UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HAROLD EUGENE HIGGINS, Petitioner, v. ANTHONY HEDGPETH, Warden, Respondent.[1]	CASE NO. 2:06-cv-02192-RAJ-JLW REPORT AND RECOMMENDATION

I. INTRODUCTION

Petitioner is a California prisoner who is currently incarcerated at the Salinas Valley State Prison, in Soledad, California. (*See* Docket 34.) He was convicted by a jury of seven counts of child molestation of two or more victims, with substantial sexual conduct, in Sacramento County Superior Court on October 19, 2004, and sentenced to thirty-two years to life in prison. (*See* Dkt. 26 at 1-2.) Petitioner has filed an amended petition under 28 U.S.C. § 2254 challenging the constitutionality of his conviction on eleven grounds. (*See* Dkt. 10.) Respondent has filed an answer to the amended petition, together with relevant portions of the

[1] Because Anthony Hedgpeth is currently the warden at the institution in which petitioner is incarcerated, the Court has substituted his name for that of the original respondent, James Yates. *See* Federal Rule of Civil Procedure 25(d). (*See* Docket 34.)

state court record, and petitioner has filed a traverse in response to the answer. (*See* Dkts. 26 and 29.) The briefing is now complete and this matter is ripe for review. The Court, having thoroughly reviewed the record and briefing of the parties, recommends the Court deny the petition, and dismiss this action with prejudice.

II. FACTS AND PROCEDURAL HISTORY

The following facts are taken from the California Court of Appeal's April 7, 2006, opinion. (*See* Dkt. 28, Lodged Docket 3.) The state court's findings of fact are presumed correct unless petitioner rebuts that presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir. 2004). Petitioner has not overcome the presumption with respect to any of the following facts. This Court therefore relies on the state court's recitation.

> An information charged defendant with two counts of lewd and lascivious acts upon a minor and five counts of lewd and lascivious acts on a child under the age of 14. The information also alleged defendant committed the offenses against two or more victims. . . . Defendant entered a plea of not guilty to all counts. The district attorney dismissed one of the counts of lewd and lascivious acts on a minor.
>
> The alleged victims of the charged conduct were related to defendant's wife. In 2003 the wife's son and his wife relocated from Indiana to California. Their children included their adopted daughter, S., who was then 14 years old. In California, S. and her family stayed in defendant's home while their new home was being built. S., who had previously met defendant and his wife when they visited in Indiana, referred to defendant as "grandpa."
>
> The day after their arrival in California, S. took a shower. She dressed and joined her siblings, who were watching television in the living room. S. sat on the couch next to defendant. Defendant put his arm around S., reached down inside her

shorts, and rubbed the outside of her vagina. When S.'s father entered the room, defendant stopped.

The following day, S., her family, and defendant and his wife took a car trip to Lake Tahoe. S. lay down on defendant's lap. He took her hand and placed it next to his penis. S. told her father about both incidents the next day.

S.'s sister D. was in born in 1991. In 2003, while her family stayed at defendant's house, D. accompanied defendant outside as he smoked his pipe. Defendant put his arm around D. and said: "Let's see what's down here" and tried to stick his hand down her pants. D. pushed his hand away, but defendant was able to touch her lower stomach. Defendant persisted for a few moments and then stopped.

Prior to their move, defendant and his wife had visited D.'s family in Indiana. During those visits, defendant frequently grabbed D.'s chest. Once, when D. wore a shirt that said "Genuine Girl," defendant grabbed her chest and said, "Let's see if you really are genuine."

After S. told their father about defendant's actions, D. also told him about what defendant had done. Their father removed the family from defendant's home immediately.

D.M., born in 1995, is S. and D.'s cousin. Defendant is his grandfather. D.M. and his mother lived in defendant's home while he attended first grade. D.M. was seven years old in first grade.

Over a five-month period, defendant sexually molested D.M. at night on several occasions. Defendant would touch D.M.'s penis and scrotum as he tried to sleep. Defendant touched D.M.'s penis and scrotum with his hands and mouth. During the molestations, D.M. would turn over to make defendant stop. D.M. finally told his mother about defendant's actions just prior to their moving to Bakersfield.

Two victims, E. and S.S., provided evidence of uncharged acts pursuant to Evidence Code section 1108. E. is D.M.'s half-sister, but they did not live together. E. considered defendant her grandfather.

When E. was four years old, she visited defendant's home.[2] As she was changing her clothes, and while she was naked, defendant took her into his room. He sat her on his bed and touched her on the outside of her vagina with his hand. E. told defendant it hurt and defendant got some lotion and began rubbing her vagina again. Defendant told E. it was a secret and so she told no one.

During another incident, defendant rubbed his penis on top of E.'s vagina, causing skin contact. Later, at preschool, a teacher found E. on top of a boy. When the teacher asked what she was doing, E. told her that was what she and defendant did. E. then told her father and the police about the incident.

S.S., born in 1955, is defendant's niece. When S.S. was a child, defendant lived with her family. When S.S. was six, she was in the back of a flatbed truck on a trip from Los Angeles to Bakersfield. Her two brothers and defendant were also in the truck.

While S.S. tried to sleep, defendant moved to lie down with her. He put his hand under her nightgown, pulled her underwear to one side, and put his fingers in her vagina. S.S. felt pressure and pain. Defendant told her, "You are Uncle Harold's little precious princess. You are my girl." S.S. squeezed her legs together and moaned in an attempt to stop defendant. Defendant stopped when her brothers, who were unaware of the molestation, attracted his attention.

Eight months to a year later, S.S. told her mother. Her father refused to believe his brother was capable of such conduct and labeled S.S. a liar.

On another occasion, defendant came to S.S.'s home for a family gathering. While pushing S.S. on a swing, he squeezed her breasts. Again, defendant told her: "You are Uncle Harold's little precious princess. You are my girl." S.S. ran and hid until defendant left. She then told her mother about the incident. When S.S. heard about the more recent molestation allegations, she reported these prior incidents to the district attorney.

[2] At the time of trial, E. was 13 years old.

The defense presented testimony of Jaylene Higgins, defendant's wife. Married since 1989, they moved to Sacramento in 1993. Although the couple had no children together, Jaylene has two children from a prior relationship.

Jaylene testified no one ever mentioned anything unusual between defendant and any of his grandchildren. Nor did Jaylene witness any untoward behavior. Neither D. nor S. ever said anything to her about inappropriate behavior by defendant. Defendant quit smoking a pipe in 2002. However, Jaylene admitted she was not in the house when S. alleged defendant put his hand down her pants.

According to Jaylene, before S. made her accusations, she was upset about being forced to give up her relationship with her biological mother in Indiana. Prior to her accusations, S.'s father angrily confronted her about her reluctance to move. Jaylene testified that S.'s father initially told Jaylene not to confront defendant about the allegations, since it was probably a misunderstanding. Jaylene told defendant, who asked S.'s father if there was a problem. S.'s father exploded and threatened to kill defendant, and defendant asked them to leave.

Jaylene confronted defendant in 1995 about E.'s accusation. Defendant denied molesting her.

Jaylene also admitted D.M. stayed with them occasionally. She testified that whenever D.M. stayed over she put him to bed, and she was always with defendant afterwards. Jaylene also testified she slept lightly and knew defendant never left the bedroom at night. D.M. never consistently slept in the house. Instead, he slept outside in a trailer with his mother.

On rebuttal, Deputy Ramona Feuillard testified regarding her interview with defendant over the allegations. Feuillard stated defendant told her D.M. stayed with them a lot and slept in Jaylene's mother's room. Defendant denied committing any of the charged offenses.

Defendant testified on surrebuttal. He denied telling Feuillard that D.M. stayed with him a lot. Defendant told Feuillard that D.M. stayed with them occasionally. He denied going into D.M.'s bedroom and putting his mouth on D.M.'s penis.

> Defendant denied doing anything inappropriate with S. or D. He admitted telling Feuillard he might have touched S., but he couldn't be sure because he had fallen asleep next to her. Defendant denied doing anything inappropriate to S.S.

(Dkt. 28, LD 3 at 1-7.)

The jury found defendant guilty on all counts and found the allegations all true. (*See id.*, LD 7 at 560-72.) "The trial court sentenced defendant to 32 years: the middle term of two years on count one, plus 15 years to life on counts two and three . . . to be served consecutively. The court also sentenced defendant to 15 years to life each on counts four through six, to be served concurrently." (*Id.*, LD 3 at 7.)

With the assistance of counsel, petitioner timely appealed his judgment and sentence to the California Court of Appeal. (*See id.*, LD 1.) The California Court of Appeal denied petitioner's claim in a reasoned decision, and affirmed the Sacramento County Superior Court's judgment on April 7, 2006. (*See id.*, LD 3.) Petitioner filed a petition for review in the California Supreme Court, which was summarily denied on June 21, 2006. (*See id*., LD 4 and 5.)

Petitioner filed his initial federal habeas petition in this Court on September 6, 2006. (*See* Dkt. 1.) By Court Order, petitioner filed an amended petition on November 21, 2006. (*See* Dkts. 9 and 10.) In his Answer, respondent admits petitioner timely filed his appeal and exhausted what he characterizes as petitioner's "claims 3 through 9." (*See* Dkt. 26 at 2.) He contends, however, that petitioner failed to exhaust his first two federal claims for relief. (*See id.*)

III. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs this petition because it was filed after the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997). Because petitioner is in custody of the California Department of Corrections pursuant to a state court judgment, 28 U.S.C. § 2254 provides the exclusive vehicle for his habeas petition. *See White v. Lambert*, 370 F.3d 1002, 1009-10 (9th Cir. 2004) (providing that § 2254 is "the exclusive vehicle for a habeas petition by a state prisoner in custody pursuant to a state court judgment. . . ."). Under AEDPA, a habeas petition may not be granted with respect to any claim adjudicated on the merits in state court unless petitioner demonstrates that the highest state court decision rejecting his petition was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2).

As a threshold matter, this Court must ascertain whether relevant federal law was "clearly established" at the time of the state court's decision. To make this determination, the Court may only consider the holdings, as opposed to dicta, of the United States Supreme Court. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000). It is also appropriate to look to lower federal court decisions to determine what law has been "clearly established" by the Supreme Court and the reasonableness of a particular application of that law. *See Duhaime v. Ducharme*, 200 F.3d 597, 598 (9th Cir. 1999). In this context, Ninth Circuit precedent

remains persuasive but not binding authority. *See Williams*, 529 U.S. at 412-13; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

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

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

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

IV. FEDERAL CLAIM FOR RELIEF

Petitioner raises the following eleven claims for relief in his amended federal habeas corpus petition:

> A. Conviction obtained by prejudicing jury[.] Defendant was paraded across hallway, in front of jurors and prospective jurors, while in handcuffs, while jury was being selected and while trial was going on, also bailiff came up and stood between witness stand and jury box while defendant was testifying, prejudicing the jury.
> B. Denial of effective assistance of counsel. Defense law[y]er did not call any witnesses for defendant other than defendant and his spouse. There were many people present when alleged, supposed offinces [sic] took place who could have given evidence that offinces [sic] never took place. They were never called.
> C. Evidence code 1108 is a violation of due process of law, on its face and as applied[.] An unproven and uncharged, 43 year old incident, which was never proven to have happened, and defendant says never happened, should never have been admitted. This also goes for incident with . . . [E.], which nothing ever happened. She admitted not remembering.
> D. Denial of sixth amendment rights to jury determination on all issues. Jury was not instructed about possible findings of less[e]r offences [sic]. Denying defendant of his rights of determination by a jury of all issues.
> E. The court err[ed] prejudicially in failing to instruct sua sponte the jury in accordance with CALJIC No. 2.71, or similar instruction which defined admission and informed the jury that evidence of an oral admission of a defendant should be viewed with caution.

F. The trial courts giving of CALJIC 2.20.1 was reversible error as it deprived appellant of due process of law.

G. Even if evidence code section 1108 is constitutional the 2002 revision of CALJIC No. 2.50.01 given here regarding propensity evidence, was erroneous, denying appell[ant] due process of law and a fair trial.

H. The court err[ed] in failing to instruct on two essent[i]al elements of the one strike law, denying appell[ant] due process of law, a fair trial, and the right of a jury determination on all issues.

I. The cumulative effect of errors discussed here in section 12 deprived appel[lant] of due process of law and a fair trial and should result in a reversal of judgement [sic].

J. The court err[ed] in applying the multiple victim circumstance under the one strike law 5 times in a case involving two victims in violation of penal code 654 and state and federal constitutional principles of due process and double jeopardy.

K. The term of 32 yrs to life imposed upon appel[lant], an ailing 68 year-old man, with no criminal record or history of violence constitute cruel and unusual punishment under both the California and U.S. Constitutions and should be reversed.

(Dkt. 10 at 5-6 and Attachments.) The above claims and supporting facts constitute the entirety of petitioner's federal habeas petition. Although petitioner filed a traverse in response to his answer, his petition does not contain any additional briefing, citation to legal authority, or factual support.

V. EXHAUSTION

Respondent submits that petitioner's first two federal claims for relief are unexhausted because petitioner failed to present them to any state court. (*See* Dkt. 26 at 12.) Respondent contends the amended petition should be dismissed without prejudice, or that petitioner should be directed to file an amended petition absent the unexhausted claims. (*See id.*) In the alternative, respondent asserts this Court should deny the claims on the merits. (*See id.* at 14.) Petitioner fails to address this issue in his traverse. (*See* Dkt. 29.)

In order to properly exhaust state court remedies, California state prisoners must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his federal habeas corpus petition. *See* 28 U.S.C. § 2254(b) & (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). *See also Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *Picard v. Connor*, 404 U.S. 270, 275 (1971). Petitioners must notify the state courts that they are presenting a federal claim in order to satisfy the fair opportunity rule. *See Duncan*, 513 U.S. at 365-66. More specifically, in this Circuit, petitioners must "make the federal basis of the claim explicit either by specifying particular provisions of the federal Constitution or statutes, or by citing to federal case law." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005) (citing *Lyons v. Crawford*, 232 F.3d 666, 668, 670 (9th Cir. 2000), *as modified by* 247 F.3d 904 (9th Cir. 2001) (stating that the law in this Circuit requires petitioners to "make the federal basis of the claim explicit either by specifying particular provisions of the federal Constitution or statutes, or by citing to federal case law.")).

Here, petitioner failed to present his first two federal claims in either of his state court petitions. In general, petitions that contain unexhausted claims must be dismissed. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). Federal courts have the discretion to deny a habeas application on the merits, however, notwithstanding a petitioner's failure to fully exhaust his state court remedies. *See* 28 U.S.C. § 2254(b)(2) ("[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"); *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) (a federal court considering a habeas petition may deny an unexhausted claim on the merits when it is perfectly clear that the claim is not "colorable"). For the reasons discussed

infra, petitioner's claims must fail on the merits. I therefore recommend the Court proceed to the merits of all eleven of petitioner's claims and deny the petition. To require him to return to the California Supreme Court would further delay an already protracted case, for no other purpose.

This Court also notes that respondent has addressed nine of petitioner's eleven federal claims for relief, omitting any discussion regarding exhaustion or the merits of petitioner's third and fourth claims. (*See* Dkt. 26 at 2 and 12-20.) Respondent's failure to address all of the allegations in the amended petition appears to be an oversight and is in violation of Rule 5(b) of the Rules Governing Section 2254 Cases in the United States District Courts, which requires respondent to address all allegations presented in a habeas corpus petition. In light of the already lengthy delay in this case, however, the Court has independently reviewed the record and determined that petitioner properly presented his third and fourth claims to the state's highest court. (*See* Dkt. 28, LD 4 at 6-12.) *See* 28 U.S.C. § 2254(b)(3); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("[s]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"); *Gatlin v. Madding*, 189 F.3d 882, 888 (9th Cir. 1999) (holding that California law requires presentation of claims to the California Supreme Court through petition for discretionary review in order to exhaust state court remedies). Accordingly, I recommend the Court find that petitioner has properly exhausted his third and fourth grounds for relief and should proceed to the merits of both claims as well.

VI. DISCUSSION

A. *Unconstitutional Security Precautions* (Unexhausted Claim)

Petitioner contends that potential jurors and, ultimately those jurors who were selected to serve on the jury, were prejudiced when they saw petitioner walk down the hallway towards the courtroom in handcuffs "on occasions." (*See* Dkt. 10 at 5 and Dkt. 29 at 1.) In addition, he contends that on two occasions they saw him enter the courtroom and sit at counsel's table before his handcuffs were removed. (*See id.*) He also asserts that the jury was prejudiced when the Bailiff stood in between the petitioner and the jury box when he testified. (*See id.*) Respondent argues that petitioner's claims are baseless as he fails to show how the alleged security precautions were sufficiently prejudicial and he fails to cite a federal case, statute or constitutional provision to support his claim. (*See id.*; Dkt. 29 at 1-3; and Dkt. 26 at 16.)

1. Unconstitutional Shackling

The U.S. Supreme Court has held that the appearance of a defendant in shackles before a jury during a trial can violate the defendant's Fifth and Fourteenth Amendment rights to due process. *Deck v. Missouri,* 544 U.S. 622, 629-634 (2005). The Court reasoned that "[v]isible shackling undermines the presumption of innocence and related fairness of the factfinding process[,] . . . can interfere with the accused's 'ability to communicate' with his lawyer" and "participate in his own defense[,]" and "'affront[s]' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" *Id.* at 630-31 (alteration in original) (quoting *Illinois v. Allen*, 397 U.S. 337, 344 (1970)).

The Court therefore held that "[trial] courts cannot routinely place defendants in shackles or other physical restraints visible to the jury" without making a specific determination that such restraints are necessary with regard to this particular defendant on the basis that shackling is '"inherently prejudicial'." *Id.* at 634 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986)). Thus, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Id.* Instead, the State bears the burden of proving "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Id.* (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

Although *Deck* set forth a heightened standard of review by shifting the burden to the State, the U.S. Supreme Court subsequently clarified that in § 2254 proceedings courts are to apply the "more forgiving" standard of review set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). *See Frye v. Pliler*, 551 U.S. 112, 121-22 (2007) ("a court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect" standard set forth in *Brecht* . . . whether or not the state appellate court recognized the error and reviewed it for harmlessness under the [*Chapman* standard of review].").

Here, petitioner asserts that both the potential and empanelled jurors witnessed him walk down the hallway towards the courtroom in handcuffs "on occasions" and on at least two occasions saw him enter the courtroom and sit down at counsel's table before his handcuffs were removed. (*See* Dkt. 10 at 5 and Dkt. 29 at 1.) Even if we assume petitioner's

factual allegations are correct, nowhere does petitioner allege he was restrained or shackled during the trial. The *Deck*-line of cases is applicable where a trial court determines that a defendant must be physically restrained during the guilt or penalty phase of a trial. That is not our case.

The facts alleged by petitioner establish that petitioner, who was in custody, was being brought into the courtroom in handcuffs and that the handcuffs were removed once he was seated. The Ninth Circuit has long "held that a jury's brief or inadvertent glimpse of a defendant in physical restraints outside of the courtroom does not warrant habeas corpus relief unless the petitioner makes an affirmative showing of prejudice. *See Ghent v. Woodford*, 279 F.3d 1121, 1133 (9th Cir. 2002) (the jurors' occasional, brief glimpses of the defendant in handcuffs and other restraints in the hallway at the entrance to the courtroom was not prejudicial); *Olano*, 62 F.3d 1180, 1190 (9th Cir. 1995) ("a jury's brief or inadvertent glimpse of a defendant in physical restraints is not inherently or presumptively prejudicial to a defendant"); *Castillo v. Stainer*, 983 F.2d 145, 148 (9th Cir. 1992) (no prejudice when, during transport to or from the courtroom, some members of the jury pool saw the defendant in shackles in the court corridor); *United States v. Halliburton*, 870 F.2d 557, 560-62 (9th Cir. 1989) (jurors' inadvertent observation of the defendant in handcuffs in the corridor did not prejudicially impair the defendant's right to a fair trial); *Wilson v. McCarthy*, 770 F.2d 1482, 1485-86 (9th Cir. 1985) (the jury's brief viewing of defendant's shackles as he left the witness stand at the conclusion of his testimony was not prejudicial).

Accordingly, the jurors' view of petitioner in handcuffs as he walked down the hallway and went into the courtroom was not inherently or presumptively prejudicial. *See*

Williams v. Woodford, 398 F.3d 567, 592-593 (9th Cir. 2004) (as amended); *United States v. Leach*, 429 F.2d 956, 962 (8th Cir. 1970) ("[i]t's a normal and regular as well as highly desirable and necessary practice to handcuff prisoners when they are being taken from one place to another, and the jury is aware of this."). I therefore recommend this Court find that petitioner is not entitled to habeas relief as to this claim.[3]

2. Unnecessary Security During Petitioner's Testimony

Petitioner alleges that the Bailiff came up to the front of the courtroom when he took the stand and stood between him and the jury. (*See* Dkt. 29 at 2.) He contends the Bailiff "appeared to be guarding the jury from some kind of attack." (*See id.*)

First, this Court's review is limited to determining whether a conviction violated federal law, which petitioner fails to clearly allege. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Even assuming he asserts a federal constitutional violation, the U.S. Supreme Court has held that the presence of armed guards in the courtroom is not equivalent to physically restraining the defendant. *Holbrook*, 475 U.S. at 568-69 (petitioner is not denied his constitutional right to a fair trial when, at his trial with five co-defendants, customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of spectator section). The presence of security personal in close proximity to the defendant is expressly contrasted with inherently prejudicial practices such as shackling during a trial. *See id.* Thus, when analyzing the situation alleged in this case, this Court is required to:

[3] For the same reasons, petitioner's claim in his traverse that he complained to his trial counsel about this issue does not merit habeas corpus review. (*See* Dkt. 29 at 1.)

> look at the scene presented to the jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.

Id. at 572.

If petitioner intended to assert that the above security measures violated his federal due process rights, his claim fails because he has not demonstrated that he suffered any prejudice as a result of the alleged security precautions. He simply fails to present any documentary or other evidence to support his claims. Moreover, the type of security present in this particular courtroom – a single bailiff positioned between the defendant and the jury during the defendant's testimony – is not inherently prejudicial. Because petitioner is ultimately unable to demonstrate actual prejudice as a result of the Bailiff's position, I recommend the court deny petitioner's claim.

B. *Ineffective Assistance of Counsel* (Unexhausted Claim)

Petitioner claims his trial counsel was ineffective when he failed to "call any witnesses for defendant other than defendant and his spouse." (Dkt. 10 at 5.) Respondent contends this claim is without merit as petitioner is unable to show that defense counsel's representation was deficient and that the outcome of the proceeding would have been different if additional witnesses were called. (*See* Dkt. 26 at 17-20.)

In order to establish ineffective assistance of counsel, petitioner must demonstrate that counsel's representation fell below the objective standard of reasonableness and that the deficient performance affected the result of the proceeding. *United States v. Strickland*, 466 U.S. at 687-88. A strong presumption exists that counsel's conduct falls within the wide-

range of reasonable professional assistance. *Id.* at 689. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The U.S. Supreme Court defines "reasonable probability" as a "probability sufficient to undermine confidence in the outcome." *Id.* Thus, in all cases, "the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morison*, 477 U.S. 365, 381 (1986).

Here, petitioner contends that he received ineffective assistance of trial counsel because counsel failed to call additional witnesses in his defense. He claims many people were present when the alleged offenses occurred and that those people could have testified that such offenses never took place. (*See* Dkt. 10 at 5.) He identifies these witnesses by name in his traverse. (*See* Dkt. 29 at 7-8.) A review of the record reveals that petitioner fails to show there is a reasonable probability that if such witnesses were called, the outcome of the trial would have been different. *See Strickland*, 466 U.S. at 694. Specifically, to establish ineffective assistance of counsel based upon a failure to call witnesses, petitioner must identify the witnesses in question, state with specificity what those witnesses would have testified to, and explain how that testimony might have altered the outcome of the trial. *See Alcala v. Woodford*, 334 F.3d 862, 872-73 (9th Cir. 2003); *see also United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir. 1987) (rejecting appellant's ineffective assistance claim where "[h]e offer[ed] no indication of what these witnesses would have testified to, or how their testimony might have changed the outcome of the hearing."). Finally, the petitioner must

show that the witnesses in question were actually available and willing to testify. *See Alcala*, 334 F.3d at 872-73. *See also United States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (rejecting ineffective assistance claim where there was no evidence which established that the witness would have testified in the trial).

Petitioner is unable to overcome the strong presumption that: 1) defense counsel's decision to only call petitioner and his wife was sound trial strategy; 2) such decision was unreasonable under prevailing professional norms; and 3) the witnesses he identified would have been available and willing to testify at trial. I therefore recommend this Court deny petitioner's claim.

In addition to the unexhausted ineffective assistance of counsel claim presented in his amended federal habeas corpus petition, petitioner also raises several additional claims of ineffective assistance of trial counsel in his traverse. (*See* Dkt. 29 at 3-10.) Specifically, he claims that his trial counsel rendered ineffective assistance by: (1) failing to suppress several victims' testimony; (2) having no experience with "life sentence" cases; and (3) failing to obtain impeachment evidence. (*See id.*) To the extent petitioner is attempting to belatedly raise new claims in his traverse, relief should be denied. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (a traverse is not the proper pleading to raise additional grounds for relief); *see also Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994) ("we review only issues which are argued specifically and distinctly in a party's opening brief"). Even if these claims had been properly raised or petitioner had sought leave to amend to add these unexhausted claims, such amendment would be futile as he fails to demonstrate that any of these claims rise to the level of a constitutional violation entitling him to relief.

C. *Due Process Challenge to California Evidence Code § 1108*

Petitioner contends his due process rights were violated when the trial court admitted evidence of uncharged prior sexual offenses against two victims under California Evidence Code § 1108. (*See* Dkt. 10 at 3-4.) Two victims testified at trial that petitioner had previously molested them on multiple occasions. (*See id.*) Petitioner also contends that § 1108 is unconstitutional "on its face" and "as applied." (*See id.* 10 at 6.) Although respondent failed to address this claim in his answer, this same issue was fully briefed and addressed in the California Court of Appeal, which issued a reasoned decision denying petitioner's claim on state law grounds. (*See* Dkt. 28, LD 3 at 7-13.)

California Evidence Code § 1108(a) states that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352 [which allows a trial court to exclude evidence if its probative value is outweighed by its prejudicial effect]." (*See id.* at 8-9.) While this legislative language is not a model of clarity, the thrust of it appears to be as follows: the trial court may admit evidence of commission of another, uncharged sexual offense unless its probative value is outweighed by its prejudicial effect. The California Court of Appeal rejected petitioner's due process claim on direct review based upon the California Supreme Court's decision in *People v. Falsetta*, which held that § 1108 does not violate federal or state due process because it requires the trial court to weigh the evidence under Evidence Code § 352. 21 Cal.4th 903, 910-922 (1999). (*See* Dkt. 28, LD 3 at 9.)

Petitioner challenges this statute on federal due process grounds. The Due Process Clause has limited operation "beyond the specific guarantees enumerated in the Bill of Rights," however. *Dowling v. United States*, 493 U.S. 342, 352 (1990). In fact, state laws only violate the Due Process Clause if they offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996). Review of a due process claim in a federal habeas corpus petition is further limited to whether the trial court admitted an error that rendered the trial so arbitrary and fundamentally unfair that it violated federal due process. *Estelle*, 502 U.S. at 67; *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995).

Moreover, the Supreme Court "has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith, or that it violates due process to admit other crimes evidence for other purposes without an instruction limiting the jury's consideration of the evidence to such purposes." *Garceau v. Woodford*, 275 F.3d 769, 774 (9th Cir. 2001), *overruled on other grounds* by *Woodford v. Garceau*, 538 U.S. 202 (2003). To the contrary, the Supreme Court has expressly left open the precise question of whether propensity evidence offends the Due Process Clause. *Estelle*, 502 U.S. at 75 n. 5 ("Because we need not reach this issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime"). *See Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008) (holding that a state court had not acted objectively unreasonable in determining that the propensity evidence introduced against the defendant did not violate his right to due process); *Alberni v. McDaniel*, 458 F.3d 860, 863-67 (9th Cir. 2006), *cert.*

denied, 549 U.S. 1287 (2007) (denying the petitioner's claim that the introduction of propensity evidence violated his due process rights under the Fourteenth Amendment because "the right [petitioner] asserts has not been clearly established by the Supreme Court, as required by AEDPA.").

Furthermore, "[w]hile no federal court has specifically ruled on the constitutionality of section 1108, several circuit courts, including the Ninth Circuit Court of Appeals, have upheld the use of propensity evidence under Rule 413 and 414 of the Federal Rules of Evidence." *Smiley v. Evans*, 2009 WL 2912514, *6 (N.D. Cal. Sept. 8, 2009) (unpublished) (citing *United States v. LeMay*, 260 F.3d 1018, 1024-25 (9th Cir. 2001) (holding that Federal Rule of Evidence 414, which permits admission of evidence of similar crimes in child molestation cases, does not violate the due process cause because it is limited by Rule 403)); *Wolff v. Newland*, 67 Fed. Appx. 398 (9th Cir. 2003) (California's Rule 1108 was modeled after the Federal Rules, and contains an express requirement that courts balance the probative value of the evidence against its prejudicial effect"); *United States v. Castillo*, 140 F.3d 874, 881 (10th Cir. 1998); *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998)). *See also Soto v. Adams*, 2010 WL 1286877 (E.D. Cal. March 29, 2010) (unpublished) (holding the California state court's rejection of a petitioner's due process challenge to § 1108 was not contrary to U.S. Supreme court law); *Barreto v. Martel*, 2010 WL 546586, *4 (N.D. Cal. Feb. 10, 2010) (the same).

Because the Supreme Court has expressly left open the question of whether the admission of propensity evidence violates due process, the California state courts' rejection of petitioner's § 1108 claim was not contrary to or an unreasonably application of U.S. Supreme

Court precedent. *See Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law"). I therefore recommend this Court find petitioner is not entitled to relief on this claim.

D. *Juror Instruction Error - No. 1*

Petitioner contends that his Sixth Amendment right to a jury determination of all issues was violated when the trial court erred by failing to instruct the jury on a lesser included offense. (*See* Dkt. 10 at 6.) Petitioner does not cite a single federal case or fact to support his claim. (*See id.* and Dkt. 29.) Respondent also fails to address this claim in his answer. (*See* Dkt. 26.) And, while petitioner presented this as a federal constitutional issue in his state court briefs, the California Court of Appeal rejected it on state law grounds, holding that trial court did not have a duty *sua sponte* to instruct the jury on a lesser included offense in this case. (*See* Dkt. 29, LD 3 at 13-15.)

Even assuming petitioner properly presented this claim in this Court, there is no clearly established federal law that requires a trial court to instruct on a lesser included offense. In *Beck v. Alabama*, a capital case, the Supreme Court held that the failure to instruct the jury on a lesser-included offense violates the Due Process Clause if there is evidence to support the instruction. 447 U.S. 625 (1980). The *Beck* Court expressly declined to decide whether the Due Process Clause requires the sentencing court to provide a lesser-included offense instruction in a noncapital case, however. *Id.* at 638 n.14. *See United States v. Torres-Flores*, 502 F.3d 885, 888 n.3 (9th Cir. 2007) ("*Beck* left open whether the due process

right extends to defendants in noncapital cases."). After *Beck*, the Ninth Circuit held that the failure of a state trial court to instruct the jury on a lesser included offense in a non-capital case, in general, is not a federal constitutional question and cannot be considered in a habeas corpus proceeding. *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984); *Windham v. Merkle*, 163 F.3d 1092, 1105-1106 (9th Cir. 1998). While the Ninth Circuit left open the possibility that "the defendant's right to adequate jury instructions on his or her theory of the case might, in some cases, constitute an exception to the general rule," such an exception requires that the lesser included offense be consistent with the defendant's theory of his case. *Solis v. Garcia*, 219 F.3d 922, 929 (9th Cir. 2000). *See Bradley v. Duncan*, 315 F.3d 1091, 1098-1100 (9th Cir. 2002) (failure to instruct on a theory of defense may constitute a violation of due process by depriving the defendant of the right to present his case if substantial evidence was presented to support that defense).

Having reviewed the record, this Court finds the California Court of Appeal reasonably concluded that the evidence did not support the trial court's *sua sponte* inclusion of the lesser included offense of attempted commission of a lewd act, a theory that does not appear to have been presented by the defense in the first instance. (Dkt. 28, LD 3 at 13-15.) As the state court held:

> D's testimony established defendant touched her stomach, she was under 14, and defendant announced his desire to "see what's down here" while struggling to push his hand farther down her pants. Defendant's intent was clear from his words and actions. The fact that D. managed to thwart his efforts to reach her private parts does not turn defendant's actions into an

> attempt." Defendant completed an act qualifying as a molestation under section 288, subdivision (a).

(*Id.* at 15.)

Thus, even assuming that instructional error occurred, it was harmless, given the lack of support for this theory. *See Brecht*, 507 U.S. at 637. Accordingly, I recommend the Court find that the omission of the lesser included instruction did not render petitioner's trial fundamentally unfair under constitutional due process standards, and more importantly, the state courts' rejection of this claim was not contrary to or an unreasonably application of U.S. Supreme Court authority. *See Brewer*, 378 F.3d at 955. Petitioner's claim should therefore be denied.

E. *Jury Instruction Error - No. 2*

Petitioner claims the trial court erred "prejudicially" when it failed to instruct the jury, *sua sponte*, with California Jury Instruction No. 2.71 ("evidence of an oral admission of the defendant not made in court should be viewed with caution"). Again, petitioner fails to articulate the basis for his federal constitutional claim, but reading his petition leniently, it appears he challenges the trial court's failure to instruct on due process grounds. Respondent contends the state courts properly rejected petitioner's constitutional claim.

In a reasoned decision, the California Court of Appeal held as follows:

> Defendant contends the trial court erred in failing to instruct sua sponte with CALJIC No. 2.71. CALJIC No. 71 provides: "An admission is a statement by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence . . . . You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in

whole or in part. . . . [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]

Defendant argues the record is "replete" with statements made by defendant that the prosecution used to prove his guilt. Among the statements defendant labels admissions are: D.'s statement that defendant said he was going to see what was "down there," E.'s statement that defendant told her his actions were a secret, defendant's questioning S.'s father about whether there was a problem with the girls, and defendant's statements to police regarding D.M.'s and E.'s living arrangements.

Any statements made outside the courtroom, whether inculpatory or exculpatory, that tends to prove guilt when considered with the rest of the evidence constitutes an admission. If substantial evidence exists that a defendant made an oral admission, the court must sua sponte instruct the jury to view the evidence with caution. The purpose of this cautionary instruction is to assist the jury in determining whether the defendant actually made the statement. (*People v. Vega* (1990) 220 Cal.App.3d 310, 317-318; *People v. Zichko*, (2004) 118 Cal.App.4th 1055, 1059; *People v. Livaditis*, (1992) 2 Cal.4th 759, 784.)

The People contend most of the statements defendant terms admissions are, in fact, not admissions. We agree. Defendant fails to explain how his remarks to S.'s father and the police tend to prove his guilt for the underlying offense.

Defendant's statements to D. that he was going to see what was "down there," suggesting sexual intent, does qualify as an admission tending to prove defendant guilty of the charged offense. As such, the trial court was required to instruct the jury to view defendant's statement with caution.

Failure to give CALJIC No. 2.71 is harmless if it is not reasonably probable a result more favorable to the defendant would have been reached absent the error. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1268-1269.) Here, it is not reasonably probable defendant would have achieved a more favorable result had the court given CALJIC No. 2.71. Defendant's statement to D. provided evidence of this intent in touching her. However, D. provided other evidence of defendant's intent.

> Prior to the incident, defendant, when visiting the family in Indiana, frequently grabbed D.'s chest. This testimony, coupled with the Evidence Code section 1108 testimony of E. and S.S. regarding defendant's molestations of them, established defendant's motive of sexual gratification in touching his victims. Any error was harmless.
>
> Defendant's statement to E. at most tended to prove the uncharged conduct involving E. However, defendant's statement to E. that it was a secret paled in comparison to E.'s recollection of the sexual conduct itself. Even assuming defendant's statement qualifies as an admission, it added little to E.'s description of his actions. Again, error was harmless.

(Dkt. 28, LD 3 at 15-18.)

To obtain relief in a habeas corpus proceeding for errors in the jury charge, a petitioner must demonstrate that the jury instruction error "so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72. In order to make this determination, the court must evaluate the jury instructions in the context of the charge to the jury and the entire trial process. *United States v. Frady*, 456 U.S. 152, 169 (1982). As discussed briefly in the prior section, if the court determines the instruction violated petitioner's due process rights, he can only obtain relief if the error "'had [a] substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)). Trial errors that do not meet this test are deemed harmless. *Bonin v. Calderon,* 59 F.3d 815, 824 (9th Cir. 1995). *See also Hedgpeth v. Pulido,* --- U.S. ---, 129 S.Ct. 530, 531 (2008).

As the California Court of Appeal found, two out of the three alleged "admissions" were not admissions at all. Petitioner's statements to S.'s father and to the police did not constitute admissions and therefore the court's failure to advise the jury did not require a

cautionary instruction. Petitioner's statement to D. that he was going to see what was "down here" was found to be an admission, however, warranting instruction under CALJIC 2.71. Nonetheless, there was additional testimony from D. and other victims to support the allegation that petitioner's intent was sexual. As the California Court of Appeal explained, the evidence against petitioner was substantial. Thus, even if the cautionary instruction had been given, petitioner is unable to demonstrate that such an instruction would have made a difference in this case.

Accordingly, the California courts' decision to reject petitioner's jury instruction claim is not contrary to or an unreasonable application of clearly established U.S. Supreme Court precedent. I therefore recommend the Court deny petitioner relief as to this claim.

F. *Jury Instruction Error - No.3*

Petitioner asserts that CALJIC No. 2.20.1 violated his constitutional right to due process. (*See* Dkt. 10 at 6a, "Section # 12 Continuation #1.") Again, he provides no authority or factual support for his assertion. Respondent contends that the state court properly rejected petitioner's claim. The California Court of Appeal addressed this claim and held as follows:

> Defendant argues the trial court's instruction on the evaluation of the testimony of a child under 10 years of age violated his right to due process. According to defendant, the instruction unfairly enhanced the credibility of D.M., lessening the People's burden of proof.
>
> The court instructed: "In evaluating the testimony of a child ten years of age or younger, you should consider all of the factors surrounding the child's testimony including the age of the child and any evidence regarding the child's level of cognitive development. . . . A child, because of age and level of cognitive development, may perform differently than an adult as a

> witness, but that does not mean a child is any more or less believable than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child. . . . 'Cognitive' means the child's ability to perceive, to understand, to remember, and to communicate any matter about which the child has knowledge." (CALJIC No. 2.20.1.)
>
> Numerous courts have upheld CALJIC No. 2.20.1 in the face of a due process challenge. In *People v. Harlan* (1990) 222 Cal.App.3d 439 (*Harlan*), the court found CALJIC No. 2.20.1 does not inform jurors to disregard a child's age and cognitive abilities. The second sentence of the instruction "merely advises the jury that due to the age and level of cognitive development, a child may act differently on the witness stand than an adult. It does not relate to the truth or falsity of the content of the child's *testimony*. The language refers to one of many factors to be applied to a jury in determining a witness's credibility, namely, the demeanor and manner of the witness while testifying." (*Harlan*, at p. 455.)
>
> The *Harlan* court concluded the instruction does not rob the jury of its role in making findings on the child's credibility as a witness. Instead, the instruction requires that jurors not find a child witness unreliable solely because of his or her age. Jurors should consider the child's testimony in light of evidence of the child's cognitive development and other factors. (*Harlan*, *supra*, 222 Cal.App.3d at p. 456.)
>
> Other courts have found CALJIC No. 2.20.1 did not impermissibly lessen the prosecution's burden of proof, but only provided the jury with guidance in assessing the credibility of a class of witnesses, supplanting a traditional bias against these witnesses. (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1393.) Nor does CALJIC 2.20.1 remove the issue of credibility from the jury. Instead, the instruction directs the jury to determine credibility after considering all the factors related to a child's testimony, including the demeanor of the child. (*People v. Jones* (1992) 10 Cal.App.4th 1566, 1574.)
>
> Accordingly, the trial court did not err in instructing the jury pursuant to CALJIC 2.20.1.

(Dkt. 28, LD 3 at 18-19.)

In *Cupp v. Naughten*, the Supreme Court held that a state judge's instruction to a jury at a criminal trial advising that "[e]very witness is presumed to speak the truth," and explaining ways in which that presumption might be overcome, did not violate due process. 414 U.S. 141, 142 (1973) (internal quotation marks omitted). Even if such an instruction were undesirable or erroneous, a state conviction would not be overturned unless the instruction "violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Id.* at 146.

The strict standard for evaluating state courts' jury instructions coupled with the California Court of Appeal's reasoned explanation that this instruction prevents the jury from disregarding a child's testimony, without "amplifying" it, renders petitioner's claim without merit. *See Brodit v. Cambra,* 350 F.3d 985, 990-91 (9th Cir. 2003). Because the state courts' decisions do not contravene or unreasonably apply clearly established Supreme Court precedent, I recommend this Court deny petitioner's claim for relief.

G. *Jury Instruction Error - No. 4*

Petitioner asserts that even if California Code of Evidence § 1108 is found to be constitutional, "the 2002 revision of CALJIC No. 2.50.01 given here regarding propensity evidence was erroneous, denying appellate [sic] due process of law and a fair trial." (Dkt. 10 at 6a, "Section #12 Continuation #1.") Specifically, petitioner contends in his brief in the state courts that the trial court erred and deprived him of due process of law in giving this instruction because it impermissibly lessened the burden of the prosecution to prove him guilty beyond a reasonable doubt. (*See* Dkt. 28, LD 1 at 51-52.) Respondent claims "the state courts reasonably found no likelihood that the jury applied the challenged instructions to

convict Petitioner based on a preponderance of the evidence or any standard below proof beyond a reasonable doubt." (*See* Dkt. 26 at 24-25.)

The California Court of Appeal considered this claim and held:

> Defendant objects to the trial court's giving of CAJIC No. 2.50.01, arguing the instruction violated his due process rights. Defendant contends the instruction allows the jury to use his prior acts of molestation, proven by a preponderance of the evidence, as proof of his intent in the charged offenses.
>
> CALJIC 2.50.01, as given, states: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. . . . 'Sexual offense' means a crime under the laws of the state or of the United States that involves any of the following: . . . Any conduct made criminal by Penal Code section 288(a). . . . If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. . . . If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. . . . **However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense . . . that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. If you determine an inference properly can be drawn from this evidence, this inference 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.** You must not consider this evidence for any other purpose.
>
> As defendant concedes, the Supreme Court has found this language passes constitutional muster. In *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), the court found CALJIC No. 2.50.01 specifically the 2002 revision given in the present case, "provides additional guidance on the permissible use of the other-acts evidence and reminds the jury of the standard of

> proof for a conviction of the charged offenses." (*Reliford*, at p. 1016.) We find no error.

(Dkt. 28, LD 3 at 20-21 and LD 8 at 135) (emphasis added).

The U.S. Supreme Court has made clear that the Due Process Clause is violated if the trial court fails to properly instruct the jury that the defendant is presumed innocent until proven guilty beyond a reasonable doubt. *See Middleton v. McNeil*, 541 U.S. 433, 437 (2004). Thus, due process "requires the prosecution to prove every element charged in a criminal offense beyond a reasonable doubt." *Gibson v. Ortiz*, 387 F.3d 812, 820 (9th Cir. 2004), *overruled on other grounds* by *Byrd v. Lewis*, 566 F.3d 855, 866 (9th Cir. 2009), (citing *In re Winship*, 397 U.S. 358, 364 (1970)). "Any jury instruction that 'reduce[s] the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence.'" *Gibson*, 387 F.3d at 820 (alterations in original) (quoting *Cool v. United States*, 409 U.S. 100, 104 (1972)).

In *Gibson*, the Ninth Circuit Court of Appeals held that the 1996 version of CALJIC No. 2.50.01 and CALJIC No. 2.50.1[4] were constitutionally flawed because the "interplay of the two instructions allowed the jury to find that [the defendant] committed the uncharged sexual offense by a preponderance of the evidence and thus to infer that he had committed the *charged* acts based upon facts not found beyond a reasonable doubt, but by a preponderance of the evidence." 387 F.3d at 822. In 1999, CALJIC No. 2.50.01 was amended to clarify how jurors should evaluate a defendant's guilt if they found that he had committed a prior sexual

[4] The trial court also gave CALJIC No. 2.50.1, which instructed that "the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses other than those for which he is on trial." (Dkt. 28, LD 8 at 136.)

offense. The revision added the following sentence: "However, if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes." CALJIC No. 2.50.01 (7th ed. 1999). This instruction also added that "[t]he weight and significance of the evidence, if any, are for you to decide." *Id.* This same instruction was revised again in 2002. That version deleted the sentence "[t]he weight and significance of the evidence, if any, are for you to decide," and inserted the following statement: "If you determine an inference properly can be drawn from this evidence, this inference 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." CALJIC No. 2.50.01. As discussed above, the California Supreme Court upheld the constitutionality of the 1999 version of CALJIC No. 2.50.01 in *Ruliford*. 29 Cal.4th 1007, 1016 (2003). It also stated that the 2002 version, although not directly before the court, was "an improvement." *Id.*

The trial court in this case charged the jury with the 2002 revision of CALJIC No. 2.50.01. Challenges to the constitutionality of the 2002 version of CALJIC No. 2.50.01 have been rejected by numerous federal courts in unpublished opinions on the basis that "the 2002 version is materially different, as it includes an explicit admonition that the evidence of a prior sexual offense is not, by itself, sufficient to convict the defendant of the charged crimes." *Abel v. Sullivan,* 326 Fed. Appx. 431, 434 (9th Cir. 2009). *See e.g., Soto v. Adams*, 2010 WL 1286877, *11-12 (E.D. Cal. March 29, 2010) (2002 version); *Barreto v. Martel*, 2010 WL 546586, *10-12 (N.D. Cal. Feb. 10, 2010) (2002 version). In addition, the

instruction given in this case cautions the jury that the defendant must be proved guilty beyond a reasonable doubt of the charged offenses.

Based on the reasoning of the above-cited opinions, I recommend this Court deny petitioner's claim as he has failed to show how the California state courts' reliance on *Reliford* in this case was contrary to, or an unreasonable application, of U.S. Supreme Court precedent.

H. *Jury Instruction Error - No. 5*

Petitioner claims the trial court failed to instruct the jury on two essential elements of the one strike law, thereby denying him due process of law, a fair trial, and the right to a jury determination on all issues. (*See* Dkt. 10 at 6a, "Section #12 Continuation #1.") Again, petitioner presents no legal or factual support for his claim, other than that provided by counsel in his state court briefs. (*See* Dkt. 28, LD 1 at 63-61.) Respondent argues that petitioner's claim was properly rejected by the California state courts. (*See* Dkt. 26 at 25-26.)

The California Court of Appeal summarized this claim and held as follows:

> Defendant faults the trial court for failing to instruct on two essential elements of the one strike law, denying him his rights to due process, a fair trial, and to a jury determination on all issues. Defendant contends the jury had to find him ineligible for probation under section 1203.066 before the trial court could sentence him under section 667.61.[5] Defendant also argues the court should have instructed the jury that it had to find separate occasions regarding the same victim to support multiple terms for defendant's molestation of D.M. Defendant contends these

[5] Section 667.61, subdivision (b) provides as follows: "Except as provided in subdivision (a), a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j)."

> omissions violate his right to a have a jury determine all issues under *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*).
>
> As defendant acknowledges, we previously rejected similar arguments in *People v. Benitez* (2005) 127 Cal.App.4th 1274, 1278 (Benitez): "Finding a defendant ineligible for probation is not a form of punishment, because probation itself is an act of clemency on the part of the trial court. [Citation.] Because a defendant's eligibility for probation results in a *reduction* rather than an increase in the sentence prescribed for his offenses, it is not subject to the rule of *Blakely*. [Citations.] As a result, the enhancement of his molestation convictions did not offend his constitutional rights." We decline defendant's request to reconsider *Benitez*.
>
> Defendant's claim that the court erred in failing to instruct the jury it must find separate occasions of molestation of D.M. to support multiple life terms also fails. Counts three through six detailed specific, separate incidents of molestations committed by defendant against D.M. In instructing the jury, the court stated counts three through six were "a further and separate cause of action, being a different offense of the same class of crimes and offenses connected in its commission" in other charges. The jury found defendant guilty of each separate count. As a result, the jury found each count a separate cause of action.

(Dkt. 28, LD 3 at 21-22.)

As discussed above, where a petitioner claims there was an instructional error in a collateral proceeding such as this, the only question for this Court is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147. In this case, petitioner's "burden is especially heavy because no erroneous instruction was given . . . . An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe*, 431 U.S. 145, 154-155 (1977).

Petitioner presents no facts, case law, or legal argument to support his claim. The California Court of Appeal, relying upon California Supreme Court case law, found no constitutional violation under *Blakely* because an instruction on the probation-eligibility requirement would only have reduced petitioner's sentence, rather than increased it. In addition, petitioner's claim that the jury was not properly instructed that they must find separate occasions of molestation was belied by the California Court of Appeal's finding that the jury was instructed that "counts three through six were 'a further and separate cause of action, being a different offense of the same class of crimes and offenses connected in its commission' in other charges." (Dkt. 28, LD 3 at 22.) Because the jury found petitioner guilty on each separate count, the state court properly determined that the "jury found each count a separate cause of action." (*Id.*)

Moreover, the California state courts' decisions were neither contrary to or an unreasonable determination of clearly established U.S. Supreme Court law, as nothing in the record indicates the omission of the above suggested instructions infected the trial in any way. I therefore recommend the Court find that petitioner is not entitled to relief on this claim.

I. *Cumulative Error*

Petitioner claims the cumulative effect of the alleged trial errors in this case resulted in prejudice. (*See* Dkt. 10 at 6a, "Section #12 Continuation #1.") Respondent argues that where no single constitutional error has occurred, nothing accumulates to the level of a constitutional violation. (*See* Dkt. 26 at 27.)

While no single trial error may warrant relief, in some cases, the cumulative effect of several errors may rise to the level of a constitutional violation. *See Alcala*, 334 F.3d at 893-

95; *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002). Where such trial errors have occurred, but petitioner fails to show he suffered prejudice as a result, he must then show that the combined effect of those deficiencies resulted in prejudice. *See Villafuerte v. Stewart*, 111 F.3d 616, 632 (9th Cir. 1997). We find, like the California courts found, that one trial error occurred in this case, but that it had no prejudicial effect. There were three other claims that potentially presented trial errors (*supra* pgs. 15, 17, 25, 28), none of which had any prejudicial effect. With the overwhelming weight of the evidence against him, petitioner is unable to demonstrate that the cumulative effect of these potential errors was prejudicial and, thus, that any constitutional violation occurred. I therefore recommend the Court deny this claim.

J. *Sentence Violated the Due Process and Double Jeopardy Clauses*

Petitioner contends "the court err[ed] in applying the multiple victim circumstances under the one strike law 5 times in a case involving two victims in violation of penal code 654 and state and federal constitutional principles of due process and double jeopardy." (Dkt. 10 at 6b, "Section #12 Continuation #2.") Petitioner cites no federal authority or factual support for his claim and respondent fails to address the merits of this claim in his answer. (*See* Dkt. 26 at 28-29.)

In analyzing petitioner's state and federal claims, the California Court of Appeals carefully considered the double jeopardy provision in California Penal Code § 654 and held:

> Defendant argues the trial court erred in applying the multiple victim circumstance under the one strike law when sentencing him pursuant to section 667.61, subdivision (e)(5). Defendant asserts the 15-years-to-life terms for counts four, five, and six violate section 654.

Section 667.61, subdivision (b) provides that a defendant convicted under section 288, subdivision (a) who committed the offense against multiple victims shall be punished by the indeterminate term of 15 years to life. (§ 667.61, subds. (c), (e)(5).) Section 667.61, subdivision (g) states that the defendant shall be sentenced to one life term per victim per occasion no matter how many offenses listed in subdivision (c) the defendant committed against a particular victim on a particular occasion.

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Defendant contends his sentence under section 667.61 violates section 654. However, as one court concluded: "Like other habitual offender provisions, section 667.61, subdivision (e)(5) "merely specifies the applicable sentence upon the present conviction for one with a certain criminal history. It is the current offense which calls for the penalty, the magnitude of which is attributable to appellant's status as a repeat offender." [Citations.] That the conviction used to invoke punishment under subdivision (e)(5) occurred in the present case rather than in a prior proceeding does not warrant a different application of section 654." (*People v. DeSimone* (1998) 62 Cal.App.4th 693, 700 (*DeSimone*).)

Defendant disagrees with *DeSimone*, arguing the multiple victim circumstance in the present case "should not be considered a recidivist- or status-based penalty provision which is not subject to section 654." Specifically, defendant argues the multiple counts involving D.M. offend section 654.

The people point out the counts involving D.M. detail violations that occurred at different times and involved different molestations. We agree. Courts three, four, five, and six charged defendant with separate violations against D.M. that took place over five months.

> Section 654 precludes multiple punishments for offenses committed as part of an indivisible course of conduct with a single intent and objective. When offenses are independent of one another, a defendant may be punished separately even though the offenses share common acts or were part of an otherwise indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294; *People v. Green* (1996) 50 Cal.App.4th 1076, 1084-1085.) Here, defendant's offenses against D.M. do not form an indivisible course of conduct. Defendant molested D.M. on at least four discrete occasions over a five-month period. We find no error.

(Dkt. 28, LD 3 at 23-25.)

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. In *Benton v. Maryland*, such protections were held applicable to the states through the Fourteenth Amendment. 395 U.S. 784 (1969). The double jeopardy guarantee protects against: (1) a second prosecution for the same offense after acquittal or conviction; and (2) multiple punishments for the same offense. *See Witte v. United States*, 515 U.S. 389, 395-96 (1995).

In this case, as determined by the California Court of Appeal, petitioner received five separate terms for five separate offenses. Because he did not receive cumulative punishments for any single act, his sentence did not violate the Double Jeopardy Clause. The California courts denied petitioner's federal due process claim on the same grounds as petitioner was unable to support his argument that he received multiple punishments for the same act. *See Watts v. Bonneville*, 879 F.2d 685, 687-88 (9th Cir. 1989). Because the California state courts' decisions were not contrary to or an unreasonable application of clearly established

U.S. Supreme Court law, I recommend this Court deny habeas corpus relief as to petitioner's double jeopardy and due process claims.

K. *Cruel and Unusual Punishment*

Petitioner claims "[t]he term of 32 yrs to life imposed upon appellant, an ailing 68 year-old man, with no criminal record or history of violence constitute[s] cruel and unusual punishment under both the California and U.S. Constitutions and should be reversed." (Dkt. 10 at 6(b), "Section #12 Continuation #12.") He elaborates further in his traverse. (*See* Dkt. 29 at 11.) Respondent contends the state courts properly "applied the federal standard in denying Petitioner's claim." (Dkt. 26 at 31-32.)

The California Court of Appeal denied petitioner's federal claim in a clearly reasoned decision.[6] Specifically, it held:

> A sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment if it is grossly out of proportion to the severity of the crime. Under both the California and federal Constitutions, the test is whether the sentence is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. (*People v Alvarado* (2001) 87 Cal.App.4th 178, 199 (*Alvarado*); *Rummel v. Estelle* (1980) 445 U.S. 263, 271-72 [63 L.Ed.2d 382].)
>
> In assessing a cruel and unusual punishment claim, we consider: the nature of the offense and the offender, how the punishment compares with punishments for more serious crimes in the jurisdiction, and how the punishment compares with the

[6] We do not reach petitioner's state law claim, as such claims are not cognizable in a federal habeas petition. *See Estelle*, 502 U.S. at 67-68 (asserting that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

punishment for the same offense in other jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425-427 (*Lynch*).)

In considering the nature of the offense and the offender, we examine not only the offense as defined by the statutes but also the fact of the crime in question. We review motive, manner of commission, the extent of defendant's involvement, and the consequences of the defendant's acts. We also take into account the defendant's culpability in light of age, prior criminality, personal characteristics, and state of mind. (*People v. Crooks* (1997) 55 Cal.App.4th 797, 806.)

Defendant stresses his age and lack of a prior criminal record as support for his claim. Defendant claims his sentence is the equivalent of life without the possibility of parole, keeping him in prison "long past the age appellant would be likely to repeat anything like the charged offenses."

Defendant's claim pales in the face of the other factors we must consider. A jury convicted defendant of sexually molesting three young children. Defendant engaged in substantial sexual conduct, including committing oral copulation on D.M. Defendant took advantage of his position of trust as their grandfather, and their proximity within his home, to abuse his grandchildren.

The acts were not isolated incidents. Defendant molested D. both in Indiana and California. He molested D.M. over a span of five months. Defendant molested S. twice. In each case, defendant isolated the child, using his position as grandfather to gain access and control over his victim. This ongoing pattern of predatory behavior toward vulnerable family members justifies the harshness of defendant's sentence.

Defendant also argues his sentence is cruel and unusual in relation to terms imposed for similar offenses. However, while California has taken an aggressive approach reflecting a zero tolerance toward the commission of sexual offenses against particularly vulnerable victims, this alone does not render a defendant's sentence excessive as a matter of law. (*Alvarado, supra*, 87 Cal.App.4th at pp. 200-201.) As the People point out, although defendant notes more heinous crimes punished less severely, the converse is also true. Although voluntary

> manslaughter merits a lesser sentence, some nonviolent crimes result in sentences of 25 years to life.
>
> * * *
>
> After weighing the factors enunciated in *Lynch*, we find defendant's sentence does not run afoul of the constitutional prohibition against cruel and unusual punishment.

(Dkt. 28, LD 3 at 25-27.)

The Eighth Amendment provides that cruel and unusual punishments shall not be inflicted. U.S. Const. amend. VIII. A sentence constitutes cruel and unusual punishment if it is "grossly disproportionate" to the crimes committed. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (holding that a California state court's affirmance of two consecutive twenty-five-years-to-life sentences for petty theft was not grossly disproportionate and not contrary to nor an unreasonable application of federal law). *See also Ewing v. California*, 538 U.S. 11 (2003) (holding that a sentence of twenty-five-years-to-life for theft under California's three strikes law was not cruel and unusual punishment); Harmelin *v. Michigan*, 501 U.S. 957, 961 (1991) (mandatory sentence of life without possibility of parole for first offense of possession of 672 grams of cocaine did not raise inference of gross disproportionality).

When reviewing an Eighth Amendment claim in a federal habeas corpus petition, the gross disproportionality principle is "the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework" under 28 U.S.C. § 2254(d)(1). *Lockyer*, 538 U.S. at 73. The "gross disproportionality rule" applies "only in the 'exceedingly rare' and 'extreme' case." *Id.*

Petitioner offers no cases that stand for the proposition that a thirty-two-years-to-life sentence for multiple counts of child molestation with multiple victims over an extended period of time is a grossly disproportionate sentence. The California state courts considered the gravity of his offenses and found no "gross disproportionality" between the crimes and the sentence. (*See* Dkt. 28, LD 3 at 27.) *See People v. Bestelmeyer*, 166 Cal.App.3d 520, 529 (1985) (imposition of sentence of 129 years upon conviction of multiple sex offenses not cruel or unusual punishment). "In light of the broad deference owed to the California legislature and the lack of any further evidence provided by [petitioner], this Court cannot make the threshold determination that [petitioner's] sentence, compared to the crimes that he committed, leads to an inference of gross proportionality." *Roos v. Runnels*, 2001 WL 1563704, *9 (N.D. Cal. 2001) (unpublished). This is not the "extremely rare" case that warrants habeas relief. Because the California state courts' rejection of petitioner's Eighth Amendment claim was neither contrary to, nor an unreasonable application of clearly established U.S. Supreme Court law, I recommend this Court deny petitioner's Eighth Amendment claim.

VII. CERTIFICATE OF APPEALABILITY

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

A petitioner seeking post-conviction relief under § 2254 may appeal a district court's dismissal of his federal habeas petition only after obtaining a certificate of appealability from

a district or circuit judge. A judge shall grant a certificate of appealability only where a petitioner has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(3). The certificate must indicate which issues satisfy this standard. *See id.* § 2253(c)(3). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 474 (2000).

For the reasons set out in the discussion of the merits, above, jurists of reason would not find the result debatable. Accordingly, I recommend that the Court decline to issue a certificate of appealability. Petitioner is advised that he may not appeal the denial of a certificate of appealability in this Court. Rather, he may seek a certificate from the court of appeals under Rule 22 of the Federal Rules of Appellate Procedure.

VIII. CONCLUSION

For the reasons set forth above, the California Court of Appeal's decision denying petitioner's claims was not contrary to, or an unreasonable application of, clearly established federal law, or based on an unreasonable determination of facts. I therefore recommend the Court find that petitioner's constitutional rights were not violated and that petitioner's amended habeas petition (Dkt. 10) be DENIED and this action DISMISSED with prejudice. Furthermore, I recommend the Court decline to issue a certificate of appealability.

This Report and Recommendation is submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen (14) days after being served with this Report and Recommendation, any party may file written

objections with this Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Report and Recommendation." Any response to the objections shall be filed and served within fourteen (14) days after service of the objections. The parties are advised that failure to file objections within the specified time might waive the right to appeal this Court's Order. *See Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). A proposed order accompanies this Report and Recommendation.

DATED this 10th day of May, 2010.

JOHN L. WEINBERG
United States Magistrate Judge