* (1991) 53 Cal.3d 522, 586, fn. 16, [intent to kill is a requirement in cases involving a felony-murder special circumstance committed after *Carlos* but before *Anderson.*] The Attorney General concedes the trial court in this case did not instruct the jury that intent to kill is an element of the felony-murder special circumstance.

***10** The issue we must resolve is whether the instructional error was harmless. "The determination of whether *Carlos* error is harmless 'depends on application of the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24[ ].' [Citation.] In other words, 'error in failing to instruct that a special circumstance contains a requirement of the intent to kill is harmless when "the evidence of defendant's intent to kill ... was overwhelming, and the jury could have had no reasonable doubt on that matter." ' [Citation.]" (*People v. Haley* (2004) 34 Cal.4th 283, 310 (*Haley*).)

The evidence of intent to kill in this case is overwhelming. The only issue at trial was the identity of the person who killed Cobb. According to the forensic pathologist, Rita Cobb died as the result of both manual and ligature strangulation. Defendant wrapped his hands around Cobb's throat, as evidenced by the fracture of the hyoid bone and voice box cartilage in her neck. Defendant then also strangled Cobb with a wire coat hanger, which he wrapped twice around her neck and tightened by twisting. That in our view is overwhelming evidence of intent to kill such that the trial court's error in failing to instruct the jury on that element of the felony-murder special circumstance was harmless beyond a reasonable doubt.

In arguing the error was prejudicial, defendant points to evidence that a pair of white shorts that could have been used as a gag had been found on or near Rita Cobb's face when her body was discovered. Defendant claims the evidence that he might have used a gag shows he only intended to keep Cobb from screaming, and therefore failure to instruct on intent to kill was not harmless beyond a reasonable doubt. In *Haley, supra,* 34 Cal.4th 283, which defendant cites to support this claim, the defendant said he only pressed a pillow down over the victim's face to keep her from screaming after she interrupted him committing a burglary, and that she was alive when he left. (*Id.* at pp. 310–311.) The forensic evidence and the defendant's statement to the police were both consistent with the defendant's claim. (*Id.* at p. 311.) Therefore, the court concluded the evidence of intent to kill was not overwhelming and the instructional error was prejudicial. (*Id.* at p. 312.)

Unlike *Haley,* the evidence in this case shows defendant not only used his hands to strangle Cobb but he also used a wire coat hanger, and possibly also used a gag. That evidence overwhelmingly supports a finding of intent to kill. Therefore, we conclude the trial court's instructional error was harmless beyond a reasonable doubt. (*Haley, supra,* 34 Cal.4th at p. 310.)

5.

INSTRUCTION TO DEADLOCKED JURY

Defendant contends the trial court effectively coerced the jury to render a verdict of guilt when it directed the jurors to continue deliberating after they announced they were deadlocked and the foreperson disclosed the split was eight for guilt and four for acquittal. We disagree.

At the outset we note defendant did not object when the trial court, after hearing the claim they were deadlocked, ordered the jurors to stop their deliberations for the day and return the following morning to continue deliberating. His failure to object arguably waives the issue for review on appeal. (*People v. Neufer* (1994) 30 Cal.App.4th 244, 254.) However, because defendant also claims he was denied the effective assistance of counsel as a result of counsel's failure to object, we will address the merits of his claim.

*11 "The applicable legal principles are well established. Under section 1140, the trial court is precluded from discharging the jury without reaching a verdict unless both parties consent or 'unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.' We have explained that '[the] determination whether there is reasonable probability of agreement rests in the sound discretion of the trial court. [Citation.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." [Citation.]' [Citations.]" (*People v. Sheldon* (1989) 48 Cal.3d 935, 959; see also *People v. Neufer, supra,* 30 Cal.App.4th at p. 254.)

The trial court in this case did not make any coercive remarks or engage in any other conduct directed at persuading the minority jurors to change their minds or acquiesce to the majority view. After questioning the foreperson, who confirmed the jurors had made progress toward reaching a unanimous verdict each day of their deliberations, the trial court simply ordered the jurors to return the following morning and "talk to each other." The court added it would not require the jurors to stay unless they felt like they were making progress. In arguing the trial court's action was coercive, defendant cites the foreperson's statement, when asked why he believed the jury was deadlocked, that "[e]ach juror has indicated [that] they're solid in their position." The cited fact is the essence of a deadlocked jury; it adds nothing to the analysis. Moreover, as defendant acknowledges, the foreperson also volunteered his view that further discussion might change the count.

Defendant also contends the trial court, before ordering the jurors to continue deliberating, should have instructed the jurors according to CALCRIM No. 3551 not to change their positions just because their opinion is different from that of other jurors or just because other jurors want them to change. Defendant acknowledges that neither his attorney, [5] nor the prosecutor asked for the instruction. Defendant does not cite any authority to show the trial court should have given the instruction sua sponte. Instead, he relies on *People v. Keenan* (1988) 46 Cal.3d 478, in which the Supreme Court cited the fact the trial court had given such an admonition as additional support for the conclusion the jury's verdict was not the result of coercion. (*Id.* at p. 534.) The trial court's failure to give such an instruction in this case does not alter our conclusion the trial court did not coerce the jurors to reach a verdict of guilt.

Because the trial court's actions were not coercive, there was no reason for defendant's trial counsel to object to the trial court's order directing the jurors to continue deliberating. In other words, defendant has failed to show trial counsel's performance was deficient. Absent such a showing, defendant cannot establish he was denied the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [defendant must show both deficient performance and resulting prejudice].)

Defendant also contends the trial court violated his Sixth Amendment right to representation by counsel because his trial attorney was not present when the trial court questioned the foreperson and ordered the jurors to resume deliberating.

Defendant does not dispute that he was represented by an attorney specially appearing on behalf of his trial attorney, who was ill. Instead defendant questions whether so-called "stand-in counsel" was adequately prepared to represent him during the discussion.

***12** Defendant did not object in the trial court to his trial attorney's absence, or to stand-in counsel representing him, or to the trial court responding to the jury's declaration they were deadlocked. Therefore, defendant has not preserved this issue for review on appeal. (*People v. Roldan* (2005) 35 Cal.4th 646, 729, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) Moreover, because he did not object, defendant's assertions regarding stand-in counsel's ability to represent him are purely speculation. [6] Because defendant was represented by counsel, and he did not object to that representation, we must reject his Sixth Amendment claim in this appeal.

6.

DENIAL OF MOTION TO RECUSE DISTRICT ATTORNEY

In September 2010, defendant filed a motion under section 1424 to disqualify the district attorney's office in this case because in his June 2010 reelection campaign, District Attorney Mike Ramos distributed campaign fliers that included a photograph of defendant and the fact of his arrest for the murder of Rita Cobb. Defendant appended one of the campaign fliers to his motion. [7] The flier includes a photograph of defendant, presumably his booking photo, with the caption, "John Henry Yablonsky [¶] Charged with murder in the 1985 slaying of Lucerne Valley mother Rita M. Cobb —on trial this year by Mike Ramos' Cold Case Unit." Next to the photo of defendant is a quotation, under the caption, printed all in bold letters, "It's Never a 'Cold Case.' " The quotation say, " 'A case is never cold to the family of a murder victim. **That's why I have worked with the Sheriff to start the Cold Case Unit.** Using DNA evidence, we have filed murder charges in 19 cold cases. Twenty five years after the crime, Rita Cobb's family will have closure.' " The quote includes the attribution, "Mike Ramos, District Attorney."

The trial court found defendant failed to make the showing required under section 1424 that the campaign flier created a conflict that rendered it unlikely defendant would receive a fair trial. Therefore, the trial court denied defendant's motion. Defendant contends the trial court abused its discretion. We disagree, but we will not resolve that issue, because defendant has failed to show prejudice.

The pertinent legal principals are set out in section 1424, which as defendant correctly points out, includes both the substantive and procedural rules pertinent to a motion to disqualify the district attorney's office. First, defendant's moving papers must set out the grounds upon which disqualification is sought and must include affidavits that set out the facts that support the asserted grounds. (§ 1424, subd. (a)(1).) In order to prevail, the defendant must show the conflict of interest is of such a nature as to "render it unlikely that the defendant would receive a fair trial." (*Ibid.*) The Supreme Court has construed section 1424 "as establishing a two-part test: (i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting? Thus, while a 'conflict' exists whenever there is a 'reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner,' the conflict is disabling only if it is 'so grave as to render it unlikely that defendant will receive fair treatment.' [Citation.]" (*People v. Eubanks* (1996) 14 Cal.4th 580, 594.) "[T]he potential for prejudice to the defendant—the likelihood that the defendant will not receive a fair trial—must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness." (*Id.* at p. 592.) In other words, the defendant must show more than the appearance of a conflict or impartiality; the defendant must show an actual likelihood of unfair treatment. (*Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, 104; *People v. Vasquez* (2006) 39 Cal.4th 47, 59.) "Where, as here, a defendant seeks to recuse not just an individual prosecutor but also an entire prosecuting office, he must make an 'especially persuasive' showing. [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 361.) "On review of the trial court's denial of a recusal motion, '[o]ur role is to determine whether there is

substantial evidence to support the [trial court's factual] findings [citation], and, based on those findings, whether the trial court abused its discretion in denying the motion.' [Citations.]" (*People v. Vasquez, supra,* 39 Cal.4th at p. 56.)

*13 Defendant did not make the required showing in the trial court. Defendant's only claim in his recusal motion was that as a result of singling defendant out in his campaign literature, the district attorney effectively committed himself to obtaining a conviction in defendant's case. Defendant did not cite any examples in his moving papers of how the prosecutor's commitment to a conviction might result in unfair treatment to defendant. Instead defendant submitted his own declaration in which he stated that in June 2010, after the district attorney's campaign literature was mailed to voters, defendant filed a civil action against the district attorney. Within 24 hours after filing that lawsuit, [8] defendant claims he was "subjected to intense harassment in the West Valley detention Center, including, but not limited to, repeated and prolonged searches of [his] cell, having [his] court materials thrown about the cell and disorganized, having legal mail compromised, and the repeated denial of my court ordered right to use the law library."

Defendant's suggestion that the sheriff's actions are somehow attributable to the district attorney is based on speculation, not fact. Defendant failed to establish in the trial court that a conflict existed because he failed to show a real potential for unfair treatment.

Defendant argues in his opening brief that the district attorney had an intense personal stake in the outcome of defendant's trial, as a result of which there was a strong risk defendant would not be treated evenhandedly. Assuming this argument is implicit in the one defendant actually made in his trial court moving papers, and assuming further the trial court abused its discretion in denying defendant's recusal motion, we nevertheless would conclude the error is harmless.

Where the defendant does not seek review by extraordinary writ of the trial court's denial of a section 1424 motion, reversal on appeal is required only if the defendant shows actual prejudice, i.e., it is reasonably probable a result more favorable to the appealing party would have been reached absent the error. (*People v. Vasquez, supra,* 39 Cal.4th at pp. 66–71; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Defendant argues the trial court's presumed error was prejudicial because defendant was forced to ask about the district attorney's campaign mailer during jury selection, and also because the deputy district attorney who actually tried the case was "likely" precluded from negotiating any plea to a lesser charge.

Defendant's second argument is obviously speculation. Moreover, nothing in the district attorney's campaign flyer suggested the district attorney was committed to convicting defendant of first degree murder with the rape special circumstance. As quoted previously, the flyer stated only that defendant had been charged with murder in the 1985 death of Rita Cobb, as a result of which her family would get closure. The mere existence of the campaign flyer does not support a conclusion defendant was denied the opportunity to negotiate a guilty plea to a lesser charge.

Defendant's need to question prospective jurors about the district attorney's campaign material in an election that occurred six months before trial also does not demonstrate prejudice. That need is not the result of a purported conflict on the part of the district attorney's office. Defendant conducted that questioning presumably to obtain a jury comprised of people who would be fair and impartial. Although defendant contends he was forced to expose the entire prospective jury pool to the district attorney's campaign flyer, that decision was not the result of the district attorney's purported conflict of interest. Moreover, by asking about the campaign flyer during voir dire, defendant presumably obtained a fair and impartial jury, i.e., one comprised of jurors who said they were not affected by the flyer and would base their verdicts only on the evidence presented in court.

*14 In short, defendant has failed to show it is reasonably probable he would have received a more favorable result in this case if the trial court had granted defendant's section 1424 motion and the entire district attorney's office had been

recused. Because he has not shown prejudice, we must conclude that even if the trial court had abused its discretion in denying his motion, that purported error is harmless in this case.

7.

CHANGE OF VENUE MOTION

In a separate but related issue defendant contends his trial attorney was ineffective because he did not file a motion for change of venue. Defendant contends that after trial counsel showed the campaign flyer to the prospective jury pool during jury selection, the entire jury venire was tainted. Therefore, he contends his trial attorney should have moved for a change of venue and failure to do so deprived him of his right to the effective assistance of counsel. Again, we disagree.

As previously discussed, in order to prevail on an ineffective assistance of counsel claim, defendant must show both deficient performance and resulting prejudice. (*Strickland v. Washington, supra,* 466 U.S. at p. 687.) Where the claim of deficient performance is that counsel failed to make a motion, defendant must show the motion was meritorious. (See *People v. Mattson* (1990) 50 Cal.3d 826, 876 ["A claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission [citation], but also that the motion or objection would have been meritorious, if the defendant is to bear his burden of demonstrating that it is reasonably probable that absent the omission a determination more favorable to defendant would have resulted"].)

A meritorious motion for change of venue requires defendant to demonstrate "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." (§ 1033, subd. (a).) " ' "The factors to be considered are the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendant in the community, and the popularity and prominence of the victim." ' [Citation.]" (*People v. Vieira* (2005) 35 Cal.4th 264, 279.)

Defendant has not made the required showing. Although he purports to address each of the factors set out above, in fact, he focuses on the district attorney's campaign flyer and its effect on the jurors in his trial. Defendant has shown only that the prospective jurors in the courtroom arguably were tainted as a result of defense counsel displaying the district attorney's campaign flyer and questioning them about it during jury selection. For example, although defendant mentions pretrial publicity, with respect to size of the community, defendant states that factor is not relevant in this case because all of the jurors were exposed to the campaign mailer. Defendant can only mean all of the jurors in the courtroom. To establish a meritorious motion for change of venue, however, defendant had to show he could not get a fair trial in the County of San Bernardino. (§ 1033.) Defendant has not made that showing.

Moreover, even if we were to conclude otherwise, and were to agree for purposes of this discussion that a motion for change of venue would have been meritorious, defendant has failed to demonstrate prejudice, i.e., it is reasonable defendant would have obtained a more favorable result if his trial had taken place in a different venue. In addressing prejudice, defendant contends the campaign flyer undoubtedly influenced the juror's deliberations because it effectively amounted to the district attorney vouching for defendant's guilt. Defendant's argument is speculation. Moreover, we know from the fact that the juror's were questioned about the campaign flyer during voir dire that they must have said they could be fair and impartial even though they had seen the flyer. Otherwise, they would have been excused for cause. As explained in *People v. Prince* (2007) 40 Cal.4th 1179, "Pervasive publicity alone does not establish prejudice. [Citation.] Jurors who have been exposed to publicity still may serve. ' " 'It is sufficient if the juror can lay aside [their] impression or opinion and render a verdict based on the evidence presented in court.' " [Citations.]" (*Id.* at p. 1214.)

*15 In summary, defendant has not established either element of his ineffective assistance of counsel claim based on trial counsel's failure to file a motion to change the venue of defendant's trial. Therefore, we reject that claim.

8.

PAROLE REVOCATION FINE

Defendant's final claim of error is the trial court improperly imposed a so-called parole revocation fine under section 1202.45. The Attorney General concedes section 1202.45 was not enacted until 1995 and therefore application of the statute to defendant's crime, which was committed in 1985, would violate ex post facto principles. (See *People v. Callejas* (2000) 85 Cal.App.4th 667, 678, citing *Johnson v. United States* (2000) 529 U.S. 694, 701–702.) The Attorney General also concedes because the trial court sentenced defendant to serve a life term without the possibility of parole, the statute does not apply to defendant.[9] (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1184.)

The Attorney General's concessions are appropriate. Therefore, we will strike the $10,000 parole revocation fine the trial court imposed on defendant under section 1202.45.

DISPOSITION

Defendant's sentence is modified by striking the $10,000 fine the trial court imposed under section 1202.45. As modified, the judgment is affirmed.

We concur:

HOLLENHORST, Acting P.J.

KING, J.

All Citations

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Footnotes

1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The record does not clearly disclose when the CODIS DNA match was made, or when the criminalist was notified there was a match. We assume these events occurred shortly before law enforcement officers contacted defendant on March 8, 2009.

3 In his new trial motion, defendant argued that blood of his own rare blood type was also found at the Brooks crime scene, but he did not support that assertion with citation to any evidence submitted in support of his new trial motion. Moreover, that evidence cuts both ways in that it suggests defendant could have killed Brooks, even though his DNA was not found at the scene.

4 Defendant cites two cases to support his claim. *Hayes v. 2831 Ellendale Place, Inc.* (1963) 223 Cal.App.2d 362, is a contract dispute; the specific page defendant cites discusses the statute of limitations on an oral contract. *People v. Keith* (1981) 118 Cal.App.3d 973, is a rape case; the page defendant cites addresses admissibility of evidence showing prior acts of consensual sex between the defendant and the victim.

5 Defendant's trial attorney apparently was ill so defendant was represented by an attorney specially appearing on behalf of his trial counsel.

6 *Moritz v. Woods* (E.D. Mich. 2012) 844 F.Supp.2d 831, which defendant cites to support his ineffective assistance of counsel claim, is not binding on this court and, in any event, has been reversed. (*Moritz v. Lafler* (6th Cir. Apr. 25, 2013) 2013 U.S. App. LEXIS 8587.)

7 In his opening brief, defendant cites a second example but that one was attached to his motion for new trial and therefore was not part of the filing the trial court considered in ruling on defendant's motion to disqualify the district attorney's office.

8 Defendant variously identifies the filing date of that lawsuit as June 28, 2010, and July 28, 2010.

9 Section 1202.45 states, in pertinent part, that it applies "[i]n every case where a person is convicted of a crime and [whose] sentence includes a period of parole ...."

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Court of Appeal, Fourth District, Division 2, California.

John Henry YABLONSKY, Plaintiff and Appellant,
v.
Geoffrey CANTY et al., Defendants and Respondents.

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Filed 08/01/2019

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed. (Super. Ct. No. CIVDS1506664)

Attorneys and Law Firms

John Henry Yablonsky, in pro. per., for Plaintiff and Appellant.

Michelle D. Blakemore, County Counsel, Matthew J. Marnell, Deputy County Counsel for Defendants and Respondents.

OPINION

MILLER, Acting P.J.

***1** Plaintiff and appellant John Henry Yablonsky was convicted of the murder of Rita Cobb and was sentenced to life without the possibility of parole. Yablonsky's conviction was affirmed on appeal by this court in our unpublished opinion (*People v. Yablonsky* (Dec. 4, 2013, E055840) [nonpub. opn.] [2013 Cal.App.Unpub. LEXIS 8800, 2013 WL 6271920]) and review was denied by the California Supreme Court. Yablonsky's habeas corpus petitions filed in the state courts attacking his conviction were unsuccessful and he remains incarcerated.

Yablonsky was represented at trial by the San Bernardino County Public Defender's Office; specifically, defendants and respondents Mark Shoup and Geoffrey Canty (collectively, Defendants), and David Sanders. On December 24, 2015, Yablonsky filed a first amended complaint (FAC) against Defendants; Sanders; Deputy District Attorney John Thomas; and Michael Ramos, the District Attorney for San Bernardino County, alleging negligence, professional negligence and a violation of Title 42 United States Code section 1983. [1] Initially, Sanders, Ramos and Thomas filed a demurrer to the FAC, which was granted, and Yablonsky appealed. In our previous unpublished decision *Yablonsky v. Ramos* (Mar. 16, 2018, E065773) [nonpub. opn.] [2018 Cal. App. Unpub. LEXIS 1766, 2018 WL 1358161 (*Yablonsky 1*), we found that Ramos and Thomas were immune from prosecution pursuant to Government Code section 821.6. As for Sanders, we found Yablonsky failed to show he obtained the

required postconviction relief in order to be granted relief on his professional negligence and fraud claims. We upheld the grant of the demurrer without leave to amend.

This second appeal involves the same FAC. Defendants were served at a different time than Sanders, Ramos and Thomas. Defendants filed a notice of demurrer and demurrer to the FAC on March 15, 2017 (Demurrer). The trial court granted the Demurrer as to Defendants on the ground that each of the causes of action alleged against them were based on malpractice and Yablonsky had failed to show that he had obtained the required postconviction relief required to bring a malpractice claim.

Yablonsky files this appeal arguing that the trial court erred by granting the Demurrer as Defendants committed fraud by refusing to turn over all of the records in their possession that would have exonerated him. Yablonsky's claims are barred by collateral estoppel.

FACTUAL AND PROCEDURAL HISTORY[2]

A. STATEMENT OF FACTS

In September 1985, Rita Cobb's decomposing body was found by her son in her bedroom in her Lucerne Valley home. She was nude and strangled by a hanger. No suspect was found at the time. Semen was found in her vagina. DNA tests were performed on the semen in 1999 but no match was found. In 2003, the DNA was once again tested and at some point matched to Yablonsky. In 2009, Yablonsky was interviewed. He lived in Long Beach but advised the interviewing San Bernardino County Sheriff's Detectives, Rob Alexander and Greg Myler, that in 1985, he and his wife rented a back house on Cobb's property in Lucerne Valley. When Yablonsky denied having sexual relations with Cobb, or any type of intimate relationship with her, he was arrested for her murder. (*Yablonsky I, supra*, E065773 at pp. *2-3.)

B. PROCEDURAL HISTORY

1. *BACKGROUND*

***2** Yablonsky was found guilty of first degree murder and was sentenced to life without the possibility of parole. Plaintiff's conviction was affirmed on appeal and review in the California Supreme Court was denied. His state court habeas petitions attacking his conviction were also denied. In addition, Yablonsky filed a federal civil rights complaint pursuant to Title 42 United States Code section 1983 in federal court. He filed an amended complaint and the federal court advised him that unless he could show reversal of his conviction, he was not entitled to relief. The federal court dismissed the complaint in December 2015 upon Yablonsky's request. (*Yablonsky I, supra*, E065773 at pp. *4-5.)

2. *FIRST AMENDED COMPLAINT*

On December 24, 2015, Yablonsky filed his FAC. In the first portion of the FAC, he set forth facts showing his diligence in bringing the claims. (*Yablonsky I, supra*, E065773 at pp. *6-7.) As for the facts, Yablonsky alleged that on March 8, 2009, Detective Alexander, assisted by Detective Myler, interrogated him in his home. They then transported him to the local police station where they continued their interrogation. They arrested Yablonsky. After the interrogation, the recordings were transcribed and were altered numerous times by Detective Alexander at the direction of Thomas, who was a deputy district attorney. Ramos and Sanders assisted or were aware of the alterations. Yablonsky's legal counsel—Sanders, Shoup, and Canty—hid the changes to the transcript from him. Canty, who represented him prior to Sanders, hid evidence from Yablonsky despite Yablonsky asking for all of the discovery. Sanders, his second counsel, also hid discovery from him violating the rules of professional conduct. This included information regarding William Backhoff who Yablonsky claimed was the true killer.

Sanders also withheld reports from him. Yablonsky alleged that Shoup was the supervisor of Sanders and instructed his attorneys. (*Yablonsky I, supra*, E065773 at pp. *7-8.)

Yablonsky further claimed that Sanders failed to conduct appropriate investigation into the DNA evidence; evidence of a red hair found on Cobb's body; DNA on cigarette butts in the house; and investigate further defense witnesses. Sanders rested the case without Plaintiff making a decision whether to testify. (*Yablonsky I, supra*, E065773 at p. *8.)

Yablonsky also alleged that prior to his trial, Ramos printed flyers to be distributed to residents of San Bernardino County where he was running for reelection as district attorney. The flyers depicted a photograph of Yablonsky along with the information that a suspect was arrested in the cold case involving Cobb. The flyers extolled Ramos's efforts in the cold case division and that Cobb's family would finally have closure. Sanders did not adequately address the issue prior to Yablonsky's trial. (*Yablonsky I, supra*, E065773 at p. *8.)

Yablonsky named both or one of the Defendants in the second, third, fifth, sixth and seventh causes of action in the FAC. Yablonsky's second cause of action was for negligence against Detective Myler, Detective Alexander, Thomas, Sanders, Ramos and Shoup. They violated his Fifth and Fourteenth Amendment rights against self "compulsion," due process and equal protection. They also violated his rights under the state Constitution. The violation was based on the presentation of the interrogation to the jury, which caused him irreparable harm. (*Yablonsky I, supra*, E065773 at pp. *8-9.)

Yablonsky's third cause of action was for negligence and right to access to the courts. He named Sanders and Shoup. His First, Sixth and Fourteenth Amendment rights under the federal Constitution were violated and his state constitutional rights were violated. The jail officials blocked access to his attorney and other public officials. Sanders and Shoup were aware of the restrictions and did not try to remedy the situation. (*Yablonsky I, supra*, E065773 at p. *9.)

***3** Yablonsky's fifth cause of action was based on negligence, professional negligence and right to an impartial jury. He named Ramos, Thomas, Sanders, Shoup and Detective Alexander. He alleged violations of his Fifth, Sixth and Fourteenth Amendment rights under the federal Constitution and his state constitutional rights. He alleged that by Ramos sending out the flyers, his right to an impartial jury was violated. Sanders and Shoup violated his rights by scheduling a trial in front of a biased jury. (*Yablonsky I, supra*, E065773 at p. *10.)

Yablonsky's sixth cause of action was for negligence, professional negligence, due process of law and equal protection. He alleged violations of the Fifth and Fourteenth Amendments of the federal and state Constitutions. He named Ramos, Thomas, Sanders, Shoup and Detective Alexander. He alleged fabrications of evidence. Yablonsky's seventh cause of action was for negligence, professional negligence, right of access to counsel and equal protections of laws. He alleged violations of the Fifth, Sixth and Fourteenth Amendments under the federal and state Constitutions. He named Shoup, Sanders, and Canty. This cause of action related to the failure to advise Plaintiff of all of the discovery in the case. His counsel violated rules of professional conduct and caused him irreparable harm, including his loss of rights. (*Yablonsky I, supra*, E065773 at p. *10-11.)

3. *DEMURRERS SEEKING DISMISSAL OF THE FAC*

On January 21, 2016, Ramos, Thomas and Sanders filed a demurrer to the FAC. They argued Yablonsky's claims were barred by judicial estoppel because he had pursued the same claims in federal court and had been unsuccessful. Further, the claims were uncertain. Ramos and Thomas argued they were immune from liability and Sanders argued that Yablonsky could not bring a claim of professional negligence or malpractice without first proving he had obtained postconviction relief. (*Yablonsky I, supra*, E065773 at pp. *11-12.)

On March 15, 2017, Defendants filed the Demurrer. They alleged that all of the causes of action were uncertain; to the extent Yablonsky's causes of action arose from Title 42 United States Code section 1983, they were barred based on his failure to

prove he had obtained postconviction relief; his state claims of negligence were barred by the failure to obtain postconviction relief; and were barred by judicial estoppel based on him filing the same claims in the federal court. They argued that since Yablonsky had admitted to failing to obtain postconviction relief, the trial court should grant the Demurrer.

Along with the Demurrer, Defendants submitted a request for judicial notice of the filing of the civil rights complaint and amendments by Yablonsky in the federal court.

4. *TRIAL COURT RULINGS IN YABLONSKY I AND THE CURRENT CASE*

In the prior case, the trial court issued a written ruling granting the demurrer filed by Ramos, Thomas and Sanders, first finding Ramos and Thomas were immune from liability pursuant to Government Code section 821.6. It further found, "The Court SUSTAINS Mr. Sander's [*sic*] demurrer to the FAC, without leave to amend, on the ground that each of the causes of action alleged against Mr. Sanders sounds in malpractice and plaintiff fails to show that he has obtained the required postconviction relief." Judgment was entered dismissing the case on March 18, 2016. (*Yablonsky I, supra*, E065773 at pp. *11, 13.)

In the current case, the Demurrer was heard on April 27, 2017. Yablonsky argued that Defendants never denied his allegations, they only claimed that they had immunity. The matter was submitted. On that same day, the trial court issued its ruling dismissing the FAC without leave to amend. On May 30, 2017, the dismissal was filed. With the dismissal the trial court made the following findings: Yablonsky was suing Defendants for malpractice, which required he show he had been granted postconviction relief. Yablonsky had admitted he remained incarcerated. Further, to the extent Yablonsky was arguing fraud, which the trial court did not believe the FAC adequately plead, the claim was based on malpractice, which required a showing of postconviction relief. He would be unable to amend the FAC to establish postconviction relief. The trial court denied the Demurrer on the grounds of judicial estoppel and that the FAC was uncertain.

5. *MOTION FOR RECONSIDERATION*

***4** Prior to the dismissal, on May 10, 2017, Yablonsky filed a motion for rehearing requesting that the court reconsider its ruling. The matter was set for June 19, 2017. Before that date, on May 30, the trial court filed its dismissal. Defendants filed opposition claiming that Yablonsky's motion for rehearing was a motion for reconsideration and he had failed to meet the requirements for filing such motion. On June 18, 2017, defendant filed his notice of appeal. On June 19, 2017, the trial court denied the motion for rehearing on the grounds of both lack of jurisdiction (it had dismissed the case on May 30, 2017) and Yablonsky had not met the requirements for filing a motion for reconsideration. [3]

DISCUSSION

Yablonsky claims on appeal Defendants failed to turn over records to him, which would have resulted in evidence sufficient to overturn his conviction. Canty, who represented him before the case was turned over to Sanders, failed to release all of the evidence in his possession to Sanders or Yablonsky. Further, Shoup, who was the supervisor of Canty and Sanders, aided in concealing the evidence. Yablonsky insists that if the evidence withheld from him had been disclosed prior to his appeal, he would have been successful in obtaining postconviction relief. He insists that Canty and Shoup participated in fraud upon the courts to get him convicted. Yablonsky admits that he has been unable to obtain postconviction relief. These claims are barred by collateral estoppel.

Yablonsky's prior appeal, based on the same FAC that involved Sanders, Ramos and Thomas, was resolved against him on March 16, 2018. We initially found that the pleading was uncertain and the demurrer was appropriately granted under Code

of Civil Procedure section 430.10, subdivision (f).[4] We also found that to the extent Yablonsky was raising civil rights claims pursuant to Title 42 United States Code section 1983, he was not entitled to relief or leave to amend. We found, "A § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." (*Yablonsky I, supra*, E065773 at pp. *17-19.) We concluded, "Yablonsky failed to establish that his conviction had been overturned or that if he was successful his conviction would be invalidated. As such, his claims under Title 42 United States Code section 1983 were properly dismissed without leave to amend." (*Yablonsky I, supra*, E065773 at p. *20.)

In our prior opinion, we also rejected any claims based on malpractice or professional negligence as it was required under state law that he show he achieved a reversal of his conviction. (*Yablonsky I, supra*, E065773 at pp. *22-23} We held, "To the extent that Yablonsky is claiming malpractice or professional negligence on Sanders's part, he also has failed to show he achieved a reversal of his conviction as required. ' " 'Permitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit by his own fraud, or to take advantage of his own wrong, or to found [a] claim upon his iniquity, or to acquire property by his own crime." ' [Citation.] Further, ' "allowing civil recovery for convicts impermissibly shifts responsibility for the crime away from the convict." ' [Citation.] 'Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss.' [¶] Yablonsky has not shown that he obtained a reversal of his conviction. As such, he cannot show that he could allege a proper cause of action of malpractice or professional negligence against Sanders." (*Yablonsky I, supra*, E065773 at pp. *22-23.)

***5** "Collateral estoppel (more accurately referred to as 'issue preclusion') 'prevents relitigation of previously decided issues,' even if the second suit raises different causes of action. [Citation.] Under California law, 'issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.' " (*Kemper v. County of San Diego* (2015) 242 Cal.App.4th 1075, 1088, 196 Cal.Rptr.3d 35.) Issue preclusion prevents "relitigation of previously decided issues." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824, 189 Cal.Rptr.3d 809, 352 P.3d 378.) "There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party." (*Id.* at p. 824, 189 Cal.Rptr.3d 809, 352 P.3d 378.)

Defendants maintain that Yablonsky's claims are barred by collateral estoppel. Here, Yablonsky is appealing the Demurrer to the same FAC wherein we already denied relief as to Sanders. There is no dispute he was a party to the previous case. Moreover, Defendants were named in the same causes of action as Sanders. The identical issues were litigated and decided in the *Yablonsky I* case. " 'The "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.' " (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511-512, 94 Cal.Rptr.3d 1, 207 P.3d 506.) "[T]he fact a party asserts new legal or factual theories or new evidence relevant to an issue previously decided does not affect the applicability of the collateral estoppel bar." (*Kemper v. County of San Diego, supra*, 242 Cal.App.4th at pp. 1090-1091, 196 Cal.Rptr.3d 35.) This appeal is based on the same FAC in *Yablonsky I.* Even though the arguments made in the prior appeal were different than those raised in this case, the relevant issues have been litigated and decided against Yablonsky.

Yablonsky argues collateral estoppel does not apply because this case involves a different set of parties who committed different acts of misconduct while representing him. Shoup acted as a supervisor who instructed Canty and Sanders, and Canty only represented him until Sanders replaced him. However, the FAC contains the same alleged professional negligence and malpractice causes of action that we found in *Yablonsky I* required a showing of postconviction relief. This equally applies to Defendants despite their involvement differing from Sanders.

Yablonsky has not met his burden of showing how he could amend his FAC to allege a cognizable claim. Absent a reasonable possibility that any pleading defects can be cured by amendment, the trial court does not abuse its discretion by denying leave to amend. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967, 9 Cal.Rptr.2d 92, 831 P.2d 317.) Yablonsky carries the burden of proving an amendment would cure any defect. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, 6 Cal.Rptr.3d 457, 79 P.3d 569.) Yablonsky has made no argument here as to how he could amend the FAC—and he cannot, as he has not obtained postconviction relief. As such, the trial court properly granted the Demurrer without leave to amend.

DISPOSITION

The grant of the Demurrer without leave to amend is affirmed. The parties will bear their own costs on appeal.

We concur:

CODRINGTON, J.

SLOUGH, J.

All Citations

Not Reported in Cal.Rptr., 2019 WL 3492488

Footnotes

1 Yablonsky named other defendants who have not appealed or are not relevant to this appeal.

2 This court provided a detailed factual and procedural history in the prior opinion. We briefly review those facts here.

3 Although Defendants address that the trial court properly denied the motion for rehearing filed by Yablonsky, we do not interpret Yablonsky's appellant's opening brief to raise any claim as to the denial of the motion.

4 Since the trial court in this case denied the Demurrer on this ground, it is not relevant to this appeal.