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05 UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

06 ERIN DECESARE,)
07 Petitioner,) CASE NO. 2:07-cv-01016-RSM-JLW
08 v.)
09 TINA HORNBEAK, Warden, *et al.*,) REPORT AND RECOMMENDATION
10 Respondents.)
11

12 I. INTRODUCTION

13 Petitioner is currently incarcerated at the Valley State Prison for Women, in
14 Chowchilla, California. With the assistance of counsel, she seeks relief under 28 U.S.C.
15 § 2254 from her 2005 jury conviction in the Placer County Superior Court for one count of
16 theft from an elder by a non-caretaker, one count of grand theft of personal property, and two
17 counts of disobeying a court order. (*See* Docket 1 at 2.) These charges all relate to
18 petitioner's theft of money from a 95-year-old-man with dementia who petitioner had recently
19 married. Petitioner is currently serving a determinate sentence of three years in prison.[1] (*See*
20 Dkt. 2 at 2.) Respondent has filed an answer to the petition, along with relevant portions of
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[1] The Court notes that, as the instant habeas petition was filed on May 29, 2007, petitioner's three-year sentence may have already expired. As of the date of this Report and Recommendation, however, this Court has not received any information from either party indicating that petitioner has been released from confinement. Furthermore, given the substantial period of time this case has been pending in this Court, through no fault of the parties, the undersigned has chosen to proceed to the merits.

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the state court record, and petitioner has filed a traverse in reply to the answer. (*See* Dkts. 15 and 16.) The briefing is now complete and this matter is ripe for review. The Court, having thoroughly reviewed the record and briefing of the parties, recommends that the Court deny the petition and dismiss this action with prejudice.

II. FACTUAL AND PROCEDURAL HISTORY

On direct review, the California Court of Appeal summarized the relevant facts adduced during petitioner's trial as follows:

A. *Current Offenses*

> In 2002, at age 93, Edward Jackson divorced his wife after 38 years of marriage. He was diagnosed with dementia and his only son, David, began caring for him.[2] David had been given power of attorney by Edward over his affairs and handled all of Edward's bills. He never saw his father go to an automated teller machine (ATM) or withdraw money from the bank. David was also trustee of Edward's assets, which included a home in Arden Park, an almond ranch, and stocks. Edward also had checking accounts at the Schools Financial Credit Union and at Wells Fargo, both which were under Edward's and David's names.
>
> David worked full time but would visit Edward every night. David believed Edward's dementia was getting worse: Edward would get lost going around the block on his scooter,[3] believed he invented chrome, thought he was going to win the Nobel Peace Prize, and believed he was going to marry the Queen of England. Edward was lonely and had asked every woman in the neighborhood to move in with him.
>
> In April 2003, David hired 20-year-old Mandy Brazell to clean Edward's house every other week. Brazell and Edward became friends, and she visited him during the day and occasionally took him to dinner at his favorite restaurant.
>
> Around Christmastime 2003, Brazell answered defendant's newspaper advertisement for a car for sale. Brazell

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[2] To avoid confusion and not out of any disrespect, we will refer to members of the Jackson family by their first names.

[3] Edward could not drive a car because his license had been revoked following a medical evaluation.

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saw the car, and she and defendant struck up a conversation. A couple of days later, Brazell called defendant to tell her she was not going to purchase the car, and the two started talking again. They began conversing regularly, and Brazell eventually told defendant about "the guy [who she] was working for." Brazell said she felt sorry for him and mentioned that he owned a house and a ranch. Defendant, who was 47 years old, said she also had taken care of older people.

In mid-January 2004, Brazell set up a meeting between defendant and Edward because Edward wanted to get out of the house and meet other people. Brazell did not tell David about the meeting because Edward did not want her to. Brazell drove Edward to a restaurant to meet defendant and stayed through the meal. Thereafter, Brazell saw Edward and defendant together once at his house.

In February 2004, David's 31-year-old son, Brandon, moved in with Edward at David's request to help Edward with his daily needs. Brandon never saw Edward handle his own money.

In April 2004, David took Edward to Kaiser Hospital to see his primary care physician, Kristen Robinson. David was concerned about Edward's dementia and wanted to talk about a possible conservatorship. Dr. Robinson noticed Edward's delusions had worsened, he seemed depressed, and she thought he might have had a stroke. Concerned that Edward's psychiatric condition was severely impairing his ability to make appropriate decisions, Dr. Robinson wrote a letter supporting conservatorship. In Dr. Robinson's opinion, anyone in regular daily or weekly contact with Edward would have been aware of his "fairly significant mental problems and cognitive defects."

On May 14, 2004, at a conservatorship court hearing, David was surprised to learn that Edward was being represented by an attorney. Two days before the hearing, at Edward's request, Brazell had contacted probate attorney Carlena Tapella whose name Brazell had found in the telephone book. Edward told Tapella he was very unhappy, and David was being secretive about finances and wanted to sell his house and put him in a "home."

The night of the conservatorship hearing, David went to Edward's house and told him he had met Edward's attorney. Edward said he did not know anything about an attorney.

On May 18, 2004, David telephoned Edward throughout the day but received no response. He tried to use the ATM card for their Wells Fargo account, but it did not work. He called

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Wells Fargo and found out that Edward had somehow gotten to Roseville and closed the account there.[4] David filed a missing person's report with the Sacramento Police Department.

Unbeknownst to David or Brandon, defendant and Edward picked up Brazell on May 18 and drove to Reno where Edward and defendant married.

On the morning of May 19, Brazell called Brandon and told him Edward was "all right" and was with a "caregiver" but refused to provide the caregiver's name. David called his attorney, Alan Schostag, who in turn called Tapella. Tapella contacted Brazell and defendant and then called Schostag. Schostag told David about the marriage. David "almost fell off [his] chair." "It was like [his] worst nightmare come true."

At approximately 5:00 p.m. the same day, defendant went to Wells Fargo in Roseville, upset and screaming that the bank was not honoring checks drawn on "her" account. The teller asked to speak with the owner of the account, and defendant said he was in the car. When defendant went to get Edward, the teller called 911 and reported a "disoriented 95-year-old male" and female "trying to get money out of a checking account."

Roseville Police Officer David Flood was dispatched to the bank and spoke with defendant and Edward. Defendant said she had met Edward six months ago, they married yesterday, she was his caregiver, and she was trying to get money out of "their checking account." When Officer Flood questioned Edward, defendant would interrupt and either try to finish his answers or would provide an answer that defendant would agree with or repeat.

When Officer Jason Bosworth arrived at the bank, defendant and Edward were separated. Defendant said she had befriended Edward to help him out because David was after his money. She said they were "planning on getting married eventually." As Officer Bosworth continued to question her, defendant said she and Edward had married six months ago, and then said they "were married just recently."

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[4] According to the records from Wells Fargo, on May 18, 2004, two accounts in the names of Edward and David were closed and on the same day two new accounts in Edward's name only were opened and $681.98 in cash from Edward's and David's accounts was not redeposited in the new accounts.

According to the records from Schools Financial Credit Union, on May 18, 2004, two accounts in the names of Edward and David were closed and on the same day two new accounts in Edward's name only were opened and $830 in cash from Edward's and David's accounts was not redeposited in the new accounts.

All of these transactions took place in Placer County.

When Officer Flood questioned Edward separately, Edward referred to defendant only as "a nice lady [who] takes care of me." When asked how long he had been married, Edward replied six months, but later said it was "two or three months or so." Believing Edward suffered from dementia, Officer Flood took him to the hospital.

At 7:30 p.m., the hospital called David and told him Edward was in the emergency ward. David thought Edward seemed very disoriented, and he did not know where he had been. Edward's wallet had no money and was missing his Social Security card and identification.

David retained attorney Larry Sinclair to have Edward's marriage annulled, after "Legal Services" would not "help [him] out." David also had a restraining order filed against defendant prohibiting her from contacting Edward.

David met defendant for the first time shortly after May 18 when she came to David's property looking for Edward. David got very angry and told her [to] leave. Defendant complied. David saw defendant again at all of the conservatorship proceedings, which she was "fighting."

At the end of May 2004, Edward moved into the Sunrise Retirement Villa. In June, defendant called the retirement home and asked if Edward was there. She called an additional three times to obtain information about Edward's residency at the retirement home and three times to speak with him. Another time, defendant and Brazell went to the retirement home and dropped off a court document to set aside the annulment and a note saying, "[P]lease call me. I love you. Your wife, Erin. Hope you're okay. Miss you and want you to come home."

In July, police spoke to defendant about violating the restraining order. Defendant said she had called the retirement home several times and Brazell had taken her there. She also admitted she and Edward had closed the two bank accounts that had David's name on them and removed his name from the accounts. They withdrew approximately $1,500 from the accounts and used $300 for the wedding, $400 for a psychological examination of Edward, and an unstated amount for clothes at K-Mart and a dinner. When asked to account for the remaining money, defendant had no response. She also had no explanation for why Edward had no money when he was escorted out of Wells Fargo.

After May 2004, Edward's condition substantially deteriorated. He cannot walk, has no short-term memory, and does not recognize David or his grandchildren.

01 B. *Prior Acts Of Elder Financial Abuse*

02 In 1989, Carolyn Young became the court-appointed
conservator for octogenarian Adam DeCesare. DeCesare's main
03 asset was his stock portfolio. Young arranged to pay for
DeCesare's lodging and meals in a care facility and provided
04 him $500 per month in spending money.
DeCesare met defendant while living in the care facility
05 after his wife died. In fall 1989, DeCesare called Young asking
for more money from his estate, and defendant was heard in the
06 background telling him what to ask for. Defendant's requests
included $10,000 so DeCesare could take her and her daughter
07 to Disneyland and a $1,000 increase in his monthly spending
allowance. DeCesare also set up a college fund for defendant's
08 daughter and included both defendant and her daughter in his
will.
09 Believing all defendant wanted from DeCesare was
money, Young successfully sought a court order prohibiting
10 defendant from visiting DeCesare without Young's approval
and prohibiting defendant from removing DeCesare from the
11 care facility. In November 1990, defendant took DeCesare to
Reno, where they married. Thereafter, DeCesare paid for a
12 $4,500 honeymoon cruise to the Caribbean.
After they married, defendant and DeCesare lived
13 together in a home purchased by defendant and paid for by
DeCesare.
14 Young successfully petitioned to have the marriage
annulled, and defendant unsuccessfully petitioned to have
15 Young removed as conservator. Young also filed a restraining
order against defendant on behalf of DeCesare. DeCesare died
16 in 1994.
Prior to her marriage to DeCesare, defendant was
17 married to Garrett Leiman, who was three years her senior.
Leiman knew DeCesare as "a nice old little guy" whom they
18 would visit in the care facility. When defendant realized her
marriage to Leiman was over, she repeatedly told Leiman she
19 was going to marry DeCesare and take care of him.

20 (Dkt. 17, Lodged Document 5, at 2-9.)

21 The California Court of Appeal affirmed the Placer County Superior Court's judgment

22 on December 12, 2006, and the California Supreme Court denied review on March 28, 2007.

01 (*See id*. at 34; Dkt. 17, LD 6.) Petitioner did not seek habeas relief from the state courts. (*See*
02 Dkt. 1 at 2.) Petitioner timely filed the instant federal habeas petition on May 29, 2007. (*See*
03 Dkts. 1 and 2).

04 III. FEDERAL CLAIMS FOR RELIEF

05 In her federal habeas petition, petitioner argues that the evidence admitted against her
06 at trial violated her federal due process rights. (*See* Dkt. 1.) Specifically, she alleges:

07 (1) California Evidence Code § 1109 is unconstitutionally vague as applied to petitioner; and
08
(2) The admission of propensity evidence at petitioner's trial violated her federal
09 due process rights.

10 (*See* Dkt. 2 at 4 and 7.)

11 Respondent concedes that petitioner has exhausted all her claims for relief, but
12 contends that her claims are without merit. (*See* Dkt. 15 at 2.)

13 IV. STANDARD OF REVIEW

14 The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this
15 petition because it was filed after the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S.
16 320, 326-27 (1997). Because petitioner is in custody of the California Department of
17 Corrections pursuant to a state court judgment, 28 U.S.C. § 2254 provides the exclusive
18 vehicle for his habeas petition. *See White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir. 2004)
19 (providing that § 2254 is "the exclusive vehicle for a habeas petition by a state prisoner in
20 custody pursuant to a state court judgment. . . ."). Under AEDPA, a habeas petition may not
21 be granted with respect to any claim adjudicated on the merits in state court unless petitioner
22 demonstrates that the highest state court decision rejecting his petition was either "contrary to,

01 or involved an unreasonable application of, clearly established Federal law" as determined by
02 the U.S. Supreme Court, or "was based on an unreasonable determination of the facts in light
03 of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2).

04 As a threshold matter, this Court must ascertain whether relevant federal law was
05 "clearly established" at the time of the state court's decision. To make this determination, the
06 Court may only consider the holdings, as opposed to dicta, of the U.S. Supreme Court. *See*
07 *Williams v. Taylor*, 529 U.S. 362, 412 (2000). In this context, Ninth Circuit precedent
08 remains persuasive but not binding authority. *See id.* at 412-13; *Clark v. Murphy*,
09 331 F.3d 1062, 1069 (9th Cir. 2003).

10 The Court must then determine whether the state court's decision was "contrary to, or
11 involved an unreasonable application of, clearly established Federal law." *See Lockyer v.*
12 *Andrade*, 538 U.S. 63, 71 (2003). "Under the 'contrary to' clause, a federal habeas court may
13 grant the writ if the state court arrives at a conclusion opposite to that reached by [the
14 Supreme] Court on a question of law or if the state court decides a case differently than [the]
15 Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 412-13.
16 "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the
17 state court identifies the correct governing legal principle from [the] Court's decisions but
18 unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. At all
19 times, a federal habeas court must keep in mind that it "may not issue the writ simply because
20 [it] concludes in its independent judgment that the relevant state-court decision applied clearly
21 established federal law erroneously or incorrectly. Rather that application must also be
22 [objectively] unreasonable." *Id.* at 411.

In each case, the petitioner has the burden of establishing that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law. *See* 28 U.S.C. § 2254; *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). To determine whether the petitioner has met this burden, a federal habeas court looks to the last reasoned state court decision because subsequent unexplained orders upholding that judgment are presumed to rest upon the same ground. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Medley v. Runnels*, 506 F.3d 857, 862 (9th Cir. 2007).

Finally, AEDPA requires federal courts to give considerable deference to state court decisions, and state courts' factual findings are presumed correct. *See* 28 U.S.C. § 2254(e)(1). Federal courts are also bound by a state's interpretation of its own laws. *See Murtishaw v. Woodford*, 255 F.3d 926, 964 (9th Cir. 2001) (citing *Powell v. Ducharme,* 998 F.2d 710, 713 (9th Cir. 1993)).

V. DISCUSSION

A. *Petitioner's Claim that California Evidence Code § 1109 is Unconstitutionally Vague As Applied to Petitioner*

Petitioner contends that California Evidence Code § 1109 is unconstitutionally vague as applied to her case, because the statute failed to define "financial abuse," and otherwise failed to put her "on notice" that "befriending and marrying Mr. Decesare" was proscribed conduct which "could be used against her in the future to establish that she had a 'propensity' to abuse elders." (Dkt. 2 at 7.) She also argues that the California Court of Appeal's decision rejecting her vagueness claim "incorrectly addressed Petitioner's vagueness claim as a facial challenge to Evidence Code § 1109 rather than as a challenge for vagueness of the statute as applied to her." (Dkt. 16 at 2; *see* Dkt. 2 at 5-6.)

The U.S. Supreme Court has held that a statute is unconstitutionally vague if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted); *see also United States v. Harriss*, 347 U.S. 612, 617 (1954). In any vagueness challenge, "[t]he threshold question . . . is whether to scrutinize the statute for intolerable vagueness on its face or whether to do so only as the statute is applied in the particular case," because these are distinct inquiries. *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346 (9th Cir. 1984).

The U.S. Supreme Court has asserted that "it is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). *See Chapman v. United States*, 500 U.S. 453, 467 (1991); *United States v. Powell*, 423 U.S. 87, 92 (1975). In other words, "the statute is judged on an as-applied basis." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). This is because "a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 495 (1982). In contrast, in order for a statute to be found unconstitutionally vague on its face, a court would have to find that the statute is "impermissibly vague in all of its applications." *Id.*

California Evidence Code § 1109 provides that "in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is [admissible] . . . if the evidence is not inadmissible pursuant to Section 352." Cal. Evid. Code § 1109(a)(2). California Evidence Code § 352 sets forth a general balancing test, permitting the trial court in its discretion to exclude otherwise admissible evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Cal. Evid. Code § 352. The definition of "abuse of an elder or dependent person" includes "financial abuse." Cal. Evid. Code § 1109(d)(1).

Petitioner first presented her argument that California Evidence Code § 1109 is unconstitutionally vague "as applied" to her case on direct appeal to the California Court of Appeal. In rejecting petitioner's contention, the court reasoned as follows:

> *Evidence Code Section 1109 Does Not Violate Due Process*
>
> Defendant contends the admission of her prior acts of elder financial abuse pursuant to Evidence Code section 1109 violated her right to due process. Specifically, she claims . . . Evidence Code section 1109 is unconstitutionally vague because the terms "financial abuse" and "wrongful use" are not statutorily defined and are inherently vague . . . We are not persuaded.
>
> A. *Vagueness*
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> "[I]n a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person," Evidence Code section 1109 permits "evidence of the defendant's commission of other abuse of an elder or dependent person." (Evid. Code, § 1109, subd. (a)(2).) "[A]buse of an elder or dependent person" includes "financial abuse." (Evid.

> Code, § 1109, subd. (d)(1).)
>
> The Legislature did not define "financial abuse" in Evidence Code section 1109, but we presume the Legislature was aware that "financial abuse" is defined in Welfare and Institutions Code section 15610.30 and intended that definition to apply to Evidence Code section 1109. (See *People v. Harrison* (1989) 48 Cal.3d 321, 329, 256 Cal. Rptr. 401 ["the Legislature . . . is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof," and in using identical words in different sections, "the Legislature undoubtedly intended to convey the same meaning"].)
>
> Welfare and Institutions Code section 15610.30, which is part of the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act) . . . defines "financial abuse" as either "(1) [t]ak[ing], secret[ing], appropriat[ing], or retain[ing] real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both; or (2) [a]ssist[ing] in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code, § 15610.30, subd. (a).) It further defines "wrongful use" as "among other things . . . secret[ing], appropriat[ing] or retain[ing] possession of property in bad faith." (Welf. & Inst. Code, § 15610.30, subd. (b).) It then defines "bad faith" as "kn[o]w[ing] or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative."[5] (Welf. & Inst. Code, § 15610.30, subd. (b)(1).)
>
> Based on the above definitions, the term "financial abuse" in Evidence Code section 1109 has been made sufficiently clear by the Elder Abuse Act, and section 1109 is not void for vagueness. (See *People v. Musovich* (2006) 138 Cal.App.4th 983, 991, quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117 ["A 'statute will not be held void for vagueness "if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to other definable sources" ' "].)

(Dkt. 17, LD 5 at 13-15.)

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[5] Here, the trial court instructed the jury on the definition of financial abuse as set forth in Welfare and Institutions Code section 15610.30.

01 Based upon the record before this Court, petitioner's argument that the California
02 Court of Appeal's opinion merely "examined § 1109 as a *facial* challenge to the statute's
03 general vagueness as applied to *anyone* under *any* set of facts" is unavailing. (Dkt. 2 at 5.)
04 Viewing the state court's analysis in the context of the entire opinion, the court was clearly
05 responding to an "as applied" vagueness challenge. (*See* Dkt 17, LD 5 at 13.) Specifically,
06 the court was rejecting petitioner's contention that "the admission of her prior acts of elder
07 financial abuse pursuant to Evidence Code section 1109 violated her right to due process."
08 (*Id*. at 1 and 13.) For example, the state court referenced the specific facts of petitioner's case
09 by pointing out that the jury at petitioner's trial was properly instructed on the relevant
10 definition of "financial abuse." (*See id*. at 15 n.5.) It also entirely limited its discussion to the
11 law that was relevant to the specific facts of petitioner's case: California Evidence Code
12 § 1109(a)(2), § 1109(d)(1), and the definitions of "financial abuse," "wrongful use," and "bad
13 faith" set forth in the Welfare and Institutions Code § 15610.30. (*See id*. at 13-15.)
14 Furthermore, in this case the California Court of Appeal did not analyze "other hypothetical
15 applications of the law," or contemplate whether California Evidence Code § 1109 was
16 "impermissibly vague in all of its applications," as would have been necessary to establish
17 "facial vagueness" under clearly established U.S. Supreme Court precedent. *See Flipside*,
18 455 U.S. at 494-97 (providing that in analyzing a facial vagueness challenge, a court "should
19 uphold the challenge only if the enactment is impermissibly vague in all its applications.").
20 Although AEDPA requires that "state-court decisions be given the benefit of the
21 doubt," even if the state court in this case erred by failing to sufficiently analyze California
22 Evidence Code § 1109 "as applied" to the specific facts of petitioner's case, petitioner's "as

01 applied" challenge lacks merit. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Specifically,
02 petitioner has offered nothing in these proceedings to contradict the state court's conclusion
03 that the meaning of "financial abuse" in California Evidence Code § 1109 was made
04 sufficiently clear by the definition of that term in the Welfare and Institutions Code
05 § 15610.30. Although petitioner asserts that her prior conduct with Mr. Decesare was "not
06 'financial abuse' if judged against plain meaning," based upon the record before this Court,
07 her conduct clearly satisfied the statutory definition of "financial abuse" set forth in Welfare
08 and Institutions Code § 15610.30, which includes obtaining or retaining possession an elder's
09 personal property in bad faith. (Dkt. 2 at 6; *see* Dkt. 17, LD 5 at 14-15.) *See* Welf. & Inst.
10 Code § 15610.30 (amended 2009). As a result, petitioner was on notice that her conduct with
11 Mr. Decesare constituted proscribed financial abuse. *See Kolender*, 461 U.S. at 357
12 (providing that a statute is not void-for-vagueness where a criminal offense is defined with
13 sufficient definiteness that ordinary people can understand what conduct is prohibited). Most
14 significantly, she was also on notice under California Evidence Code § 1109 that her conduct
15 with Mr. Decesare could be used against her in future proceedings to establish that she had a
16 propensity to abuse elders. (*See* Dkt. 2 at 7.)
17 Accordingly, petitioner has not shown that the California Court of Appeal's rejection
18 of her vagueness claim was contrary to, or an unreasonable application of, clearly established
19 federal law, or based upon an unreasonable determination of the facts. The state court
20 reasonably found that California Evidence Code § 1109 is not unconstitutionally vague "as
21 applied" to petitioner's case. I therefore recommend that petitioner's vagueness claim be
22 denied.

B. *Petitioner's Claim that the Admission of Propensity Evidence at Her Trial Violated Her Due Process Rights*

Petitioner contends that the California Court of Appeal's decision denying her due process claim made a "blanket finding" that the admission of propensity evidence under California Evidence Code § 1109 "can never violate due process," which she posits was "out of step with each federal circuits' application of Supreme Court precedent." (Dkt. 2 at 7-8; Dkt. 16 at 2.) Although she acknowledges that the U.S. Supreme Court has never expressly held that it may violate due process to admit propensity evidence at trial, she asserts that the U.S. Supreme Court has "established a general principle that evidence that 'is so extremely unfair that its admission violates fundamental conceptions of justice' may violate due process." (Dkt. 2 at 7.) Thus, she claims that "[t]his Court can and should rely upon the Supreme Court's general precedent and find upon the facts of this case that the admission of propensity evidence . . . violate[d] fundamental concepts of justice." (Dkt. 16 at 2; *see* Dkt. 2 at 7.) In support of her claim, petitioner cites *Dowling v. United States*, 493 U.S. 342, 353 (1989), and *Alberni v. McDaniel*, 458 F.3d 860, 866 (9th Cir. 2006). (*See id.*)

The U.S. Supreme Court "has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes." *Garceau v. Woodford*, 275 F.3d 769, 774 (9th Cir. 2001), *overruled on other grounds by Woodford v. Garceau*, 538 U.S. 202 (2003). To the contrary, the Supreme Court has expressly left open the precise question of whether propensity evidence offends the Due Process Clause. *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 ("Because we need not reach this issue, we express no

opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime.").

"[B]eyond the specific guarantees enumerated in the Bill of Rights," the federal Due Process Clause has limited operation. *Dowling*, 493 U.S. at 352. State laws only violate the Due Process Clause if they offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996). Thus, review of a due process claim in a federal habeas corpus petition is limited to determining whether the trial court made an error that rendered the trial so arbitrary and fundamentally unfair that it violated federal due process. *Estelle*, 502 U.S. at 67; *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). The U.S. Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly," as those "which lie at the base of our civil and political institutions" and define "the community's sense of fair play and decency." *Dowling*, 493 U.S. at 352-53. *See also Mejia v. Garcia*, 534 F.3d 1036, 1047 (9th Cir. 2008) (holding that a state court had not acted objectively unreasonable in determining that the introduction of propensity evidence "in the total context of this case did not render the trial fundamentally unfair.").

The California Court of Appeal denied petitioner's due process claim on direct review. Specifically, it reasoned as follows:

> B. *Noncriminal Conduct Used As Propensity Evidence*
>
> We turn then to defendant's argument that Evidence Code section 1109 violates due process because it allows vague, noncriminal conduct to be used as propensity evidence. Evidence Code section 1109 does not mention evidence of prior *convictions*. Instead, it refers to "evidence of the defendant's

> commission of other abuse of an elder or dependent person." (Evid. Code, § 1109. subd. (a)(2).) In *People v. Falsetta* (1999) 21 Cal.4th 903, our Supreme Court construed Evidence Code section 1108, a companion statute covering evidence of other sexual offenses. (*Falsetta*, at p. 916.) *Falsetta* upheld the constitutionality of Evidence Code section 1108 despite the defendant's argument that the admission of evidence of a prior sex offense violated due process because it allowed evidence to be considered for purposes of propensity. (*Falsetta*, at pp. 907, 910.) Although *Falsetta* involved the admission of other sex crimes, its holding did not turn on the criminality of defendant's prior sexual acts. (*Id*. at pp. 909-910, 917.) Rather, the *Falsetta* court found that "the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge." (*Id*. at p. 917.) The same is true of Evidence Code section 1109: the admission of other acts of elder financial abuse is conditioned on their admissibility under Evidence Code section 352 (Evid. Code, § 1109, subd. (a)(2)), saving the statute from a due process challenge (*People v. Johnson* (2000) 77 Cal.App.4th 410, 418-419, 420).

(Dkt. 17, LD 5 at 15-16.)

The conclusion of the California Court of Appeal is amply supported by the record before this Court. Specifically, although the state court's decision with respect to petitioner's due process claim did not explicitly discuss the applicable federal law, petitioner has failed to establish that it was contrary to or an unreasonable application of clearly established U.S. Supreme Court precedent, or based upon an unreasonable determination of the facts.

As a threshold matter, petitioner has not provided any reasons why the admission of evidence of her prior conduct with Mr. Decesare at trial was "so extremely unfair . . . [it] violate[d] fundamental conceptions of justice" under U.S. Supreme Court precedent. (Dkt. 2 at 7; *see* Dkt. 16 at 2.) *See Dowling*, 493 U.S. at 352-53 (where petitioner proffered "four reasons why, according to him, admission of [the testimony at issue] was fundamentally

unfair."). As the California Court of Appeal observed, "it is logical to infer a disposition toward elder theft and grand theft based on a prior act of elder financial abuse." (Dkt. 17, LD 5 at 17.) In addition, while petitioner appears to argue, on the one hand, that the admission of propensity evidence in her case was so prejudicial that it rendered her trial "fundamentally unfair," on the other hand she maintains that her prior conduct with Mr. Decesare was not illegal, abusive, or even reprehensible. (*See* Dkt. 2 at 6 and 8.) If her conduct as to Mr. Decesare was completely innocent, as she alleges, then it could not have been prejudicial in this case. She cannot have it both ways. In any event, without more, petitioner's conclusory allegation that based "upon the facts of this case . . . the admission of the propensity evidence did violate fundamental concepts of justice" is insufficient to support her claim for habeas relief. *See Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir. 1995) (conclusory allegations do not warrant habeas relief).

Petitioner has also failed to demonstrate that the California Court of Appeal's rejection of her due process claim was "out of step" with the "federal circuits' application of Supreme Court precedent." (Dkt. 2 at 8; Dkt. 16 at 2.) Petitioner relies heavily upon the Ninth Circuit's comment in *Alberni*, in dicta, that

> [i]n applying this general principle [that the admission of "fundamentally unfair" evidence may violate due process], both our precedents and the precedents of our sister circuits have concluded that it could apply to the introduction of propensity evidence. Had the [state court] concluded that the introduction of propensity evidence could never violate due process, this holding would have been out of step with each Circuit's application of Supreme Court precedent.

Alberni, 458 F.3d at 866. In the instant case, however, the California Court of Appeal limited its discussion to the admission of propensity evidence under California Evidence Code

§ 1109, and it did not consider whether the admission of propensity evidence under any other factual scenarios or provisions of the evidence code could ever violate due process. (*See* Dkt. 17, LD 5 at 15-17.) As a result, the California Court of Appeal's conclusion was not out of step with the federal circuits' decisions, as petitioner's claims.[6] (*See* Dkt. 16 at 2.)

Most significantly, the *Alberni* court did not hold that this "general principle" entitles a petitioner to federal habeas relief. Rather, the *Alberni* court concluded that "when the Supreme Court has expressly reserved consideration of an issue, as it has here [in *Estelle*] . . . [a habeas] petitioner cannot rely on circuit authority to demonstrate that the right he or she seeks to vindicate is clearly established." *Alberni*, 458 F.3d at 864. Thus, regardless of how many circuits find that this "general principle" could potentially be extended to the admission of propensity evidence, a federal habeas petitioner cannot demonstrate a right to habeas relief under clearly established decisions of the U.S. Supreme Court. *See Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law.").

[6] This Court observes that the California Court of Appeal's reasoning is also consistent with the findings of other state courts that have addressed the constitutionality of California Evidence Code § 1109, or similar provisions. *See People v. Jennings*, 81 Cal.App.4th 1301, 1310 ("In short, the constitutionality of section 1109 under the due process clauses of the federal and state constitutions has now been settled."). *See also People v. Falsetta*, 21 Cal.4th 903, 916-17 (1999) (upholding the constitutionality of California Evidence Code § 1108, a parallel statute which addressed prior "sexual offenses" rather than prior "elder abuse," against a similar due process challenge); *People v. Brown*, 77 Cal.App.4th 1334, 1331-34 (2000) (holding that California Evidence Code § 1109 can withstand a due process challenge); *People v. Johnson*, 77 Cal.App.4th 410, 416-420 (2000) (same). The Ninth Circuit has reached a similar conclusion. *See United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) (holding that there is nothing "fundamentally unfair" about the allowance of propensity evidence under Federal Rule of Evidence 414, as long as the protections of Federal Rule of Evidence 403 remain in place to ensure that prejudicial evidence of little probative value will not reach the jury).

Thus, as in *Alberni*, petitioner in this case has failed to demonstrate that the admission of propensity evidence at trial violated her federal due process rights, because "the right [petitioner] asserts has not been clearly established by the Supreme Court, as required by AEDPA." *Alberni*, 458 F.3d at 867. The state courts' rejection of petitioner's due process claim was not contrary to or an unreasonably application of U.S. Supreme Court precedent, or based upon an unreasonable determination of the facts. I therefore recommend that this Court find petitioner is not entitled to relief on her due process claim.

VI. CERTIFICATE OF APPEALABILITY

The federal rules governing habeas cases brought by state prisoners were recently amended to require a district court that denies a habeas petition to grant or deny a certificate of appealability in the ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. § 2254 (effective December 1, 2009).

In order to obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Specifically, if a court denies a petition, a certificate of appealability may only be issued "if jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). *See also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of his case, he must demonstrate "something more than the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at 338. The Ninth Circuit recently described this standard as "lenient." *Hayward v. Marshall*, 603 F.3d 546, 553 (9th Cir. 2010).

01 For the reasons set forth in the discussion of the merits, *supra*, jurists of reason could
02 not find the result recommended in this case debatable. Accordingly, I recommend that the
03 Court decline to issue petitioner a certificate of appealability on the issue of whether the state
04 courts' rejection of petitioner's claims were contrary to, or involved an unreasonable
05 application of, clearly established Federal law as determined by the Supreme Court of the
06 United States, or resulted in a decision that was based on an unreasonable determination of
07 the facts in light of the evidence presented.

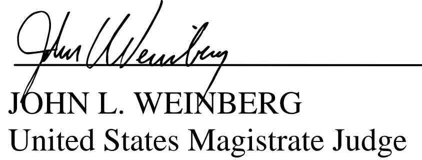
08 VII. CONCLUSION

09 For all of these reasons, I recommend the Court find that the state courts' decisions
10 denying petitioner's claims were not contrary to, or an unreasonable application of, clearly
11 established federal law, or based on an unreasonable determination of facts. I further
12 recommend that the Court decline to issue a certificate of appealability and enter an Order
13 approving and adopting this Report and Recommendation, denying the petition (Dkts. 1 and
14 2), and directing that judgment be entered dismissing this action with prejudice.

15 This Report and Recommendation is submitted to the United States District Judge
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen (14)
17 days of being served with this Report and Recommendation, any party may file written
18 objections with this Court and serve a copy on all parties. Such a document should be
19 captioned "Objections to Magistrate Judge's Report and Recommendation." Either party may
20 then respond to the other party's objections within fourteen (14) days of being served a copy
21 of such written objections. Failure to file objections within the specified time may waive the
22

right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). A proposed order accompanies this Report and Recommendation.

DATED this 1st day of June, 2010.



JOHN L. WEINBERG
United States Magistrate Judge