

1 count of sodomizing a disabled person. He seeks federal habeas relief on the following grounds:
2 (1) prosecutorial misconduct resulted in an unfair trial; (2) his convictions are not supported by
3 sufficient evidence; and (3) his due process rights were violated by the trial court's decision to
4 admit evidence of a prior, uncharged sex offense. Upon careful consideration of the record and
5 the applicable law, the undersigned recommends that petitioner's application for habeas corpus
6 relief be denied.

7 **I. Background**

8 In its unpublished memorandum and opinion affirming petitioner's judgment of
9 conviction on appeal, the California Court of Appeal for the Third Appellate District provided the
10 following procedural and factual summary:

11 Defendant Jesus Andres Lopez was convicted of 16 counts of various sex
12 crimes against seven boys. He asserts reversible error on the following
grounds:

- 13 1. The prosecutor committed misconduct in his rebuttal jury argument;
- 14 2. Insufficient evidence supports his six convictions of exhibiting harmful
15 matter to a minor;
- 16 3. The trial court erred by admitting evidence of a prior uncharged sex
17 crime;
- 18 4. The trial court imposed unauthorized restitution and parole revocation
19 fines; and
- 20 5. The abstract of judgment incorrectly records his presentence custody
credits.

21 In addition, the Attorney General asks us to modify the judgment to impose
22 sentences on subordinate consecutive terms in the correct manner and to
23 order the abstract of judgment be similarly corrected. Defendant agrees
with the Attorney General's requests.

24 We reverse the judgment as to two of the convictions for exhibiting
25 harmful matter; we modify the judgment to impose the correct restitution
26 and parole revocation fines and sentences on the subordinate consecutive
27 terms; and we order the abstract of judgment amended to record
28 defendant's sentencing, restitution fines, and presentence custody credit
accurately. In all other respects, we affirm the judgment.

1 FACTS

2 We need not recite all of the sordid facts in order to address defendant's
3 contentions. Suffice it to say, defendant, who turned 39 years old three
4 days after trial in 2012, was convicted of committing the following crimes
 against seven boys in 2010 and 2011:

5 One count of orally copulating a child under the age of 14 (Pen.Code, §
6 288a, subd. (c)(1))1 (count I);

7 Two counts of committing lewd acts on a child under the age of 14 (§ 288,
8 subd. (a)) (counts II and XVII);

9 One count of sodomizing a child under the age of 14 (§ 286, subd. (c)(1))
10 (count III);

11 Six counts of exhibiting harmful matter to a minor (§ 288.2, subd. (a))
 (counts IV, VIII, XVI, XVIII, XIX, and XX);

12 One count of orally copulating a child under the age of 16 (§ 288a, subd.
13 (b)(2)) (count IX);

14 One count of orally copulating a disabled person (§ 288a, subd. (g)) (count
15 X);

16 Two counts of committing lewd acts on a child under the age of 16 (§ 288,
17 subd. (c)(1)) (counts XI and XIV);

18 One count of sodomizing a child under the age of 16 (§ 286, subd. (b)(2))
19 (count XII); and

 One count of sodomizing a disabled person (§ 286, subd. (g)) (count XIII).

20 The jury also found true a multiple victim enhancement under section
21 667.61, subdivisions (b), (c)(8), and (e)(4), as to counts II and XVII.

22 The trial court sentenced defendant to state prison for an indeterminate
23 term of 30 years to life, plus 19 years four months, calculated as follows:
24 Consecutive 15 years to life terms on counts II and XVII (lewd acts on a
25 child under 14) pursuant to the multiple victim enhancement; a consecutive
26 upper term of eight years on count III (sodomy on a child under 14);
27 consecutive middle terms of six years stayed except for one-third of the
28 middle term sentences of two years on counts I, X, and XIII (oral
 copulation of a child under 14, oral copulation of a disabled person, and
 sodomy of a disabled person); and consecutive middle terms of two years
 stayed except for one-third of the middle term sentences of eight months on
 counts IV, VIII, XVI, XVIII, XIX, and XX (exhibiting harmful matter to a
 minor) and counts XI and XIV (lewd acts on a child under 16).

1 The court also imposed and stayed under section 654 the middle term
2 sentences of two years on counts IX and XII (oral copulation of a child
under 16 and sodomy of a child under 16).

3 The court imposed restitution and parole revocation fines of \$100,000
4 each. It also granted defendant a total of 499 days of custody credit; 434
5 days for actual custody and 65 days for worktime credits.

6 *People v. Lopez*, No. C072072, 2014 WL 5796683, at *1-2 (Cal. Ct. App. Nov. 7, 2014), *review*
7 *denied* (Jan. 14, 2015).

8 **II. Standards of Review Applicable to Habeas Corpus Claims**

9 An application for a writ of habeas corpus by a person in custody under a judgment of a
10 state court can be granted only for violations of the Constitution or laws of the United States. 28
11 U.S.C. § 2254(a). A federal writ is not available for alleged error in the interpretation or
12 application of state law. *See Wilson v. Corcoran*, 562 U.S. 1,5 (2010); *Estelle v. McGuire*, 502
13 U.S. 62, 67-68 (1991); *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000).

14 Title 28 U.S.C. § 2254(d) sets forth the following standards for granting federal habeas
15 corpus relief:

16 An application for a writ of habeas corpus on behalf of a
17 person in custody pursuant to the judgment of a State court shall not
18 be granted with respect to any claim that was adjudicated on the
merits in State court proceedings unless the adjudication of the
claim -

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

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

23 For purposes of applying § 2254(d)(1), “clearly established federal law” consists of
24 holdings of the United States Supreme Court at the time of the last reasoned state court decision.
25 *Thompson v. Runnels*, 705 F.3d 1089, 1096 (9th Cir. 2013) (citing *Greene v. Fisher*, 565 U.S. 34,
26 (2011); *Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011) (citing *Williams v. Taylor*, 529 U.S.
27 362, 405-06 (2000)). Circuit court precedent “may be persuasive in determining what law is
28 clearly established and whether a state court applied that law unreasonably.” *Stanley*, 633 F.3d at

1 859 (quoting *Maxwell v. Roe*, 606 F.3d 561, 567 (9th Cir. 2010)). However, circuit precedent
2 may not be “used to refine or sharpen a general principle of Supreme Court jurisprudence into a
3 specific legal rule that th[e] [Supreme] Court has not announced.” *Marshall v. Rodgers*, 133 S.
4 Ct. 1446, 1450 (2013) (citing *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (per curiam)).
5 Nor may it be used to “determine whether a particular rule of law is so widely accepted among
6 the Federal Circuits that it would, if presented to th[e] [Supreme] Court, be accepted as correct.
7 *Id.* Further, where courts of appeals have diverged in their treatment of an issue, it cannot be said
8 that there is “clearly established Federal law” governing that issue. *Carey v. Musladin*, 549 U.S.
9 70, 77 (2006).

10 A state court decision is “contrary to” clearly established federal law if it applies a rule
11 contradicting a holding of the Supreme Court or reaches a result different from Supreme Court
12 precedent on “materially indistinguishable” facts. *Price v. Vincent*, 538 U.S. 634, 640 (2003).
13 Under the “unreasonable application” clause of § 2254(d)(1), a federal habeas court may grant the
14 writ if the state court identifies the correct governing legal principle from the Supreme Court’s
15 decisions, but unreasonably applies that principle to the facts of the prisoner’s case.² *Lockyer v.*
16 *Andrade*, 538 U.S. 63, 75 (2003); *Williams*, 529 U.S. at 413; *Chia v. Cambra*, 360 F.3d 997, 1002
17 (9th Cir. 2004). In this regard, a federal habeas court “may not issue the writ simply because that
18 court concludes in its independent judgment that the relevant state-court decision applied clearly
19 established federal law erroneously or incorrectly. Rather, that application must also be
20 unreasonable.” *Williams*, 529 U.S. at 412. *See also Schriro v. Landrigan*, 550 U.S. 465, 473
21 (2007); *Lockyer*, 538 U.S. at 75 (it is “not enough that a federal habeas court, in its independent
22 review of the legal question, is left with a ‘firm conviction’ that the state court was ‘erroneous.’”).
23 “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as
24 ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Harrington v.*
25 *Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

26 ² Under § 2254(d)(2), a state court decision based on a factual determination is not to be
27 overturned on factual grounds unless it is “objectively unreasonable in light of the evidence
28 presented in the state court proceeding.” *Stanley*, 633 F.3d at 859 (quoting *Davis v. Woodford*,
384 F.3d 628, 638 (9th Cir. 2004)).

1 Accordingly, “[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner
2 must show that the state court’s ruling on the claim being presented in federal court was so
3 lacking in justification that there was an error well understood and comprehended in existing law
4 beyond any possibility for fairminded disagreement.” *Richter*, 562 U.S. at 103.

5 If the state court’s decision does not meet the criteria set forth in § 2254(d), a reviewing
6 court must conduct a de novo review of a habeas petitioner’s claims. *Delgadillo v. Woodford*,
7 527 F.3d 919, 925 (9th Cir. 2008); *see also Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008)
8 (en banc) (“[I]t is now clear both that we may not grant habeas relief simply because of §
9 2254(d)(1) error and that, if there is such error, we must decide the habeas petition by considering
10 de novo the constitutional issues raised.”).

11 The court looks to the last reasoned state court decision as the basis for the state court
12 judgment. *Stanley*, 633 F.3d at 859; *Robinson v. Ignacio*, 360 F.3d 1044, 1055 (9th Cir. 2004). If
13 the last reasoned state court decision adopts or substantially incorporates the reasoning from a
14 previous state court decision, this court may consider both decisions to ascertain the reasoning of
15 the last decision. *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc). “When
16 a federal claim has been presented to a state court and the state court has denied relief, it may be
17 presumed that the state court adjudicated the claim on the merits in the absence of any indication
18 or state-law procedural principles to the contrary.” *Richter*, 562 U.S. at 99. This presumption
19 may be overcome by a showing “there is reason to think some other explanation for the state
20 court’s decision is more likely.” *Id.* at 785 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991)).
21 Similarly, when a state court decision on a petitioner’s claims rejects some claims but does not
22 expressly address a federal claim, a federal habeas court must presume, subject to rebuttal, that
23 the federal claim was adjudicated on the merits. *Johnson v. Williams*, 568 U.S. 289, 292 (2013).

24 Where the state court reaches a decision on the merits but provides no reasoning to
25 support its conclusion, a federal habeas court independently reviews the record to determine
26 whether habeas corpus relief is available under § 2254(d). *Stanley*, 633 F.3d at 860; *Himes v.*
27 *Thompson*, 336 F.3d 848, 853 (9th Cir. 2003). “Independent review of the record is not de novo
28 review of the constitutional issue, but rather, the only method by which we can determine whether

1 a silent state court decision is objectively unreasonable.” *Himes*, 336 F.3d at 853. Where no
2 reasoned decision is available, the habeas petitioner still has the burden of “showing there was no
3 reasonable basis for the state court to deny relief.” *Richter*, 562 U.S. at 98.

4 A summary denial is presumed to be a denial on the merits of the petitioner’s claims.
5 *Stancl v. Clay*, 692 F.3d 948, 957 & n. 3 (9th Cir. 2012). While the federal court cannot analyze
6 just what the state court did when it issued a summary denial, the federal court must review the
7 state court record to determine whether there was any “reasonable basis for the state court to deny
8 relief.” *Richter*, 562 U.S. at 98. This court “must determine what arguments or theories ... could
9 have supported, the state court’s decision; and then it must ask whether it is possible fairminded
10 jurists could disagree that those arguments or theories are inconsistent with the holding in a prior
11 decision of [the Supreme] Court.” *Id.* at 102. The petitioner bears “the burden to demonstrate
12 that ‘there was no reasonable basis for the state court to deny relief.’” *Walker v. Martel*, 709 F.3d
13 925, 939 (9th Cir. 2013) (quoting *Richter*, 562 U.S. at 98).

14 When it is clear, however, that a state court has not reached the merits of a petitioner’s
15 claim, the deferential standard set forth in 28 U.S.C. § 2254(d) does not apply and a federal
16 habeas court must review the claim de novo. *Stanley*, 633 F.3d at 860; *Reynoso v. Giurbino*, 462
17 F.3d 1099, 1109 (9th Cir. 2006); *Nulph v. Cook*, 333 F.3d 1052, 1056 (9th Cir. 2003).

18 **III. Petitioner’s Claims**

19 **A. Prosecutorial Misconduct**

20 The prosecutor, by way of his rebuttal closing argument, stated that the defense had failed
21 to offer a reasonable explanation as to why the victims would choose to lie about the crimes
22 perpetrated against them. The petitioner, who had staked his defense on a theory that the victims
23 were lying, argues that the prosecutor’s comment imposed an unwarranted burden of proof on
24 him. The Court of Appeal rejected this argument:

25 Defendant contends the prosecutor committed misconduct in his rebuttal
26 closing argument by stating the defense, whose theory was the victims
27 were lying, had not introduced a reasonable explanation as to why the
28 victims would lie. Defendant asserts the comment imposed on him a
burden of proof. We conclude defendant has forfeited this argument. If we
considered the argument on its merits, we would conclude the statement

1 was merely a comment on the state of the evidence and was not
2 misconduct.

3 **A. Additional background information**

4 Defendant's trial theory was that the victims lied. In closing argument,
5 defense counsel referenced a letter written by one of the victims, K.S.
6 Counsel argued another victim, Anthony, learned of the molestations by
7 reading that letter. Counsel called the letter a "smoking gun" that
8 contaminated the case and created reasonable doubt.

9 In his rebuttal argument, the prosecutor spoke of the facts on which all
10 parties agreed. Defendant, a man in his thirty's, hung out with young boys
11 at his house. Boys spent the night there in defendant's bedroom. In his
12 bedroom, defendant kept a rubber vagina, a bag of condoms, lubricant, and
13 also a bowl of candy on the bed's headboard. To get to the candy, boys had
14 to go onto the bed, and defendant would invite them to do so.

15 The dialogue continued as follows:

16 "[PROSECUTOR:] What else? We have seven boys come in, into this
17 courtroom, seven, and they tell you that in that room they're watching porn.
18 The Defendant is showing them porn. So that's changing everything to
19 something different and sexual. It's not just weird that he has them spend
20 the night. Now there's something sexual going on in there. Five of those
21 boys tell you they were molested.... Five kids tell you that they were
22 molested in there. And what's the explanation for all of this? Why all these
23 kids would lie?

24 "Defense Counsel says there's a smoking gun of a note written by [K.S.] So
25 we're supposed to believe that these kids saw a note, and because they read
26 that note are willing to tell people, come in here and say that they had sex
27 with a man. Is that believable? The question is reasonable doubt. Is it
28 reasonable that seven boys, who we know were sleeping in his bedroom or
spending time with him, would just make up lies for no reason? What were
we told? Defense had an opportunity to explain something to you.

29 "[DEFENSE COUNSEL]: Judge, I'm going to object. This is rebuttal.

30 "THE COURT: Objection is sustained. It is not a rebuttal comment. [¶]
31 You may go into your next area.

32 "[PROSECUTOR]: Defense never provided you with an explanation.

33 "[DEFENSE COUNSEL]: Same objection, Judge.

34 "THE COURT: Objection will be sustained. It is a valid objection. Rebuttal
35 must be made to comments.

1 “[PROSECUTOR]: Is it reasonable to believe that these boys lied? Why
2 did they lie? To believe that they're lying, it must be reasonable to believe
3 it, and something to be reasonable needs an explanation. You must know
4 why you believe it. You can't just believe it. Why? And in detail, different
5 details.... Why did it happen? Why would they lie? The fact is, they didn't
6 lie.” No objection was made to this part of counsel's argument.

5 **B. Analysis**

6 Defendant asserts the prosecutor, by stating the defense had an opportunity
7 to explain something to the jury, improperly shifted the burden of proof to
8 the defense to explain why the victims would lie.

8 Defendant has forfeited this claim on appeal. “ ‘[A] defendant may not
9 complain on appeal of prosecutorial misconduct unless in a timely
10 fashion—and on the same ground—the defendant made an assignment of
11 misconduct and requested that the jury be admonished to disregard the
12 impropriety. [Citation.]’ [Citation.]” (*People v. Stanley* (2006) 39 Cal.4th
13 913, 952, italics added.) At trial, defense counsel did not request an
14 admonition to the jury when he objected to the prosecutor's argument, and
15 he objected on grounds of improper rebuttal, not burden shifting. The
16 argument is thus forfeited.

14 Defendant asserts for the first time in his reply brief that should we
15 conclude his claim of prosecutorial misconduct is forfeited, we should
16 review the matter for ineffective assistance of counsel. By failing to raise a
17 claim of ineffective assistance of counsel in his opening brief, defendant
18 has forfeited that contention as well. Arguments raised for the first time in
19 a reply brief may be deemed forfeited absent a showing of good cause.
20 (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10.) Defendant
21 makes no showing as to why he should be permitted to raise his claim for
22 ineffective assistance of counsel in his reply brief. Accordingly, the claim
23 is deemed forfeited.

20 Even were we to consider defendant's claim of prosecutorial misconduct on
21 the merits, we would conclude the prosecutor committed no error. For
22 purposes of prosecutorial misconduct, “[a] distinction clearly exists
23 between the permissible comment that a defendant has not produced any
24 evidence, and on the other hand an improper statement that a defendant has
25 a duty or burden to produce evidence, or a duty or burden to prove his or
26 her innocence.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.) The
27 latter constitutes prosecutorial misconduct, but the former does not. The
28 prosecutor's comment was of the former; a comment on the lack of
evidence providing a reason for why the victims would lie.

“A prosecutor may comment on the state of the evidence or on the failure
of the defense to introduce material evidence or to call logical witnesses.
[Citation.] So, too, may a prosecutor point out in final argument that

1 defense counsel have been silent in their argument on crucial factors in the
2 evidence, and thus have, presumably, no explanation to offer for these
3 factors.” (*People v. Singleton* (1980) 112 Cal.App.3d 418, 423.)

4 By his comment, the prosecutor addressed the state of the evidence on the
5 issue of reasonable doubt. In doing so, he did not impose on defendant any
6 burden to establish reasonable doubt. He simply argued the jury could not
7 reasonably rely upon the evidence defendant had submitted and had
8 referenced in closing argument to find reasonable doubt. The prosecutor
9 was free to make this argument.

10 Moreover, the jury was properly instructed on the presumption of
11 innocence, the prosecution's burden to prove the crime beyond a reasonable
12 doubt, and that attorney arguments were not evidence. We presume the jury
13 followed those instructions, and thus we would conclude the prosecutor's
14 argument did not constitute prosecutorial misconduct.

15 *Lopez*, 2014 WL 5796683, at *2-4. Petitioner raised this issue in a petition to the California
16 Supreme Court which was summarily denied. Lodg. Doc. No. 11 (Petition for Review); Lodg.
17 Doc. No. 12 (Order Denying Review).

18 **1. Applicable Legal Standards**

19 A habeas petition raising prosecutorial misconduct will not be granted unless the
20 misconduct “so infect[ed] the trial with unfairness as to make the resulting conviction a denial of
21 due process.” *Greer v. Miller*, 483 U.S. 756, 765 (1987). “[T]he touchstone of due process
22 analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability
23 of the prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219, (1982). As such, in deciding whether a
24 prosecutor’s remarks rendered a trial fundamentally unfair, those remarks must be weighed in the
25 context of the entire proceeding. *Boyd v. California*, 494 U.S. 370, 385 (1990); *Darden v.*
26 *Wainwright*, 477 U.S. 168, 179-182 (1986). Additionally, because “improvisation frequently
27 results in syntax left imperfect and meaning less than crystal clear. . . . a court should not lightly
28 infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a
jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less
damaging interpretations.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). Lastly, even
where prosecutorial misconduct gives rise to a due process violation, habeas relief is only

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1 warranted if that misconduct is prejudicial under the harmless error test established in *Brecht v.*
2 *Abrahamson*, 507 U.S. 619, 637-638 (1993).

3 **2. Analysis**

4 As a preliminary matter, respondent argues, *inter alia*, that this claim should be dismissed
5 as procedurally barred. ECF No. 31 at 21-22.³ The court need not reach this question, however,
6 as petitioner’s prosecutorial misconduct claim is meritless and will be resolved on that basis. *See*
7 *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (holding that judicial economy might favor
8 resolving claims on grounds other than procedural bar if “the procedural bar issue involved
9 complicated issues of state law”); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002)
10 (“Procedural bar issues are not infrequently more complex than the merits issues . . . , so it may
11 well make sense in some instances to proceed to the merits if the result will be the same.”).

12 It is well settled that prosecutors are permitted to argue reasonable inferences from the
13 evidence. *Duckett v. Godinez*, 67 F.3d 734, 742 (9th Cir. 1995); *see also United States v. Birges*,
14 723 F.2d 666, 672 (9th Cir. 1984) (“The prosecutor’s interpretation of [the defense theory] as a
15 “fabrication” is also well within the bounds of acceptable comment.”). Here, the prosecutor
16 emphasized what he perceived as a weakness in the defense theory of the case. Nothing in his
17 comments explicitly referred to or articulated an additional burden for the defendant to meet. To
18 the contrary, he referred to the proper standard of reasonable doubt and permissibly argued that
19 any doubts as to the veracity of the victims were not reasonable in light of the evidence. Even if
20 the prosecutor’s comments could be interpreted as ambiguous or confusing, the court will not
21 presume, absent some supportive evidence, either that he intended his remarks to raise a new
22 burden for the defense to overcome or that the jury independently interpreted such a burden from
23 those remarks. *See Donnelly*, 416 U.S. at 647. Indeed, the record reflects that the jury was
24 instructed as to both the presumption of innocence and the prosecution’s burden to prove guilt
25 beyond a reasonable doubt. Lodg. Doc. No. 2 (Clerk’s Transcript Vol. 2) at 290. And juries are
26 presumed, absent evidence to the contrary, to follow their instructions. *Richardson v. Marsh*, 481

27 ³ Page number citations such as this one are to the page numbers reflected on the court’s
28 CM/ECF system and not to page numbers assigned by the parties.

1 U.S. 200, 211 (1987). Finally, as respondent points out, the evidence used to convict petitioner
2 was strong insofar as it featured testimony from multiple victims (Lodg. Doc. No. 4 (Reporter’s
3 Transcript Vol. II) at, e.g., 412 – 439, 440-464, 465-492) and his defense – that the victims were
4 lying - was weak. *United States v. Young*, 470 U.S. 1, 19 (1985) (overwhelming evidence of guilt
5 “eliminates any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's
6 deliberations . . .”).

7 **B. Sufficiency of the Evidence**

8 Next, petitioner contends that the evidence was not sufficient to sustain his convictions for
9 exhibiting harmful matter to a minor. ECF No. 25 at 16. Two of these convictions (showing
10 harmful matter to Chris and Ronald) were reversed by the Court of Appeal, but the remaining
11 four (showing harmful matter to N.C., G.W., Anthony, and K.S.) were upheld. The Court of
12 Appeal reasoned:

13 Defendant was convicted of six counts of exhibiting harmful matter to a
14 minor. Section 288.2 makes it a crime for an individual to knowingly
15 exhibit to a minor any “harmful matter,” as defined in Section 313, with the
16 intent of seducing the minor to engage in sexual conduct. (§ 288.2,
17 subds.(a), (c).) Defendant contends the evidence is insufficient to support
18 these convictions because the prosecution failed to prove the material was
19 “harmful matter” as defined in section 313; specifically, that it was
20 “patently offensive” to an adult. We conclude sufficient evidence supports
21 four of the six convictions.

22 **Additional background information**

23 We first review the victims' testimony concerning what defendant showed
24 them.

25 N.C. (count XX), 14 years old at trial, met defendant when he was 12.
26 Defendant showed him and four other victims “porn” in defendant's
27 bedroom on a laptop computer from a Web site named Porn Hub, and from
28 another Web site which had the word “hamster” in its name. The porn was
“guy on girl” and “boy on boy;” they were “having sex” in both instances.

N.C. also testified that defendant showed him a cell phone video of another
of defendant's victims, J.B., masturbating. Expert testimony at trial
established J.B. suffered from autism and mild mental retardation, and he
did not have the ability or understanding to consent to sex. Watching the

1 cell phone video of J.B., N.C. heard J.B.'s and defendant's voices on the
2 video. J.B. told defendant to get out of there because he was "doing his
own thing."

3 G.W. (count XVIII), 14 years old at trial, met defendant when he was 11 or
4 12. Defendant showed him and three other boys "porno" in defendant's
5 bedroom. Defendant always locked his bedroom door when he showed
6 pornography to the boys. Defendant would show it on "DVD, computer,
7 Internet." The porn was videos of "boys on girls and boys on boys. Like
Asian boys on boys." The videos of boys on girls and the Asian boys on
8 boys showed them having anal sex. The Web sites were named something
like "X and XX porn."

9 Defendant also showed G.W. a video from his cell phone that depicted J.B.
10 masturbating. G.W. could hear defendant's voice on the video telling J.B.
to "keep going." From the video, it appeared defendant was watching J.B.
and telling him to "keep going."

11 Ronald (count XIX), 12 years old at trial, met defendant two years before
12 trial. Defendant showed Ronald and two to four other boys "porn" on his
television and on a computer. Defendant would lock his bedroom door
13 when he showed the videos to Ronald. The porn was "a guy and a girl."

14 Anthony (count VIII) was 14 years old at the time of trial. He watched
15 "porn" on a computer in defendant's bedroom. The materials were on Web
sites named X Hamster and Porn Hub. Anthony said he saw in the porn
16 videos "very disturbing things," "girl on girl and guy on girl." Regarding
the "guy on girl" video, Anthony saw the guy insert his penis in the girl's
17 vagina.

18 K.S. (count IV), 14 years old at trial, was about 12 years old when he met
19 defendant. Defendant showed "porn" to K.S. in his bedroom on a
computer. Defendant would show the porn either to K.S. alone or to K.S.
20 and other boys. He would lock his bedroom door when he showed the porn.
The porn was from a Web site named X Hamster. K.S. saw "girl on girl,
21 guy on guy," and "guy on woman." The "guy on woman" were "having
sex." The girl on girl were "touching each other," and the guy on guy
22 "were fucking each other."

23 Chris (count XVI), 16 years old at trial, was 14 when he met defendant.
24 Defendant showed Chris "adult clips" on his laptop and his television while
Chris was in his bedroom. The clips on television were from VHS tapes.
25 One tape depicted a "girl and a guy having sex." The clips on the computer
were from the X Hamster Web site.

26 In addition to introducing the testimony of the victims, the prosecution
27 introduced the testimony of Cindy DeWoody, a child abuse sexual assault
investigator with the District Attorney's office. DeWoody viewed the Porn
28

1 Hub and X Hamster Web sites. She testified a person could view any kind
2 of pornography at these Web sites. She saw “[g]ay porn, lesbian porn, elder
3 porn, if you're into the elderly. Everything from hard-core porn with force,
4 mother-in-law relationships, threesomes. You name it, you were able to
5 access it.” She explained how the sites worked: “Each of these porn sites
6 had categories like a menu, and you could click on the categories, and it
7 would take you to numerous icons of different videos. All you had to do
8 was click on that icon, and the video immediately popped up, and you
9 watched it.”

10 DeWoody testified the videos on the Porn Hub and X Hamster Web sites
11 were much more explicit than pornography depicted in Playboy or an R-
12 rated movie. In these videos, “you are seeing everything, and it's action.
13 Everything from masturbation to anal sex, oral copulation, intercourse. It's
14 all there and it's all in action.” When asked if there was any sort of artistic
15 value to what she saw, DeWoody said, “No artwork that I know anybody
16 would have.”

17 **Analysis**

18 We turn to determine whether sufficient evidence supports all six of the
19 convictions for exhibiting harmful matter to a minor. Section 313 defines
20 “[h]armful matter” as “matter, [(1)] taken as a whole, which to the
21 average person, applying contemporary statewide standards, appeals to the
22 prurient interest, and [(2)] is matter which, taken as a whole, depicts or
23 describes in a patently offensive way sexual conduct and [(3)] which,
24 taken as a whole, lacks serious literary, artistic, political, or scientific value
25 for minors.” (§ 313, subd. (a).) This definition “essentially ‘tracks’ the
26 three-prong test for obscenity articulated by the United States Supreme
27 Court in *Miller v. California* (1973) 413 U.S. 15 [37 L.Ed.2d 419],” adding
28 that the lack of serious artistic, political or scientific value must be
evaluated with regard to minors. (*People v. Dyke* (2009) 172 Cal.App.4th
1377, 1382–1383 (*Dyke*).) “As to the first two prongs of the test for
harmful matter, nothing in section 313 indicates that the ‘average person’
applying ‘contemporary statewide standards’ is anything other than an
average adult applying adult standards, or that the determination of whether
sexual conduct is depicted or described in a patently offensive way should
be made using anything but adult standards.” (*Dyke*, supra, at p. 1383,
italics & fn. omitted.)

“[I]n order to determine whether a portrayal of sex is patently offensive to
the average adult, ‘[a] reviewing court must, of necessity, look at the
context of the material, as well as its content.’ [Citation.]” (*Dyke*, supra,
172 Cal.App.4th at p. 1385.) “[T]he question of what is “patently
offensive” ’ under the community standard obscenity test is essentially a
question of fact. [Citation.]” (*Id.* at p. 1384.)

1 Judicial decisions have defined the “patently offensive” prong under
2 sections 288.2 and 313 to prohibit the exhibition of hard-core pornography
3 to a minor, and, to affirm a conviction under section 288.2, have required a
4 sufficient factual showing for the fact finder to determine from the
5 exhibited material's content and context that the material was hard-core
6 pornography. In *Dyke*, the 16-year-old minor testified that, while she was
7 at the house of a friend, the defendant, who was her friend's father,
8 displayed what she referred to as “ ‘pornography’ ” on the television while
9 flipping through the channels. The minor remembered seeing a naked
10 woman dancing for somewhere between one and eight minutes and, for
11 around 45 seconds, the upper bodies of a naked man and woman who were
12 “ ‘having sex’ ” with the woman “on top.” The defendant stated to the
13 minor: “ ‘I shouldn't have this on because then you will have funny
14 dreams and feel funny.’ ” After the minor went to bed, defendant came
15 in, rubbed her breast, kissed her mouth and asked her if she was “horny.”
16 In addition to being convicted of section 288.2, subdivision (a), the
17 defendant was found guilty of misdemeanor sexual battery. (*Dyke*, supra,
18 172 Cal.App.4th at pp. 1380–1381, 1385.)

12 The appellate court held the evidence was insufficient to establish that the
13 television images constituted “harmful matter” for purposes of section
14 288.2, subdivision (a), noting that “nudity alone” and “portrayals of sexual
15 activity” are not per se obscene, even as to minors and “even if they may
16 be characterized as ‘dismally unpleasant, uncouth, and tawdry.’ [Citation.]”
17 (*Dyke*, supra, 172 Cal.App.4th at pp. 1384–1385.) The court cited United
18 States Supreme Court authority stating: “ ‘[A]n essential First Amendment
19 rule [is]: The artistic merit of a work does not depend on the presence of a
20 single explicit scene. [Citation.]’ ” (*Id.* at p. 1386.) The court observed that,
21 “in order to determine whether a portrayal of sex is patently offensive to
22 the average adult, ‘[a] reviewing court must, of necessity, look at the
23 context of the material, as well as its content’ [citation]” and the record
24 before it was missing “any context” from which it could be determined
25 whether what was depicted was patently offensive to the average adult. (*Id.*
26 at p. 1385.) The court concluded that, “[w]ithout more, neither we nor the
27 jury are permitted to presume that such content [a nude woman dancing
28 and a naked couple having sex, shown from the waist up] is patently
offensive to the average adult, applying statewide community standards.”
(*Ibid.*) The court found the minor's reference to “ ‘pornography’ ” equally
lacking in evidentiary weight without any testimony “as to what she meant
by that term, or how broadly it may have been intended.” (*Id.* at p. 1384,
fn. 5; see also *People v. Powell* (2011) 194 Cal.App.4th 1268, 1291
(*Powell*).) It noted additionally: “[I]t is not the minor's opinion that
matters; the sexual conduct depicted must be judged patently offensive
under a single contemporary statewide standard.” (*Dyke*, supra, 172
Cal.App.4th at p. 1384, fn. 5.)

In *Powell*, supra, 194 Cal.App.4th 1268, the defendant was convicted of
raping his daughter (who was 10 years old or younger) and exposing her to

1 pornographic movies. (*Id.* at p. 1274.) With regard to the movies she was
2 shown, the victim testified they depicted “ ‘girls and boys’ ” with their
3 penises and vaginas exposed, and they would engage in sexual activity. (*Id.*
4 at pp. 1284–1286.) She also described the man in these movies uncovering
5 his penis and “ ‘put[ting] his penis in the vagina,’ ” but the penis was
6 obscured by pixelization. (*Id.* at p. 1286.) Then they would have sex, which
7 she could see and hear them perform. (*Ibid.*)

8 In evaluating the sufficiency of the evidence as to section 288.2, the
9 appellate court noted that “nudity or depictions of sexual intercourse or
10 other sexual activity do not, by themselves, make a movie obscene.”
11 (*Powell*, supra, 194 Cal.App.4th at p. 1291.) The court noted that in *Miller*,
12 the Supreme Court held “ ‘no one will be subject to prosecution for the sale
13 or exposure of obscene materials unless these materials depict or describe
14 patently offensive “hard core” sexual conduct specifically defined by the
15 regulating state law, as written or construed.’ [Citation.]” (*Powell*, supra,
16 194 Cal.App.4th at p. 1293.) The *Powell* court observed: “Miller makes
17 plain that ‘hard-core pornography is synonymous with obscene
18 pornography.’ [Citation.] ‘Based on *Miller*, the law distinguishes between
19 hard-core pornography and soft-core pornography, which involves
20 depictions of nudity and limited and simulated sexual conduct. Because it
21 is not as graphic or explicit as hard-core pornography, soft-core
22 pornography is protected under the First Amendment.’ [Citation.]” (*Powell*,
23 supra, at p. 1293.)

24 “Softcore (or soft porn) is a form of pornography, either video or nude
25 glamour photography, that is less explicit than hardcore material in
26 depicting or describing sexual behavior. Softcore does not depict explicit
27 sexual contact, but ranges from nudity to simulated intercourse. While both
28 softcore and hardcore feature sexual situations with the intention of
arousing the viewer, the key difference is that softcore does not clearly
show aroused genitalia (including masturbation), ejaculation, or penetration
(vaginal, anal and/or oral).’ [Citation.] ‘In contrast to hard-core
pornography, which depicts full male nudity and actual sex, soft-core sex is
more simulated than real, and the films usually attempt to have coherent
storylines and dialogue.’ [Citation.]” (*Powell*, supra, at p. 1294.)

The appellate court in *Powell* concluded that, for the most part, the victim's
description of the movies she was shown was insufficient to determine
whether the material was “obscene.” (*Powell*, supra, at p. 1293.) However,
the victim's description of seeing a movie depicting people engaged in
sexual activity in which “ ‘some of their men parts and women parts
weren't blocked,’ ” and “[p]enises, breasts, and vaginas [were] featured in
lewd displays as the actors ‘did it,’ i.e., engaged in sexual activity and not
just kissing” established she had been shown hard-core pornography and
was sufficient to satisfy the “harmful matter” element of the offense. (*Id.* at
p. 1295.)

1 In the present matter, the victims' testimony, the investigator's testimony,
2 and the reasonable inferences drawn from those statements, make it clear
3 that what defendant showed the victims was hard-core pornography, except
4 as to Ronald and Chris. Defendant showed N.C. and G.W. a cell phone
5 video of a young man who suffers from autism and mental retardation
6 masturbating. Defendant apparently participated in making the video, as he
7 is heard in the background encouraging the young man to go on. This was
8 hard core pornography in one of its vilest forms, exploiting a disabled
9 minor who lacked the mental acuity to consent to sex solely for defendant's
10 prurient interest.

11 Defendant also showed G.W. videos from Web sites that depicted men
12 having anal sex. G.W. would not have been able to say what the videos
13 depicted unless he had actually seen the performance of anal sex while
14 viewing them. These videos constituted hard-core pornography.

15 Sufficient evidence also supports the jury's findings that defendant showed
16 hard-core pornography to Anthony and K.S. From the X Hamster and Porn
17 Hub Web sites, defendant showed Anthony a video that depicted a man
18 inserting his penis into a woman's vagina. From the X Hamster Web site,
19 defendant showed K.S. videos that depicted couples "having sex" and
20 "fucking each other." These videos were accessed through Web sites
21 whose function was to exhibit hard-core pornography. It was thus
22 reasonable for the jury to infer from the victims' testimony in light of the
23 investigator's description of the Web sites that the videos defendant showed
24 Anthony and K.S. were hard-core pornography.

25 The evidence supporting defendant's convictions of showing harmful
26 matter to Ronald and Chris, however, is insufficient. Ronald described the
27 videos he saw as "porn" involving "a guy and a girl," but he did not
28 explain the source or context of the videos he saw. Chris described the
29 videos he saw as "adult clips." One was from a VHS tape that depicted a
30 "girl and a guy having sex." Other clips were from the X Hamster Web
31 site, but Chris did not describe what he saw in those clips. The testimony of
32 these two victims does not provide sufficient descriptions of content and
33 context from which the jury could infer the videos defendant showed them
34 were hard-core pornography.

35 We conclude there is sufficient evidence to support defendant's convictions
36 under section 288.2 for showing harmful matter to N.C., G.W., Anthony,
37 and K.S. (counts XX, XVIII, VIII, and IV), but not for showing harmful
38 matter to Chris and Ronald (counts XVI and XIX).

39 *Lopez*, 2014 WL 5796683, at *4–8. Petitioner raised his sufficiency of evidence claims in a
40 petition for review to the California Supreme Court which was summarily rejected. Lodg. Doc.
41 No. 11 (Petition for Review); Lodg. Doc. No. 12 (Order Denying Review).

1 **1. Applicable Legal Standards**

2 The Due Process Clause “protects the accused against conviction except upon proof
3 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is
4 charged.” *In re Winship*, 397 U.S. 358, 364 (1970). There is sufficient evidence to support a
5 conviction if, “after viewing the evidence in the light most favorable to the prosecution, any
6 rational trier of fact could have found the essential elements of the crime beyond a reasonable
7 doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). “[T]he dispositive question under *Jackson*
8 is ‘whether the record evidence could reasonably support a finding of guilt beyond a reasonable
9 doubt.’” *Chein v. Shumsky*, 373 F.3d 978, 982 (9th Cir. 2004) (quoting *Jackson*, 443 U.S. at 318).
10 Put another way, “a reviewing court may set aside the jury’s verdict on the ground of insufficient
11 evidence only if no rational trier of fact could have agreed with the jury.” *Cavazos v. Smith*, 565
12 U.S. 1,2 (2011). Sufficiency of the evidence claims in federal habeas proceedings must be
13 measured with reference to substantive elements of the criminal offense as defined by state law.
14 *Jackson*, 443 U.S. at 324 n.16.

15 In conducting federal habeas review of a claim of insufficient evidence, “all evidence
16 must be considered in the light most favorable to the prosecution.” *Ngo v. Giurbino*, 651 F.3d
17 1112, 1115 (9th Cir. 2011). “*Jackson* leaves juries broad discretion in deciding what inferences
18 to draw from the evidence presented at trial,” and it requires only that they draw “‘reasonable
19 inferences from basic facts to ultimate facts.’” *Coleman v. Johnson*, 566 U.S. 650, 655 (2012)
20 (per curiam) (citation omitted). “‘Circumstantial evidence and inferences drawn from it may be
21 sufficient to sustain a conviction.’” *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation
22 omitted).

23 If the record supports conflicting inferences, the reviewing court “must presume — even
24 if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts
25 in favor of the prosecution, and must defer to that resolution.” *McDaniel v. Brown*, 558 U.S. 120,
26 133 (2010) (per curiam) (quoting *Jackson*, 443 U.S. at 326). In evaluating the evidence presented

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29

1 at trial, this court may not weigh conflicting evidence or consider witness credibility. *Wingfield*
2 *v. Massie*, 122 F.3d 1329, 1332 (10th Cir. 1997). Instead, as noted above, the Court must view
3 the evidence in the “light most favorable to the prosecution,” *Jackson*, 443 U.S. at 319.

4 Juries have broad discretion in deciding what inferences to draw from the evidence
5 presented at trial. This court may not “impinge[] on the jury's role as factfinder,” or engage in
6 “fine-grained factual parsing.” *Coleman*, 566 U.S. at 655. As the Ninth Circuit has explained,
7 “[t]he relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but
8 whether the jury could reasonably arrive at its verdict.” *United States v. Mares*, 940 F.2d 455,
9 458 (9th Cir. 1991). Under *Jackson*, the Court need not find that the conclusion of guilt was
10 compelled, only that it rationally could have been reached. *Drayden v. White*, 232 F.3d 704, 709-
11 10 (9th Cir. 2000).

12 “A petitioner for a federal writ of habeas corpus faces a heavy burden when challenging
13 the sufficiency of the evidence used to obtain a state conviction on federal due process grounds.”
14 *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005). Because this case is governed by the Anti-
15 Terrorism and Effective Death Penalty Act, this court owes a “double dose of deference” to the
16 decision of the state court. *Long v. Johnson*, 736 F.3d 891, 896 (9th Cir. 2013) (quoting *Boyer v.*
17 *Belleque*, 659 F.3d 957, 960 (9th Cir. 2011)). *See also Coleman*, 565 U.S. at 651 (“*Jackson*
18 claims face a high bar in federal habeas proceedings because they are subject to two layers of
19 judicial deference.”); *Kyzar v. Ryan*, 780 F.3d 940, 943 (9th Cir. 2015) (same).

20 **2. Analysis**

21 Section 288.2 of the California Penal Code prohibits exhibiting “harmful matter” to a
22 minor with “the intent of arousing, appealing to, or gratifying the lust or passions or sexual
23 desires of that person or of the minor . . .” Cal. Pen. Code § 288.2, subd. (a), (c). ‘Harmful
24 matter’ is, per section 313 of the code, defined as:

25 [M]atter, taken as a whole, which to the average person, applying contemporary
26 statewide standards, appeals to the prurient interest, and is matter which, taken as a
27 whole, depicts or describes in a patently offensive way sexual conduct and which,
28 taken as a whole, lacks serious literary, artistic, political, or scientific value for
minors.

1 Cal. Pen. Code § 313 (a). The Court of Appeal, as previously indicated, found that there was
2 sufficient evidence to uphold four⁴ convictions for exhibiting harmful matter to four (N.C., G.W.,
3 Anthony, and K.S.) of the six victims. It noted that testimony from the both the victims and
4 investigators indicated that: (1) petitioner showed N.C. and G.W. video of an autistic youth
5 masturbating; (2) petitioner showed G.W. video of men having anal sex; (3) petitioner showed
6 Anthony a video of vaginal intercourse from a hard-core pornographic website; and (4) petitioner
7 showed K.S. videos of couples engaging in intercourse on a hard-core pornographic website.
8 *Lopez*, 2014 WL 5796683, at *7-8. This testimony is clearly presented in the record. Lodg. Doc.
9 No. 4 (Reporter’s Transcript Vol. II) at 451-52, 472-73, 519, 566-67. For his part, petitioner has
10 only vaguely alleged that the evidence is insufficient. ECF No. 25 at 16. He has not explained
11 how the Court of Appeal’s rejection of his challenge to the sufficiency of the evidence was
12 contrary to, or an unreasonable application of, any clearly established Federal Law. It bears
13 reiterating that, under *Jackson*, the court need conclude only that the jury could have rationally
14 reached its verdict. Here, the record simply does not support petitioner’s conclusory contention
15 that a finding in his favor on these counts was the only reasonable outcome.

16 **C. Admission of Prior, Uncharged Sex Offense**

17 Finally, petitioner contends that the admission of prior, uncharged sex offenses violated
18 his due process rights.⁵ ECF No. 25 at 17-18. The Court of Appeal rejected this claim:

19 The trial court admitted evidence under Evidence Code section 1108 of a
20 prior uncharged sex offense committed by defendant. Defendant contends
21 the court abused its discretion by admitting the evidence because, under
22 Evidence Code section 352, the evidence was more prejudicial than
23 probative. He asserts the evidence was more prejudicial because it
24 concerned an event that was not in close proximity to the charged offenses,
25 was not corroborated, and did not result in conviction or punishment. He

24 ⁴ As noted *supra*, two of these convictions were overturned by the Court of Appeal.
25 Accordingly, this court does not reach them. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)
26 (“[F]ederal courts are without power to decide questions that cannot affect the rights of litigants
27 in the case before them.”).

28 ⁵ Petitioner also alleges that his state due process rights were violated. ECF No. 25 at 17-
18. These claims are not cognizable, however. *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct.
475, 116 L. Ed. 2d 385 (1991) (“In conducting habeas review, a federal court is limited to
deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”).

1 claims admitting the evidence violated his constitutional rights to due
2 process. We disagree with his contentions. The trial court did not abuse its
3 discretion by admitting the evidence.

4 **Additional background information**

5 Defendant moved in limine to exclude evidence offered under Evidence
6 Code section 1108, arguing the evidence was unduly prejudicial under
7 Evidence Code section 352. The prosecution opposed. It sought to
8 introduce the testimony of Sergio A. concerning an uncharged sex act
9 committed by defendant against him some six years before defendant
10 committed the acts at issue here, and it argued the evidence was not unduly
11 prejudicial.

12 The trial court denied plaintiff's motion. It found the testimony to be highly
13 probative and no more inflammatory than the testimony to be introduced
14 by the other victims. It found the testimony was not stale, and that it would
15 not distract the jury or consume an undue amount of time.

16 Sergio A. testified at trial. At that time, he was 19 years old. He became
17 acquainted with defendant, his mother's friend, in about 2004 at the age of
18 11. Defendant gave Sergio A. money and gifts. They would smoke
19 marijuana and watch pornography together. Defendant told Sergio A. he
20 was "really cute." He occasionally would smack Sergio A.'s buttocks, or
21 would give him very long hugs. These statements and actions made Sergio
22 A. uncomfortable. Defendant gave Sergio A. marijuana and alcohol.

23 One night, Sergio A. was falling asleep on his bed lying on his stomach.
24 Defendant sat next to him and massaged his back. Defendant was saying
25 something, but Sergio A. was "half asleep." Then defendant pulled down
26 Sergio A.'s pants. Sergio A. turned around quickly to look at defendant,
27 and saw that defendant had exposed his penis. Sergio A. asked defendant
28 what he was doing, but defendant tried "to play it off" and denied doing
anything. Sergio A. then called out for his uncle. On cross-examination,
Sergio A. stated defendant had pulled his pants down to his "butt cheek,"
was "massaging [his] back," and "then he tried to touch me with his
freakin' wiener." Defendant testified he told this point to the prosecutor's
investigator.

29 **Analysis**

30 Evidence Code section 1108 authorizes a trial court to admit evidence of a
31 defendant's prior sexual offenses as propensity evidence in a sex crime case
32 when the evidence is not inadmissible under Evidence Code section 352.
33 (Evid.Code, § 1108, subd. (a).) When determining whether evidence of
34 prior sex offenses is prejudicial under Evidence Code section 352, "trial
35 judges must consider such factors as its nature, relevance, and possible
36 remoteness, the degree of certainty of its commission and the likelihood of

1 confusing, misleading, or distracting the jurors from their main inquiry, its
2 similarity to the charged offense, its likely prejudicial impact on the jurors,
3 the burden on the defendant in defending against the uncharged offense,
4 and the availability of less prejudicial alternatives to its outright admission,
5 such as admitting some but not all of the defendant's other sex offenses, or
6 excluding irrelevant though inflammatory details surrounding the offense.’
7 (*People v. Falsetta* [(1999) 21 Cal.4th 903,] 917.) The court's ruling under
8 [Evidence Code] section 1108 is subject to review for abuse of discretion.
9 (*People v. Story* [(2009) 45 Cal.4th 1282,] 1295.)” (*People v. Loy* (2011)
10 52 Cal.4th 46, 61.)

11 We conclude the trial court did not abuse its discretion in admitting Sergio
12 A.'s testimony. The testimony was probative and not unduly inflammatory.
13 It was probative of defendant's propensity to groom and molest young men
14 in their early teens, as he did with the victims here. And Sergio A.'s
15 testimony was far less inflammatory than the victims' testimony of what
16 defendant did to them.

17 The event of which Sergio A. testified was not so remote as to be
18 irrelevant. Under Evidence Code section 1108, courts have admitted
19 evidence of similar uncharged sex acts committed up to 30 years before the
20 charged acts were committed. (See, e.g., *People v. Branch* (2001) 91
21 Cal.App.4th 274, 284 [30 years]; *People v. Waples* (2000) 79 Cal.App.4th
22 1389, 1393–1395 [between 15 and 22 years].) Six years is not too remote,
23 particularly due to the similarities between defendant's actions against
24 Sergio A. and the victims here.

25 The testimony also did not distract the jury or consume an undue amount of
26 time. Sergio A.'s testimony takes up only 20 pages of the 954–page
27 reporter's transcript.

28 Defendant complains Sergio A.'s testimony was unduly prejudicial because
it was not corroborated by any other eyewitnesses, Sergio A. had a motive
to lie because he believed defendant introduced his mother to drugs, Sergio
A. never disclosed the incident until he learned about this case, and Sergio
A.'s claim was never presented to a jury for determination. These issues go
more toward credibility than admissibility and prejudice.

“The prejudice that [Evidence Code] section 352 ‘ “is designed to avoid is
not the prejudice or damage to a defense that naturally flows from relevant,
highly probative evidence.” [Citations]. “Rather, the statute uses the word
in its etymological sense of ‘prejudging’ a person or cause on the basis of
extraneous factors. [Citation.]” [Citation.]’ [Citation.] In other words,
evidence should be excluded as unduly prejudicial when it is of such nature
as to inflame the emotions of the jury, motivating them to use the
information, not to logically evaluate the point upon which it is relevant,
but to reward or punish one side because of the jurors' emotional reaction.
In such a circumstance, the evidence is unduly prejudicial because of the

1 substantial likelihood the jury will use it for an illegitimate purpose.”
2 (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.)

3 Defendant has not demonstrated Sergio A.'s testimony was so
4 inflammatory as to motivate the jurors to decide his case based solely on
5 their emotional reaction to uncharged sex act evidence, or that the trial
6 court's admission of the evidence was arbitrary or capricious. We thus
conclude the court did not abuse its discretion admitting the evidence, and
defendant suffered no loss of his due process rights.

7 *Lopez*, 2014 WL 5796683, at *8–10. Petitioner raised his sufficiency of evidence claims in a
8 petition for review to the California Supreme Court which was summarily rejected. Lodg. Doc.
9 No. 11 (Petition for Review); Lodg. Doc. No. 12 (Order Denying Review).

10 **1. Applicable Legal Standards**

11 The United States Supreme Court has not ruled on the question of whether admission of
12 propensity evidence violates due process. *Estelle*, 502 U.S. at 75, n.5 (“Because we need not
13 reach the issue, we express no opinion on whether a state law would violate the Due Process
14 Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged
15 crime.”). As such, there is no clearly established federal law addressing this issue. Habeas relief
16 may still issue on this claim, however, if petitioner can show that the admission of these
17 uncharged acts was fundamentally unfair and resulted in a denial of due process. *Id.* at 72.
18 Constitutional due process is violated if there are no permissible inferences to be drawn from the
19 challenged evidence. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). “Evidence
20 introduced by the prosecution will often raise more than one inference, some permissible, some
21 not; we must rely on the jury to sort them out in light of the court's instructions.” *Id.* at 920. “A
22 habeas petitioner bears a heavy burden in showing a due process violation based on an
23 evidentiary decision.” *Boyd v. Brown*, 404 F.3d 1159, 1172 (9th Cir. 2005).

24 **2. Analysis**

25 As noted above, there is no clearly established federal law proscribing the admission of
26 propensity evidence. As such, he would be entitled to relief only if the jury could draw no
27 permissible inferences from it. The Court of Appeal held that the testimony was “probative of
28

1 defendant's propensity to groom and molest young men in their early teens, as he did here."
2 *Lopez*, 2014 WL 5796683, at *9. The court finds that this was not an unreasonable determination
3 and that such an inference would be permissible under federal law. *See Alberni v. McDaniel*, 458
4 F.3d 860, 863-67, 866 n.1 (9th Cir. 2006) (recognizing that the Supreme Court has not clearly
5 established that the introduction of propensity evidence violates due process and that it has denied
6 certiorari on the issue at least four times). Accordingly, petitioner is not entitled to habeas relief
7 on this claim.

8 **IV. Conclusion**

9 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of
10 habeas corpus be denied.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
16 shall be served and filed within fourteen days after service of the objections. Failure to file
17 objections within the specified time may waive the right to appeal the District Court's order.
18 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.
19 1991). In his objections petitioner may address whether a certificate of appealability should issue
20 in the event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing
21 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it
22 enters a final order adverse to the applicant).

23 DATED: November 16, 2017.

24 
25 EDMUND F. BRENNAN
26 UNITED STATES MAGISTRATE JUDGE
27
28