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

CARLOS DELGADO,

No. C 06-5436 WHA (PR)

Petitioner,

**DENIAL OF PETITION FOR WRIT
OF HABEAS CORPUS**

v.

BOB HOREL, Warden,

Respondent.

This is a habeas corpus case filed by a state prisoner pursuant to 28 U.S.C. 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent has answered and filed a brief in support, and has lodged the record. Petitioner has responded with a traverse. For the reasons set forth below the petition is **DENIED**.

STATEMENT

A jury convicted petitioner of lewd conduct with a child. He was sentenced to twelve years in prison. His conviction was affirmed on direct appeal by the California Court of Appeal, and the California Supreme Court denied review. The issue he raises here was raised on direct appeal and so is exhausted.

DISCUSSION

A. STANDARD OF REVIEW

A district court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's

1 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an
2 unreasonable application of, clearly established Federal law, as determined by the Supreme
3 Court of the United States; or (2) resulted in a decision that was based on an unreasonable
4 determination of the facts in light of the evidence presented in the State court proceeding." 28
5 U.S.C. § 2254(d). The first prong applies both to questions of law and to mixed questions of
6 law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000), while the second prong
7 applies to decisions based on factual determinations, *Miller-El v. Cockrell*, 537 U.S. 322, 340
8 (2003).

9 A state court decision is "contrary to" Supreme Court authority, that is, falls under the
10 first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that
11 reached by [the Supreme] Court on a question of law or if the state court decides a case
12 differently than [the Supreme] Court has on a set of materially indistinguishable facts."
13 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an "unreasonable application of"
14 Supreme Court authority, falls under the second clause of § 2254(d)(1), if it correctly identifies
15 the governing legal principle from the Supreme Court's decisions but "unreasonably applies
16 that principle to the facts of the prisoner's case." *Id.* at 413. The federal court on habeas
17 review may not issue the writ "simply because that court concludes in its independent judgment
18 that the relevant state-court decision applied clearly established federal law erroneously or
19 incorrectly." *Id.* at 411. Rather, the application must be "objectively unreasonable" to support
20 granting the writ. *See id.* at 409.

21 "Factual determinations by state courts are presumed correct absent clear and
22 convincing evidence to the contrary." *Miller-El*, 537 U.S. at 340. This presumption is not
23 altered by the fact that the finding was made by a state court of appeals, rather than by a state
24 trial court. *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *Bragg v. Galaza*, 242 F.3d 1082,
25 1087 (9th Cir.), *amended*, 253 F.3d 1150 (9th Cir. 2001). A petitioner must present clear and
26 convincing evidence to overcome § 2254(e)(1)'s presumption of correctness; conclusory
27 assertions will not do. *Id.*

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1 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual determination
2 will not be overturned on factual grounds unless objectively unreasonable in light of the
3 evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. at 340; *see also Torres*
4 *v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

5 When there is no reasoned opinion from the highest state court to consider the
6 petitioner’s claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*, 501
7 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th Cir.2000).

8 **B. ISSUES PRESENTED**

9 Petitioner lived in a garage at the victim’s mother’s house for nine or ten years, starting
10 when the victim was about one (Exh. 4 at 1). When she was about eight he began molesting
11 here (*id.* at 2-4). When she was ten she told family what was happening (*ibid.*). She told police
12 she had been molested at least thirty times, that it had happened nearly every day except the two
13 days a week when her mother did not go to work (*ibid.*). She also was able to provide details
14 and dates for three of the incidents (*id.* at 3).

15 As grounds for federal habeas relief, petitioner raises only one issue, that the trial court's
16 denial of his challenge for cause of a biased juror forced him to use a peremptory challenge to
17 remove her from the jury. He contends that this violated his due process, equal protection, and
18 jury trial rights.

19 The court of appeal set out the facts relevant to this issue:

20 Juror Jarvis was a mother of two children, ages one and three years old.
21 During voir dire by the court, she spontaneously expressed concern about her
22 ability to serve as a fair and impartial juror. After apologizing because “this is
23 really emotional for me,” she stated: “[W]hen I initially walked into the
24 courtroom, I had some issues with the fact that I assumed that he was a public
25 defender and at this point I watched three different translators with him, um. I
26 have issues with the fact that when he turned to face the jury to see if any of us
27 knew him, he didn't make eye contact with anyone. He looked quickly at the
28 floor. I knew immediately before you even said what the charges were.” After
the court explained jurors must not “let those kinds of responses or reactions
affect” their decision, and remarked that the nature of the charges and Delgado's
courtroom behavior were “not evidence,” juror Jarvis responded, “No, I know,”
and said “I think-I would like to hope I can have an open mind. I'd like to hope I
could.” The court went on to explain the duty of jurors to keep an open mind and
start the case with no preconceptions about the defendant. When the court
concluded by asking juror Jarvis if she could commit to returning a verdict of not
guilty if she heard no evidence to rebut the presumption of innocence, she responded, “I hope

1 so.” The court noted it is not unusual for people to have strong emotional reactions, and the
2 important question for Jarvis was whether she could put aside her emotional response. The
3 court indicated it would give her time to “think about it” before the attorneys questioned her.

4 Before the court moved on to question other potential jurors, Jarvis volunteered
5 information she had not included on her juror questionnaire. In response to a
6 question about involvement in a previous criminal matter, she stated that in 1991
7 she was held hostage in Puerto Vallarta. The people responsible were not
8 arrested and charged. Jarvis did not believe this experience would affect the way
9 she viewed the evidence or made a decision in this case. Also, regarding a
10 question asking whether the juror would have difficulty being fair and impartial
11 if the alleged perpetrator owned sexually explicit materials (to which Jarvis had
12 responded “no”), Jarvis stated, “If that question was not complete enough to
13 include anything other than mainstream heterosexual adult behavior, I need to
14 change my answer.” The court noted that, as far as it was aware, the sexually
15 explicit evidence would consist of videotape and print material displaying adult
16 heterosexual behavior. Jarvis responded, “If it's adults, I have no problem. If it
17 involved-I will tell you right out. If it involved anything other than two adults, a
18 male and female, I cannot be objective at all.” The court reassured her it was
19 aware of no such material that would be presented to the jury.

20 In a hearing outside the presence of the jury, defense counsel complained he was
21 “very, very troubled” by statements Jarvis made in open court, which counsel
22 interpreted “as being classist, [sic] racist, homophobic, [and] judgmental” in
23 that Jarvis apparently assumed Delgado was guilty. Later, Delgado challenged
24 juror Jarvis for cause, and the court indicated it would be inclined to grant this
25 challenge if she were called into the jury box, based on “[h]er very strong
26 emotional reaction together with the equivocal response and concerns on the issues....”

27 When Jarvis was eventually seated in the jury box, the court announced it
28 intended to excuse her from the case because it appeared “this might be a little
too difficult for you.” However, Jarvis said she had “done a lot of soul
searching” and believed she would be “okay” if she stayed on the jury. The
court then asked for an assurance that she could still be a fair and impartial juror,
given the emotional difficulty the case posed for her. Jarvis responded that,
although the issue was emotional for her, especially because she had two very
young children, “I do believe that he deserves a fair trial. I think my mind is
open enough to give him as an individual an open mind.” Finally, Jarvis affirmed
that if she were in Delgado's place and wanted people on the jury who would
make a fair-minded, objective decision, she would indeed be comfortable having
someone with her frame of mind sitting on the jury. Defense counsel did not
renew its challenge for cause to Jarvis but exercised a peremptory challenge to
excuse her. Before the jury was sworn, Delgado's counsel objected to the court's
failure to excuse Jarvis, and other jurors, for cause and expressed dissatisfaction
with the jury. Counsel requested an additional six peremptory challenges. The
court denied this request, noting with respect to Jarvis it did not believe a
dismissal for cause was appropriate because, after she thought over the matter,
Jarvis unequivocally expressed her ability to be fair.

(Exh. 4 at 5-7)

A prospective juror must be removed for cause if the juror’s views or beliefs would
prevent or substantially impair the performance of his or her duties as a juror. *Wainwright v.*

1 Witt, 469 U.S. 412, 424 (1985). "Even if only one juror is unduly biased or prejudiced, the
2 defendant is denied his constitutional right to an impartial jury." *Tinsley v. Borg*, 895 F.2d 520,
3 523-34 (9th Cir. 1990) (internal quotations omitted).

4 In this case, however, the juror did not end up on the jury, because the defense used a
5 peremptory strike to eject her. The issue here, then, is whether petitioner's rights were violated
6 when the trial court denied a challenge for cause, thereby forcing the defense to use a
7 peremptory, and preventing the defense from using that peremptory to remove a biased juror
8 who ended up sitting on the jury. In such cases the outcome depends on whether petitioner can
9 show that a biased juror was seated as a result of his having to waste a peremptory on a
10 prospective juror who should have been stricken for cause. *See United States v. Martinez-*
11 *Salazar*, 528 U.S. 304, 311 (9th Cir. 2000) ("peremptory challenges are not of federal
12 constitutional dimension."); *Ross v. Oklahoma*, 487 U.S. 81, 88, 90-91 (1988).

13 Petitioner has failed to show that any of the jurors who sat were biased. He had
14 challenged three of them for cause. Two had expressed some concern with the "beyond a
15 reasonable doubt" standard, but then affirmed to the court that they could follow the court's
16 instructions and would be fair and impartial (Exh. 2D at 184). Another juror was challenged for
17 cause because she had worked with a child assault prevention group twenty years before the
18 trial; she also affirmed that she could be fair and impartial (*id.* at 221). This is far from
19 sufficient to show that the jurors were biased.

20 Petitioner argues that he does not have to show bias on the part of at least one juror, but
21 rather that under California law he need only show that a challenge to a juror for cause was
22 erroneously denied, forcing him to waste a peremptory, and that he was "dissatisfied" with the
23 composition of the jury (Trav. at 8). He asserts that the deprivation of the full quota of
24 peremptories California law allows him was a "violation of his Fifth and Fourteenth
25 Amendment rights to due process." The California Court of Appeal rejected his contention that
26 the denial for cause was erroneous, however, so one of the essential elements of his reasoning is
27 conclusively negated. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (a state court's
28 interpretation of state law, including one announced on direct appeal of the challenged

1 conviction, binds a federal court sitting in habeas corpus). As a consequence, even assuming
2 the correctness of petitioner's contention that a simple violation of state law in this area is also a
3 violation of due process, no constitutional violation has been made out (Exh. 4 at 10).

4 Additionally, as the United States Supreme Court has recently reaffirmed, there is no
5 constitutional right to peremptories or any specific number of them. *Rivera v. Illinois*, 2009
6 WL 815033 at *3 (Mar. 31, 2009). Petitioner's attempt to bootstrap his claim by claiming a
7 violation of state law cannot be allowed to negate this fact, even leaving aside that, as noted
8 above, there was no state law violation..

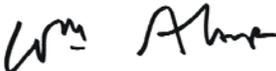
9 The rejections of these claims by the state appellate courts were not contrary to, or
10 unreasonable applications of, clearly-established United States Supreme Court authority.

11 **CONCLUSION**

12 The petition for a writ of habeas corpus is **DENIED**. The clerk shall close the file.

13 **IT IS SO ORDERED.**

14 Dated: April 3, 2009.

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17 WILLIAM ALSUP
18 UNITED STATES DISTRICT JUDGE
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