

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DARRYL DIAZ,

Petitioner,

v.

DAVID DAVEY, Warden,

Respondent.

Case No. 1:15-cv-00898 LJO MJS (HC)

FINDINGS AND RECOMMENDATION REGARDING PETITION FOR WRIT OF HABEAS CORPUS

DAVID DAVEY, Warden,

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent, David Davey, warden of California State Prison, Corcoran, is hereby substituted as the proper named respondent pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. Respondent is represented by Rebecca Whitfield of the office of the California Attorney General. The parties declined magistrate judge jurisdiction. (ECF No. 6, 17.)

I. Procedural Background

Petitioner is currently in the custody of the California Department of Corrections pursuant to a judgment of the Superior Court of California, County of Fresno, following his conviction by jury trial on October 12, 2011, for three counts of each of sexual intercourse with a child and lewd act upon a child. (Lodged Doc. 3, Clerk's Tr. at 423-424.)

1 26.) On February 17, 2012, Petitioner was sentenced to an indeterminate prison term of
2 fifty (50) years to life plus an additional determinate term of seven years. (Id.)

3 Petitioner filed a direct appeal with the California Court of Appeal, Fifth Appellate
4 District. (Lodged Doc. 8.) On December 23, 2013, the appellate court affirmed the
5 conviction. (Answer, Ex. A) Petitioner sought review by the California Supreme Court on
6 January 28, 2014. (Lodged Doc. 11.) The petition for review was denied on March 12,
7 2014. (Lodged Doc. 12.)

8 Petitioner proceeded to file collateral appeals in the form of petitions for writ of
9 habeas corpus in the state courts. He filed a petition with the Fresno County Superior
10 Court on September 10, 2014. (Lodged Doc. 13.) It was dismissed on September 26,
11 2014 without prejudice to refiling as Petitioner failed to attach a proper proof of service.
12 (Lodged Doc. 14.) Petitioner then filed a petition for writ of habeas corpus with the
13 California Supreme Court on June 1, 2015. The petition was summarily denied on
14 August 19, 2015. (Lodged Docs. 15-16.)

15 Petitioner filed his federal habeas petition on June 15, 2015. (Pet., ECF No. 1.)
16 Petitioner raised the following five claims for relief: (1) that counsel was ineffective by not
17 questioning the victim whether she was home at the time of the incident; (2) that counsel
18 was ineffective for failing to request transcripts of the opening and closing statements;
19 (3) that the trial court erred by failing to give an unanimity instruction; (4) that the trial
20 court erred in failing to exclude certain images that were overly prejudicial; and (5) that
21 his due process rights were violated by the use of a jury instruction regarding the
22 admission of prior crimes evidence. (Pet. at 5-17.)

23 Respondent filed an answer to the petition on January 27, 2016. (Answer, ECF
24 Nos. 18-19.) Petitioner filed a traverse to the answer on April 15, 2016. (Traverse, ECF
25 No. 24.)

26

27

28

1 **II. Statement of Facts¹**

2 **STATEMENT OF FACTS**

3 **I. Prosecution Evidence**

4 On or around October 12, 2008, E.,[fn1] then nine years of
5 age,[fn2] attended a celebrity golf tournament with defendant, her legal
6 father. The following night, while she was sleeping in his bedroom, she
7 awoke to him "breathing behind [her]" and "touching [her] butt with his no-
8 no."[fn3] Roughly one week before January 17, 2009, E. was watching
9 cartoons at defendant's apartment when defendant used a cable to
10 connect his desktop computer to the television. He showed her "nasty
11 videos" and pictures from his computer "up on the TV" of adults,
12 teenagers, and preadolescents "kissing," "touching their private parts,"
13 and "doing the bad thing."[fn4] Defendant had E. sit on his lap, placed his
14 hand on her crotch, had her remove her panties, and touched her vagina.
15 When she went to the bathroom, he pulled down his pants. Defendant
16 went to E., who had returned and sat on the couch, and touched her with
17 his penis. He laid her on her back, partially inserted his penis into her
18 vagina for at least five seconds, and withdrew when she expressed pain.
19 Defendant then repositioned E. on her stomach, partially inserted his
20 penis into her anus, and withdrew when she expressed pain. At some
21 point, he touched her breasts.

22 **FN1:** In this opinion, certain persons are identified by an
23 abbreviated name in accordance with our Supreme Court's
24 policy regarding protective nondisclosure. Also, individuals
25 who share a last name are identified primarily by their first
26 name to avoid confusion. In both instances, no disrespect is
27 intended.

28 **FN2:** At the time of trial, E. was 12 years of age.

29 **FN3:** E. identified the male "no-no" as the penis and female
30 "no-no" as the vagina.

31 **FN4:** E. testified that she watched such videos on at least
32 five occasions.

33 E. described other incidents that transpired at defendant's
34 apartment "[e]very other week or so" between October 12, 2008, and
35 January 15, 2009. When she watched the television show American
36 Idol,[fn5] defendant rubbed her crotch, watched pornography and
37 masturbated during commercial breaks, and deposited his semen onto her
38 toes and hand. When she did not watch American Idol, he watched
39 pornography and touched her in the living room and bedroom. The "bad
40 touching" did not occur on Wednesdays. E. saw defendant ejaculate on
41 previous occasions and specified that he inserted his penis into her anus
42 "less than five times, but at least two times[.]" She was warned by

27 ¹ The Fifth District Court of Appeal's summary of the facts in its December 23, 2013 opinion is presumed
28 correct. 28 U.S.C. § 2254(e)(1).

1 defendant "[not to] tell anybody about what's happening, because if [she]
2 do[es], he'll get in trouble and [she]'ll get in trouble."

3 **FN5:** The prosecutor and defense counsel stipulated that
4 American Idol aired on KMPH Fox 26 the nights of Tuesday,
5 January 13, 2009, and Wednesday, January 14, 2009.

6 During a sleepover at the home of A.E., E.'s mother and
7 defendant's ex-wife, on Saturday, January 17, 2009, E. revealed to Emily
8 C., her friend, that defendant touched her, masturbated, deposited "white
9 stuff" between her toes, and "tried to stick his private part inside of hers
10 but it hurt too much so he quit." Thereafter, at Emily's insistence, E. told
11 A.E. that defendant "would take the white stuff out of his man part and put
12 it between her toes," "made her watch weird Web sites," and "tried to put
13 his man part in her no-no but she was too loud so he stopped." A.E. had
14 E.E., then her husband, call the police.

15 Officer Jay Froman, Jr., was dispatched to A.E.'s home on January
16 17, 2009. He interviewed E., who detailed that defendant "tried to put his
17 penis in her vagina," "play[ed] with his no-no part," had her "rub[] [his
18 penis] up and down," ejaculated "onto her face" or "into his hand and then
19 rub[bed] it on her feet," and used his middle and index fingers to "spread
20 apart ... and ... rub her private parts ... 'like someone who was trying to get
chocolate sauce off their fingers[.]" The incidents occurred "[o]ver the last
year." E. also told Froman that defendant let her stay up past her bedtime
to watch American Idol only if she looked at Web sites containing videos
and images of "boys' no-no parts going into the girl's private parts" and he
"g[ot] to cum in [her] mouth."^[fn6]

21 **FN6:** According to Froman, E. denied that defendant actually
22 ejaculated into her mouth because "it made her sick when he
23 ejaculated onto her face and that is why she would not let
24 him do that in her mouth."

25 On January 18, 2009, the police executed a search warrant at
26 defendant's apartment. Forensic analysis of his computer's internal hard
27 drive uncovered approximately 2,500 images of child pornography and
28 related search terms. The trial court admitted five of these images as
circumstantial evidence of propensity and the jury viewed each image for
three seconds via slide-show presentation.^[fn7]

21 **FN7:** The trial court denied defense counsel's motion in
22 limine to exclude all pornographic images from evidence.
23 Defense counsel made a continuing objection.

24 II. Defense Evidence

25 On January 18, 2009, E. underwent a forensic medical examination
26 for sexual abuse. She did not sustain genital abrasions, bruising, redness,
27 tearing, swelling, or bleeding or exhibit signs of previous trauma or healed
28 injuries. Judy Malmgren, a registered nurse and certified sexual assault
nurse examiner, reviewed the examination records and opined that the
lack of physical findings was "consistent with no acts of sexual penetration
having occurred[.]" She also attested that "it is not unusual for there to be
no findings with a child sexual assault allegation" and an absence of
findings may result when vaginal or anal penetration is slight. Laboratory

1 analysis of two pairs of panties belonging to E., taken from defendant's
2 apartment, did not detect semen.

3 E. was interviewed by Maria Gutierrez at the Multi-Disciplinary
4 Interview Center (MDIC) on January 22, 2009. She told Gutierrez that
5 defendant touched her crotch and chest for the first time in 2007 when she
6 was watching the television show Extreme Makeover: Home Edition. The
7 next day, he "French kiss[ed]" her more than once.[fn8] During the last
8 three incidents, which occurred on the Monday, Tuesday, and Thursday
9 before E. went to A.E.'s home, defendant touched E.'s breasts, watched
10 pornography, masturbated, ejaculated, and deposited semen on her face
11 and toes. In addition, on Monday, he pulled down her underwear and
12 licked her vagina. E. recalled that she watched American Idol on Monday
13 and Tuesday. She denied that defendant touched her in any other manner
14 or made her touch his body. E. did not tell Gutierrez that he inserted his
15 penis into her vagina or anus.

16 **FN8:** E. defined a French kiss as "[when] he would use your
17 tongue while kiss[ing] you" and "one person kisses another
18 person with their mouth[s] open."

19 At the preliminary hearing held on June 10, 2009, E. testified that
20 defendant kissed her on the mouth, touched her breasts and vagina,
21 made her look at pornographic videos and images on his computer, made
22 her touch his penis, inserted his penis into her vagina for approximately
23 two minutes four times, ejaculated, and deposited semen on her stomach
24 and feet sometime in the fall during a Monday broadcast of American Idol.
25 Identical acts also took place the following Tuesday and Thursday.

26 On cross-examination, E. was shown footage of her MDIC interview
27 and read transcripts of this interview and her preliminary hearing
28 testimony. She often testified that she could neither remember her
previous statements nor understand defense counsel's questions.

29 Dr. Susan Napolitano, a psychologist with expertise in forensic
30 interviews of children for sexual abuse, reviewed the videotape and
31 transcript of E.'s MDIC interview. She opined that Gutierrez failed to
32 comply with proper protocol during the information-gathering stage. In
33 particular, Gutierrez seldom asked open-ended questions, often asked
34 leading questions, raised "a barrage of, 'Anything else?' questions" after
35 many of E.'s responses, and displayed confirmatory bias. Napolitano
36 concluded that the interview "strayed so significantly" from protocol as to
37 heighten the risk of creating false memories and obtaining inaccurate
38 information.

39 III. Jury Instructions

40 The trial court, upon the request of both the prosecutor and defense
41 counsel, gave the following modified CALCRIM No. 1191 (Evidence of
42 Uncharged Sex Offense):

43 "The People presented evidence that the defendant
44 committed the crime of possessing matter depicting minors
45 engaging in or simulating sexual conduct that was not
46 charged in this case.... [¶] You may consider this evidence
47 only if the People have proved by a preponderance of the

1 evidence that the defendant in fact committed the uncharged
2 offenses. Proof by a preponderance of the evidence is a
3 different burden of proof from proof beyond a reasonable
4 doubt. A fact is proved by a preponderance of the evidence if
5 you conclude that it is more likely than not that the fact is
6 true. [¶] If the People have not met this burden of proof, you
7 must disregard this evidence entirely.
8

9 "If you decide that the defendant committed the uncharged
10 offense, you may, but are not required to, conclude from that
11 evidence that the defendant was disposed or inclined to
12 commit sexual offenses, and based on that decision, also
13 conclude that the defendant was likely to commit the crimes
14 of sexual intercourse or sodomy with a child 10 years of age
15 or younger and/or lewd acts upon a child, as charged. If you
16 conclude that the defendant committed the uncharged
17 offense, that conclusion is only one factor to consider along
18 with all the other evidence. It is not sufficient by itself to
19 prove that the defendant is guilty of the crimes of sexual
20 intercourse or sodomy with a child 10 years of age or
21 younger and/or lewd acts upon a child. The People must still
22 prove each charge beyond a reasonable doubt. [¶] Do not
23 consider this evidence for any other purpose."
24

25 Defense counsel did not object to this instruction.
26

27 The prosecutor requested an instruction conforming with either
28 CALCRIM No. 3500 (Unanimity)[fn9] or CALCRIM No. 3501 (Unanimity:
When Generic Testimony of Offense is Presented).[fn10] The court did not
provide a unanimity instruction.

16 **FN9:** CALCRIM No. 3500 reads:

17 "The defendant is charged with <insert description of
18 alleged offense> [in Count] [sometime during the period
19 of to]. [¶] The People have presented evidence of more
20 than one act to prove that the defendant committed this
21 offense. You must not find the defendant guilty unless you all
22 agree that the People have proved that the defendant
23 committed at least one of these acts and you all agree on
24 which act (he/she) committed."
25

26 **FN10:** CALCRIM No. 3501 reads:
27

28 "The defendant is charged with <insert description[s] of
alleged offense[s]> [in Count[s]] sometime during the
period of to . [¶] The People have presented evidence of
more than one act to prove that the defendant committed
(this/these) offense[s]. You must not find the defendant guilty
unless: [¶] 1. You all agree that the People have proved that
the defendant committed at least one of these acts and you
all agree on which act (he/she) committed [for each offense];
[¶] OR [¶] 2. You all agree that the People have proved that
the defendant committed all the acts alleged to have
occurred during this time period [and have proved that the
defendant committed at least the number of offenses

1 charged]."

2 IV. Closing Arguments

3 The prosecutor remarked in closing:

4 "Ladies and Gentlemen, if you have listened to this
5 evidence and you feel that [E.] told the truth and that the
6 defendant penetrated her vagina at least one time, Count
7 One is guilty. If you think that he penetrated her butt, her
8 anus, her backside, Count Two, guilty. The People aren't
9 saying it only happened three times. The People are just —
10 at least three times. If you feel that he penetrated her a third
11 time, anal, vaginal, if you believe the evidence shows this
12 happened, that is Count Three. You don't have to agree —
13 you all have to agree on the type of penetration. You don't
14 have to agree on what happened, only that it happened and
15 that it is the same event. So if you all agree on that, Count
16 One, Count Two, and Count Three are guilty.

17 "As to Counts Four, Five and Six — if you believe that
18 he touched her on her vagina one time, that's Count Four. If
19 you believe he did it at least three times, that is Four, Five
20 and Six, he is guilty. If you believe he ejaculated on her and
had her rub — and had her touch his penis, that count[s]. If
you believe that he kissed her or touched her in any other
inappropriate manner and you all agree on the same facts,
he did these things — once again, we're not saying it only
happened three times, we're saying it happened at least
three times. Because we all know [E.] told you it happened a
lot over those three months, almost half the time she ever
watched American Idol, and also during other times. All you
have to do is agree that the same conduct occurred and the
same conduct occurred more than once. [¶] You have plenty
to pick from."

21 Defense counsel contended that E. offered inconsistent accounts of
22 what took place and therefore lacked credibility. He also asserted that A.E.
23 had E. allege molestation against defendant to allow her, her children, and
24 E.E. to move out of state without defendant's interference.

25 People v. Diaz, 2013 Cal. App. Unpub. LEXIS 9301, 2-13 (Dec. 23, 2013).

26 **II. Discussion**

27 **A. Jurisdiction**

28 Relief by way of a petition for writ of habeas corpus extends to a person in
custody pursuant to the judgment of a state court if the custody is in violation of the
Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. §
2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 fn.7 (2000). Petitioner asserts that he
suffered violations of his rights as guaranteed by the U.S. Constitution. In addition, the

1 conviction challenged arises out of the Fresno County Superior Court, which is located
2 within the jurisdiction of this court. 28 U.S.C. § 2241(d); 2254(a). Accordingly, the Court
3 has jurisdiction over the action.

4 **B. Legal Standard of Review**

5 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death
6 Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus
7 filed after its enactment. Lindh v. Murphy, 521 U.S. 320, 326 (1997); Jeffries v. Wood,
8 114 F.3d 1484, 1499 (9th Cir. 1997). The instant petition was filed after the enactment of
9 the AEDPA; thus, it is governed by its provisions.

10 Under AEDPA, an application for a writ of habeas corpus by a person in custody
11 under a judgment of a state court may be granted only for violations of the Constitution
12 or laws of the United States. 28 U.S.C. § 2254(a); Williams v. Taylor, 529 U.S. at 375 n.
13 7 (2000). Federal habeas corpus relief is available for any claim decided on the merits in
14 state court proceedings if the state court's adjudication of the claim:

15 (1) resulted in a decision that was contrary to, or involved an
16 unreasonable application of, clearly established federal law, as
determined by the Supreme Court of the United States; or

17 (2) resulted in a decision that was based on an unreasonable
18 determination of the facts in light of the evidence presented in the State
court proceeding.

19 28 U.S.C. § 2254(d).

20 **1. Contrary to or an Unreasonable Application of Federal Law**

21 A state court decision is "contrary to" federal law if it "applies a rule that
22 contradicts governing law set forth in [Supreme Court] cases" or "confronts a set of facts
23 that are materially indistinguishable from" a Supreme Court case, yet reaches a different
24 result." Brown v. Payton, 544 U.S. 133, 141 (2005) citing Williams, 529 U.S. at 405-06.
25 "AEDPA does not require state and federal courts to wait for some nearly identical
26 factual pattern before a legal rule must be applied. . . . The statute recognizes . . . that
27 even a general standard may be applied in an unreasonable manner" Panetti v.
28 Quarterman, 551 U.S. 930, 953 (2007) (citations and quotation marks omitted). The

1 "clearly established Federal law" requirement "does not demand more than a 'principle'
2 or 'general standard.'" Musladin v. Lamarque, 555 F.3d 830, 839 (2009). For a state
3 decision to be an unreasonable application of clearly established federal law under §
4 2254(d)(1), the Supreme Court's prior decisions must provide a governing legal principle
5 (or principles) to the issue before the state court. Lockyer v. Andrade, 538 U.S. 63, 70-
6 71 (2003). A state court decision will involve an "unreasonable application of" federal
7 law only if it is "objectively unreasonable." Id. at 75-76, quoting Williams, 529 U.S. at
8 409-10; Woodford v. Visciotti, 537 U.S. 19, 24-25 (2002). In Harrington v. Richter, the
9 Court further stresses that "an *unreasonable* application of federal law is different from
10 an *incorrect* application of federal law." 131 S. Ct. 770, 785 (2011), (citing Williams, 529
11 U.S. at 410) (emphasis in original). "A state court's determination that a claim lacks
12 merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the
13 correctness of the state court's decision." Id. at 786 (citing Yarborough v. Alvarado, 541
14 U.S. 653, 664 (2004)). Further, "[t]he more general the rule, the more leeway courts
15 have in reading outcomes in case-by-case determinations." Id.; Renico v. Lett, 130 S.
16 Ct. 1855, 1864 (2010). "It is not an unreasonable application of clearly established
17 Federal law for a state court to decline to apply a specific legal rule that has not been
18 squarely established by this Court." Knowles v. Mirzayance, 129 S. Ct. 1411, 1419
19 (2009), quoted by Richter, 131 S. Ct. at 786.

20 **2. Review of State Decisions**

21 "Where there has been one reasoned state judgment rejecting a federal claim,
22 later unexplained orders upholding that judgment or rejecting the claim rest on the same
23 grounds." See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). This is referred to as the
24 "look through" presumption. Id. at 804; Plascencia v. Alameida, 467 F.3d 1190, 1198
25 (9th Cir. 2006). Determining whether a state court's decision resulted from an
26 unreasonable legal or factual conclusion, "does not require that there be an opinion from
27 the state court explaining the state court's reasoning." Richter, 131 S. Ct. at 784-85.
28 "Where a state court's decision is unaccompanied by an explanation, the habeas

1 petitioner's burden still must be met by showing there was no reasonable basis for the
2 state court to deny relief." Id. ("This Court now holds and reconfirms that § 2254(d) does
3 not require a state court to give reasons before its decision can be deemed to have been
4 'adjudicated on the merits.'").

5 Richter instructs that whether the state court decision is reasoned and explained,
6 or merely a summary denial, the approach to evaluating unreasonableness under §
7 2254(d) is the same: "Under § 2254(d), a habeas court must determine what arguments
8 or theories supported or, as here, could have supported, the state court's decision; then
9 it must ask whether it is possible fairminded jurists could disagree that those arguments
10 or theories are inconsistent with the holding in a prior decision of this Court." Id. at 786.
11 Thus, "even a strong case for relief does not mean the state court's contrary conclusion
12 was unreasonable." Id. (citing Lockyer v. Andrade, 538 U.S. at 75). AEDPA "preserves
13 authority to issue the writ in cases where there is no possibility fairminded jurists could
14 disagree that the state court's decision conflicts with this Court's precedents." Id. To put
15 it yet another way:

16 As a condition for obtaining habeas corpus relief from a federal
17 court, a state prisoner must show that the state court's ruling on the claim
18 being presented in federal court was so lacking in justification that there
was an error well understood and comprehended in existing law beyond
any possibility for fairminded disagreement.

19 Id. at 786-87. The Court then explains the rationale for this rule, i.e., "that state courts
20 are the principal forum for asserting constitutional challenges to state convictions." Id. at
21 787. It follows from this consideration that § 2254(d) "complements the exhaustion
22 requirement and the doctrine of procedural bar to ensure that state proceedings are the
23 central process, not just a preliminary step for later federal habeas proceedings." Id.
24 (citing Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).

25 **3. Prejudicial Impact of Constitutional Error**

26 The prejudicial impact of any constitutional error is assessed by asking whether
27 the error had "a substantial and injurious effect or influence in determining the jury's
28 verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); see also Fry v. Pliler, 551

1 U.S. 112, 121-22 (2007) (holding that the Brech standard applies whether or not the
2 state court recognized the error and reviewed it for harmlessness). Some constitutional
3 errors, however, do not require that the petitioner demonstrate prejudice. See Arizona v.
4 Fulminante, 499 U.S. 279, 310 (1991); United States v. Cronic, 466 U.S. 648, 659
5 (1984). Furthermore, where a habeas petition governed by AEDPA alleges ineffective
6 assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), the
7 Strickland prejudice standard is applied and courts do not engage in a separate analysis
8 applying the Brech standard. Avila v. Galaza, 297 F.3d 911, 918, n. 7 (2002). Musalin
9 v. Lamarque, 555 F.3d at 834.

10 **III. Review of Petition**

11 **A. Claim One: Ineffective Assistance of Trial Counsel**

12 Petitioner contends trial counsel was ineffective for failing to impeach the victim's
13 testimony by presenting evidence that she did not live with Petitioner at the time of one
14 or more of the alleged assaults.

15 **1. State Court Decision**

16 The last reasoned decision of the state court summarily denied Petitioner's
17 ineffective assistance of counsel claim.¹ Determining whether a state court's decision
18 resulted from an unreasonable legal or factual conclusion, "does not require that there
19 be an opinion from the state court explaining the state court's reasoning." Harrington,
20 131 S. Ct. at 784-85. "Where a state court's decision is unaccompanied by an
21 explanation, the habeas petitioner's burden still must be met by showing there was no
22 reasonable basis for the state court to deny relief." Id. ("This Court now holds and
23 reconfirms that § 2254(d) does not require a state court to give reasons before its
24 decision can be deemed to have been 'adjudicated on the merits.'").

25

26 ¹ The Fresno County Superior Court dismissed the claim without prejudice on procedural grounds.
27 Rather than re-file the petition with the Superior Court, Petitioner filed a petition with the California
28 Supreme Court, which denied the petition in a summary decision. (Lodged Docs. 13-16.) Accordingly,
even with the benefit of the look-through doctrine (Ylst v. Nunnemaker, 501 U.S. at 804-05), there is no
reasoned decision provided by the state courts.

1 Harrington instructs that whether the state court decision is reasoned and
2 explained, or merely a summary denial, the approach to evaluating unreasonableness
3 under § 2254(d) is the same: "Under § 2254(d), a habeas court must determine what
4 arguments or theories supported or, as here, could have supported, the state court's
5 decision; then it must ask whether it is possible fairminded jurists could disagree that
6 those arguments or theories are inconsistent with the holding in a prior decision of this
7 Court." Id. at 786.

8 **2. Legal Standard**

9 The law governing ineffective assistance of counsel claims is clearly established
10 for the purposes of the AEDPA deference standard set forth in 28 U.S.C. § 2254(d).
11 Canales v. Roe, 151 F.3d 1226, 1229 (9th Cir. 1998). In a petition for writ of habeas
12 corpus alleging ineffective assistance of counsel, the Court must consider two factors.
13 Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Lowry
14 v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994). First, the petitioner must show that counsel's
15 performance was deficient, requiring a showing that counsel made errors so serious that
16 he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment.
17 Strickland, 466 U.S. at 687. The petitioner must show that counsel's representation fell
18 below an objective standard of reasonableness, and must identify counsel's alleged acts
19 or omissions that were not the result of reasonable professional judgment considering
20 the circumstances. Id. at 688; United States v. Quintero-Barraza, 78 F.3d 1344, 1348
21 (9th Cir. 1995). Judicial scrutiny of counsel's performance is highly deferential. A court
22 indulges a strong presumption that counsel's conduct falls within the wide range of
23 reasonable professional assistance. Strickland, 466 U.S. at 687; see also, Harrington v.
24 Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

25 Second, the petitioner must demonstrate that "there is a reasonable probability
26 that, but for counsel's unprofessional errors, the result ... would have been different."
27 Strickland, 466 U.S. at 694. Petitioner must show that counsel's errors were "so serious
28 as to deprive defendant of a fair trial, a trial whose result is reliable." Id. at 687. The

1 Court must evaluate whether the entire trial was fundamentally unfair or unreliable
2 because of counsel's ineffectiveness. Id.; Quintero-Barraza, 78 F.3d at 1348; United
3 States v. Palomba, 31 F.3d 1456, 1461 (9th Cir. 1994).

4 A court need not determine whether counsel's performance was deficient before
5 examining the prejudice suffered by the petitioner as a result of the alleged deficiencies.
6 Strickland, 466 U.S. at 697. Since the defendant must affirmatively prove prejudice, any
7 deficiency that does not result in prejudice must necessarily fail. However, there are
8 certain instances which are legally presumed to result in prejudice, e.g., where there has
9 been an actual or constructive denial of the assistance of counsel or where the State has
10 interfered with counsel's assistance. Id. at 692; United States v. Cronic, 466 U.S., at 659,
11 and n. 25 (1984).

12 As the Supreme Court reaffirmed in Harrington v. Richter, meeting the standard
13 for ineffective assistance of counsel in federal habeas is extremely difficult:

14 The pivotal question is whether the state court's application of the
15 Strickland standard was unreasonable. This is different from asking
16 whether defense counsel's performance fell below Strickland's standard.
17 Were that the inquiry, the analysis would be no different than if, for
18 example, this Court were adjudicating a Strickland claim on direct review
19 of a criminal conviction in a United States district court. Under AEDPA,
20 though, it is a necessary premise that the two questions are different. For
21 purposes of § 2254(d)(1), "an unreasonable application of federal law is
22 different from an incorrect application of federal law." Williams, *supra*, at
23 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389. A state court must be granted a
24 deference and latitude that are not in operation when the case involves
25 review under the Strickland standard itself.

26 A state court's determination that a claim lacks merit precludes
27 federal habeas relief so long as "fairminded jurists could disagree" on the
28 correctness of the state court's decision. Yarborough v. Alvarado, 541
U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). And as this
Court has explained, "[E]valuating whether a rule application was
unreasonable requires considering the rule's specificity. The more general
the rule, the more leeway courts have in reaching outcomes in case-by-
case determinations." *Ibid.* "[I]t is not an unreasonable application of
clearly established Federal law for a state court to decline to apply a
specific legal rule that has not been squarely established by this Court."
Knowles v. Mirzayance, 556 U.S. 111, 129 S. Ct. 1411, 1419, 173 L. Ed.
2d 251, 261 (2009) (internal quotation marks omitted).

29 Harrington v. Richter, 131 S. Ct. at 785-86.

30 "It bears repeating that even a strong case for relief does not mean the state

1 court's contrary conclusion was unreasonable." Id. at 786. "As amended by AEDPA, §
2 2254(d) stops short of imposing a complete bar on federal court relitigation of claims
3 already rejected in state proceedings." Id. "As a condition for obtaining habeas corpus
4 from a federal court, a state prisoner must show that the state court's ruling on the claim
5 being presented in federal court was so lacking in justification that there was an error
6 well understood and comprehended in existing law beyond any possibility for fairminded
7 disagreement." Id. at 786-87.

8 Accordingly, even if Petitioner presents a strong case of ineffective assistance of
9 counsel, this Court may only grant relief if no fairminded jurist could agree on the
10 correctness of the state court decision.

11 **3. Analysis**

12 Petitioner contends that counsel was ineffective by failing to cross-examine the
13 victim regarding whether she lived with Petitioner on the nights of the alleged sexual
14 assaults. Respondent asserts that the California Supreme Court decision denying the
15 claim was reasonable because counsel neither performed deficiently, nor did counsel's
16 performance prejudice Petitioner.

17 During direct testimony, the victim explained that several incidents occurred at
18 night while she and Petitioner were watching the television show American Idol, but
19 there was no mention as to which day or days of the week that the show was on. (Rep.
20 Tr. 216-25.) The victim testified that the sexual abuse happened frequently, but not all
21 the time, and that some instances involved Petitioner showing her explicit videos while
22 others involved sexual assault. (Id. at 217-18.)

23 On cross-examination, the victim recalled that one of the incidences of assault
24 occurred on either a Friday or Saturday. (Rep. Tr. at 240.) When asked about whether
25 the victim remembers telling an investigator that the last incidence of assault occurred on
26 a Thursday, the victim was no longer able to recall. (Id. at 248-49.) The victim was
27 provided her prior answers to questions from investigators where she stated that
28 incidents occurred on Monday, Tuesday and Thursday of a given week, however she did

1 not recall making such statements. (Id. at 251-52.) When asked again during cross-
2 examination whether anything occurred on the Monday or Wednesday of the week in
3 question, the victim could not remember. (Id. at 274, 276.)

4 Later during cross-examination, defense counsel again asked the victim about
5 where she spent the night on the Monday, Tuesday, and Wednesday of the week before
6 she reported Petitioner's conduct to police. (Lodged Doc. 5 at 356-57.) Again, the victim
7 testified that she did not remember where she spent the night on the Monday and
8 Tuesday. However, she remembered that she spent the night at Petitioner's house on
9 the Wednesday because she helped Petitioner with his homework. (Lodged Doc. 5 at
10 357.) Defense counsel asked the victim detailed questions about whether she actually
11 spent the night at her grandmother's house, rather than Petitioner's house on the
12 Monday and Tuesday. (Id. at 358-61.) The victim testified that she did not remember. (Id.
13 at 358-61.)

14 Based on a review of the trial testimony, Petitioner's counsel did ask the victim several
15 questions regarding which nights of the week the acts of abuse took place. Petitioner
16 admits that counsel questioned the victim about whether she was at Petitioner's
17 apartment on nights in which she claimed abuse. However, he asserts that counsel was
18 ineffective with failing to present evidence, in the form of declarations or testimony of
19 other witnesses, to prove that she was not at Petitioner's apartment.

20 Petitioner has failed to present any evidence that other witnesses, especially
21 family members had information, and were willing to testify, that the victim was not at his
22 residence on the nights in which she claimed the abuse occurred. This Court, in
23 reviewing Petitioner's claims and determining if the state court decision was reasonable,
24 may only rely upon the record before the state court. See Cullen v. Pinholster, 131 S. Ct.
25 1388, 1398 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record
26 that was before the state court that adjudicated the claim on the merits."). Petitioner
27 presented no evidence in state court of exculpatory evidence based on statements from
28 the victim's family members that the victim was not present at Petitioner's apartment on

1 the nights in question.

2 Petitioner has not shown that counsel's representation was ineffective. Counsel
3 had thoroughly questioned the victim regarding her recall of the events, and forced the
4 victim to admit that her recall of the events had been diminished by the passage of time
5 between the events and trial. Further, Petitioner has not presented the Court with
6 evidence that impeachment testimony existed, as alleged, that would contradict the
7 victim's story that she was at Petitioner's house on the night in question.

8 Harrington instructs that "[u]nder § 2254(d), a habeas court must determine what
9 arguments or theories supported or, as here, could have supported, the state court's
10 decision." Harrington, 131 S. Ct. at 784-85. In this case, the Court could have concluded
11 that trial counsel acted competently by cross-examining the victim and focusing on a
12 defense based on the inconsistencies of the victim's testimony. At closing, Petitioner's
13 counsel focused strongly on the inconsistencies, and argued that in light of them, the
14 prosecution did not meet its burden of proof. (Rep. Tr. at 871-94.) Had the state court
15 denied the claim based on this reasoning, "fairminded jurists could disagree that those
16 arguments or theories are inconsistent" of Strickland. See Harrington 131 S. Ct. at 786.
17 Here, fairminded jurists could disagree that Petitioner's counsel's strategy, to show that
18 the victim's statements were inconsistent and therefore the prosecution did not prove its
19 case beyond a reasonable doubt, was reasonable. Furthermore, fairminded jurists could
20 disagree that, even had counsel been ineffective, Petitioner was not prejudiced by his
21 actions. The case revolved around the allegations of the victim who was eight or nine
22 years old at the time of the molestation, and was testifying three years later about the
23 incidents. Based on the victim's age and the significant time that had elapsed between
24 the incidents and trial, it is reasonable that jurors may have been less critical regarding
25 inconsistencies in the victim's testimony regarding the events. The victim gave detailed
26 statements regarding the acts of sexual intercourse and molestation, despite no longer
27 remembering details such as the days in question when the events occurred. Further,
28 even if counsel's conduct was unreasonable, Petitioner has not shown that it was

1 reasonably probable that the result would be different. Petitioner has not shown that
2 counsel's conduct was unreasonable, nor that he was prejudiced by counsel's actions.

3 The arguments or theories that could have supported the state court's decision
4 rejecting Petitioner's claim of ineffective assistance of counsel are not "so lacking in
5 justification that there was an error well understood and comprehended in existing law
6 beyond any possibility for fairminded disagreement." Richter, 131 S. Ct. at 786-87.
7 Petitioner is not entitled to federal habeas relief on this claim.

8 **B. Claim Two: Ineffective Assistance of Appellate Counsel**

9 Petitioner next contends appellate counsel was ineffective based on statements
10 made in opening and closing statements. However, trial counsel only requested copies
11 of the closing statements be preserved. Transcripts of the opening statements are not
12 available. (Rep. Tr. at 170-71.)

13 **1. State Court Decision**

14 Like Petitioner's first claim for ineffective assistance of counsel, the last reasoned
15 decision of the state court summarily denied Petitioner's claim of ineffective assistance
16 of appellate counsel. Where there is no reasoned decision from the state court,
17 Harrington instructs that "a habeas court must determine what arguments or theories
18 supported or, as here, could have supported, the state court's decision; then it must ask
19 whether it is possible fairminded jurists could disagree that those arguments or theories
20 are inconsistent with the holding in a prior decision of this Court." Id. at 786. Harrington,
21 131 S. Ct. at 784-85.

22 **2. Legal Standard**

23 Petitioner claims ineffective assistance of appellate counsel. The Due Process
24 Clause of the Fourteenth Amendment guarantees a criminal defendant the effective
25 assistance of counsel on his first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 391-
26 405, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Claims of ineffective assistance of
27 appellate counsel are reviewed according to the standard set out above in claim one
28 under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

1 Smith v. Robbins, 528 U.S. 259, 285 (2000); Moormann v. Ryan, 628 F.3d 1102, 1106
2 (9th Cir. 2010). The petitioner must show that counsel's performance was objectively
3 unreasonable, which in the appellate context requires the petitioner to demonstrate that
4 counsel acted unreasonably in failing to discover and brief a merit-worthy issue. Smith,
5 528 U.S. at 285; Moormann, 628 F.3d at 1106. The petitioner also must show prejudice,
6 which in this context requires the petitioner to demonstrate a reasonable probability that,
7 but for appellate counsel's failure to raise the issue, the petitioner would have prevailed
8 in his appeal. Smith, 528 U.S. at 285-86; Moormann, 628 F.3d at 1106.

9 **3. Analysis**

10 Contrary to Petitioner's assertions, transcripts of the closing arguments were
11 preserved in the record. (Rep. Tr. at 838-910.) Records do not exist of the opening
12 statements. However, Petitioner provides no more than a general argument that trial
13 counsel committed acts of ineffective assistance of counsel. The only elaboration by
14 Petitioner regarding the errors made during opening statements is the following: "Most
15 cases of prosecutor misconduct occur on closing arguments, where the DA runs
16 slipshod over defendant's rights." (Pet. at 7.)

17 Petitioner has not pointed to specific errors that occurred during opening
18 statements. Petitioner was present during the statements, and could have argued based
19 on personal knowledge what errors occurred. Having presented the Court with no
20 evidence that errors occurred during opening statements, Petitioner has not met his
21 burden of showing that the state court's denial of the claim of ineffective assistance of
22 appellate counsel was unreasonable.

23 With regard to the closing statements, Petitioner contends that the prosecutor
24 committed misconduct and defense counsel failed to object or take any action against
25 that misconduct. Again, Petitioner provides no specific incidents of error in closing
26 arguments, despite the fact that copies of the closing arguments were preserved. After
27 Respondent pointed out in his answer that the closing arguments were preserved,
28 Petitioner filed a traverse, but again provided no argument about specific incidences of

1 error in the closing arguments. Without presenting any factual support for his
2 contentions, Petitioner's claim lacks merit. Based on the summary nature of his claim of
3 ineffective assistance of appellate counsel of failing to present claims of error during
4 opening and closing statements, it was a reasonable determination for the state court to
5 deny the claim. See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994); see also Jones v.
6 Gomez, 66 F.3d 199, 204 (9th Cir. 1995) ("[c]onclusory allegations which are not
7 supported by a statement of specific facts do not warrant habeas relief"); Blackledge v.
8 Allison, 431 U.S. 63, 75 n.7 (1977) (summary disposition of habeas petition appropriate
9 where allegations are vague or conclusory; "the petition is expected to state facts that
10 point to a real possibility of constitutional error") (citation and internal quotations
11 omitted). Petitioner claim of ineffective assistance of appellate counsel is without merit.

12 **C. Claim Three – Failure to Instruct on an Unanimous Verdict**

13 Petitioner next contends the trial court erred by failing to instruct the jury regarding
14 the unanimity requirement for criminal verdicts.

15 **1. State Court Decision**

16 Petitioner presented this claim by way of direct appeal to the California Court of
17 Appeal, Fifth Appellate District. The claim was denied in a reasoned decision by the
18 appellate court and summarily denied in a subsequent petition for review by the
19 California Supreme Court. (Lodged Docs. 8-12, Answer, Ex. A.) Because the California
20 Supreme Court's opinion is summary in nature, this Court "looks through" that decision
21 and presumes it adopted the reasoning of the California Court of Appeal, the last state
22 court to have issued a reasoned opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 804-05
23 & n.3 (1991) (establishing, on habeas review, "look through" presumption that higher
24 court agrees with lower court's reasoning where former affirms latter without discussion);
25 see also LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000) (holding federal
26 courts look to last reasoned state court opinion in determining whether state court's
27 rejection of petitioner's claims was contrary to or an unreasonable application of federal
28 law under 28 U.S.C. § 2254(d)(1)).

In denying Petitioner's claim, the California Court of Appeal explained:

I. The trial court's failure to provide a unanimity instruction was harmless beyond a reasonable doubt.

In a criminal case, a jury verdict must be unanimous. (People v. Russo (2001) 25 Cal.4th 1124, 1132.) The unanimity requirement is founded on the constitutional principle that a criminal defendant is entitled to a verdict in which all 12 jurors agree, beyond a reasonable doubt, as to each count charged. (People v. Brown (1996) 42 Cal.App.4th 1493, 1499-1500, citing Cal. Const., art. I, § 16 & People v. Jones (1990) 51 Cal.3d 294, 305, 321 (Jones); see also People v. Hernandez (2013) 217 Cal.App.4th 559, 570 (Hernandez) ["The importance of the unanimity instruction is rooted in the Fourteenth Amendment to the United States Constitution's requirement that all criminal defendants are afforded due process of law."].) "When the evidence tends to show a larger number of distinct violations of the charged crime than have been charged and the prosecution has not elected a specific criminal act or event upon which it will rely for each allegation, the court must instruct the jury on the need for unanimous agreement on the distinct criminal act or event supporting each charge...." (People v. Whitham (1995) 38 Cal.App.4th 1282, 1295.) "In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim." (Jones, supra, at pp. 321-322.) Whether a particular instruction should have been given in a case is a predominantly legal question reviewed under the *de novo* standard. (See People v. Waidla (2000) 22 Cal.4th 690, 733.)

In the instant case, defendant was charged with three counts of sexual intercourse or sodomy in violation of Penal Code section 288.7, subdivision (a). E.'s testimony indicated a larger number of violations than were charged: penetration of her vagina and anus about a week before January 17, 2009, and penetration of her anus on two to five other occasions between October 12, 2008, and January 15, 2009. Defendant was also charged with three counts of committing a lewd act in violation of Penal Code section 288, subdivision (a). Again, E.'s testimony indicated a larger number of violations than were charged: touching of her buttocks sometime after October 12, 2008; touching of her breasts and vagina and placement of the exposed penis on her body about a week before January 17, 2009; and rubbing of her vagina, ejaculation of semen onto her face, depositing of semen onto her hand and toes, and having her rub the penis "[e]very other week or so" between October 12, 2008, and January 15, 2009. The prosecutor did not elect a specific act for each count and the trial court, in error, failed to provide sua sponte any unanimity instruction.[fn11] (See Hernandez, supra, 217 Cal.App.4th at p. 569.) Hence, the question now before us is whether this error requires reversal of defendant's conviction.

FN11: The Attorney General also concedes that the charged

offenses did not fall under the "continuous course of conduct" exception.

We apply the test set forth in Chapman v. California (1967) 386 U.S. 18, 24 (Chapman) to determine whether the trial court's failure to provide a unanimity instruction was harmless beyond a reasonable doubt.[fn12] (See, e.g., People v. Gary (1987) 189 Cal.App.3d 1212, 1218; People v. Metheney (1984) 154 Cal.App.3d 555, 563-564, fn. 5.) Under Chapman, "[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless." (People v. Thompson (1995) 36 Cal.App.4th 843, 853 (Thompson).) For instance, "where the defendant offered the same defense to all criminal acts, and 'the jury's verdict implies that it did not believe the only defense offered,' failure to give a unanimity instruction is harmless error." (Hernandez, supra, 217 Cal.App.4th at p. 577, citing People v. Diedrich (1982) 31 Cal.3d 263, 283 (Diedrich)). Additionally, "[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless." (Thompson, supra, at p. 853.)

FN12: We recognize a split of authority as to the proper standard for prejudicial error in unanimity instruction cases. We adhere to the majority rule that the Chapman test is correct. (See Hernandez, supra, 217 Cal.App.4th at p. 576; but see People v. Vargas (2001) 91 Cal.App.4th 506, 562 [applying test set forth in People v. Watson (1956) 46 Cal.2d 818, 836].)

We conclude the trial court's failure to provide a unanimity instruction was harmless beyond a reasonable doubt. Here, the record does not provide a rational basis for the jury to distinguish among the various acts of molestation alleged so as to find defendant guilty of some of these acts but not guilty of others. (See People v. Deletto (1983) 147 Cal.App.3d 458, 466, 473.) The prosecution's case, devoid of third-party eyewitnesses and physical evidence of molestation, rested on E.'s testimony describing sexual abuse at the hands of defendant for a three-month period. Aside from the first and last incidents, she blurred together the acts. In his closing argument, the prosecutor did not differentiate among the violations, stating *inter alia* that the jury had "plenty to pick from." On the other side, defense counsel had E. watch footage of her MDIC interview and read transcripts of this interview and her preliminary hearing testimony. He then elicited testimony tending to show her flawed recollection of the events in question. Napolitano also testified that E.'s MDIC interview may have been compromised by the interviewer's disregard of protocol. In his closing argument, defense counsel presented a single defense to each charge, namely that E. lied at the behest of her mother. (See Thompson, supra, 36 Cal.App.4th at p. 853 [different defenses gave the jury a rational basis to distinguish between various acts].)

Furthermore, the jury's return of a guilty verdict on all counts indicated that it rejected in toto defendant's unitary defense, resolved the

1 credibility dispute against him, and established beyond a reasonable
2 doubt that defendant committed the acts described by E. (See Hernandez,
3 supra, 217 Cal.App.4th at p. 577; see also Jones, supra, 51 Cal.3d at p.
4 321, original italics ["[I]f an information charged two counts of lewd
5 conduct during a particular time period, the child victim testified that such
6 conduct took place *three times* during that same period, and the jury
7 believed that testimony in toto, its difficulty in differentiating between the
8 various acts should not preclude a conviction of the two counts charged,
9 so long as there is no possibility of jury disagreement regarding the
10 defendant's commission of any of these acts."].) In other words, even
11 without an appropriate instruction, the unanimity requirement was
12 satisfied. (See Jones, supra, at p. 322, quoting People v. Moore (1989)
13 211 Cal.App.3d 1400, 1414 ["[In child molestation cases], the jury either
14 will believe the child's testimony that the consistent, repetitive pattern of
15 acts occurred or disbelieve it. In either event, a defendant will have his
16 unanimous jury verdict [citation] and the prosecution will have proven
17 beyond a reasonable doubt that the defendant committed a specific act,
18 for if the jury believes the defendant committed all the acts it necessarily
19 believes he committed each specific act [citations]."].)

20 Defendant argues that People v. Smith (2005) 132 Cal.App.4th
21 1537 (Smith) supports reversal of his conviction. We disagree. In Smith,
22 the accused was charged with 10 counts of lewd and lascivious conduct
23 with a child under 14 years of age. (Id. at p. 1540.) The trial court
24 instructed the jury that "[it] must unanimously agree that the prosecution
25 proved beyond a reasonable doubt that the defendant committed all the
26 acts described by the alleged victim," but failed to also provide the
27 specific acts unanimity instruction in compliance with Jones, supra, 51
28 Cal.3d 294. (Smith, supra, at pp. 1540, 1543, italics omitted.) In finding
prejudicial error under Chapman, the Third Appellate District examined the
conduct of the jury, which ignored the only instruction given and convicted
on the first count, failed to reach a verdict on the second count, and
acquitted on the remaining counts, and concluded that it could not declare
beyond a reasonable doubt that "the jury acted in a manner that suggests
that it focused on the same specific act of molestation when it reached its
decision on count one." (Smith, supra, at p. 1546.) Here, by contrast, the
trial court did not instruct the jurors that a conviction is allowed if they
unanimously agree either on the specific acts or that defendant committed
all the acts described by E. Nonetheless, their verdict convicting defendant
on all counts, in view of the circumstances of this case, would have
followed an instruction conforming with CALCRIM No. 3501 had it been
given.

29
30 People v. Diaz, 2013 Cal. App. Unpub. LEXIS 9301 at 13-21.

31 2. Analysis

32 Petitioner's claim challenging the jury's verdict for lack of unanimity fails. There is
33 no federal constitutional right to a unanimous jury verdict in a state criminal trial. See
34 Richardson v. United States, 526 U.S. 813, 817 (1999) (federal jury need not
35 unanimously decide which set of facts make up a particular element of a crime); Schad

1 v. Arizona, 501 U.S. 624, 631-32 (1991) (plurality holding that conviction under different
2 theories does not violate due process); see also McKoy v. N. Carolina, 494 U.S. 433,
3 449, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990) (Blackmun, J., concurring) ("[D]ifferent
4 jurors may be persuaded by different pieces of evidence, even when they agree upon
5 the bottom line. Plainly there is no general requirement that the jury reach agreement on
6 the preliminary factual issues which underlie the verdict." (footnotes omitted)). Under
7 California law a trial court may be required to *sua sponte* instruct the jury in a criminal
8 trial that it must unanimously agree on the acts or elements underlying the offense in
9 order to convict. See People v. Diedrich, 643 P.2d 971, 980-81 (Cal. 1982); People v.
10 Crawford, 131 Cal. App. 3d 591, 182 Cal. Rptr. 536, 538 (1982) (unanimity instruction
11 required where defendant was charged with possession of one or more firearms by felon
12 and jury could disagree as to particular firearm). However, federal law is clear that, at
13 least in a non-capital case, there is no federal right to a unanimous jury verdict. Schad,
14 501 U.S. at 634 n.5 ("a state criminal defendant, at least in noncapital cases, has no
15 federal right to a unanimous jury verdict"); Apodaca v. Oregon, 406 U.S. 404, 410-13, 92
16 S. Ct. 1628, 32 L. Ed. 2d 184 (1972) (no constitutional right to unanimous jury verdict in
17 non-capital criminal cases). Accordingly, Petitioner is not entitled to relief on this ground.

18 **D. Claim Four – Admission of Prejudicial Propensity Evidence**

19 Petitioner next contends the trial court erred by allowing five images of child
20 pornography from his computer to be admitted at trial and that the prejudicial nature of
21 the images violated his due process rights to a fair trial.

22 **1. State Court Decision**

23 Petitioner presented this claim by way of direct appeal to the California Court of
24 Appeal, Fifth Appellate District. The claim was denied in a reasoned decision by the
25 appellate court and summarily denied in a subsequent petition for review by the
26 California Supreme Court. (Lodged Docs. 8-12, Answer, Ex. A.) Because the California
27 Supreme Court's opinion is summary in nature, this Court "looks through" that decision
28 and presumes it adopted the reasoning of the California Court of Appeal, the last state

1 court to have issued a reasoned opinion. See Ylst v. Nunnemaker, 501 U.S. at 804-05 &
2 n.3. In denying Petitioner's claim, the California Court of Appeal explained:

3 II. Five images of child pornography extracted from defendant's computer
4 and offered by the prosecution as circumstantial evidence of propensity
were admissible; their probative value outweighed their prejudicial effect.

5 Generally, "evidence of a person's character or a trait of his or her
6 character (whether in the form of an opinion, evidence of reputation, or
7 evidence of specific instances of his or her conduct) is inadmissible when
8 offered to prove his or her conduct on a specified occasion." (Evid. Code,
9 § 1101, subd. (a).)[fn13] However, in a criminal action in which a
10 defendant is accused of a sexual offense, evidence of the defendant's
11 commission of another sexual offense is not made inadmissible by section
12 1101, so long as the evidence is not made inadmissible by section 352. (§
13 1108, subd. (a).) The California State Legislature enacted section 1108 to
14 "relax the evidentiary restraints" imposed by section 1101, "expand the
15 admissibility of disposition or propensity evidence in sex offense cases,"
16 and "assure that the trier of fact would be made aware of the defendant's
17 other sex offenses in evaluating the victim's and the defendant's
18 credibility." (People v. Falsetta (1999) 21 Cal.4th 903, 911 (Falsetta)). The
19 Legislature recognized that sex crimes "[b]y their very nature ... are
20 usually committed in seclusion without third party witnesses or substantial
21 corroborating evidence" and "[t]he ensuing trial often presents conflicting
22 versions of the event and requires the trier of fact to make difficult
23 credibility determinations." (Id. at p. 915.) In view of "the serious and
24 secretive nature of sex crimes and the often resulting credibility contest at
25 trial," evidence of a defendant's willingness to commit a sexual offense,
26 an attribute "not common to most individuals[,] ... is particularly probative
27 and necessary for determining the credibility of the witness." (Id. at pp.
28 911-912.)

FN13: All subsequent statutory citations refer to the Evidence Code unless
otherwise indicated.

In evaluating the admissibility of propensity evidence under section 1108, the trial court must decide whether the evidence is excluded by section 352. (People v. Robertson (2012) 208 Cal.App.4th 965, 990 (Robertson); see also Falsetta, *supra*, 21 Cal.4th at pp. 916-921 [describing § 352 as safeguard supporting the constitutionality of § 1108].) "The court in its discretion may exclude 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." (§ 352.) Factors to weigh include the "nature, relevance, and possible remoteness [of the uncharged sex offense], the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (Falsetta, *supra*, 21 Cal.4th at p. 917.) Evidence should be excluded as unduly prejudicial ""when it is

1 of such nature as to inflame the emotions of the jury, motivating them to
2 use the information, not to logically evaluate the point upon which it is
3 relevant, but to reward or punish one side because of the jurors' emotional
4 reaction. In such a circumstance, the evidence is unduly prejudicial
5 because of the substantial likelihood the jury will use it for an illegitimate
6 purpose." [Citation.]' [Citation.]" (People v. Scott (2011) 52 Cal.4th 452,
7 491; see also People v. Gionis (1995) 9 Cal.4th 1196, 1214 ["prejudice"
8 set forth in § 352 does not refer to prejudice or damage to a defense that
9 naturally flows from relevant, highly probative evidence, but applies to
evidence that uniquely tends to evoke an emotional bias against the
defendant as an individual and has very little effect on the issues].)

10 We review a trial court's ruling admitting propensity evidence in a
11 sex offense case for abuse of discretion and will reverse only if the ruling
12 was arbitrary, whimsical, or capricious as a matter of law. Moreover, we
13 review the correctness of the court's ruling at the time it was made and not
14 by reference to evidence produced at a later date. (Robertson, *supra*, 208
15 Cal.App.4th at p. 991.)

16 We conclude the trial court did not abuse its discretion when it
17 admitted five images of child pornography extracted from defendant's
18 computer. E. testified that defendant sexually abused her numerous times
19 and had shown her images of minors engaging in or simulating sexual
20 conduct. The photographs entered into evidence corroborated her account
21 that defendant showed her similar items and may be reasonably
22 interpreted to establish his deviant sexual proclivity for underage girls. In
the absence of third-party eyewitnesses and physical proof of molestation,
evidence bearing on the credibility of both the victim and perpetrator
becomes highly probative. (See People v. Yovanov (1999) 69 Cal.App.4th
392, 405 [evidence of uncharged sexual offenses uniquely probative in
sex crimes prosecutions].) We have reviewed these images and find the
content, though objectionable, not to be exceedingly inflammatory since
defendant's conduct in the present case was "more likely to have aroused
the passions of the jurors against him." (Robertson, *supra*, 208
Cal.App.4th at p. 993.) The trial court's decision to limit the number of
images shown to the jury to five, out of the estimated 2,500, and present
each image for three seconds via slide-show format ensured that the jury
would not expend an inordinate amount of time "trying the uncharged
offense[]" so as to "dwarf[] the trial on the current charge [and] unfairly
prejudice the defendant." (People v. Frazier (2001) 89 Cal.App.4th 30, 42.)
Furthermore, the court's modified CALCRIM No. 1191 offset the risk that
the "jury might punish the defendant for his uncharged crime[] regardless
of whether it considered him guilty of the charged offense" (People v.
Frazier, *supra*, at p. 42.)

23 Defendant argues that the propensity to have sexual intercourse or
24 sodomy with a child or commit lewd acts upon a child, the crimes for which
25 he was charged and convicted, cannot be inferred conclusively from the
26 different, uncharged crime of possessing child pornography. However, in
enacting section 1108, the Legislature determined that the disposition to
commit any sexual offense is not common to most individuals. (Falsetta,
supra, 21 Cal.4th at p. 912.) ""Many sex offenders are not 'specialists',
and commit a variety of offenses which differ in specific character."'
[Citation.]" (People v. Soto (1998) 64 Cal.App.4th 966, 984.) In Soto we
held:

1 "Section 1108 does not require ""more exacting requirements
2 of similarity between the charged offense and the
3 defendant's other offenses"" [Citation.] Such a
4 requirement was not added to the statute because '["]doing
5 so would tend to reintroduce the excessive requirements of
6 specific similarity under prior law which [section 1108] is
7 designed to overcome, ... and could often prevent the
8 admission and consideration of evidence of other sexual
9 offenses in circumstances where it is rationally probative."""
(Ibid.)

10 Contrary to defendant's position, we find the images of child
11 pornography to be highly probative circumstantial evidence of propensity.
12 (Cf. People v. Holford (2012) 203 Cal.App.4th 155, 181, 185-186
13 [evidence of the defendant's prior molestation of his 15-year-old daughter
14 tended to show his sexual attraction to underage girls and a predisposition
15 to possess child pornography].)

16 People v. Diaz, 2013 Cal. App. Unpub. LEXIS 9301 at 21-28.

17 2. Analysis

18 As Respondent correctly argues, the United States Supreme Court has expressly
19 left open the question of whether the admission of propensity evidence violates due
20 process. See Estelle v. McGuire, 502 U.S. at 75, n.5; Garceau v. Woodford, 275 F.3d
21 769, 774 (9th Cir. 2001). In Estelle, the Supreme Court expressly refused to determine
22 whether the introduction of prior crimes evidence to show propensity to commit a crime
23 would violate the Due Process Clause. Id. ("Because we need not reach the issue, we
24 express no opinion on whether a state law would violate the Due Process Clause if it
25 permitted the use of 'prior crimes' evidence to show propensity to commit a charged
26 crime."); see also Alberni v. McDaniel, 458 F.3d 860, 866 (9th Cir. 2006) ("Estelle
27 expressly left this issue an 'open question'"). Because the Supreme Court has
28 specifically declined to address whether the introduction of propensity evidence violates
due process, Petitioner lacks the clearly established federal law necessary to support his
claims. Id.; see also Mejia v. Garcia, 534 F.3d 1036, 1046-47 (9th Cir. 2008) (relying on
Estelle and Alberni and concluding that the introduction of propensity evidence under
California Evidence Code § 1108 does not provide a basis for federal habeas relief, even
where the propensity evidence relates to an uncharged crime); Holley v. Yarborough,
568 F.3d 1091, 1101 (9th Cir. 2009) (The Supreme Court "has not yet made a clear

1 ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due
2 process violation sufficient to warrant issuance of the writ.").

3 Accordingly, the state courts' rejection of Petitioner's claim could not have been
4 "contrary to, or an unreasonable application of, clearly established" United States
5 Supreme Court authority, since no such "clearly established" Supreme Court authority
6 exists. 28 U.S.C. § 2254(d)(1).

7 Nevertheless, there can be habeas relief for the admission of prejudicial evidence
8 if the admission was fundamentally unfair and resulted in a denial of due process.

9 Estelle, 502 U.S. at 72; Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); Jeffries v.
10 Blodgett, 5 F.3d 1180, 1192 (9th Cir. 1993); Gordon v. Duran, 895 F.2d 610, 613 (9th
11 Cir.1990). Constitutional due process is violated if there are no permissible inferences
12 that may be drawn from the challenged evidence. Jammal v. Van de Kamp, 926 F.2d
13 918, 919-20 (9th Cir. 1991). "Evidence introduced by the prosecution will often raise
14 more than one inference, some permissible, some not." Id. at 920. "A habeas petitioner
15 bears a heavy burden in showing a due process violation based on an evidentiary
16 decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005).

17 Here, the California Court of Appeal appropriately found that the evidence was
18 properly admitted to show Petitioner's propensity towards sexual assault against minors
19 based on the possession of child pornography. Both the Ninth Circuit and the California
20 Supreme Court have found that California Evidence Rule 1108 ("Rule 1108") survives
21 due process challenges because of California Evidence Rule 352 ("Rule 352"), which the
22 Court of Appeal appropriately applied in this case. See People v. Falsetta, 21 Cal. 4th
23 903, 917, 89 Cal. Rptr. 2d 847, 986 P.2d 182 (Cal. 1999) ("[T]he trial court's discretion to
24 exclude propensity evidence under section 352 saves section 1108 from defendant's
25 due process challenge.").

26 The Court of Appeal sufficiently protected Petitioner's due process rights by
27 finding that the Superior Court had not abused its discretion in applying Rule 352 to
28 admit the propensity evidence under Rule 1108. The Court of Appeal found the evidence

1 to have a high probative value, which outweighed the danger of prejudice. People v.
2 Diaz, 2013 Cal. App. Unpub. LEXIS 9301 at 21-28 (applying Cal. Evid. Code § 352). The
3 Court of Appeal found the pornographic images probative because they corroborated the
4 victim's testimony that Petitioner showed her similar images several times and to
5 establish his sexual proclivity to underage girls. Id. Further, the Court did not find the
6 evidence overly prejudicial because the alleged criminal conduct was more likely to have
7 upset the jurors, and that the trial court limited the showing to only five images, shown
8 for three seconds each, of the over 2,500 images found on his computer. Id.

9 This Court must defer to the Court of Appeal's conclusions with regard to
10 California law, Bains v. Cambra, 204 F.3d 964, 972 (9th Cir. 2000) (citing Wainwright v.
11 Goode, 464 U.S. 78, 84 (1983)). The Court finds that this analysis adequately addressed
12 the permissible inferences created by the evidence and the fundamental fairness of its
13 introduction. The California Court of Appeal decision denying this claim was not contrary
14 to clearly established Supreme Court precedent. Accordingly, Petitioner is not entitled to
15 habeas relief with regard to claim four.

16 **E. Claim Five – Use of Uncharged Offenses to Prove Charged Offenses**

17 Petitioner next contends the trial court erred in using jury instruction CALCRIM
18 No. 1191 which allowed the jury to find that Petitioner was disposed or inclined to
19 commit the charged offenses based on evidence of uncharged offenses.² Petitioner
20 claims the instruction violated his Due Process rights by lowering the evidentiary burden
21 necessary to convict him of the charged offenses.

22 **1. State Court Decision**

23 Petitioner presented this claim by way of direct appeal to the California Court of
24 Appeal, Fifth Appellate District. The claim was denied in a reasoned decision by the
25 appellate court and summarily denied in subsequent petition for review by the California
26 Supreme Court. (Lodged Docs. 8-12, Answer, Ex. A.) Because the California Supreme

27 _____
28 ² The language of CALCRIM No. 1191 is set forth in the Summary of Fact section above. See
Supra, Sec. II.

1 Court's opinion is summary in nature, this Court "looks through" that decision and
2 presumes it adopted the reasoning of the California Court of Appeal, the last state court
3 to have issued a reasoned opinion. See Ylst, 501 U.S. at 804-05.

4 In denying Petitioner's claim, the Fifth District Court of Appeal explained:

5 **III. CALCRIM No. 1191 is constitutional.**

6 Finally, defendant contends CALCRIM No. 1191 deprives him of
7 due process because the instruction authorizes the jury to base a
8 conviction of the charged offense, in part, on evidence that he committed
9 an uncharged offense proved only by a preponderance of the evidence
10 rather than beyond a reasonable doubt.[fn14] We reject this claim in view
11 of People v. Reliford (2003) 29 Cal.4th 1007, in which our Supreme Court
12 upheld the constitutionality of the 1999 version of California Jury
13 Instructions Criminal (CALJIC) No. 2.50.01, CALCRIM No. 1191's
precursor. (See also People v. Cromp (2007) 153 Cal.App.4th 476, 480;
People v. Schnabel (2007) 150 Cal.App.4th 83, 87 [finding 1999 version of
CALJIC No. 2.50.01 and CALCRIM No. 1191 similar in all material
respects and rejecting constitutional challenges to CALCRIM No. 1191 on
the basis of Reliford.] We are required by the doctrine of stare decisis to
follow Reliford.[fn15] (Auto Equity Sales, Inc. v. Superior Court (1962) 57
Cal.2d 450, 455.)

14 **FN14:** The Attorney General asserts on appeal that
15 defendant forfeited the issue because defense counsel did
16 not object to the instruction below. We believe defendant's
17 argument is cognizable on appeal, despite his failure to
object, because he claims the instruction erroneously states
the law and, if he were correct, would affect his substantial
rights. (See People v. Kelly (2007) 42 Cal.4th 763, 791;
accord Pen. Code, § 1259.)

18 **FN15:** Defendant relies on Gibson v. Ortiz (9th Cir. 2004)
19 387 F.3d 812 (Gibson) for the proposition that CALCRIM No.
20 1191 is unconstitutional. Decisions of the lower federal
courts are not binding on state courts. (James v. State of
21 California (2013) 219 Cal.App.4th 1265, 1278, fn. 7.)
22 Moreover, Gibson is factually inapposite. In that case, the
issue was whether the 1996 version of CALJIC No. 2.50.01
23 and CALJIC No. 2.50.1, in tandem, deprived an inmate of
due process. (Gibson, *supra*, at p. 822.) The 1996 version of
CALJIC No. 2.50.01 did not contain the caveat subsequently
added in the 1999 version, and rephrased in CALCRIM No.
1191, that evidence of a defendant's prior sexual offense
proved by a preponderance of the evidence "is not sufficient
by itself to prove beyond a reasonable doubt that [he] [she]
committed the charged crime[s]" and an inference properly
drawn from this evidence "is simply one item for you to
consider, along with all other evidence, in determining
whether the defendant has been proved guilty beyond a
reasonable doubt of the charged crime." (Gibson, *supra*, at
pp. 818-819.) CALJIC No. 2.50.1, on the other hand,

1 "ascribed a lesser burden of proof for evidence of previous
2 sexual offenses" and "specifically referenced CALJIC No.
3 2.50.01" (Gibson, *supra*, at p. 822.) Although the Ninth
4 Circuit ultimately found these two instructions to be
5 unconstitutional because "the[ir] interplay ... allowed the jury
6 to find that [inmate] committed the uncharged sexual
7 offenses by a preponderance of the evidence and thus to
8 infer that he had committed the charged acts based upon
9 facts found not beyond a reasonable doubt, but by a
10 preponderance of the evidence," (italics omitted) it
11 suggested that "[h]ad the jury instructions ended with
12 CALJIC No. 2.50.01, our inquiry would have ended with a
13 denial of [inmate]'s petition [for a writ of habeas corpus]."
14 (Ibid.)

15 We also point out that the Ninth Circuit recently held
16 that the Fourth Appellate District "did not act contrary to
17 federal law in applying the analysis from Reliford to uphold
18 the 2002 version of CALJIC No. 2.50.01," which incorporated
19 revisions made in 1999 and 2002 and, "[i]n contrast with the
20 instructions given in Gibson, ... in no way suggests that a
21 jury could reasonably convict a defendant for charged
22 offenses based merely on a preponderance of the evidence."
23 (Schultz v. Tilton (9th. Cir. 2011) 659 F.3d 941, 945.)

24 People v. Diaz, 2013 Cal. App. Unpub. LEXIS 9301 at 28-31.

2. Analysis

25 Challenges to state jury instructions are generally questions of state law and are
26 thus not cognizable on habeas review. Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). In
27 order to merit federal habeas relief on a claim that the trial court erred by failing to
28 instruct a jury properly, a petitioner must show the trial court committed an error that "so
infected the entire trial that the resulting conviction violates due process." Id. at 72
(quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). "The burden of demonstrating
that an erroneous instruction was so prejudicial that it will support a collateral attack on
the constitutional validity of a state court's judgment is even greater than the showing
required to establish plain error on direct appeal." Henderson v. Kibbe, 431 U.S. 145,
154 (1977). In making this determination, the jury instruction "may not be judged in
artificial isolation, but must be considered in the context of the instructions as a whole
and the trial record." Waddington v. Sarausad, 555 U.S. 179, 191, 129 S. Ct. 823, 172 L.
Ed. 2d 532 (2009) (internal quotation marks omitted). Even if Petitioner can demonstrate
that the instruction violated his right to due process, habeas corpus relief may only be

1 granted if the error had a "substantial and injurious effect or influence in determining the
2 jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (citation omitted); see
3 also Hanna v. Riveland, 87 F.3d 1034, 1039 (9th Cir. 1996).

4 Here, Petitioner failed to demonstrate that the trial court erred in instructing the
5 jury pursuant to CALCRIM No. 1191. The Ninth Circuit agreed with the Reliford court that
6 an earlier version of the instruction does not violate due process as it is not "reasonably
7 likely a jury would interpret the instructions to authorize conviction of the charged
8 offenses based on a lowered standard of proof." Schultz v. Tilton, 659 F.3d 941, 944
9 (9th Cir. 2011) (citing Reliford, 29 Cal. 4th 1007, 1016 (2003)). Similar to the instructions
10 in Reliford, the version of the instruction at issue negates any reasonable likelihood of
11 impermissible burden-lowering. The instruction specifically cautions that, if the jury found
12 by a preponderance of the evidence that Petitioner committed the uncharged offenses,
13 "that conclusion is only one factor to consider along with all the other evidence" and that
14 "it is not sufficient by itself to prove that the defendant is guilty of the crimes charged in
15 this case." The California Court of Appeal's decision to apply Reliford in upholding
16 CALCRIM No. 1191 was not contrary to or an unreasonable application of federal law.
17 See Schultz, 659 F.3d at 945. Petitioner is not entitled to habeas relief on this claim.

18 **IV. Recommendation**

19 Accordingly, it is hereby recommended that the petition for a writ of habeas
20 corpus be DENIED with prejudice.

21 This Findings and Recommendation is submitted to the assigned District Judge,
22 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty (30) days after
23 being served with the Findings and Recommendation, any party may file written
24 objections with the Court and serve a copy on all parties. Such a document should be
25 captioned "Objections to Magistrate Judge's Findings and Recommendation." Any reply
26 to the objections shall be served and filed within fourteen (14) days after service of the
27 objections. The parties are advised that failure to file objections within the specified time
28

1 may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d
2 834, 839 (9th Cir. 2014).

3 IT IS SO ORDERED.
4

5 Dated: March 6, 2017

6 /s/ Michael J. Seng
7 UNITED STATES MAGISTRATE JUDGE
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