

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Scott Allen McCurry v. Kathleen Allison

No. 1:22-cv-01398-ADA-SKO (HC) (E.D. Cal. Mar. 6, 2023) · No. No. 1:22-cv-01398-ADA-SKO (HC) ·
Decided March 7, 2023

SUMMARY

This document is a United States District Court for the Eastern District of California findings and recommendation addressing Scott Allen McCurry’s 28 U.S.C. § 2254 petition for a writ of habeas corpus. The court recommends denying the petition, which challenged state convictions for torture, corporal injury to a cohabitant, assault, and battery, based on claims involving destruction of evidence, allegedly altered interrogation evidence, ineffective assistance of trial and appellate counsel, and prosecutorial misconduct.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Sheila K. Oberto
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	March 7, 2023
DOCKET	No. 1:22-cv-01398-ADA-SKO (HC)
DISPOSITION	other
PROCEDURAL POSTURE	Petitioner, a California state prisoner proceeding pro se, sought federal habeas relief under 28 U.S.C. § 2254 from state convictions for torture, corporal injury to a spouse or cohabitant, assault, and battery. The magistrate judge issued findings and recommendations recommending denial of the petition with prejudice on the merits, subject to objections and review by the assigned district judge.
STANDARD OF REVIEW	Under AEDPA, habeas relief may be granted only if the state court decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court law, or was based on an unreasonable determination of the facts. For ineffective-assistance claims, the federal court applies doubly deferential review to the state court's application of Strickland. Constitutional error is additionally assessed under the Brecht substantial-and-injurious-effect standard.

PRECEDENTIAL VALUE	nonprecedential
PARTIES	Scott Allen McCurry v. Kathleen Allison, CDCR Secretary

TOPICS

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether the alleged destruction of trial exhibits violated due process because the evidence was materially exculpatory or destroyed in bad faith.
2. Whether the prosecution violated due process by using an allegedly altered interrogation transcript.
3. Whether trial counsel was ineffective for failing to challenge the transcript, investigate or call requested witnesses, question a defense witness, preserve exhibits, or object to allegedly false evidence.
4. Whether appellate counsel was ineffective for filing a Wende brief rather than raising McCurry's proposed claims.
5. Whether the prosecutor committed misconduct by introducing an allegedly altered transcript and permitting allegedly false testimony.
6. Whether the state court decisions rejecting McCurry's claims were contrary to, or unreasonable applications of, clearly established federal law under AEDPA.

HOLDINGS

1. The alleged destruction of trial exhibits did not establish a due process violation because McCurry did not show that the prosecution destroyed the evidence, that the evidence had apparent exculpatory value, that comparable evidence was unavailable, or that the government acted in bad faith.
2. McCurry failed to establish a Brady or other due process violation based on the allegedly altered interrogation transcript because the transcript was not suppressed, was not shown to be false, and did not prejudice him.
3. McCurry failed to show that trial counsel performed deficiently or that any alleged deficiency caused prejudice under Strickland.
4. Appellate counsel was not ineffective for filing a Wende brief because McCurry failed to identify a meritorious issue that counsel should have raised or establish prejudice.
5. McCurry failed to establish prosecutorial misconduct because there was no evidence that the prosecutor intentionally altered the transcript or knowingly elicited false testimony, and the alleged inconsistencies

were explored before the jury.

6. Federal habeas relief was unavailable because McCurry did not show that the state courts' adjudication of his claims was contrary to, or an unreasonable application of, clearly established Supreme Court law, or based on an unreasonable factual determination.

KEY QUOTATIONS

“that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” (at 8)

“Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense.” (at 8)

“The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” (at 9)

“an unreasonable application of federal law is different from an incorrect application of federal law.” (at 3)

“must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement.” (at 4)

FACTUAL BACKGROUND

McCurry was convicted after a jury found that he assaulted and severely abused JS, his cohabitant, during an October 2016 incident. The evidence included JS's testimony that McCurry beat, choked, threatened, sexually assaulted, and burned her, medical evidence and photographs of her injuries, and an audio recording of McCurry's police interview in which he admitted assaulting and burning JS. The defense argued that the relationship involved rough consensual sex, that JS exaggerated her account, and that her inconsistent statements created reasonable doubt.

PROCEDURAL HISTORY

McCurry was convicted by a Stanislaus County Superior Court jury in 2017 and sentenced to twelve years to life. The California Court of Appeal affirmed the sentence description but remanded for consideration of Senate Bill No. 1393 regarding the prior-serious-felony enhancement. McCurry pursued several state habeas petitions, which were denied, with his final California Supreme Court petition denied as successive and repetitive. He filed the federal § 2254 petition on October 31, 2022; Respondent answered, McCurry filed a traverse, and the magistrate judge recommended denial with prejudice.

DISPOSITION

other

REMAND INSTRUCTIONS

The magistrate judge recommended that the petition be denied with prejudice on the merits. Any party could file objections within thirty days, after which the assigned district judge would review the findings and recommendation under 28 U.S.C. § 636(b)(1)(C).

CASES CITED

- Williams v. Taylor, 529 U.S. 362, 375 n. 7, 390-91, 405-06, 412-13 (2000)
- Lindh v. Murphy, 521 U.S. 320 (1997)
- Lockyer v. Andrade, 538 U.S. 63, 70-71 (2003)
- Brown v. Payton, 544 U.S. 133, 141 (2005)
- Harrington v. Richter, 562 U.S. 86, 101, 103 (2011)
- Cullen v. Pinholster, 563 U.S. 170, 203 (2011)
- Davis v. Woodford, 384 F.3d 628, 637 (9th Cir. 2003)
- Miller-El v. Cockrell, 537 U.S. 322 (2003)
- Wiggins v. Smith, 539 U.S. 510, 520 (2003)
- Jeffries v. Wood, 114 F.3d 1484, 1500 (9th Cir. 1997)
- Taylor v. Maddox, 366 F.3d 992, 999-1001 (9th Cir. 2004)
- Ylst v. Nunnemaker, 501 U.S. 979, 803 (1991)
- Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004)
- Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)
- Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)
- Fry v. Pliler, 551 U.S. 112, 119-20 (2007)
- Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000)
- Arizona v. Youngblood, 488 U.S. 51, 56-58 (1988)
- California v. Trombetta, 467 U.S. 479, 488-89 (1984)
- Killian v. United States, 368 U.S. 231, 242 (1961)
- Grisby v. Blodgett, 130 F.3d 365, 371 (9th Cir. 1997)
- United States v. Barton, 995 F.2d 931, 934 (9th Cir. 1993)
- United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993)
- Brady v. Maryland, 373 U.S. 83, 87 (1963)
- Cooper v. Brown, 510 F.3d 870, 924 (9th Cir. 2007)
- Strickler v. Greene, 527 U.S. 263, 281-82 (1999)
- Banks v. Dretke, 540 U.S. 668, 691 (2004)
- Silva v. Brown, 416 F.3d 980, 985 (9th Cir. 2005)
- Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984)
- Evitts v. Lucey, 469 U.S. 387, 391-405 (1985)
- Miller v. Keeney, 882 F.2d 1428, 1433-34 (9th Cir. 1989)
- United States v. Birtle, 792 F.2d 846, 847 (9th Cir. 1986)

- Penson v. Ohio, 488 U.S. 75 (1988)
- Babbitt v. Calderon, 151 F.3d 1170, 1173 (9th Cir. 1998)
- Knowles v. Mirzayance, 556 U.S. 111, 122-23 (2009)
- Schriro v. Landrigan, 550 U.S. 465, 473 (2007)
- Yarborough v. Gentry, 540 U.S. 1, 5 (2003)
- Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)
- United States v. Harden, 846 F.2d 1229, 1231-32 (9th Cir. 1988)
- United States v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987)
- Jones v. Barnes, 463 U.S. 745, 751-52 (1983)
- Smith v. Murray, 477 U.S. 527, 536 (1986)
- Davila v. Davis, 137 S. Ct. 2058, 2067 (2017)
- People v. Wende, 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979)
- Smith v. Robbins, 528 U.S. 259, 265, 285-86 (2000)
- Moorman v. Ryan, 628 F.3d 1102, 1107 (9th Cir. 2010)
- Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001)
- Featherstone v. Estelle, 948 F.2d 1497, 1507 (9th Cir. 1991)
- Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)
- Greer v. Miller, 485 U.S. 756, 765-66 (1987)
- United States v. Bagley, 473 U.S. 667 (1985)
- United States v. Weitzenhoff, 35 F.3d 1275, 1291 (9th Cir. 1994)
- Smith v. Phillips, 455 U.S. 209, 219 (1982)
- Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991)
- In re Clark, 5 Cal. 4th 750, 767-69 (1993)
- In re Miller, 17 Cal. 2d 734, 735 (1941)
- In re Waltreus, 52 Cal. 2d 218, 225 (1965)
- In re Dixon, 41 Cal. 2d 756, 758-59 (1953)
- In re Harris, 5 Cal. 3d 813, 829 (1993)
- In re Terry, 4 Cal. 3d 911, 927 (1971)

OPINION

(HC) McCurry v. Allison

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10

11 SCOTT ALLEN MCCURRY, No. 1:22-cv-01398-ADA-SKO (HC)

12 Petitioner, FINDINGS AND RECOMMENDATION

TO DENY PETITION FOR WRIT OF

13 v. HABEAS CORPUS

14 KATHLEEN ALLISON, CDCR Secretary, [THIRTY DAY OBJECTION DEADLINE]

15 Respondent. 16

17 Petitioner is a state prisoner proceeding pro se and in forma pauperis with a petition for 18 writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter was referred to the undersigned 19 pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302. 20 On October 31, 2022, Petitioner filed the instant habeas petition challenging Stanislaus 21 County Superior Court convictions of torture, corporal injury to a cohabitant, assault, and battery. 22 As discussed below, the Court finds the claims to be without merit and recommends the petition 23 be DENIED.

24 I. PROCEDURAL HISTORY

25 On August 25, 2017, Petitioner was convicted by jury trial in the Stanislaus County 26 Superior Court of two felonies: torture in violation of Cal. Penal Code § 206, and corporal injury 27 28 1 to a spouse/cohabitant in violation of Cal. Penal Code § 273.5(a). (Doc. 11-23 at 2.1) As to both 2 felony counts, the jury found true a prior serious conviction enhancement (Cal. Penal Code § 3 667(a)) and prior strike conviction, and an enhancement for great bodily injury (Cal. Penal Code 4 § 12022.7). (Doc. 11-23 at 2.) The jury also found true four misdemeanors: two counts of assault 5 in violation of Cal. Penal Code § 240, and two counts of battery in violation of Cal. Penal Code § 6 242. (Doc. 11-23 at 2.) On December 11, 2017, the sentencing court granted Petitioner's request 7 to strike the prior conviction pursuant to Cal. Penal Code § 1385. (Doc. 11-23 at 2.) Petitioner 8 was sentenced to 7 years-to-life in prison with possibility of parole on the torture count and a 9 consecutive five-year term for the § 667(a) prior serious felony enhancement, for a total stated 10 term of 12 years-to-life. (Doc. 11-23 at 2-3.) Petitioner was also sentenced to concurrent terms 11 of eight years on the corporal injury count and 180 days on the four misdemeanor counts. (Doc. 12 11-23 at 3.) 13 On December 12, 2017, Petitioner appealed to the California Court of Appeal, Fifth 14 Appellate District ("Fifth DCA"). (Doc. 11-23 at 3.) Petitioner argued the sentencing court 15 imposed an unauthorized sentence for the count of torture, because it aggregated the minimum 16 parole ineligibility period of 7 years with the life sentence and characterized it as the minimum 17 sentence. He also contended the matter must be remanded because of the subsequent enactment 18 of Cal. Senate Bill No. 1393 (2017–2018 Reg. Sess.), which gave discretion to the sentencing 19 court to dismiss the section 667(a) prior serious felony conviction enhancement. (Doc. 11-23 at 20 3.) 21 On May 9, 2019, the appellate court held the trial court did not commit error when it 22 described the minimum parole ineligibility period of seven years as the minimum prison term and 23 added the five-year term for the prior serious felony enhancement to that seven-year minimum 24 term, for a total term of 12 years to life. (Doc. 11-15.) On May 23, 2019, the appellate court 25 modified its opinion, agreeing that the matter should be remanded because Senate Bill 1393 26 amended § 667(a) after the sentencing hearing to give the sentencing court discretion to 27 28 1

Docket citations refer to ECF pagination. 1 determine whether to dismiss the consecutive term of five years that it imposed for that 2 enhancement. (Doc. 11-16 at 1-2.) 3 On November 13, 2019, Petitioner filed a petition for writ of habeas corpus in the 4 Stanislaus County Superior Court. (Doc. 11-25 at 3-71.) On December 11, 2019, the court denied 5 the claim in a reasoned decision. (Doc. 11-25 at 1-3.) 6 On March 25, 2020, Petitioner filed a petition for writ of habeas corpus in the Fifth DCA. 7 (Doc. 11-26 at 2-169.) The petition was denied without comment or citation to authority on April 8 29, 2020. (Doc. 11-26 at 1.) 9 On May 8, 2020, Petitioner filed a habeas petition in the California Supreme Court. (Doc. 10 11-27 at 2-175.) The petition was summarily denied on July 22, 2020. (Doc. 11-27 at 1.) On

11 October 1, 2021, Petitioner filed a second habeas petition in the California Supreme Court. (Doc.

12 11-28 at 2-99.) On December 15, 2021, the petition was summarily denied. (Doc. 11-28 at 1.) 13 On January 10, 2022, Petitioner commenced another round of collateral review by filing a 14 habeas petition in the Stanislaus County Superior Court. (Doc. 11-29 at 8-101.) On February 28, 15 2022, the court denied the petition in a reasoned decision. (Doc. 11-29 at 1-7.) Petitioner then 16 filed a habeas petition in the appellate court on March 18, 2022. (Doc. 11-30 at 2-112.) The 17 petition was summarily denied on May 12, 2022. (Doc. 11-30 at 1.) On May 27, 2022, Petitioner 18 filed a habeas petition in the California Supreme Court. (Doc. 11-31 at 2-120.) On September 14, 19 2022, the California Supreme Court denied the petition as procedurally barred, citing *In re Clark*, 20 5 Cal.4th 750, 767-69 (1993) (“courts will not entertain habeas corpus claims that are 21 successive”) and *In re Miller*, 17 Cal.2d 734, 735 (1941) (“courts will not entertain habeas corpus 22 claims that are repetitive”). (Doc. 11-31 at 1.) 23 On October 31, 2022, Petitioner filed the instant habeas petition in this Court. (Doc. 1.) 24 On January 3, 2023, Respondent filed an answer to the petition. (Doc. 12.) On January 13, 2023, 25 Petitioner filed a traverse to the answer. (Doc. 13.)

26 II. FACTUAL BACKGROUND

27 A. The incident 28 The victim, JS, testified that she was in a relationship with Petitioner for approximately 1 two years. (Doc. 11-6 at 60.) She had been living in a one-bedroom studio apartment in Modesto 2 with Petitioner for approximately eight months. (Doc. 11-6 at 60-61.) On October 25, 2016, JS 3 decided to end the relationship because of the abuse she had endured. (Doc. 11-6 at 64.) At 4 approximately 1:30 a.m., JS arrived at the apartment to obtain her belongings and move out. 5 (Doc. 11-6 at 64.) JS texted Petitioner, and he later texted back. (Doc. 11-6 at 64-65.) They met 6 at another location, argued, and Petitioner sped off on his motorcycle. (Doc. 11-6 at 65.) JS 7 chased Petitioner to a Taco Bell where they argued some more. (Doc. 11-6 at 65.) Petitioner told 8 JS that he was “going to go see another bitch.” (Doc. 11-6 at 65.) JS replied, “That’s fine. Not on 9 my motorcycle.” (Doc. 11-6 at 65.) Petitioner stated, “If you can ride off on it like I told you, you 10 can have it back.” (Doc. 11-6 at 65-66.) JS then reached for the motorcycle to put her leg over it 11 and leave, but Petitioner took the keys and pushed her.

(Doc. 11-6 at 66.) Petitioner got back on 12 the motorcycle, and JS told him that she was going to go back to the apartment and collect her 13 belongings. (Doc. 11-6 at 66.) 14 JS then returned to the apartment, and Petitioner let her in. (Doc. 11-6 at 66.) When JS 15 entered the house, Petitioner punched her in the face. (Doc. 11-6 at 67.) He then told her, "Look 16 at you. I can't let you go nowhere now." (Doc. 11-6 at 67.) JS replied that she was going to get 17 her things and leave. (Doc. 11-6 at 68.) Petitioner told her, "You are not going anywhere," and he 18 blocked her from leaving. (Doc. 11-6 at 68.) Petitioner then told her they were going to have sex. 19 (Doc. 11-6 at 69.) JS told him they were not because she didn't want to do so. (Doc. 11-6 at 69.) 20 Petitioner proceeded to rip JS's clothes off and demanded she take out her dentures and orally 21 copulate him. (Doc. 11-6 at 69.) Petitioner told her that if she did not, "he was going to shove 22 this bat up [her] ass." (Doc. 11-6 at 70.) JS eventually took her dentures out and Petitioner forced 23 her to orally copulate him. (Doc. 11-6 at 70.) JS attempted to resist, but Petitioner got violent and 24 began choking her. (Doc. 11-6 at 71.) He also kneed her in the stomach. (Doc. 11-6 at 71.) 25 Petitioner then demanded that JS sit next to him so he could tell her something. (Doc. 11-6 at 72.) 26 JS refused. (Doc. 11-6 at 72.) Petitioner then told her, "If you go to the cops and you tell the 27 cops, I'll go to jail for about two or three years, and then I will definitely kill you. I may not kill 28 you tonight, but I am going to fuck you up. I'm going to disfigure your face so bad your kids 1 won't even want to be around you." (Doc. 11-6 at 72.) JS was scared but couldn't leave. (Doc. 2 11-6 at 72-73.) 3 JS refused to have intercourse with Petitioner. (Doc. 11-6 at 74.) Petitioner proceeded to 4 throw JS on the bed, get on top of her and insert his penis into her anus. (Doc. 11-6 at 74.) 5 During this time, Petitioner also attempted to insert an air freshener can into her anus. (Doc. 11-6 6 at 75.) When it would not go in, he placed his penis back in JS's anus and then inserted the air 7 freshener can into her vagina. (Doc. 11-6 at 74-75.) JS tried to get Petitioner to stop, stating, "No. 8 No. You don't have [to] do this. Why are you doing this? Take it out. Take it out." (Doc. 11-6 at 9 74.) Also during the time, Petitioner struck JS with a closed fist over twenty times in the arms, 10 kidneys, and stomach. (Doc. 11-6 at 78.) JS stated Petitioner also "kicked me in my ass one 11 time." (Doc. 11-6 at 78.) Petitioner eventually ejaculated. (Doc. 11-6 at 77.) JS then got up and 12 told Petitioner she needed to use the bathroom because she had involuntarily defecated. (Doc. 11- 13 6 at 77.) 14 In the bathroom, JS wiped herself with a towel and saw that she was bleeding from the 15 rectum. (Doc. 11-6 at 78.) Petitioner then came into the bathroom with a lit torch. (Doc. 11-6 at 16 79.) Petitioner put the torch "on full blast and told me he was going to melt my face off." (Doc. 17 11-6 at 79.) JS attempted to stop him but Petitioner burned her on her left hip. (Doc. 11-6 at 79.) 18 Petitioner kept attempting to burn JS but she was able to extinguish the flame with a cup several 19 times. (Doc. 11-6 at 79.) Petitioner stated, "Come on, I'm getting tired. I just want to get this 20 done and over with. Because it's going to happen tonight. I'm going to fuck you up." (Doc. 11-6 21 at 79-80.) The burn JS received to her left hip left a permanent scar. (Doc. 11-6 at 80.) 22 After the incident with the torch, JS asked if she could get a drink of water because she 23 was out of breath and thirsty, and Petitioner allowed

her to do so. (Doc. 11-6 at 82.) Petitioner 24 then started hitting her in the head, punching her in the face four times. (Doc. 11-6 at 82.) JS 25 eventually became confused and dazed and asked if Petitioner could stop and let her lay down 26 and rest for a bit, which Petitioner did. (Doc. 11-6 at 82.) JS laid down on the bed for a while. 27 (Doc. 11-6 at 83.) 28 JS eventually got up and went to the bathroom to smoke a cigarette. (Doc. 11-6 at 83.) 1 Petitioner followed her in and grabbed her by the throat, wrestled her to the floor, and choked her 2 again. (Doc. 11-6 at 83.) JS fought back by grabbing at his bottom jaw. (Doc. 11-6 at 83.) 3 Petitioner said, "You ripped my teeth out, you stupid bitch." (Doc. 11-6 at 83.) JS stated he 4 continued to choke her with one hand and she could not breathe. (Doc. 11-6 at 84.) Petitioner 5 then got up and told her, "Man, you are so stupid, you don't even try to get out. What the hell's 6 wrong with you? You know I'm going to kill you, right?" (Doc. 11-6 at 84.) JS attempted to 7 assuage him by telling him she loved him and that she would not call the police. (Doc. 11-6 at 8 84.) 9 Later, Petitioner went to the bathroom and JS attempted to escape through the front door. 10 (Doc. 11-6 at 84-85.) Petitioner caught her at the front door and wrestled her to the ground on a 11 piece of plywood. (Doc. 11-6 at 85.) Petitioner then thrust a glass methamphetamine pipe into 12 her forehead. (Doc. 11-6 at 85.) JS sustained a cut on her head from the glass pipe. Petitioner 13 then got off of JS and let her go. (Doc. 11-6 at 85.) It was daylight outside, and JS went home. 14 (Doc. 11-6 at 86.) At approximately 2:00-2:30 p.m. that afternoon, JS's cousin took her to the 15 hospital where she was treated for her injuries. (Doc. 11-6 at 86.) 16 B. Prior Relationship History 17 The prosecutor then went over JS's prior relevant sexual history with Petitioner. (Doc. 11- 18 6 at 99.) JS stated that while Petitioner had spanked her on her rear during sexual intercourse in 19 the past, he had never before punched her during sexual intercourse. (Doc. 11-6 at 99.) He had 20 never before used a torch or any other item to inflict burns on JS. (Doc. 11-6 at 100.) Prior to the 21 incident, at no point had Petitioner ever inserted a foreign object into her. (Doc. 11-6 at 100.) 22 And, at no point during the incident had JS ever told Petitioner it was okay to do any of these acts 23 to her. (Doc. 11-6 at 100.) 24 C. Cross-Examination of JS 25 During cross-examination, JS admitted to going to the apartment the day before the 26 incident, but not taking any of her belongings. (Doc. 11-6 at 102.) She also smoked 27 methamphetamine prior to going to the apartment. (Doc. 11-6 at 101.) JS's account of the details 28 prior to the incident and the facts of the incident varied in several significant details. At the 1 preliminary hearing, JS did not state that Petitioner had kneed her in the stomach. (Doc. 11-6 at 2 106.) At the preliminary hearing, JS stated she removed her shirt and pants herself. (Doc. 11-6 at 3 110-111.) JS also stated that after oral sex, Petitioner had told her, "You are beautiful. Don't let 4 anybody ever tell you you are not." (Doc. 11-6 at 111.) On cross-examination, JS also admitted 5 that she had taken a nap, and that when she awoke, Petitioner was crying and told her to leave. 6 (Doc. 11-6 at 111.) JS also admitted that in 2010, she was convicted of felony infliction of 7 potentially great bodily injury to a child. (Doc. 11-6 at 114.) 8 D. Petitioner's Statement to Police 9 Petitioner was interviewed by police concerning the incident. (Doc. 11-2 at 11.) 10 Petitioner admitted that JS had upset him and so he "smacked her." (Doc. 11-2 at 13.) However, 11

Petitioner stated their relationship was based on “rough sex.” (Doc. 11-2 at 16.) Petitioner 12 admitted he had assaulted JS, and he had hit JS all over her body over a long period of time. (Doc. 13 11-2 at 19-20.) Petitioner also admitted that he used a blow torch on JS, stating, “Yeah I – I burnt 14 [sic] her. My – my bad.” (Doc. 11-2 at 38.) He stated that he “was fucking with her.” (Doc. 11-2 15 at 38.) When the investigator remarked that there’s a difference between pleasure and getting 16 burned, Petitioner responded, “You’d be surprised. You would be surprised.” (Doc. 11-2 at 39.) 17 E. Defense Argument 18 The defense theory in this case was characterized as “[r]evenge and exaggeration.” (Doc. 19 11-6 at 250.) Defense counsel did not dispute that Petitioner caused the injuries sustained by JS; 20 however, counsel argued it was consistent with an abusive relationship. (Doc. 11-6 at 251.) 21 Defense counsel argued that Petitioner did inflict injuries on JS, but that JS exaggerated the 22 nature of those injuries. (Doc. 11-6 at 253.) Defense counsel pointed out that JS made numerous 23 inconsistent statements. (Doc. 11-6 at 253-54.) Counsel noted that JS’s trial testimony was 24 different in many respects from her prior statements to medical staff and police, and from her 25 preliminary hearing. (Doc. 11-6 at 253-54.) Defense counsel further noted that Petitioner 26 accepted responsibility for burning JS, but that it was an accident and he didn’t know that he was 27 actually burning her. (Doc. 11-6 at 255-56.) Defense counsel argued that there was reasonable 28 doubt that JS consented to the actions, and whether JS’s account of Petitioner’s actions were 1 exaggerated in light of JS’s inconsistent statements. (Doc. 11-6 at 256-60.) Defense counsel 2 contended the acts did not constitute torture, rape or assault, but were acts of unusual but 3 consensual sexual activity. (Doc. 11-6 at 260.) He summed up the argument stating, “It is true 4 that [JS] was assaulted. It is true that [Petitioner] hit [JS]. But all the other stuff is an 5 exaggeration. He didn’t punch her eight times in the face. He didn’t torture her. He didn’t rape 6 her. He didn’t sodomize her. He didn’t force her to give him oral sex.” (Doc. 11-6 at 260.)

7 III. DISCUSSION

8 A. Jurisdiction 9 Relief by way of a petition for writ of habeas corpus extends to a person in custody 10 pursuant to the judgment of a state court if the custody is in violation of the Constitution, laws, or 11 treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c) (3); *Williams v. Taylor*, 12 529 U.S. 362, 375 n. 7 (2000). Petitioner asserts that he suffered violations of his rights as 13 guaranteed by the United States Constitution. The challenged conviction arises out of the 14 Stanislaus County Superior Court, which is located within the jurisdiction of this court. 28 15 U.S.C. § 2254(a); 28 U.S.C. § 2241(d). 16 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 17 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its 18 enactment. *Lindh v. Murphy*, 521 U.S. 320 (1997) (holding the AEDPA only applicable to cases 19 filed after statute’s enactment). The instant petition was filed after the enactment of the AEDPA 20 and is therefore governed by its provisions. 21 B. Legal Standard of Review 22 A petition for writ of habeas corpus under 28 U.S.C. § 2254(d) will not be granted unless 23 the petitioner can show that the

state court's adjudication of his claim: (1) resulted in a decision 24 that was contrary to, or involved an unreasonable application of, clearly established Federal law, 25 as determined by the Supreme Court of the United States; or (2) resulted in a decision that "was 26 based on an unreasonable determination of the facts in light of the evidence presented in the State 27 court proceeding." 28 U.S.C. § 2254(d); *Lockyer v. Andrade*, 538 U.S. 63, 70-71 (2003); 28 *Williams*, 529 U.S. at 412-413. 1 A state court decision is "contrary to" clearly established federal law "if it applies a rule 2 that contradicts the governing law set forth in [the Supreme Court's] cases, or "if it confronts a set 3 of facts that is materially indistinguishable from a [Supreme Court] decision but reaches a 4 different result." *Brown v. Payton*, 544 U.S. 133, 141 (2005) (citing *Williams*, 529 U.S. at 405- 5 406). 6 In *Harrington v. Richter*, 562 U.S. 86, 101 (2011), the U.S. Supreme Court explained that 7 an "unreasonable application" of federal law is an objective test that turns on "whether it is 8 possible that fairminded jurists could disagree" that the state court decision meets the standards 9 set forth in the AEDPA. The Supreme Court has "said time and again that 'an unreasonable 10 application of federal law is different from an incorrect application of federal law.'" *Cullen v. 11 Pinholster*, 563 U.S. 170, 203 (2011). Thus, a state prisoner seeking a writ of habeas corpus from 12 a federal court "must show that the state court's ruling on the claim being presented in federal 13 court was so lacking in justification that there was an error well understood and comprehended in 14 existing law beyond any possibility of fairminded disagreement." *Harrington*, 562 U.S. at 103. 15 The second prong pertains to state court decisions based on factual findings. *Davis v. 16 Woodford*, 384 F.3d 628, 637 (9th Cir. 2003) (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). 17 Under § 2254(d)(2), a federal court may grant habeas relief if a state court's adjudication of the 18 petitioner's claims "resulted in a decision that was based on an unreasonable determination of the 19 facts in light of the evidence presented in the State court proceeding." *Wiggins v. Smith*, 539 20 U.S. 510, 520 (2003); *Jeffries v. Wood*, 114 F.3d 1484, 1500 (9th Cir. 1997). A state court's 21 factual finding is unreasonable when it is "so clearly incorrect that it would not be debatable 22 among reasonable jurists." *Jeffries*, 114 F.3d at 1500; see *Taylor v. Maddox*, 366 F.3d 992, 999- 23 1001 (9th Cir. 2004), cert.denied, *Maddox v. Taylor*, 543 U.S. 1038 (2004). 24 To determine whether habeas relief is available under § 2254(d), the federal court looks to 25 the last reasoned state court decision as the basis of the state court's decision. See *Ylst v. 26 Nunnemaker*, 501 U.S. 979, 803 (1991); *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 27 2004). "[A]lthough we independently review the record, we still defer to the state court's 28 ultimate decisions." *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). 1 The prejudicial impact of any constitutional error is assessed by asking whether the error 2 had "a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. 3 Abrahamson*, 507 U.S. 619, 623 (1993); see also *Fry v. Pliler*, 551 U.S. 112, 119-120 (2007) 4 (holding that the *Brecht* standard applies whether or not the state court recognized the error and 5 reviewed it for harmlessness). 6 In a case where the state court decided the petitioner's claims on the merits but provided 7 no reasoning for its decision, the federal habeas court conducts "an

independent review of the 8 record . . . to determine whether the state court [was objectively unreasonable] in its application 9 of controlling federal law.” *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2002). “[A]lthough 10 we independently review the record, we still defer to the state court’s ultimate decisions.” *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). 12 C. Review of Petition 13 Petitioner presents the following grounds for relief: 2: 1) Trial exhibits were destroyed in 14 bad faith by the State, and the prosecution used false evidence in the form of an altered transcript 15 of Petitioner’s interview, in violation of Petitioner’s constitutional rights; 2) Defense counsel 16 rendered ineffective assistance of counsel in the following ways: by wrongfully withholding the 17 fact that she allowed the exhibits to be destroyed; by failing to ask a single question of the only 18 defense witness; by allowing the State to submit an altered interrogation; by failing to interview 19 any of the witnesses Petitioner asked her to interview, in particular, JS’s daughter, who would 20 have testified how vindictive and dishonest JS is, and Petitioner’s sister, who would have testified 21 that she had beaten up JS, not Petitioner; and, by failing to object to false evidence that Petitioner 22 burned the victim with a torch, and that Petitioner confessed to the crime; 3) Petitioner’s right to 23 effective assistance of appellate counsel was violated when she filed a Wende brief, rather than 24 assert the claims Petitioner asked to present; and 4) The prosecutor committed misconduct by 25 introducing false evidence. 26 27 2 Petitioner has set forth six numbered grounds for relief; however, Grounds Four and Five are 28 restatements and/or supplements of the previous grounds. 1 1. Ground One 2 In Ground One, Petitioner brings two related claims. Although Petitioner titles the claim, 3 “Newly Discovered Evidence,” the claim actually involves alleged bad faith destruction of 4 evidence by the prosecution and the use of an allegedly falsely altered interrogation transcript. 5 As to the first part of the claim, Petitioner alleges that the State destroyed all of the exhibits from 6 Petitioner’s trial to prevent Petitioner from challenging the conviction. Included among the 7 exhibits were photographs of the victim’s burn injuries. In Ground Five, Petitioner claims the 8 destruction of the photographs was also prejudicial. Since the claim is mainly an addition to 9 Ground One, the Court will address it. As to the second part, Petitioner alleges the prosecutor 10 and defense counsel utilized a transcript of Petitioner’s interrogation that had been falsely altered 11 from the original so as to favor the prosecution. In Ground Four, Petitioner expands on this claim 12 by alleging the prosecutor altered the transcript. The Court will address the subclaims separately, 13 as they involve different legal theories. 14 a. Destruction of Evidence 15 Petitioner first raised the claim before the California Supreme Court in a habeas petition 16 filed on October 1, 2021. (Doc. 11-28 at 2.) The California Supreme Court rejected the claim 17 without comment or citation of authority. (Doc. 11-28 at 1.) Petitioner next raised the claim in a 18 habeas petition in the Stanislaus County Superior Court. (Doc. 11-29.) The claim was denied in a 19 reasoned decision. (Doc. 11-29.) Petitioner then raised it to the California Court of Appeal in a 20 habeas petition, but the petition was summarily denied without comment. (Doc. 11-30.) Finally, 21 Petitioner presented the claim again to the California Supreme Court in a habeas petition. (Doc. 22 11-31.)

The California Supreme Court denied the petition on procedural grounds as repetitive 23 and successive. (Doc. 11-31.) 24 i. Legal Standard 25 In *Arizona v. Youngblood*, the Supreme Court held “that unless a criminal defendant can 26 show bad faith on the part of the police, failure to preserve potentially useful evidence does not 27 constitute a denial of due process of law.” 488 U.S. 51, 58 (1988). In *California v. Trombetta*, 28 the Supreme Court stated: “Whatever duty the Constitution imposes on the States to preserve 1 evidence, that duty must be limited to evidence that might be expected to play a significant role in 2 the suspect’s defense. To meet this standard of constitutional materiality, evidence must both 3 possess an exculpatory value that was apparent before the evidence was destroyed, and be of such 4 a nature that the defendant would be unable to obtain comparable evidence by other reasonably 5 available means.” 467 U.S. 479, 488-89 (1984) (citations and footnotes omitted). In addition, 6 “if, having served [its] purpose, [the evidence was] destroyed by the agents in good faith and in 7 accord with their normal practices, it would be clear that [its] destruction did not constitute an 8 impermissible destruction of evidence nor deprive petitioner of any right.” *Killian v. United 9 States*, 368 U.S. 231, 242 (1961). The presence or absence of bad faith turns on the government’s 10 knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. 11 *Youngblood*, 488 U.S. at 56-57; see also *Grisby v. Blodgett*, 130 F.3d 365, 371 (9th Cir. 1997); 12 *United States v. Barton*, 995 F.2d 931, 934 (9th Cir. 1993); *United States v. Cooper*, 983 F.2d 13 928, 931 (9th Cir. 1993). 14 ii. Analysis 15 In rejecting the claim, the Stanislaus County Superior Court noted that Petitioner had not 16 in fact been notified that the exhibits had been destroyed. (Doc. 11-29 at 4.) Appellate counsel 17 was instead advised by the District Attorney’s office that the photographs had not been scanned 18 into their system and they were looking for the disc containing the photographs. (Doc. 11-29 at 19 4.) Petitioner was advised of this on July 30, 2021, (doc. 11-29 at 4), but by this time, the time to 20 file an appeal concerning the exhibits had already expired. (Doc. 11-29 at 4.) The court further 21 noted that the claim could have been, but was not raised on direct appeal. Citing to *In re 22 Waltreus*, 52 Cal.2d 218, 225 (1965) and *In re Dixon*, 41 Cal.2d 756, 759 (1953), the court 23 determined that Petitioner was procedurally barred from raising the claim. 24 The claim fails for several reasons. First, there is no evidence that the prosecution 25 destroyed evidence. According to the exhibits, the documents were destroyed by a law office that 26 had been provided photographs contained on a disc from the District Attorney’s office. (Doc. 11- 27 29 at 96.) Therefore, any constitutional authority requiring the prosecution to preserve evidence 28 is inapplicable. Likewise, Petitioner cannot demonstrate bad faith on the part of the government, 1 since it was not the prosecution that allegedly destroyed evidence. Accordingly, Petitioner fails 2 to show that his due process rights were violated. 3 Petitioner submits exhibits which purport to show that the trial court destroyed its copies 4 of exhibits on January 8, 2020. (Doc. 1 at 128-133.) This was done by the trial court following 5 conclusion of direct appeal, not by the prosecution, and it was done in accord with normal 6 procedures. In any event, Petitioner fails to show that the photographs, or any other exhibit for 7 that matter, were exculpatory, or that their alleged

destruction was prejudicial. 8 The photograph of the burn from the torch was published to the jury as People's Exhibit 9 28. (Doc. 11-6 at 97.) The victim described the injuries depicted in the photograph as, "That's 10 the burn mark on my left thigh from the torch." (Doc. 11-6 at 97.) The victim was then asked to 11 show the scar resulting from the burn to the jury in person; when she did so, the prosecutor noted 12 for the record that the victim "is pointing to a red kind of crescent-curved mark on her left thigh," 13 to which the court stated, "Yes." (Doc. 11-6 at 97.) Petitioner's assertion that the photograph 14 revealed no injury is therefore frivolous. Had there in fact been no burn injury, this would have 15 been apparent to both the judge and jury. Thus, Petitioner's claim that the photographs would 16 have aided him subsequent to the appeal is speculative and unfounded. Petitioner also contends 17 other exhibits were also destroyed, but fails to state how he was prejudiced by the destruction of 18 these other unidentified exhibits. The claim therefore fails. 19

b. Altered Transcript 20 In the second part of the claim, Petitioner alleges the prosecutor used an altered transcript 21 of the interrogation which contained false statements made by Petitioner that incriminated him. 22 He further faults defense counsel for failing to challenge the altered transcript at trial. 23 Petitioner also first raised the claim in a habeas petition to the California Supreme Court 24 on October 1, 2021. (Doc. 11-28 at 2.) The petition was summarily denied. (Doc. 11-28 at 1.) 25 Petitioner next raised the claim in a habeas petition in the Stanislaus County Superior Court. 26 (Doc. 11-29.) The claim was denied on procedural grounds; specifically, the claim was barred 27 pursuant to *In re Waltreus*, 52 Cal.2d 218, 225 (1965), *In re Dixon*, 41 Cal.2d 756, 758 (1953), *In re Harris*, 5 Cal.3d 813, 829 (1993), *In re Clark*, 5 Cal.4th 750, 770 (1993), and *In re Terry*, 41 Cal.3d 911, 927 (1971), because it could have been raised on direct appeal. (Doc. 11-29.) 28 Petitioner then raised it to the California Court of Appeal in a habeas petition, where it was 3 summarily denied. (Doc. 11-30.) Finally, Petitioner presented the claim again to the California 4 Supreme Court in a habeas petition. (Doc. 11-31.) The California Supreme Court denied the 5 petition on procedural grounds as repetitive and successive. (Doc. 11-31.) 6

i. Legal Standard 7 Due process requires that the prosecution disclose exculpatory evidence within its 8 possession. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Cooper v. Brown*, 510 F.3d 870, 924 (9th Cir. 2007). There are three components of a Brady violation: "[t]he evidence at issue must be 10 favorable to the accused, either because it is exculpatory, or because it is impeaching; the 11 evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice 12 must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); see also *Banks v. Dretke*, 13 540 U.S. 668, 691 (2004); *Silva v. Brown*, 416 F.3d 980, 985 (9th Cir. 2005). 14

ii. Analysis 15 The claim fails. First, the evidence was never suppressed by the prosecution. It was 16 known that the initial transcript was prepared by an outside company, and defense counsel had 17 professed objections to it. (Doc. 11-6 at 32.) The updated transcript was provided to defense 18 counsel at trial. (Doc. 11-6 at 32.) 19 Second, Petitioner has not demonstrated that the updated transcript was false. At most, he 20 points out that one transcriber's discernment of what was said may have varied slightly from what 21 another transcriber discerned. There is no evidence that the updated

transcript was in fact false. 22 Third, Petitioner fails to demonstrate any prejudice resulting from the allegedly altered 23 transcript. The trial court noted defense counsel's hesitance in using the updated transcript and 24 stated it would caution the jury that the transcript was only for their convenience and that if there 25 were any discrepancies, they were to be guided by the actual audio recording. (Doc. 11-6 at 33.) 26 When the audio recording was played for the jury, the trial court gave the following admonition: 27 [The prosecution] is going to play the audio of the interview that was done by this witness and the defendant. You will receive a copy of a transcript of that 28 interview. The transcript is someone's best effort at transcribing what was heard 1 on the audio. If you believe - - and we are providing you a transcript for use in listening to the video. If you believe there's a discrepancy between the audio and 2 the transcript, you are to be guided by the audio version, not the transcript. 3 (Doc. 11-6 at 138.) 4 Thus, the jury was well aware that the transcript was only the transcriber's best effort at 5 discerning what was said, and it was for them to decide what was actually said by listening to the 6 actual audio recording. 7 Moreover, the final transcript included Petitioner's hesitance in acknowledging that he 8 burned the victim. (Doc. 11-2 at 37, 41.) It included his statement that he didn't actually think he 9 was burning her. (Doc. 11-2 at 44.) The transcript also included Petitioner's statement that the 10 officer was trying to put words in his mouth. (Doc. 11-2 at 41, 42.) In closing remarks, defense 11 counsel highlighted the fact Petitioner had stated he didn't know he was actually burning her. 12 (Doc. 11-6 at 256.) Defense counsel further pointed out that Petitioner "didn't have much chance 13 to talk. . . . and "that the majority of it is [the officer] talking." (Doc. 11-6 at 257-58.) He argued 14 that Petitioner was not permitted to tell the whole story and that he was cut off repeatedly. (Doc. 15 11-6 at 258.) Therefore, Petitioner fails to demonstrate that the allegedly altered transcript was 16 prejudicial. The claim should be denied. 17 For the same reasons, Petitioner's subclaim that defense counsel rendered ineffective 18 assistance must also fail. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). As noted 19 above, there is no evidence that the updated transcript was false. At most, it varied slightly based 20 on the transcriber. Moreover, Petitioner cannot show that defense counsel's failure to object to 21 the transcript resulted in prejudice. *Id.* at 694. The jury was advised that with respect to any 22 variance between the transcription and the recording, the audio recording controlled. Defense 23 counsel also highlighted the helpful portions of the transcript while urging the jury to discard the 24 damaging admissions as the officer repeatedly cutting off Petitioner and suggesting facts never 25 stated by Petitioner. 26

2. Ground Two

27 Petitioner next alleges defense counsel rendered ineffective assistance in several ways: by 28 1 wrongfully withholding the fact that she allowed the exhibits to be destroyed; by failing to ask a 2 single question of the only defense witness; by allowing the State to submit an altered 3 interrogation; by failing to interview any of the witnesses Petitioner asked her to, in particular, 4 JS's daughter, who would have testified how vindictive and dishonest JS is, and Petitioner's 5 sister, who would have testified that she had beaten up JS, not Petitioner; and, by failing to object

6 to false evidence that Petitioner burned the victim with a torch, and that Petitioner confessed to 7 the crime. 8 a. Legal Standard 9 Effective assistance of counsel is guaranteed by the Due Process Clause of the Fourteenth 10 Amendment. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). Claims of ineffective assistance of 11 counsel are reviewed according to Strickland's two-pronged test. *Strickland v. Washington*, 466 12 U.S. 668, 687-88 (1984); *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989); *United States v. 13 Birtle*, 792 F.2d 846, 847 (9th Cir.1986); see also *Penson v. Ohio*, 488 U.S. 75 (1988) (holding 14 that where a defendant has been actually or constructively denied the assistance of counsel 15 altogether, the Strickland standard does not apply and prejudice is presumed; the implication is 16 that Strickland does apply where counsel is present but ineffective). 17 To prevail, Petitioner must show two things. First, he must establish that counsel's 18 deficient performance fell below an objective standard of reasonableness under prevailing 19 professional norms. *Strickland*, 466 U.S. at 687-88. Second, Petitioner must establish that he 20 suffered prejudice in that there was a reasonable probability that, but for counsel's unprofessional 21 errors, he would have prevailed at trial. *Id.* at 694. A "reasonable probability" is a probability 22 sufficient to undermine confidence in the outcome of the trial. *Id.* The relevant inquiry is not what 23 counsel could have done; rather, it is whether the choices made by counsel were reasonable. 24 *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). 25 With the passage of the AEDPA, habeas relief may only be granted if the state-court 26 decision unreasonably applied this general Strickland standard for ineffective assistance. 27 *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). Accordingly, the question "is not whether a 28 federal court believes the state court's determination under the Strickland standard "was incorrect 1 but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. 2 Landrigan*, 550 U.S. 465, 473 (2007); *Knowles*, 556 U.S. at 123. In effect, the AEDPA standard 3 is "doubly deferential" because it requires that it be shown not only that the state court 4 determination was erroneous, but also that it was objectively unreasonable. *Yarborough v. 5 Gentry*, 540 U.S. 1, 5 (2003). Moreover, because the Strickland standard is a general standard, a 6 state court has even more latitude to reasonably determine that a defendant has not satisfied that 7 standard. See *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule 8 application was unreasonable requires considering the rule's specificity. The more general the 9 rule, the more leeway courts have in reaching outcomes in case-by-case determinations.") 10 b. Analysis 11 Petitioner first faults counsel for allegedly wrongfully withholding the fact that she 12 allowed the exhibits to be destroyed. There is no evidence that counsel knowingly withheld this 13 information from Petitioner, and Petitioner cannot demonstrate any prejudice resulting therefrom. 14 As discussed above, Petitioner fails to demonstrate that the exhibits or photographs would have 15 changed the outcome had he possessed them subsequent to the appeal. 16 Petitioner also contends that defense counsel was ineffective in failing to ask a single 17 question of the only defense witness. The claim is unsupported and conclusory. Petitioner does 18 not identify the witness, the questions counsel should have asked, and how it would have altered 19 the outcome

of the case. 20 Petitioner alleges defense counsel was ineffective in permitting the State to submit an 21 altered interrogation. As previously discussed, defense counsel raised concerns about the 22 transcript to the court, and the court responded that it would, and in fact did, admonish the jury 23 that the transcript was only a best guess by a transcriber as to what was said, and that the jury was 24 to be guided by the actual audio recording rather than the transcript. Petitioner fails to show what 25 more counsel could have done, or how the outcome would have been different. 26 Petitioner next claims that counsel failed to interview any of the witnesses he requested, 27 specifically, JS's daughter, who would have testified how vindictive and dishonest JS is, and 28 Petitioner's sister, who would have testified that she, not Petitioner had beaten up JS. Petitioner 1 does not present any evidence to which the witnesses would have testified, what the testimony 2 would have been, and how the testimony would have affected the outcome in this case. Without 3 such proof, Petitioner cannot demonstrate that he was prejudiced by counsel's failure to call the 4 witnesses. See *United States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (no claim for 5 ineffective assistance of counsel for a failure to call a witness where no evidence witness would 6 testify); *United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir. 1987) (ineffective assistance of 7 counsel for a failure to call witnesses fails when there is no indication what witnesses would have 8 testified to or how their testimony may have changed outcome of hearing). 9 Petitioner next claims counsel failed to object to false evidence that Petitioner burned the 10 victim with a torch, and that Petitioner confessed to the crime. The claims are frivolous. The 11 photographs and scarring were showed to the jury, and the audio recording of the confession was 12 played to the jury. Petitioner's contention that the evidence was false was demonstrably refuted 13 by the jury's findings. 14 In sum, Petitioner fails to show that the state court rejection of his claims were 15 unreasonable applications of Strickland. The claim of ineffective assistance of counsel should be 16 denied. 17 3. Ground Three 18 Petitioner next contends that his appellate counsel rendered ineffective assistance by filing 19 a Wende³ brief rather than pursuing the claims now raised by Petitioner. 20 a. Legal Standard 21 A habeas claim alleging appellate counsel was ineffective is evaluated under Strickland. 22 See *Williams v. Taylor*, 529 U.S. at 390-391. To establish ineffective assistance of counsel, 23 Petitioner must prove: (1) counsel's representation fell below an objective standard of 24 reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, 25 but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-694, 697 (1984). As the high court has observed, appellate 27 28 3 *People v. Wende*, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979). 1 counsel performs properly and competently when he or she exercises discretion and presents only 2 the strongest claims instead of every conceivable claim. *Jones v. Barnes*, 463 U.S. 745, 752 3 (1983); *Smith v. Murray*, 477 U.S. 527, 536 (1986). "Effective appellate counsel should not raise 4 every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed." 5 *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017). "In many instances, appellate counsel will fail to 6 raise an issue because she foresees little or no likelihood of success on that issue;

indeed, the 7 weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate 8 advocacy.” *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). The relevant inquiry is not 9 what counsel could have done; rather, it is whether the choices made by counsel were reasonable. 10 *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). 11 In *People v. Wende*, the California Supreme Court established a constitutionally sufficient 12 procedure by which appellate counsel may inform the court of the nature of an appeal and decline 13 to brief issues judged to be frivolous. *Smith v. Robbins*, 528 U.S. 259, 265 (2000). Appellate 14 counsel's decision to file a *Wende* brief is reviewed under *Strickland*. *Smith*, 528 U.S. at 285. 15 Even if petitioner could demonstrate his appellate attorney acted unreasonably, he must still show 16 prejudice. *Smith*, at 285-286. Habeas relief for ineffective assistance of counsel may only be 17 granted if the state-court decision unreasonably applied the *Strickland* standard. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). 19 b. Analysis 20 Petitioner fails to demonstrate prejudice. As previously discussed, there were no 21 meritorious issues that appellate counsel failed to raise. See *Jones v. Barnes*, 463 U.S. at 751-52 22 (appellate counsel does not have an obligation to raise every nonfrivolous argument); *Miller v. 23 Keeney*, 882 F.2d at 1434-35 (appellate counsel's failure to raise a weak issue did not constitute 24 ineffective counsel); see also *Moorman v. Ryan*, 628 F.3d 1102, 1107 (9th Cir. 2010) (“If trial 25 counsel's performance was not objectively unreasonable or did not prejudice [petitioner], then 26 appellate counsel did not act unreasonably in failing to raise a meritless claim of ineffective 27 assistance of counsel, and [petitioner] was not prejudiced by appellate counsel's omission”); 28 *Wildman v. Johnson*, 261 F.3d 832, 840 (9th Cir. 2001) (“[petitioner] cannot sustain his claim for 1 ineffective assistance of appellate counsel because the issues he raises are without merit”); 2 *Featherstone v. Estelle*, 948 F.2d 1497, 1507 (9th Cir. 1991) (where trial counsel's performance 3 did not fall below *Strickland* standard, claim that appellate counsel was ineffective for failing to 4 raise ineffective assistance of trial counsel on appeal must fail). Thus, the claim fails. 5 4. Ground Six 4 6 In his final claim for relief, Petitioner alleges that the prosecutor committed misconduct 7 by introducing an altered transcript of the audio recording of Petitioner’s interview. He further 8 claims the prosecutor permitted the victim to knowingly testify falsely. 9 a. Legal Standard 10 A petitioner is entitled to habeas corpus relief if the prosecutor’s misconduct “so infected 11 the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. 12 DeChristoforo*, 416 U.S. 637, 643 (1974). To constitute a due process violation, the prosecutorial 13 misconduct must be “of sufficient significance to result in the denial of the defendant’s right to a 14 fair trial.” *Greer v. Miller*, 485 U.S. 756, 765 (1987) (quoting *United States v. Bagley*, 473 U.S. 15 667 (1985)). Any claim of prosecutorial misconduct must be reviewed within the context of the 16 entire trial. *Id.* at 765-66; *United States v. Weitzenhoff*, 35 F.3d 1275, 1291 (9th Cir. 1994). The 17 Court must keep in mind that “[t]he touchstone of due process analysis in cases of alleged 18 prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor” and “the 19 aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance 20 of an unfair trial to the

accused.” *Smith v. Phillips*, 455 U.S. 209, 219 (1982). If prosecutorial misconduct is established, and it was constitutional error, the error must be evaluated pursuant to the harmless error test set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). See *Thompson*, 74 F.3d at 1577 (Only if constitutional error is established “would we have to decide whether the constitutional error was harmless.”). b. Analysis Petitioner fails to show that the prosecutor committed any misconduct, let alone Grounds Four and Five concerning the transcript and exhibits were previously discussed and rejected within Ground One, *supra*. 1 misconduct of constitutional magnitude. There is no evidence that the prosecutor intentionally 2 altered the transcript of the audio hearing. The jury was advised that the transcript was only a 3 best guess by a transcriber as to what was said. There is also no reasonable probability that the 4 transcript was in any way prejudicial. The audio recording of the interview was played to the 5 jury. The transcript was provided only for convenience. If the jury believed something was said 6 other than what was provided in the transcript, the jury was advised that the audio recording 7 controlled. Petitioner fails to show that the state court rejection of the claim was objectively 8 unreasonable. 9 There is also no support for the contention that the prosecutor permitted the victim to 10 testify falsely. Petitioner points out various inconsistencies and contradictions between the 11 victim’s earlier statements as compared to her trial testimony. There is no evidence that the 12 prosecutor knowingly elicited false testimony or knowingly misrepresented the victim’s 13 testimony. The victim’s varying and inconsistent statements were thoroughly cross-examined by 14 defense counsel. (Doc. 11-6 at 100-114.) Defense counsel also used those inconsistencies in 15 attacking the victim’s credibility during closing remarks. (Doc. 11-6 at 253-260.) Ultimately, the 16 victim’s credibility was a determination for the jury to make. Petitioner has not shown the 17 prosecutor committed misconduct and the claim fails.

18 IV. RECOMMENDATION

19 For the foregoing reasons, the Court RECOMMENDS that the Petition for Writ of Habeas 20 Corpus be DENIED with prejudice on the merits. 21 This Findings and Recommendation is submitted to the United States District Court Judge 22 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the 23 Local Rules of Practice for the United States District Court, Eastern District of California. Within 24 thirty (30) days after being served with a copy of this Findings and Recommendation, any party 25 may file written objections with the Court and serve a copy on all parties. Such a document 26 should be captioned “Objections to Magistrate Judge’s Findings and Recommendation.” Replies 27 to the Objections shall be served and filed within fourteen (14) court days (plus three days if 28 served by mail) after service of the Objections. The Court will then review the Magistrate 1 Judge’s ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file 2 objections within the specified time may waive the right to appeal the Order of the District Court. 3 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). 4 IT IS SO ORDERED. 5 6 Dated: March 6, 2023 /s/ Sheila K. Oberto .

UNITED STATES MAGISTRATE JUDGE

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