

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JESUS VALENCIA,

No. C 08-01144 MHP

Petitioner,

MEMORANDUM & ORDER

v.

**Re: Petitioner's Request for Oral Argument
and Petition for Writ of Habeas Corpus**

ANTHONY HEDGPETH, Warden,

Respondent.

Petitioner Jesus Valencia ("Valencia" or "petitioner"), who was tried in the Superior Court for the County of Santa Clara and is currently a prisoner in Kern Valley State Prison, is serving a thirty-year prison sentence after being found guilty by a jury of two counts of continuous sexual abuse of a child and two counts of forcible lewd conduct on a child. Petitioner filed a timely petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254, alleging violation of his Sixth and Fourteenth Amendment rights to effective assistance of counsel. Petitioner contends that he was denied effective assistance of counsel when his defense counsel failed to move for the suppression of or object to the admission of various pieces of evidence admitted at trial, including (1) his confession to police, (2) evidence related to a "red stain" on his sister's clothing after she left petitioner's bed room, and (3) statements by his sister that he had previously used drugs and fought with the police. Having considered the parties' arguments and submissions, the court enters the following memorandum and order.

1 BACKGROUND

2 I. Factual Background¹

3 At trial, the jury heard and saw evidence of the following. In 2000, petitioner came from
4 Mexico to live with his mother and his younger sisters, L., K. and D. in San Jose, California. Resp't
5 Exh. 1 (Clerk's Transcript ("CT")) 671. In the fall of 2003, fourteen-year-old L. told David and
6 Rosalie Correa, workers at her school, that she had seen petitioner kissing K. on the mouth. In
7 January 2004, L. told Rosalie that petitioner had pulled off her blouse while they were "horse
8 playing." In February 2004, L. told David Correa that her brother had touched her in a bad way. L.
9 then told Rosalie Correa that her brother had crawled into bed with her the previous week, but
10 nothing had happened. Rosalie then filed a report with Child Protective Services ("CPS").

11 In March 2004, L. told another worker at her school, Victoria Sandoval, that petitioner had
12 tried to get in bed with her. Sandoval also reported this to CPS. On July 15, 2004, L., D. and K. met
13 Sandoval at a Walgreen's store, and K. told Sandoval that petitioner had stuck his hand in her
14 underpants and had touched K. and D. CT 645. Sandoval then took the girls to her home and tried
15 unsuccessfully to contact CPS.

16 On the evening of July 15, 2004, detectives interviewed each of the sisters twice. *See*
17 *generally* CT 438-524. 529-650. 843-89. The youngest sister, eight-year-old D., told the police that
18 petitioner had kissed her on the lips. *Id.* at 443; 448-50. In two interviews, D. stated that petitioner
19 pulled her and K.'s pants part of the way down, tried to remove her underpants and tried to put his
20 hand on her private parts when she was in his bedroom to look at his pet fishes. *Id.* at 862-71, 456-
21 62. D. stated that petitioner touched her "two times only." *Id.* at 462. She also stated that she did
22 not tell her mom because her mom was sick and would get mad. *Id.* at 452-53.

23 K. stated that petitioner touched her four or five times. *Id.* at 468. Petitioner tried to pull her
24 shirt off a few times, and one time, he pulled it all the way off and touched her chest, but she was
25 wearing another shirt underneath. *Id.* at 470-73. Petitioner also tried to pull her pants off. *Id.* at
26 473. She also saw petitioner try to remove D.'s clothes in her mother's bedroom. *Id.* at 477. In
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1 another incident, petitioner told K. that if she wanted to see his new fish, she had to take her clothes
2 off. *Id.* at 484.

3 K. also stated that she saw L. sleep in petitioner's bedroom one night. *Id.* at 487. K. said
4 that when L. left his room, she had a shirt that was "all red" and had "red pants." *Id.* at 490. When
5 the police asked why her clothes were red, K. said, "I don't know, I think it was for the pants that
6 she put something and then she was like, sleeping in her pants, I think." *Id.* When the police asked
7 whether something had spilled, she said, "I think, I don't know, I'm not sure." *Id.* When asked
8 whether her shirt was stained, K. responded "yes." *Id.*

9 In another interview, K. again reported to the police that petitioner put his hand under her
10 shirt on her breasts. *Id.* at 559-60. K. also stated that while they were in her mother's room,
11 petitioner tried to pull her pants off, and she hit him with a wooden "thing" on his head, pulled her
12 pants back and got away. *Id.* at 564. She stated that she was scared that he would touch her in her
13 privates. *Id.* at 568. On one hot day, K. said that she and D. were sleeping in her parents' room, and
14 petitioner touched her and her sister's vaginas. *Id.* at 572. They woke up, removed his hands and
15 took a shower. *Id.* at 578.

16 In another interview, L. stated that petitioner tried to kiss D., and that he touched K. and D.'s
17 vaginas. *Id.* at 498. She stated that on one occasion, petitioner took her keys, and they began
18 fighting and hitting each other. *Id.* at 505-06. While they were fighting, she started choking and
19 hitting him, and he touched her vagina and undid her bra, lifted her shirt and laughed at her. *Id.* at
20 506-08. L. then told the police that one night, she drank six beers, petitioner told her to stay in his
21 bed, and she spent the night in his bed with him, but he did not touch her. *Id.* at 512. L. stated that
22 D. and K. told her that petitioner had touched them under their pants, when he called them into his
23 room to show them his fishes. *Id.* at 642-43. L. said that she told her mom about petitioner and she
24 just started crying. *Id.* at 516. Her mother also put cameras in the house because they felt that
25 petitioner was doing "drugs and stuff." *Id.*

26 In another interview, L. reiterated the same stories as in her first interview. She also stated
27 that on another occasion, petitioner looked at her through the window while she was taking a
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1 shower. *Id.* at 631. L. described that petitioner would get really angry and has fought with the
2 police before. *Id.* at 597. After the girls were interviewed by police, they were removed from their
3 home into protective custody and placed in a shelter.

4 On July 16, 2004, petitioner, who was 20 years old and had no criminal history, voluntarily
5 went to the police station to talk to the police. *Id.* at 543. Petitioner was told that he was not under
6 arrest and that he was free to leave at any time. *Id.* at 654. Petitioner stated that he was willing to
7 talk to “clean up this thing.” *Id.* at 654. Detectives Dillon and Tovar then conducted the interview.
8 *Id.* at 656.

9 Petitioner described that he got along with his sibling, L., but sometimes they had fights
10 when they hit each other or called each other names. *Id.* at 670-81. Petitioner described that on one
11 occasion, he took L.’s keys and they started wrestling, L.’s shirt lifted up and he saw part of her bra
12 or breast. *Id.* at 712-729. He stated that he might have touched L., but if he did, it was by accident,
13 and that he did not unsnap her bra. *Id.* at 781, 790. Petitioner also stated that he never pulled down
14 K. or D.’s pants. *Id.* at 764.

15 Later in the interview, petitioner admitted that about four-and-a-half years prior, he once
16 touched K. on her vagina over her clothes, saying “Where are the little testicles?” and that about four
17 years prior, he also touched her vagina when he was watching T.V. and she was sleeping next to him
18 in her underwear. *Id.* at 815, 821. Then, petitioner stated that about one year prior, he touched K.
19 under her panties for about three or four minutes while he was watching television and she was
20 sleeping. *Id.* at 831. Detective Tovar stated at trial that petitioner’s admission of skin-to-skin
21 contact occurred about two hours and twenty minutes into the interview.

22 After the interview, petitioner wrote letters of apology to K. and L. In his letter to K.,
23 petitioner asked her “to excuse me for touching your intimate or private parts.” In his letter to L., he
24 asked her to excuse him “if some day I touched your intimate (private) parts” and that he was “sorry
25 for the day I pulled your blouse when I was playing with you.”

26 After some time, the girls returned home to their mother. On July 17, 2004, social worker
27 Sylvia Roque interviewed the three sisters and their mother. The girls told her the same stories that
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1 they told the police. In August 2004, L. told Rosalie Correa that petitioner had touched her sisters
2 and had touched D. since she was four years old. L. stated that she would be in trouble if she told
3 the truth and that her mother told her to deny that these things happened, otherwise they would go
4 back to a foster home.

5 On September 21, 2004, D. told Gabriella Nielsen, her therapist, that petitioner touched and
6 caressed her "private parts," and the therapist made a CPS report on that day. CT 465-68. D. also
7 told the therapist that her mother told her to say that it didn't happen. D. also said that petitioner had
8 touched her vaginal area with his penis and put his penis in K.'s mouth when they were under a fig
9 tree in the backyard.

10 In September 2004, L. told Sandoval that she was going to have to lie to the police because
11 her mother was pressuring her to lie. L. also said that her mother was afraid that petitioner would go
12 to jail and be hurt and that the children would be taken away. L.'s mother also said that she would
13 kill herself and petitioner if the molestation allegations were true. In October, L. asked Sandoval to
14 tell people that Sandoval was lying.

15 During the trial, each of the sisters denied that petitioner ever touched them inappropriately.
16 D. and K. denied that petitioner ever touched their breasts or vaginas or pulled down their pants, and
17 if he had, it was by accident. L. testified that petitioner had never touched her breasts or vagina and
18 that she never had seen him touch D. or K. D. said that she had changed her story to help petitioner.
19 K. said that she lied to the police because she was "mad" at petitioner for throwing away some of her
20 toys and was sad that he had moved away. Petitioner testified that he made false admissions to the
21 police because he thought this would bring the girls back home.

22 Petitioner's older sister, N., testified at trial that there had been times where petitioner and
23 she were "play fighting" and he had touched her crotch area accidentally. N. also stated that she had
24 made a false accusation against her father for molesting her because she felt that he was not
25 responsible and told L. that the accusation was false. N. testified that L. was mad at petitioner
26 because he got special treatment from their mother and wanted him to move out of the house.

Petitioner's mother also testified at trial that she did not tell any of her children to lie and that she did not install hidden cameras in the house.

II. Procedural History

Petitioner was represented by retained counsel in a jury trial in February 2005, which resulted in a mistrial on all counts. The charges were then amended to contain eight counts of lewd conduct, two counts of forcible lewd conduct and two counts of continuous sexual abuse. Defendant was retried in May 2005, in Santa Clara County Superior Court (Case No. CC460324).

The jury found petitioner guilty on two counts of continuous sexual abuse of a child (Cal. Pen. Code, § 288.5) and two counts of forcible lewd conduct on a child (Cal. Pen. Code, § 288(b)(1)) for acts against his three younger sisters. CT 1022-49. Petitioner is currently in custody at the Kern Valley State Prison in Delano, California. Petitioner was sentenced to an aggregate term of thirty years in state prison. *Id.* at 1086-88.

Petitioner filed a timely notice of appeal as well as a habeas petition. All of his claims on appeal and in his habeas petition related to whether his trial attorney provided effective assistance of counsel. The California Court of Appeal, in the published portion of its opinion, reversed one of the continuous sexual abuse counts, holding that petitioner's right to effective assistance of counsel had in fact been violated by his attorney's failure to object to the admission of prejudicial hearsay testimony. The court remanded the case for potential retrial on that count. *People v. Valencia*, 146 Cal. App. 4th 92, 105 (2006). In the unpublished portion of the opinion, the court rejected the remainder of petitioner's ineffective assistance of counsel claims. ; Resp't Exh. 6 (Ct. App. Op.) at 11-25. Petitioner filed a petition for review and a petition for writ of habeas corpus in the California Supreme Court, which were both denied on April 18, 2007. Resp't Exhs. 7-10. On February 27, 2008, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254, asserting the ineffectiveness claims that the Court of Appeal had previously rejected.

JURISDICTION AND VENUE

This court has subject matter jurisdiction over this habeas action for relief under 28 U.S.C. section 2254. 28 U.S.C. § 1331. A petition for a writ of habeas corpus made by a person in custody under the judgment and sentence of a state court of a state which contains two or more federal judicial districts may be filed in either the district of confinement or the district of conviction. See 28 U.S.C. § 2241(d). Each of such districts shall have concurrent jurisdiction to entertain the petition. See id. Federal courts in California traditionally have chosen to hear petitions challenging a conviction or sentence in the district of conviction. See Dannenberg v. Ingle, 831 F. Supp. 767, 768 (N.D. Cal. 1993); Laue v. Nelson, 279 F. Supp. 265, 266 (N.D. Cal. 1968). Since petitioner was convicted in the Superior Court for the County of Santa Clara, which is in this judicial district, the petition is properly venued in this court.

EXHAUSTION

Prisoners in state custody who wish to challenge collaterally, in federal habeas proceedings, either the fact or length of their confinement are required first to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. *See* 28 U.S.C. § 2254(b), (c). The parties do not contest that all the claims at issue in petitioner's habeas petition have been exhausted.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs the analysis of habeas corpus claims raised by an individual previously convicted in state court. 28 U.S.C. § 2254. Under AEDPA, the court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Under section 2254(d)(1), the petition may not be granted with respect to any claim that was adjudicated on

1 the merits in state court unless the state court decision (1) “was contrary to . . . clearly established
2 Federal law, as determined by the Supreme Court of the United States,” or (2) “involved an
3 unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court
4 of the United States.” *See Williams v. Taylor*, 529 U.S. 362, 412 (2000) (interpreting 28 U.S.C. §
5 2254(d)(1)).

6 A state court decision is “contrary” to clearly established Supreme Court precedent if it
7 “applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or
8 “confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court]
9 and nevertheless arrives at a result different from our precedent.” *Id.* at 405-06. “Under the
10 ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court
11 identifies the correct governing legal principle from [the Supreme Court’s] decisions but
12 unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S.
13 63, 75 (2003) (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause requires
14 the state court decision to be an objectively unreasonable application of established federal law,
15 rather than simply incorrect or erroneous. *Id.* The only source of clearly established federal law
16 under 28 U.S.C. section 2254(d) is the holdings of the United States Supreme Court as of the time of
17 the state court decision. *See Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003) (citing *Williams*,
18 529 U.S. at 412).

19 In deciding whether a state court’s decision is contrary to, or an unreasonable application of,
20 clearly established federal law, a federal court looks to the “last reasoned decision” of the highest
21 state court that addressed the merits of the petitioner’s claim. *See Ylst v. Nunnemaker*, 501 U.S. 797,
22 803-04 (1991); *Barker v. Fleming*, 423 F.3d 1085, 1091-92 (9th Cir. 2005). Here, the last reasoned
23 decision was the decision of the California Court of Appeal.

24 25 DISCUSSION

26 As is discussed below, petitioner asserts that he was deprived of his Sixth and Fourteenth
27 Amendment rights to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668,
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686 (1984). To prevail on an ineffective assistance of counsel claim, a petitioner must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) that counsel's deficient performance resulted in prejudice, i.e. there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 687-88, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* 694. The relevant inquiry under *Strickland* does not focus on what the defense counsel could have done, but whether his choices were reasonable. *Strickland*, 466 U.S. at 688. Consequently, "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." *Id.* at 689. Failure to satisfy either the performance or prejudice prong defeats an ineffectiveness claim. *Strickland*, 466 U.S. at 700.

Petitioner's moving papers betray a fundamental misunderstanding of the standard of review that cabins this court's review of state court criminal proceedings. Rather than arguing that the Court of Appeal's determination that petitioner received effective assistance of counsel is contrary to, or an unreasonable application of, clearly established federal law, petitioner briefed this case as if this court could conduct a de novo review of petitioner's trial proceedings *and* as if Ninth Circuit decisions can set forth clearly established federal law. As is discussed above, under AEDPA, the court's review is limited and constrained.

Viewing petitioner's arguments through the proper lens, all of petitioner's ineffective assistance of counsel claims are predicated on a similar, albeit somewhat unwieldy, legal theory: that the Court of Appeal unreasonably held that, even though petitioner's attorney failed to move for the exclusion of certain evidence at trial, petitioner's constitutional right to effective assistance of counsel was not violated. Firstly, petitioner asserts that the Court of Appeal unreasonably concluded that—even though petitioner's counsel failed to move to suppress petitioner's confession to the police—petitioner's attorney did not perform deficiently. Petitioner insists that his confession was coerced and therefore inadmissible. Because the confession was involuntary, petitioner contends that his attorney performed below an objectively reasonable standard in failing to move to exclude

1 the confession. Secondly, petitioner argues that the Court of Appeal unreasonably held
2 that—assuming petitioner’s attorney unreasonably failed to move to exclude evidence, testimony
3 and argument tending to establish that K. saw L. leave petitioner’s room with a “red stain” on her
4 clothes—petitioner suffered no prejudice from the evidence’s admission. Finally, petitioner
5 contends that the Court of Appeal unreasonably held that—assuming petitioner’s attorney acted
6 unreasonably when he failed to move to exclude the tape recording of the interview in which L.
7 stated that petitioner did drugs and had fought with the police—petitioner suffered no prejudice from
8 the evidence’s admission. The court addresses each argument in turn.²

9 I. Counsel’s Failure to Move to Exclude Petitioner’s Confession

10 Petitioner contends that the Court of Appeal unreasonably concluded that his attorney did not
11 perform deficiently in failing to seek suppression of petitioner’s confession. In a line of decisions
12 beginning with *Brown v. State of Mississippi*, 297 U.S. 278 (1936), the Supreme Court has held that
13 a defendant’s Fourteenth Amendment rights are violated when an involuntary confession is obtained
14 and introduced into evidence in a criminal prosecution, resulting in a conviction. A confession is
15 involuntary when the defendant’s “will was overborne.” *Schneckloth v. Bustamonte*, 412 U.S. 218,
16 225-26 (1973). More specifically, the test for voluntariness is whether the confession was
17 “‘extracted by any sort of threats or violence, (or) obtained by any direct or implied promises,
18 however slight, (or) by the exertion of any improper influence.’” *Hutto v. Ross*, 429 U.S. 28, 30
19 (1976) (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)). In applying this test, the court
20 must assess “the totality of all the surrounding circumstances—both the characteristics of the
21 accused and the details of the interrogation.” *Schneckloth*, 412 U.S. at 226.

22 Petitioner asserts that the police coerced him into confessing in three separate ways: (1) by
23 promising to reunify his family if petitioner confessed; (2) by promising that his sisters would not
24 have to testify in court if petitioner confessed; and (3) by promising “help” to petitioner if he
25 confessed. The Court of Appeal found that the totality of the circumstances did not support
26 petitioner’s claim that his confession was coerced. The court therefore held that his trial counsel
27 was not deficient in failing to seek the exclusion of those statements.
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In this court, petitioner has not argued, nor could he, that the Court of Appeal decision was “contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States.” *Williams*, 529 U.S. at 405-06. The Court of Appeal accurately set forth the legal framework for analyzing a claim of ineffective assistance of counsel³ and discussed at great length the standard for determining when a confession is coerced⁴. Furthermore, petitioner has not identified and the court has not discovered any Supreme Court cases with a “set of facts that are materially indistinguishable” from the case at bar. As a result, petitioner is limited to arguing that the Court of Appeal unreasonably applied clearly established federal law relating to coerced confessions.

A. The Court of Appeal Opinion

The Court of Appeal focused first on petitioner’s claim that the detectives’ statements about the reunification of his family were coercive. During the interview, Detectives Dillon and Tovar repeatedly told petitioner that telling the truth would help bring his family back together. Among other similar statements, Tovar stated, “I wanna know the truth about what happened. The truth is the only thing that’s gonna fix all this, and keep your family together as a unit. That’s the only thing that’s gonna keep your family together” CT 780.⁵ The Court of Appeal held that statements related to the reunification of petitioner’s family addressed only what could be expected to naturally follow from the circumstances, and therefore were not equivalent to the promises of leniency or threats required for a finding of coercion. The court explained:

Nothing that Dillon or Tovar said about the potential for reunification of defendant’s family went beyond what could be expected to naturally follow from the circumstances. With defendant’s younger sisters alleging that they had been sexually molested by him, his sisters obviously could not be permitted to return to the household they shared with defendant until the truth of their allegations was resolved. Early on, they told defendant that his sisters would not be returning to the family home until the “truth” was known. There was no impropriety in this statement because it merely noted the natural consequences of the allegations.

By the time the subject of reunification of defendant’s family came up again, defendant had already admitted touching L. Dillon and Tovar did not improperly coerce a statement by urging defendant to tell the truth in order to facilitate the reunification of his family, since this was something that would naturally spring from truthful disclosures.

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2 Dillon and Tovar never suggested, and defendant could not have reasonably believed,
3 that *he* would be permitted to rejoin his family if only he admitted molesting his
4 sisters. Since the allegations by his sisters were the basis for the separation of his
5 family, Dillon and Tovar were not precluded from truthfully representing that family
6 reunification depended on the resolution of these allegations. Nor were such
7 representations likely to produce an unreliable and involuntary statement.

8 Ct. App. Op. at 19-20.

9 The Court of Appeal also considered and rejected petitioner's claim that the officers'
10 suggestions that petitioner would prefer to "tell [them] what happened . . . rather [than] go to court
11 and . . . listen to your sisters tell the judge," and other similar statements⁶ were coercive. CT 785;
12 Ct. App. Op. at 19-20. Specifically, the court held that Dillon and Tovar were neither offering
13 petitioner leniency (or any other benefit) nor threatening him by suggesting that he could avoid
14 having his sisters testify in court if he confessed:

15 When Dillon and Tovar suggested that defendant would prefer to "tell us here what
16 happened . . . rather [than] go to court and . . . listen to your sisters tell the judge" in
17 front of other people, defendant acknowledged that he did not wish to go to court
18 and would "feel bad" if that occurred, but he maintained that he was telling the
19 truth and had not touched D. or K. Again, Dillon and Tovar did not offer defendant
20 leniency or threaten him by suggesting that he could avoid having his sisters testify
21 in court by confessing. Defendant could have admitted that allegations and pleaded
22 guilty, and his sisters would then have avoided testifying in court about his
23 molestations of them.

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25 The statements by Dillon and Tovar regarding going to court did not suggest that
26 defendant was being offered *leniency* of any kind in return for his statements. The
27 necessity of his sisters being required to testify in court could have been avoided
28 had he admitted their allegations *and pleaded guilty* to charges based on those
allegations. While defendant did end up having to go to court because he continued
to deny touching D. and disavowed his admissions, the statements by Dillon and
Tovar were not thereby rendered false.

Ct. App. Op. at 20 (emphasis in original).

Finally, the Court of Appeal found that the detectives' statements about wanting to "help"
petitioner were not coercive. *Id.* at 19-20. Among other statements⁷, Detectives Dillon and Tovar
told petitioner: "We're trying to help you; we're not trying to, to get you in trouble" CT 799.
The court determined that

1 [w]hen Dillon and Tovar told defendant that they wanted to “help” him rather than
2 “get him in trouble” . . . they made no promises or threats but simply utilized a
3 permissible ruse in order to make defendant feel more comfortable admitting his
4 guilt. . . . [T]he expression of frustration that Dillon and Tovar conveyed to defendant
5 when he maintained his denial was neither a promise or a threat. Their statement that
6 they would “just write up what they said and take it over to the D.A. and let them, let
7 them deal with it in court” and that they “can’t help you any more” was another
8 statement of fact. If defendant continued to deny the allegations, the matter would
9 proceed through the judicial system.

10 Ct. App. Op. at 19-20.

11 B. Analysis of Court of Appeal Decision

12 None of the Court of Appeal’s determinations, taken individually or collectively, were
13 “objectively unreasonable.” *See Williams*, 529 U.S. at 409. It was reasonable for the court to
14 conclude that the detectives’ statements regarding the reunification of petitioner’s family were
15 neither threats nor promises amounting to coercion under the *Hutto* standard, but were simply
16 recitations of the consequences that naturally flow from the sisters’ allegations and petitioner’s
17 decision whether or not to confess. Petitioner’s sisters had been placed in a shelter, and could not be
18 returned to their the home—where petitioner, who was not yet under arrest, still resided—until the
19 detectives had determined the truth or falsity of their statements. Similarly, with respect to the
20 statements addressing whether petitioner’s sisters would have to testify in open court, the Court of
21 Appeal reasonably concluded that the officers were merely explaining, albeit in a manner designed
22 to appeal to petitioner’s care for his family, that the need for his sisters to testify could be one of the
23 natural consequences of petitioner insisting that he had never engaged in inappropriate conduct.
24 Finally, with respect to the detectives’ statements about “helping” petitioner, the Court of Appeal
25 reasonably determined that the officers never, in fact, promised petitioner anything. Rather, the
26 “help” that they offered to petitioner was a chance to confess and clear his conscience, rather than
27 listen to his sisters’ testimony before a court of law as would be required if he continued to deny the
28 allegations. *See* CT 799, 803, 808. Because a confession would be tantamount to pleading guilty,
the detectives were not alluding to an option which was not already within petitioner’s range of
choices.

1 The Court of Appeal's findings are reinforced by the "totality of all the surrounding
2 circumstances." *See Schneckloth*, 412 U.S. at 226. Nothing about the circumstances of petitioner's
3 discussion with the police was coercive. Petitioner came to the police station on his own accord; he
4 was not under arrest and the detectives frequently reiterated that he was free to leave at any time.
5 *See* CT 654, 656, 657. On occasions too numerous to count, the detectives simply told petitioner to
6 tell them the "truth"; never did the officers exhort petitioner to "confess." *See* CT 809 (Tovar:
7 "[W]e're not going to make you say things that aren't true . . ."); *id.* 812 (Tovar: "Nobody's gonna
8 twist your arm and make you say anything, but I'm telling, I'm telling you from my experience,
9 gettin' it off your chest, you're gonna feel a lot better, okay? Talk, tellin' us what happened is gonna
10 make you feel a lot better, alright? But it's gotta be the truth, alright? I don't wanna hear, 'Okay, I
11 did it,' just to make us happy, to make us go away."). Moreover, although youth and ignorance are
12 factors to be considered in determining whether a statement was coerced, *see Schneckloth*, 412 U.S.
13 at 226, petitioner was a mentally competent adult, and the court finds no indication in the record that
14 he did not understand the conversation he was having with the police or the options presently before
15 him. Consequently, the appellate court's determination that the detectives' statements regarding the
16 return of petitioner's sisters did not amount to coercion was a reasonable application of established
17 Supreme Court law regarding coercion.

18 Petitioner's arguments to the contrary, to the extent that he makes them, are not persuasive.
19 The only relevant Supreme Court opinion to which petitioner cites, *Brady v. United States*, 397 U.S.
20 742, 754 (1970), supports the reasonableness of the Court of Appeal's decision. In *Brady*, the Court
21 found that even "a mild promise of leniency" rendered a statement involuntary when the defendant
22 was "in custody, alone and unrepresented by counsel." *Id.* The court went on to hold that because
23 Brady did not find himself in such circumstances, his confession was voluntary. *Id.* Here,
24 petitioner, like Brady, was not "in custody." In fact, as noted above, petitioner had full freedom to
25 leave the interview at any time. *See* CT 654, 656, 657. In such circumstances, petitioner was much
26 less "sensitive to inducement," as compared with an individual who is held under arrest without
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1 counsel. *See id.* It therefore cannot be said that the appellate court's decision was an objectively
2 unreasonable application of *Brady*.

3 The remainder of the cases cited by petitioner are circuit court or state court opinions, which
4 only serve as persuasive authority when adjudicating a habeas petition under AEDPA. *See Clark*,
5 331 F.3d at 1069 ("While circuit law may be 'persuasive authority' for purposes of determining
6 whether a state court decision is an unreasonable application of Supreme Court law, only the
7 Supreme Court's holdings are binding on the state courts and only those holdings need be
8 reasonably applied."). (citations omitted). Even if the court were bound by the circuit opinions cited
9 by petitioner, none of the cases would compel a different result. In the most persuasive case, *United*
10 *States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981), the court held that police officers' statements to a
11 defendant, not in custody, that she would not see her child for a long time if she failed to cooperate
12 were coercive when read together with both their threats of a lengthy prison term and promises of
13 leniency (conveying her cooperation to the prosecutor). In the instant case, the detectives made no
14 concurrent threats regarding prison sentences nor did they extend any promises of leniency; in
15 addition, the statements regarding petitioner's family were directly relevant to the investigation at
16 issue, whereas Tingle's child was irrelevant to her potential culpability in a bank robbery. Petitioner
17 also cites to *Moore v. Czreniak*, 534 F.3d 1128 (9th Cir. 2008), where the Ninth Circuit found that
18 the police officers' statements to the defendant that they would "go to bat" for him and that the
19 prosecutor would not "jam" him if he confessed were coercive. There, however, the statements at
20 issue were made when the defendant was under arrest and had been repeatedly denied counsel,
21 whereas in the instant case, petitioner was free to leave the interrogation at any time. Moreover, in
22 *Moore* the officers made explicit promises of leniency, whereas the detectives speaking with
23 petitioner simply offered him an opportunity to confess and potentially resolve the matter outside of
24 a courtroom.

25 The Court of Appeal's determination that the detectives' various statements were not
26 coercive was neither contrary to, nor an unreasonable application of, clearly establish federal law as
27 announced by the Supreme Court. Therefore, by failing to move to suppress petitioner's confession,
28

petitioner's attorney could not possibly have performed deficiently. Because petitioner has not met his burden under *Strickland* of demonstrating that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms, petitioner's claims to habeas relief predicated upon his attorney's failure to move to exclude petitioner's confession are DENIED.

II. Counsel's Failure to Object to Evidence About Red Stains on L.'s Clothing, or to Request California Jury Instructions Nos. 2.50.1 and 2.50.2

Petitioner also contends that the Court of Appeal's determination—that counsel was not ineffective for failing to object to the admission of evidence that K. saw L. leave petitioner's room with a "red stain" on her clothes, or alternatively, for failing to request California Jury Instructions ("CALJIC") Nos. 2.50.1 and 2.50.2 at the trial—was an unreasonable application of clearly established federal law.

At trial, the prosecutor played a recording of K.'s pre-trial statements that she saw L. leave petitioner's room after sleeping there with stained clothing. In the recording, K. states that L.'s "shirt . . . it was uh, all red. And she had a red pants, I think ummm, she had, I don't know, but it was all ho—, red over here, her shirt that she had right now. It was all red like —" CT 490. When asked on the recording, "Red who, red from what," K. said "I don't know, I think it was for the pants that she put something, and then she was like sleeping in her pants, I think." *Id.* At trial, the prosecutor also asked K. to recount her testimony in court:

Q: Now, did you also tell that officer that one time you saw L. coming out of Jesus's room in the morning?

A: Yeah.

Q: And you saw a red stain on part of her shirt?

A: Yeah.

Q: Was that true?

A: No.

Resp't Exh. 2 (Reporter's Transcript ("RT")) 96-97.

In his closing argument, the prosecutor then made the following statements to the jury:

There's no suggestion from [L.] or from [K.] that [K.] is well versed in the ways of what might have happen to a girl when she's sexually penetrated for the first time

1 or for that matter, she has intercourse when she's on her period. [K.] is 9 years old.
2 We don't have proof that there was intercourse on that day, that's why we haven't
3 charged it, but I submit to you, ladies and gentlemen, there's enough evidence out
there to lead you to believe that a whole lot more is going on here, a whole lot
more.

4 *Id.* at 1022. The prosecutor also stated, "[K.] mentioned seeing blood on the shirt and the shorts.
5 That's not something the kid is going to make up, a nine-year-old, because she doesn't see it as
6 anything significant." *Id.* at 1071.

7 For the purpose of analyzing petitioner's claims, the Court of Appeal assumed that
8 petitioner's counsel performed deficiently, and held that, under *Strickland*, petitioner was not
9 prejudiced by the admission of the "red stain" evidence or the prosecutor's statements in his closing
10 argument. To begin with, the appellate court found that the admitted statements were too vague to
11 carry significant weight in the jury's deliberation:

12 K.'s statements were very difficult to parse. The only clear thing K. said was that
13 she had seen a red stain on L's shirt after L. spent the entire night in defendant's
14 bedroom. K. did not say that L's pants were stained but only that L. "had a red
15 pants" It is entirely unclear what this meant. Nor is it possible to make any
16 sense out of K.'s response to the "red from what" question. K. said "I think it was
for the pants that she put something, and then she was like sleeping in her pants, I
think." Since K.'s statement in this regard was brief and substantially
unintelligible, it would have had little potential for prejudice had the prosecutor not
highlighted it in his argument to the jury.

17 Ct. App. Op. at 23.

18 The court then concluded that while it had "little doubt that the prosecutor's argument was
19 intended to be inflammatory. Yet . . . it is improbable that rational jurors would have allowed their
20 decisions on the charged offenses, which do not include any allegations of intercourse, to be
21 influenced by this unsupported argument." *Id.* Specifically, the court found that the potential for
22 prejudice flowing from the admission of this evidence or the prosecutor's related statements was
23 significantly diminished by the plethora of other more inflammatory evidence. *Id.* at 23-24. The
24 court noted:

25 D. told her therapist that defendant had pulled down her pants and touched his
26 penis to her private parts and that she had seen defendant put his penis in K.'s
27 mouth. D's accusation of attempted intercourse and oral copulation had far more
28 potential to prejudice defendant than K's ambiguous testimony. The red stain
evidence and the prosecutor's argument based on it pales in comparison to D's
accusations. In addition, we must take into account that defendant admitted at least

1 one unequivocal act of lewd conduct. This admission rebutted his claim that he
2 lacked any sexual intent.

3 *Id.* at 24. The court therefore held that it was “confident that the jurors would not have reached
4 different verdicts if only defendant’s trial counsel had secured the exclusion of the red stain evidence
5 that provided the seed for the prosecutor’s argument.” *Id.* As a result, the Court of Appeal
6 concluded that petitioner had failed to demonstrate prejudice as required by *Strickland*. *Id.*

7 The Court of Appeal’s decision was neither contrary to nor an unreasonable application of
8 established federal law. The Court of Appeal applied the proper standard—*Strickland*’s prejudice
9 test—and reasonably concluded that the jury likely would have reached the same conclusion
10 regarding petitioner’s guilt had his attorney successfully moved for the exclusion of the “red stain”
11 evidence and the related portions of the prosecutor’s closing statement. This is not to say that a
12 court, viewing the trial proceedings in the first instance, may not have reached a different
13 conclusion. There can be no doubt, that the “red stain” evidence was prejudicial in that it both
14 functioned as circumstantial evidence that petitioner molested his sister and painted the petitioner in
15 a less favorable light; and it would be absurd to assert that the prosecutor’s suggestion that petitioner
16 took his younger sister’s virginity was not an inflammatory, irrelevant and unsubstantiated
17 statement. The Court of Appeal admitted as much. The *Strickland* prejudice analysis is not,
18 however, concerned with whether a given statement or piece of evidence, standing alone, increased
19 the likelihood of conviction; all evidence that is probative of a defendant’s guilt is “prejudicial.”
20 Rather, *Strickland* requires that a court answer the following question: if the evidence had been
21 excluded, is there a reasonable probability that the jury would have reached a different conclusion?
22 AEDPA further circumscribes this court’s role in the collateral review process, limiting this court’s
23 review to determining whether the Court of Appeal conducted the *Strickland* analysis in a reasonable
24 manner. Given the voluminous evidence of guilt in petitioner’s case, the Court of Appeal
25 reasonably concluded that had the “red stain” evidence and the prosecutor’s related, misguided
26 statements been excluded, the jury still would have found petitioner guilty of the same counts.

27 None of petitioner’s arguments persuade the court otherwise. Petitioner contends that the
28 appellate court’s decision was unreasonable because it only considered the vague statements K.

1 made during her pre-trial interview with police and not her testimony at trial in which she admitted
2 to telling the police that L.'s pants were red. Petitioner argues that K's testimony at trial was far
3 more prejudicial than the vague pre-trial statements that the appellate court considered. Petitioner is
4 mistaken. Had the Court of Appeal considered whether K.'s testimony at trial was prejudicial, and it
5 should have, that inquiry would not have altered the result reached by the court. Contrary to
6 petitioner's assertions, K.'s testimony, in which she explicitly admitted to lying to the police about
7 the red stain, was far *less* prejudicial than her pre-trial statements. RT 96-97. Any prejudice flowing
8 from K.'s statement that she told the officers she saw red stains on L.'s clothing was tempered by
9 her admission that she lied to the police. Therefore, the court does not find the appellate court's
10 decision to be unreasonable in light of this additional evidence.

11 Petitioner also argues that the red stain evidence must be given more weight because this was
12 a close case. He cites as evidence for this proposition the fact that all of his sisters recanted their
13 stories at trial and that his first trial resulted in a hung jury. As documented by the Court of Appeal,
14 the evidence of guilt in this case was overwhelming. In addition, testimony was presented by
15 multiple witnesses that the sisters would lie at trial in order to obey their mother or keep their
16 brother from jail, minimizing the import of their recantations. *Id.* at 6-7. Finally, the charges against
17 petitioner on which the prior jury hung differed from the charges in petitioner's second trial; as a
18 result, the hung verdict in the first trial is not necessarily probative of the closeness in the second
19 trial. *Id.* at 7-8.

20 Petitioner lastly argues that the defense counsel rendered deficient performance by failing to
21 request California Jury Instruction ("CALJIC") Nos. 2.50.1 and 2.50.2, which require that a jury
22 may only consider evidence of uncharged crimes or sexual offenses if it finds by a preponderance of
23 the evidence that the defendant committed such offenses.⁸ Although petitioner raised this claim
24 before the Court of Appeal, the appellate court's decision does not directly address its merits.
25 Nonetheless, the Court of Appeal's analysis regarding the admission of the "red stain" evidence
26 subsumes the jury instruction issue. The Court of Appeal's reasonable conclusion that there was a
27 reasonable probability that the result of the proceedings would have been the same had petitioner
28

1 successfully moved to exclude the “red stain” holds equally true if the jury had disregarded the
2 evidence pursuant to the CALJIC Nos. 2.50.1 and 2.50.2.

3 Accordingly, because petitioner has failed to establish that the Court of Appeal unreasonably
4 determined that, under *Strickland*, petitioner was not prejudiced by the admission of the “red stain
5 evidence,” petitioner’s habeas claims based upon his attorney’s failure to object to the evidence is
6 DENIED.

7 III. Counsel’s Failure to Object to L.’s Statement that Petitioner Did Drugs and Fought with
8 Police

9 Petitioner also asserts that the Court of Appeal unreasonably determined that his counsel’s
10 failure to object to the admission of L.’s recorded statements that petitioner did drugs and had fought
11 with the police was not prejudicial. The Court of Appeal found that even if defense counsel could
12 have achieved the exclusion of this evidence, these “extremely fleeting bits of evidence had little
13 potential for prejudice.” Ct. App. Op. at 24-25. As such, it concluded that “[e]ven if defendant’s
14 trial counsel could have obtained exclusion of this evidence by objecting to it, it had no real
15 potential to influence the jury’s verdicts, so any deficiency was non-prejudicial.”

16 Petitioner has failed to show that the Court of Appeal’s decision was contrary to, or an
17 unreasonable application of, federal law.⁹ Simply put, given the other, properly admitted evidence
18 that spoke directly to the charges at issue, there was little or no probability that the character
19 evidence to which petitioner objects played any role in the jury’s deliberations. Accordingly, the
20 state appellate court reasonably concluded, under *Strickland*, that assuming it was error for
21 petitioner’s counsel to fail to object to the character evidence, the outcome of the proceeding would
22 have been exactly the same. Therefore, petitioner’s habeas claims predicated on his attorney’s
23 failure to object to the admission of the character evidence is DENIED.

24 IV. Cumulative Prejudice

25 Lastly, petitioner contends that cumulative prejudice flowed from the several errors
26 committed by defense counsel. Specifically, petitioner argues here and argued before the Court of
27 Appeal that, even if none of the above-asserted claims, standing alone, warranted reversal of
28 petitioner’s conviction, if all of the evidence about which he complained had been excluded then the

1 results of the proceeding would have been different. This cumulative error argument is predicated
2 on the assumption that the Court of Appeal unreasonably concluded that petitioner's attorney did not
3 err in failing to seek the exclusion of petitioner's confession. Trav. at 26 ("Had the case been
4 properly litigated, the jury would not have heard three critical and highly negative pieces of
5 evidence . . . ,” including petitioner's confession.). However, this court has already found the Court
6 of Appeal's holding that petitioner's counsel was not deficient in failing to move to suppress the
7 confession to be reasonable. Accordingly, the only cumulative prejudice argument available to
8 petitioner is that, taken together, the “red stain” evidence and the testimony regarding petitioner's
9 drug use and run-ins with the police resulted in prejudice that would not have flowed from those
10 individual pieces of evidence. The Court of Appeals confidently concluded that the exclusion of
11 each of those pieces of evidence could not possibly have altered the result of the trial; this court has
12 no hesitation holding that the Court of Appeal would have arrived at the same decision had it
13 considered the evidence cumulatively. Accordingly, petitioner's claim for relief due to cumulative
14 prejudice from his attorney's failure to object to evidence is DENIED

15
16 CONCLUSION

17 For the reasons discussed above, petitioner Jesus Valencia's petition for writ of habeas
18 corpus is DENIED.

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20 IT IS SO ORDERED.

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22 Dated: August 24, 2010

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MARILYN HALL PATEL
United States District Court Judge
Northern District of California

ENDNOTES

1. All facts are taken from the state court Reporter's Transcript (RT), unless otherwise stated. *See* Resp't Exh. 2.

2. Pursuant to Habeas Local Rule 2254-8(a), petitioner requests oral argument to address these issues. An oral argument is unnecessary when the factual record suffices. *See* Habeas L.R. 2254-8(b) (oral argument granted at court's discretion). Here, the facts presented in papers submitted by the parties and the record are sufficiently detailed to determine whether petitioner was deprived of the effective assistance of counsel and whether cumulative prejudice flowed from counsel's conduct at trial. Petitioner has not shown that there are uniquely complex legal or factual issues that are not sufficiently described in the papers or record which would require an oral argument. Accordingly, petitioner's request for oral argument is denied.

3. The court set forth the following standard for analyzing a claim of ineffectiveness:

"Defendant has the burden of proving ineffective assistance of counsel. [Citation.] To prevail on a claim of ineffective assistance of counsel, a defendant must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice. [Citation.] A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . . Moreover, prejudice must be affirmatively proved; the record must demonstrate 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. [Citation.]" (*People v. Maury* (2003) 30 cal. 4th 342, 389, internal quotation marks omitted.)

Ct. App. Op. at 10.

4. The Court of Appeal set forth the following standard for determining whether a confession was coerced:

It long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. [Citations.] A statement is involuntary [citation] when, among other circumstances it was extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight . . . [Citations.] Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the "totality of [the] circumstances."

"Promises and threats traditionally have been recognized as corrosive of voluntariness." (*People v. Neal, supra*, 31 cal. 4th 63, 84.) "In general, any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law. [Citations.] In identifying the circumstances under which this rule applies, we have made clear that investigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime. [Citation.] The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable" (*People v. Ray* (1996) 13 Cal. 4th 313, 339-340, internal quotation marks omitted.)

"In determining whether a defendant's will was overborne in a particular case, the Court

has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.” (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226, citations omitted.)

“A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citations.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it ‘does not itself compel a finding that a resulting confession is involuntary.’ [Citation.] The statement and the inducement must be causally linked.” (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

“The line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police. Thus, ‘advice or exhortation by a police officer to an accused to “tell the truth” or that “it would be better to tell the truth” unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary.’ . . . [¶] When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear.” (*People v. Hill* (1967) 66 Cal.2d 536, 549.)

Ct. App. Op. at 11-13.

5. Dillon and Tovar also made the following statements related to family reunification:

Dillon: “I can’t send them back in the house unless I know the truth.” CT 688.

Dillon: “Do you like seeing your family apart . . . ?” *Id.* at 775.

Dillon: “They’re [your sisters] are telling the truth. And if you want your family back together, you’re the key to the whole thing, okay? It’s on you.” *Id.* at 776.

Tovar: “Let’s see if somebody can settle the curiosity and, and so it doesn’t happen within your family, and we can get your family back, you, and you can, you can, you can end up working your family to where everybody’s, everything’s good again - it’s a possibility.” *Id.* at 776.

Tovar: “All we wanna do is get your family back together, but you gotta tell us. But then we, if you don’t say anything, we’re not gonna make you say things that aren’t true, but then we can’t help you anymore.” *Id.* at 809.

6. Dillon and Tovar also made the following statements regarding the possibility of petitioner's sisters having to testify at trial.

Dillon: "It's better, we're trying to get you to tell us here, rather than going to court, and then your sisters tell you, say this in front of strangers, the judge, other people there in court." CT 785.

Dillon: "I know you don't wanna see your sisters get up there and say things like that, or people look at the recording of what they said that you did. That's why it's important, that's why we have you here to talk to you about it, so you can't tell us here, so that your poor sisters don't have to go through that, and you don't have to go through it either, be embarrassed about it." *Id.* at 785-86.

Tovar: "[R]ight now, than have to go to court and have her—how would you feel having her say that in front of other people, the judge and, and, and all that, and you're there." *Id.* at 803-04.

Tovar: "We're trying to make you tell us now, than to go over there in front of the judges and uh, strangers, and, and have your sisters tell them what you did, that you touched their front part one time." *Id.* at 808.

7. Dillon and Tovar also made the following statements regarding "helping" petitioner:

Tovar: "Well you need to start talkin' about this, because you're limiting our options. There's not a whole lot I can do." CT 790

Tovar: "Did you touch her right here when you're, when you're wrestling and you like that with your hand? And be honest with me—here you were already tell us, 'Yeah, I did this, I did that,' and you add to it. We're trying to help you; we're not trying to get you in trouble." *Id.* at 799.

Tovar: "I don't know what else to tell you. Like he said, he's getting a little upset with everything, and we, we can only help you so much." Dillon: He doesn't want help." *Id.* at 807.

Tovar: "It's all we can do. I mean, I can't help you anymore." *Id.* at 811.

8. At the time of trial, CALCIC No. 2.50.1 provided:

Within the meaning of the preceding instruction[s], the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed [a] [crime[s]] [or] [sexual offense[s]] other than [that] [those] for which [he] [she] is on trial.

"You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that [a] [the] defendant committed the other [crimes[s]] [or] [sexual offense[s]].

"If you find other crime[s] were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged [or included crime] in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.

CALCIC No. 2.50.2 provides:

1 “Preponderance of the evidence” means evidence that has more convincing force than
2 that opposed to it. If the evidence is so evenly balanced that you are unable to find that
3 the evidence on either side of an issue preponderates, your finding on that issue must
4 be against the party who had the burden of proving it.

5 9. Petitioner’s citation to Tenth Circuit law is inapposite. As has been reiterated throughout this order,
6 the court need only consider whether the state court reasonably applied federal law as established by
7 the Supreme Court. Moreover, the case petitioner cites to, *Fisher v. Gibson*, 282 F.3d 1283 (10th Cir.
8 2002), is materially distinguishable from the case at bar. In *Fisher*, it was the *defense counsel* himself
9 who admitted the evidence regarding defendant’s drug use. 282 F.3d at 1300. In its reasoning, the court
10 noted that defense counsel repeatedly elicited damaging testimony and evidence from his client, thus
11 seriously calling into question his loyalty to his client: “We can discern nor conceive of a trial strategy
12 that would justify this treatment of one’s own client, which so clearly cast doubt upon the client’s
13 defense and his credibility and integrity before the jury.” *Id.* at 1302. The court found that “the nature
14 of the case made the counsel’s errors prejudicial”: “the trial was in essence a swearing match between
15 Mr. Fisher and Mr. Johnson, either of whom could have committed the murder” and consequently
16 defense counsel’s repeated attempts to destroy the credibility of his own client, while bolstering that of
17 Mr. Johnson, the primary witness against him, undermined a critical component of the defense. *Id.* at
18 1308. Such egregious conduct by the defense counsel distinguishes *Fisher* from case at bar.