

**United States District Court**  
For the Northern District of California

Petitioner Bryan Randall Monkres, a state prisoner incarcerated at Mule Creek State Prison, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a conviction and sentence imposed by Lake County Superior Court. On March 18, 2008, the Court entered judgment denying the petition. On April 23, 2008, the Court received from Petitioner a notice of appeal and an application to proceed in forma pauperis on appeal (docket no. 51). On April 24, 2008, the Clerk of the Court processed the appeal by forwarding the case file with the notice of appeal to the Ninth Circuit Court of Appeals.

On November 4, 2008, the Ninth Circuit remanded this case to the district court for the limited purpose of granting or denying a certificate of appealability (COA). See Monkres v. Campbell, No. 08-16011, slip op. at 1 (9th Cir. Nov. 4, 2008).

Petitioner did not seek a COA; however, the Court will construe his notice of appeal as a request for a COA on all of the claims raised in his habeas petition. See United States v. Asrar, 116 F.3d 1268, 1270 (9th Cir. 1997) ("If no express request is made for a certificate of appealability, the notice of appeal shall be

1 deemed to constitute a request for a certificate.").

2       An appeal may not be taken to the court of appeals from the  
3 final order in a habeas corpus proceeding unless the petitioner  
4 first obtains a COA. A judge shall grant a COA "only if the  
5 applicant has made a substantial showing of the denial of a  
6 constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district  
7 court has rejected the constitutional claims on the merits, the  
8 showing required to satisfy § 2253(c) is straightforward: the  
9 petitioner must demonstrate that reasonable jurists would find the  
10 district court's assessment of the constitutional claims debatable  
11 or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). This  
12 requires an overview of the claims in the habeas petition and a  
13 general assessment of their merits. It does not require full  
14 consideration of the factual or legal bases adduced in support of  
15 the claims. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). The  
16 question is the debatability of the underlying constitutional  
17 claim, not the resolution of that debate. Id. at 342.

18       The Court has reviewed its Order denying the petition for a  
19 writ of habeas corpus and GRANTS Petitioner's request for a COA  
20 with respect to the following claims. The request is DENIED with  
21 respect to all other claims.

22 I. Admission of Prior Bad Acts

23       Petitioner claims the trial court erroneously admitted  
24 evidence of prior bad acts. Before trial, the State filed a motion  
25 to admit evidence of charged physical and uncharged sexual assaults  
26 Petitioner committed in Arizona against the victim, T.P., when she  
27 was between the ages of twelve and fourteen. On February 20, 2002,  
28 the trial court held a hearing regarding the allegations of

1 uncharged prior sexual acts against T.P. The trial court granted  
2 the State's motion following the hearing.

3 Petitioner argued that the testimony of T.P. relating to the  
4 prior bad acts should not have been admitted because it was more  
5 prejudicial than probative.

6 The trial court rejected Petitioner's claim, stating:

7 Evidence Code 1108 permits evidence of prior  
8 sexual conduct to show propensity unless it's  
9 otherwise inadmissible under 352. In  
10 conducting that weighing process under 352 the  
11 court would find this evidence to be  
12 admissible. It is probative as to the issue of  
13 whether or not the victim was coerced because  
14 of past physical, if not sexual, abuse. It  
15 does not appear to the court that it would be  
16 unduly time-consuming. There is some risk of  
17 the jury confusing the issues, but I think that  
18 can be handled. And the court makes that  
19 ruling based upon the People's representation  
20 that this will be evidence that is basically  
21 limited to the conduct that gave rise to the  
22 criminal case down in Arizona.

23 (Resp't Ex. 2, Vol. 2 at 15.)

24 This Court rejected Petitioner's contention that admission of  
25 the evidence of the prior bad acts was unduly prejudicial and  
26 denied him the right to a fair trial. The Court concluded,  
27 "Because the state court's balancing test was not contrary to but  
28 consistent with federal law, the state court's rejection of his  
claim was not objectively unreasonable." (Mar. 18, 2008 Order at  
34 (citing Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003).)

24 The admission of other crimes evidence violates due process  
25 where there are no permissible inferences the jury can draw from  
26 the evidence, in other words, no inference other than one that the  
27 defendant's conduct in the case at issue was in conformity with his  
28 previous conduct. See McKinney v. Rees, 993 F.2d 1378, 1384 (9th

1 Cir. 1993); Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir.  
2 1991). The relevance of the evidence of other bad acts to motive  
3 or intent, the opportunity for the jury to weigh the credibility of  
4 the witness's account of the other bad acts, and the judge's use of  
5 cautionary jury instructions to limit the jury's consideration of  
6 the other bad acts all are factors a federal court may consider to  
7 determine whether a due process violation occurred. See Terrovona  
8 v. Kincheloe, 912 F.2d 1176, 1180-81 (9th Cir. 1990).

9 The Court finds that reasonable jurists viewing the record  
10 could find the Court's assessment of this claim "debatable or  
11 wrong." Slack, 529 U.S. at 484. Accordingly, his request for a  
12 COA is GRANTED with respect to this claim.

13 II. Ineffective Assistance of Appellate Counsel

14 Petitioner argues his Sixth Amendment right was violated  
15 because his appellate counsel failed to raise on direct appeal the  
16 claim that the trial court erred in admitting evidence of prior bad  
17 acts.

18 The Court rejected Petitioner's claim as follows:

19 Petitioner has failed to establish that it  
20 was unreasonable for appellate counsel not to  
21 raise the claim of improper admission of prior  
22 bad acts evidence. The trial court conducted a  
23 balancing test to weigh the prejudicial effect  
24 of the prior bad acts evidence under California  
25 Evidence Code section 352. Petitioner has not  
26 shown that his appellate counsel's failure to  
27 raise a claim of improper admission of prior  
28 bad acts evidence on direct appeal amounted to  
deficient performance, or that there is a  
reasonable probability that, but for counsel's  
failure to do so, he would have prevailed on  
appeal.

The Court finds that the state court's  
rejection of Petitioner's ineffective  
assistance of appellate counsel claim was not

contrary to or an unreasonable application of  
Strickland. See Himes, 336 F.3d at 853.  
Accordingly, his claim for habeas corpus relief  
on this basis is DENIED.

(Mar. 18, 2008 Order at 36.)

The Court concludes that reasonable jurists could find that  
the Court's assessment of this claims was debatable or wrong,  
consistent with Court's decision above to grant a COA with respect  
to his claim that the trial court erroneously admitted evidence of  
prior bad acts. Accordingly, his request for a COA is GRANTED with  
respect to this ineffective assistance of appellate counsel claim.

CONCLUSION

Good cause appearing, Petitioner's request for leave to  
proceed in forma pauperis on appeal (docket no. 51) is GRANTED.

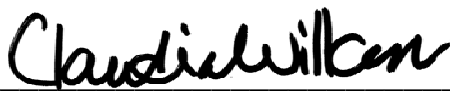
Petitioner's request for a COA is GRANTED in part as to the  
claims discussed in this Order. The motion is DENIED as to all  
other claims because Petitioner has failed to make a substantial  
showing that any of his other claims amounted to a denial of his  
constitutional rights or demonstrate that a reasonable jurist would  
disagree with this Court's assessment.

The Clerk shall process the notice of appeal accordingly.

This Order terminates Docket no. 51.

IT IS SO ORDERED.

DATED: 11/14/08

  
\_\_\_\_\_  
CLAUDIA WILKEN  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA  
4  
5

6 MONKRES,

Case Number: CV04-02311 CW

7 Plaintiff,

**CERTIFICATE OF SERVICE**

8 v.

9 KERNAN et al,

10 Defendant.  
11 \_\_\_\_\_/

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
13 Court, Northern District of California.

14 That on November 14, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said  
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
16 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
17 located in the Clerk's office.

18 Bryan Randall Monkres T-50137  
19 Mule Creek State Prison  
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Ione, CA 95640-9000

21 Peter Ernest Flores  
22 California Attorney General's Office  
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24 Clerk  
25 U.S. Court of Appeals  
26 P.O. Box 193939  
San Francisco, CA 94119-3939

27 Dated: November 14, 2008

Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk