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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HECTOR HUGO ABURTO,
Petitioner,
v.
SHAWN HATTON, WARDEN
Respondent.

Case No. EDCV 06-00640 JLS
(AFM)

**ORDER ACCEPTING IN PART
AND REJECTING IN PART
FINAL REPORT AND
RECOMMENDATION (Doc. 72)**

**ORDER GRANTING ISSUANCE
OF CERTIFICATE OF
APPEALABILITY**

This action arises out of a § 2254 Petition for Writ of Habeas Corpus filed by a Petitioner in state custody. The matter is before the Court on Remand from the Ninth Circuit. (Doc. 36.) The appeal was of the Judgment entered after the adoption of the August 9, 2010 Report & Recommendation (“2010 R&R”). (See Docs. 17, & 21-24.)

Currently before the Court is the Magistrate Judge’s March 8, 2017 Final Report and Recommendation (“Final R&R”), which recommends that the Court grant a conditional writ of habeas corpus. Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and the Final Report and Recommendation of United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Final Report to which objections have been made. As set forth herein, the Court rejects in part and accepts in part the findings and recommendations of the Magistrate Judge.

1 **I. BACKGROUND**

2 On October 29, 2002, Petitioner was convicted of fifty-seven counts of various
3 crimes involving the sexual abuse of his former foster daughter, who was fifteen years
4 old at the time the abuse began. (2010 R&R, Doc. 17 at 2.) Of these crimes, nine
5 counts were crimes involving force, and the remaining forty-eight counts were for
6 non-forcible sex crimes.¹ (*Id.*) On December 9, 2002, Petitioner was sentenced to
7 fifty-seven years imprisonment, which consisted of six years for each forcible count,
8 to be served consecutively, for a total of fifty-four years, and an additional three years
9 for each of the non-forcible counts, to be served concurrently to each other, but
10 consecutively to the time on the forcible counts. (*Id.*; CT 460-64.)

11 However, as the record eventually revealed, and as the parties have now
12 acknowledged in the Joint Statement Regarding Further Proceedings (“Joint
13 Statement”), all forty-nine of the non-forcible counts were untimely when brought.
14 (*See* Jt. Stmt., Doc. 55 at 1.) The parties agree defense counsel’s failure to object to
15 the non-forcible counts constituted deficient performance within the meaning of
16 *Strickland v. Washington*, 466 U.S. 668, 686 (1984), resulting in prejudice; thus,
17 Petitioner was denied the effective assistance of counsel in violation of the Sixth
18 Amendment. (*Id.* at 1-2.) More specifically, on May 18, 2015, the parties stipulated
19 that the present Petition seeks review of a state court decision that “involved an
20 unreasonable application of clearly established Federal law, as determined by the
21 Supreme Court of the United States,” and that Petitioner is entitled to habeas relief to
22 remedy the additional three-year term of incarceration imposed upon Petitioner at his
23 sentencing as a result of the conviction on the untimely, non-forcible counts. (*Id.*
24 (quoting 28 U.S.C. § 2254(d)(1).) The parties disagree regarding what additional
25 remedy is required, if any. (*Id.* at 2.) Petitioner argues that his convictions should be

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27 ¹ At various points in the record, the number of non-forcible counts is noted as forty-nine or fifty.
28 Forty-nine (not fifty) non-forcible counts were tried, but one of those counts (Count 34) was
dismissed in the interests of justice due to an error in the verdict form. (*See* 2010 R&R at 2; CT 202-
06; RT 658-659.)

1 vacated and he should be returned to the plea bargaining stage or, alternatively, that he
2 is entitled to a new trial. (*Id.*) Respondent contends that resentencing on the forcible
3 counts will cure all prejudice. (*Id.*)

4 This dispute may be framed as a disagreement as to the proper remedy, or it
5 may be framed in terms of the scope of the *Strickland*-type prejudice suffered by
6 Petitioner as a result of counsel's concededly deficient performance. The resulting
7 inquiry is essentially the same, because the scope of the prejudice determines the
8 appropriateness of the remedy, and the parties' disagreement as to the appropriate
9 remedy arises from their disagreement as to the full extent of the prejudice.

10 The Final R&R recommends granting a conditional writ of habeas corpus and
11 ordering that, if Petitioner is not brought to retrial within one hundred twenty (120
12 days), he be discharged from all adverse consequences of his conviction. (Final R&R
13 at 16-17.) In arriving at that recommendation, the Magistrate Judge rejected
14 Petitioner's contention that he should be returned to the plea bargaining stage,² and
15 the Magistrate Judge also rejected Respondent's arguments that the matter be
16 remanded for evidentiary hearing and/or that resentencing is the only remedy required.
17 (*Id.* at 10-12.)

18

19 **II. LEGAL STANDARD**

20 In recommending that the Court conditionally grant the petition and order a new
21 trial for Petitioner, the Magistrate Judge relied heavily on the spillover effect doctrine,
22 which relates to a denial of due process rather than ineffective assistance of counsel.
23 Briefly, the spillover effect doctrine provides that where a defendant is charged with
24 multiple crimes, and where he moves unsuccessfully to sever one or more of those
25 counts, he may later challenge the court's denial of his motion to sever on habeas
26 review if the joinder resulted in an unfair trial. *See Sandoval v. Calderon*, 241 F.3d

27 ² The Court accepts and adopts this portion of the Final R&R. The indictment was amended to add
28 the untimely charges on the eve of trial, and therefore counsel's performance was not deficient prior
to that time, during the plea bargaining stage. (*See* Final R&R at 10-12.)

1 765, 771-72 (9th Cir. 2000). In such a case, prejudice in the form of a violation of the
2 Due Process Clause is shown where an “impermissible joinder had a substantial and
3 injurious effect or influence in determining the jury’s verdict.” *Id.* at 772 (citation
4 omitted). The spillover effect doctrine has some analogous application to this case
5 because both it and the *Strickland* standard examine whether the challenged action
6 likely affected the jury verdict.

7 However, the Court’s analysis must focus on the standard governing the Sixth
8 Amendment right to the effective assistance of counsel at trial. *See Strickland*, 466
9 U.S. at 686. To establish ineffective assistance by his trial counsel, a petitioner must
10 demonstrate both that: (1) counsel’s performance was deficient; and (2) the deficient
11 performance prejudiced his defense. *Id.* at 688-93. Here, the parties have stipulated
12 to the first *Strickland* prong, and they have stipulated as to the prejudice resulting
13 from Petitioner’s conviction on the time-barred counts. They disagree whether
14 Petitioner has shown prejudice as a result of the joinder of the time-barred offenses
15 with the timely offenses.

16 To show prejudice, a petitioner must show a “reasonable probability that, but
17 for counsel’s unprofessional errors, the result of the [trial] would have been different.”
18 *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to
19 undermine confidence in the outcome.” *Id.* “The likelihood of a different result must
20 be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011).
21 Stated another way, “*Strickland* asks whether it is ‘reasonably likely’ the result would
22 have been different.” *Id.* at 111. “Only those habeas petitioners who can prove under
23 *Strickland* that they have been denied a fair trial by the gross incompetence of their
24 attorneys will be granted the writ and will be entitled to retrial.” *Kimmelman v.*
25 *Morrison*, 477 U.S. 365, 382 (1986).

26 Where *Strickland*-type prejudice is found, the Court fashions a remedy that
27 “‘neutralize[s] the taint’ of [the] constitutional violation, . . . while at the same time
28 [does] not grant a windfall to the defendant or needlessly squander the considerable

1 resources the State properly invested in the criminal prosecution.” *Lafler v. Cooper*,
2 566 U.S. 156, 170 (2012) (citation omitted).

3 4 **III. DISCUSSION**

5 **A. Evidence Regarding the Non-Forcible Counts Would Have Been** 6 **Admissible Even if the Non-Forcible Counts Were Not Joined**

7 Petitioner claims prejudice in the form of the admission of evidence regarding
8 the untimely, non-forcible counts. (*See* Pet’r. Mem. P&A, Doc. 59 at 30-35.)
9 However, evidence of this nature would have been admitted even if the non-forcible
10 counts had not been joined.

11 In California prosecutions for sexual offenses, propensity evidence (in the form
12 of evidence of prior sexual offenses) is generally admissible as an exception to the
13 more general rule that excludes character evidence. Cal. Evid. Code §§ 1101, 1108.
14 Admission of such evidence is subject to a balancing test that weighs probative value
15 against the danger of undue prejudice. Cal. Evid. Code § 352. Before admitting such
16 evidence, courts engage in a “careful weighing process” that considers the prejudicial
17 impact on the jury, and other factors such as the “nature [and] relevance” of the
18 evidence, the likelihood of whether the other offense occurred, “its similarity to the
19 charged offense,” and any “less prejudicial alternatives to . . . admission” of the
20 evidence. *People v. Falsetta*, 21 Cal. 4th 903, 916-17 (1999). The constitutionality of
21 the admission of this type of propensity evidence has been upheld by California courts
22 and, under analogous federal evidentiary rules, by the Ninth Circuit. *See, e.g., People*
23 *v. Cabrera*, 152 Cal. App. 4th 695, 704 (2007); *United States v. LeMay*, 260 F.3d
24 1018, 1027 (9th Cir. 2001).

25 Here, under California law, the evidence regarding the non-forcible counts
26 would have been admissible even in the absence of charges on the non-forcible
27 counts. *See People v. Villatoro*, 54 Cal. 4th 1152, 1160 (2012) (noting that prior,
28 uncharged sexual offenses are admissible when the accused is on trial for sexual

1 offenses). Such evidence is admissible to show a defendant’s propensity to commit
2 sexual offenses, and “is especially probative and should be considered by the trier of
3 fact when determining the credibility of a victim’s testimony.” *Id.* at 1164 (citation
4 omitted). Evidence regarding Petitioner’s sexual victimization of Jane Doe in a non-
5 forcible manner on numerous occasions while she was placed in his home as a foster
6 child would fall into the § 1108 exception to the general rule precluding the admission
7 of character evidence.

8 **B. Under the Balancing Test, Most or All of the Evidence on the Non-**
9 **Forcible Counts Would Have Been Admitted**

10 The conclusion that the evidence would have been admissible under § 1108
11 leads to the question of whether application of the balancing test of § 352 would have
12 resulted in exclusion of the evidence. The Court concludes that it would not have, and
13 that most, if not all, of the evidence regarding the non-forcible counts would have
14 been admitted because it gave context to the abusive foster-parent/child relationship,
15 and it corroborated the testimony of Jane Doe; additionally, it explained the time gaps
16 between the forcible sexual crimes, and it explained Jane Doe’s delay in reporting the
17 crimes.

18 Here, the jury heard Petitioner testify that he did not engage in any sexual
19 activity with Jane Doe.³ (RT 479-80.) They also heard from Petitioner’s wife, Karen
20 Aburto, who testified that there was sexual activity between Petitioner and Jane Doe,
21 that she was aware of instances in which Petitioner would take Jane Doe alone with
22 him into a bedroom for a period of time, that she witnessed the two of them engaging
23 in sexual activity, and that she also participated in some of this activity with them.⁴

24 ³ At sentencing, Petitioner recanted that testimony in part. He acknowledged that he engaged in non-
25 forcible sexual activity with Jane Doe, by stating that he “ha[d] a sexual relationship with [Jane
26 Doe,]” but that he “never did rape her.” (RT 682.)

26 ⁴ Mrs. Aburto’s testimony at trial was consistent with her original statements to police investigators.
27 (*Compare* RT 229-88 (trial testimony on Oct. 22, 2002) *with* CT 148-90 (transcript of police
28 interview with Karen Aburto on Mar. 28, 2001).) In between the time of her initial statements
before Petitioner’s arrest and the trial, Mrs. Aburto wrote a letter to the judge presiding over
Petitioner’s case. (*See* RT 192.) In the letter, Mrs. Aburto denied that she or Petitioner engaged in
any sexual activity with Jane Doe. (*Id.*) The jury heard evidence regarding this change to Mrs.

1 (RT 241-43.) Mrs. Aburto also testified that she believed, based on her observation,
2 that Jane Doe was a willing participant in the sexual activity and was not subjected to
3 force. (RT 281.)

4 Conversely, Jane Doe testified that Petitioner subjected her to both forcible
5 sexual acts and non-forcible sexual acts. She testified regarding two date-specific
6 instances of rape, one on December 17, 1997 (exactly one month after her fifteenth
7 birthday) and the next on December 19, 1997 (two days later); she also testified more
8 generally of being raped an additional ten to twenty times in the month that followed
9 before she stopped physically resisting Petitioner in January 1998. (RT at 103-13,
10 119.) She also testified regarding forcible oral copulation and sodomy in April 1998
11 and June 1998, respectively. (RT 113-18 & 126-27.) Finally, Jane Doe testified that
12 the non-forcible sexual acts were a more-or-less daily occurrence during her
13 placement in Petitioner's home. (RT at 119 (victim's testimony).)

14 On this record, it is unlikely that the evidence regarding the non-forcible counts
15 would have been excluded, as it is highly probative on a key issue, namely, sexual
16 activity between Petitioner and Jane Doe. When compared to evidence of forcible
17 sexual acts, evidence of non-forcible sexual acts are less inflammatory, and therefore
18 less prejudicial. Thus, while evidence of a defendant's daily sexual abuse of a minor
19 is prejudicial, even inflammatory, such evidence is not unduly prejudicial or unfairly
20 prejudicial under the circumstances of this case.

21 Evidence of the continued non-forcible sexual abuse is also probative as to why
22 Jane Doe did not report Petitioner's use of force sooner: she acquiesced to a
23 continuing pattern of Petitioner's sexual abuse of her while she was placed in his
24 home. This is consistent with Jane Doe's testimony that she reported the abuse to her
25 aunt about five months after she moved out of Petitioner's home and into her aunt's
26 home. (RT 139-41.)

27 Aburto's account of the relevant events. (RT 273-82.) Mrs. Aburto also testified that she denied any
28 sexual activity when speaking with defense counsel's investigator and a therapist to whom she had
been referred. (RT 275-76 & 87.)

1 Nor is it likely in this case that the evidence regarding the non-forcible sexual
2 abuse could have been limited in some fashion. Here, the evidence of the non-forcible
3 acts consisted of Jane Doe’s testimony and Mrs. Aburto’s testimony, and each
4 testified in a general manner regarding the non-forcible acts. Jane Doe testified that
5 the abuse continued on a daily basis for over a year and a half, and Mrs. Aburto
6 testified she witnessed non-forcible sexual activity between Petitioner and Jane Doe
7 on a number of occasions. In a trial on the forcible counts only, the probative value of
8 this testimony as given is high, and would likely have been admitted without any
9 changes.

10 On balance, the Court concludes that the evidence regarding Petitioner’s non-
11 forcible sexual abuse of Jane Doe would not have been excluded because the weight
12 of the probative value regarding Petitioner’s willingness to engage in sexual activity
13 with a minor placed in his home as a foster child is not substantially outweighed by a
14 danger of undue prejudice of this evidence. As a result, the evidence considered by
15 the jury would likely have been the same even in the absence of the joinder of the
16 non-forcible counts, and no *Strickland*-type prejudice resulted from that joinder.

17 **C. The State of the Evidence as to Forcible Counts Does Not Warrant a**
18 **Retrial**

19 In the Final R&R, the Magistrate Judge concludes that “the strength of the
20 government’s case on the remaining nine counts of forcible offenses reflects that the
21 government’s case was not sufficiently strong to overcome the spillover effect” of the
22 evidence admitted as to the non-forcible counts. (Final R&R at 8.) For reasons
23 already discussed, including likely admission of the same evidence even absent
24 joinder of the non-forcible counts, the Court need not compartmentalize the evidence
25 on the forcible and non-forcible counts; under California law, the latter is deemed
26 relevant proof of the former. Rather, the question is whether, in addition to propensity
27 evidence, the evidence on the forcible counts was sufficiently strong to negate a
28 finding of prejudice. In other words, under *Strickland*, the strength of the

1 prosecution’s case factors into the determination of prejudice. *See Strickland*, 466
2 U.S. at 696 (“[A] verdict or conclusion only weakly supported by the record is more
3 likely to have been affected by errors than one with overwhelming record support.”);
4 *Riley v. Payne*, 352 F.3d 1313, 1321 n.8 (9th Cir. 2003) (“[O]ur evaluation of
5 *Strickland* prejudice must be considered in light of the strength of the government’s
6 case.”)

7 Here, the trial judge’s rationale for denying a motion for new trial is helpful as
8 to a determination of whether Petitioner was prejudiced. (*See* RT 673-76.) Weighing
9 the evidence as a “thirteenth juror” to determine its sufficiency, the trial judge
10 recognized that the crucial question in this case was the believability of the testimony
11 of Jane Doe, Petitioner, and Mrs. Aburto. (RT 673-74.) The judge found Jane Doe’s
12 testimony regarding Petitioner’s use of force credible, and he found particularly
13 credible her testimony regarding the first rape on December 17, 1997, including her
14 testimony regarding a torn nightgown, which Jane Doe kept and which was admitted
15 as evidence at trial. (RT 291-95, 524 & 673-76.) The judge took note of Jane Doe’s
16 testimony of the forcible sodomy count, where she testified that Petitioner stopped
17 penetrating her anus with his penis when she told him that it hurt. (RT 674-75.) The
18 judge noted that if Jane Doe had been motivated by ill intent toward Petitioner, she
19 could have embellished her testimony regarding this incident rather than testifying as
20 she did. (RT 674-75.) The judge also found credible Mrs. Aburto’s testimony⁵
21 regarding the lack of use of force, but he noted that her testimony on this issue could
22 be reconciled with Jane Doe’s testimony based on timing. (RT 674-76.) Specifically,
23 Mrs. Aburto first became involved in the sexual abuse only after Jane Doe stopped
24 physically resisting Petitioner’s attempts at vaginal intercourse in January 1998.⁶ (RT

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26 ⁵ Although not expressly stated, it is apparent that the judge did not credit Mrs. Aburto’s 2001 denial
of any sexual activity and instead believed her trial testimony. *See supra* n.4.

27 ⁶ Although not expressly addressed by the trial judge, as to the counts of forcible oral copulation and
28 sodomy, which occurred later in 1998, Mrs. Aburto’s testimony is reconcilable with Jane Doe’s
testimony because Mrs. Aburto was not present for all the sexual activity between Jane Doe and
Petitioner. (*See* RT 125 & 241-43.)

1 675.)

2 These remarks further establish that Petitioner was not prejudiced by the joinder
3 of the non-forcible counts. The case against Petitioner as to the use of force was
4 strong, and that strength was derived from Jane Doe’s credibility. Jane Doe was not
5 likely to be less credible on this issue had Petitioner been charged only with the
6 forcible counts. Additionally, as discussed above, the evidence regarding the non-
7 forcible counts was cross-admissible in the sense that it was highly likely to be
8 admitted in a trial on only the forcible counts. Moreover, the forcible crimes are
9 “simple and distinct” from the non-forcible crimes, and the distinctions were
10 highlighted for the jury. Finally, the judge’s discussion reveals that the evidence
11 regarding the use of force was easily compartmentalized from evidence regarding the
12 non-forcible crimes. Together, these factors are a further indication that Petitioner
13 suffered no prejudice by the joinder of the non-forcible counts.

14 **D. Jury Instructions**

15 The Final R&R discusses how joining the non-forcible counts in the trial
16 deprived Petitioner of the opportunity to request a limiting instruction regarding the
17 use of propensity evidence. (*See* Final R&R at 15 (citing *Falsetta*, 21 Cal.4th at
18 924).) Where a jury is advised that they may consider evidence of other sexual
19 offenses to infer that a defendant had a predisposition to commit such offenses, the
20 jury is also instructed on the limited manner in which they may view such evidence.
21 *See Falsetta*, 21 Cal.4th at 923; CALJIC No. 2.50.01. Thereafter, the jury is
22 instructed that if they infer such a predisposition, they may consider it as evidence that
23 the defendant was likely to commit the charged offense, but that propensity evidence
24 is not sufficient by itself to support a guilty verdict, and that the prosecution must still
25 meet its burden of proof beyond reasonable doubt as to a defendant’s guilt as the
26 charged offense. *Falsetta*, 21 Cal.4th at 923.

27 This is a correct observation, as far as it goes. Certainly, Petitioner did not have
28 the occasion to seek such a limiting instruction regarding propensity evidence.

1 However, as this trial proceeded, the evidence was admitted not as propensity
2 evidence but as substantive evidence to support the additional non-forcible counts.
3 The court properly instructed the jury to consider the evidence regarding each count
4 separately. (CT 255.) Specifically, the court instructed the jury with CALJIC 17.02,
5 which at the time provided:⁷ “Each Count charge[s] a distinct crime. You must
6 decide each Count separately. The defendant may be found guilty or not guilty of [any
7 or all] of the crimes charged. Your finding as to each Count must be stated in a
8 separate verdict.” The completed verdict form in the record has fifty-eight separate
9 pages, each dated October 29, 2002, finding Petitioner guilty on fifty-eight counts.⁸
10 (CT 292-349.) The jury was polled regarding the verdict as to each of the fifty-nine
11 counts.⁹ (RT 650-64.)

12 Thus, despite the fact that Petitioner did not have the occasion to request a
13 limiting instruction, the jury instructions given were sufficient to guard against
14 prejudice as a result of the joinder of the non-forcible counts. The instructions, read
15 as a whole, properly instructed the jury as to how to consider the evidence, and those
16 instructions specifically directed the jury that to consider the evidence separately as to
17 each count. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (“It is well established
18 that the instruction ‘may not be judged in artificial isolation,’ but must be considered
19 in the context of the instructions as a whole and the trial record.”) (citation omitted).
20 The law presumes that the jury understood and followed these instructions. *See Weeks*
21 *v. Angelone*, 528 U.S. 225, 234 (2000) (“A jury is presumed to follow its
22 instructions.”); *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) (“The Court
23 presumes that jurors, conscious of the gravity of their task, attend closely the
24 particular language of the trial court’s instructions in a criminal case and strive to
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26 ⁷ The current instruction is not substantially different than the earlier version.

27 ⁸ More specifically, it appears the jury was given a verdict form with two separate pages for each
28 count: one with a “guilty” finding and one with a “not guilty” finding. The record also contains the
“not guilty” pages for all counts, but these pages are not dated; they are blank except for a
handwritten, upward slash “/” through the caption and text of each of these pages. (CT 350-408.)

⁹ One count was dismissed due to an error in the verdict form. *See supra* n.1.

1 understand, make sense of, and follow the instructions given them.”). In this
2 particular context, “[i]n making the determination whether the specified errors
3 resulted in the required prejudice, [the Court] presume[s] . . . that the judge or jury
4 acted according to law.” *Strickland*, 466 U.S. at 694. Moreover, because the
5 pagination of the verdict form required the jury to focus on a “guilty” or “not guilty”
6 finding as to each count, the need to differentiate among the numerous counts was
7 reemphasized to the jury when the verdict form was being completed by them.

8 *Strickland*-type prejudice is not easily established. *See Padilla v. Kentucky*, 559
9 U.S. 356, 371 (2010) (“Surmounting *Strickland*’s high bar is never an easy task.”);
10 *Kimmelman*, 477 U.S. at 382 (“As is obvious, *Strickland*’s standard . . . is highly
11 demanding.”). On this record, Petitioner has not shown prejudice resulting from
12 admission of the evidence regarding the untimely, non-forcible counts.¹⁰ Neither has
13 he shown prejudice based on the related issue of the lack of opportunity to seek a
14 limiting instruction.¹¹ As discussed above, Petitioner has not shown a “reasonable
15 probability that, but for counsel’s unprofessional errors, the result of the [trial] would
16 have been different.” *Id.* Notwithstanding the acknowledged deficient performance
17 of defense counsel at trial in failing to address the untimeliness of the non-forcible
18 counts, Petitioner has not shown that he was denied a fair trial; therefore, the
19 Constitution does not require that he be granted a new trial. *See Kimmelman*, 477
20 U.S. at 382. Instead, to address the prejudice suffered as a result of the conviction on
21

22 ¹⁰ Petitioner argues that had the non-forcible counts not been joined, he might have adopted a
23 different strategy regarding his testimony. Specifically, rather than testifying that he did not ever
24 sexually abuse Jane Doe, Petitioner would have chosen to either refrain from testifying or to testify
25 that he did not ever use force. (*See* Doc. 71, Pet’r Resp. to Obj. at 7-11.) Petitioner relies on
26 *Johnson v. Baldwin* for this argument. 114 F.3d 835 (9th Cir. 1997). In *Johnson*, the Ninth Circuit
27 held that the petitioner was prejudiced by his counsel’s admittedly deficient performance in failing to
28 investigate the petitioner’s uncorroborated and unconvincing denial regarding his presence at the
scene of an alleged rape. *Id.* at 838-40. *Johnson* is easily distinguished from the present case
because in *Johnson*, the prosecution’s case against the petitioner was weak. *Id.* at 839 (“Because of
the precariousness of the prosecution’s case, there is a ‘reasonable probability’ that, if [defendant]
had not taken the stand and lied, the outcome of the trial would have been different.”).

¹¹ Indeed, the jury instructions as given did not inform the jurors that the evidence of non-forcible
sexual acts was relevant to show Petitioner’s propensity to commit the forcible offenses. It is
difficult to see how Petitioner was prejudiced by this omission.

1 the non-forcible counts, Petitioner is entitled to be resentenced.

2
3 **IV. CERTIFICATE OF APPEALABILITY**

4 28 U.S.C. § 2253(c)(2) provides that a certificate of appealability may issue
5 “only if the applicant has made a substantial showing of the denial of a constitutional
6 right.” To satisfy this standard, petitioner must show “that reasonable jurists could
7 debate whether . . . the petition should have been resolved in a different manner or that
8 the issues presented were adequate to deserve encouragement to proceed further.”
9 *Slack v. McDaniel*, 120 S.Ct. 1595, 1603-04 (2000) (internal quotation marks and
10 citation omitted). Because the Court recognizes that reasonable jurists could differ
11 (and have differed) regarding the resolution of the issues presented, the Court issues a
12 certificate of appealability regarding this matter. Specifically, the Court certifies for
13 appeal the issue of whether the scope of *Strickland*-type prejudice suffered by
14 Petitioner extends beyond his convictions on the non-forcible counts. Relatedly, the
15 issue certified for appeal raises the question of whether the remedy granted Petitioner
16 herein, namely, resentencing, is a sufficient remedy or whether Petitioner must be
17 retried on the timely counts.

18 The parties are directed to Federal Rule of Appellate Procedure 4(a), which sets
19 forth time limitations for the filing of an appeal, and to Federal Rule of Appellate
20 Procedure Federal Rule of Appellate Procedure 22(b)(1)-(2), which relates to
21 Certificates of Appealability.

22
23 **V. CONCLUSION**

24 As set forth herein, the record reveals that Petitioner was convicted on the
25 timely, forcible counts based on the strength of Jane Doe’s testimony regarding the
26 use of force, which the jury accepted over testimony to the contrary from Petitioner
27 and his wife. Petitioner did not suffer prejudice as a result of the joinder of the non-
28 forcible counts because the court would have been unlikely to exclude evidence

1 regarding the non-forcible sexual activity from a trial on only the forcible counts.
2 Moreover, the jury was properly instructed to consider each count separately, and no
3 prejudice resulted from the lack of a limiting instruction regarding propensity
4 evidence. As a result, Petitioner cannot show additional prejudice beyond the
5 conviction for the additional counts, and a new trial is not required to neutralize the
6 taint of the constitutional violation. Therefore, the Court rejects those parts of the
7 Final R&R that find that Petitioner should be retried. Instead, the Court holds that
8 Petitioner should be resentenced.

9 ACCORDINGLY, IT IS ORDERED that (1) the Final Report and
10 Recommendation of the Magistrate Judge is ACCEPTED IN PART AND
11 REJECTED IN PART; and (2) Judgment shall be entered granting a conditional writ
12 of habeas corpus as follows: Unless petitioner is resentenced within one hundred
13 twenty (120) days of the date of the Judgment (plus any additional delay authorized
14 under state law), Respondent shall discharge petitioner from all adverse consequences
15 of his conviction in Riverside County Superior Court, Case No. RIF 096321.

16 **IT IS SO ORDERED.**

17 Dated: September 27, 2018



18
19 Hon. Josephine L. Staton
20 United States District Judge