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

AMADO REYES TRUJILLO,
Petitioner,

v.

RANDY GROUNDS, Warden,
Respondent.

No. C 11-1908 CW

ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS

_____ /

Petitioner Amado Reyes Trujillo, a state prisoner, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his state criminal conviction and asserting four claims of constitutional error. Respondent has filed an answer and a memorandum of points and authorities in support thereof and Petitioner, through appointed counsel, has filed a traverse. For the reasons discussed below, the Court DENIES the petition.

BACKGROUND

I. Procedural History

On January 22, 2003, a Santa Clara County jury found Petitioner guilty of one count of lewd and lascivious conduct upon a child under the age of fourteen and found that he had been previously convicted of the same offense. On May 30, 2003, the trial court sentenced Petitioner to fifty years to life in prison. Represented by counsel, Petitioner filed a direct appeal to the California Court of Appeal, raising five grounds: (1) that

1 permitting a prosecution witness to testify with a support person
2 violated Petitioner's right to a fair trial; (2) that the trial
3 court violated Petitioner's constitutional rights by admitting
4 hearsay evidence; (3) that the trial court violated Petitioner's
5 right to due process and confrontation by admitting evidence of a
6 defense witness's prior misdemeanor conviction; (4) that the trial
7 court violated Petitioner's constitutional rights by admitting
8 prior hearsay statements of a prosecuting witness; and (5) that
9 the trial court invaded the province of the jury by directing a
10 verdict on the prior strike allegation. On October 21, 2004, the
11 Court of Appeal affirmed Petitioner's judgment in an unpublished
12 decision. On February 2, 2005, the California Supreme Court
13 denied Petitioner's petition for review of the denial of his
14 direct appeal.
15

16
17 On July 26, 2010, Petitioner, proceeding pro se, filed a
18 state habeas petition arguing entitlement to relief based upon
19 claims (1), (2), (3) and (5), above. The California Supreme Court
20 denied the petition on February 26, 2011.

21 Petitioner filed the instant habeas petition on April 20,
22 2011.

23 II. Statement of Facts

24 The following facts (including footnotes) are taken from the
25 California Court of Appeal decision denying Petitioner's direct
26 appeal.
27
28

1 Between April 1 and October 1, 2001,¹ defendant
2 frequently visited the San Jose three-bedroom home where
3 12-year-old Angela and her sister Anays, who celebrated
4 her ninth birthday during that six-month period,² lived
5 with their mother Anna, their father, and their two-
6 year-old brother. Anna, a homemaker at the time, became
7 pregnant that summer and gave birth to a daughter in
8 March 2002. Sonja G. stayed with the family and
9 occupied a bedroom from April until she moved out
10 several months later. Angela and Anays shared the
11 second bedroom, and Anna, her husband, and their son
12 shared the third. Sonja's boyfriend Juan often was at
13 the house to visit Sonja. Defendant was Juan's friend.

14 Anna testified she had been married for six years
15 and that she and her husband lived together during the
16 six-month period, but he worked two jobs and "wasn't
17 around the house very much." While Sonja rented from
18 her, Anna considered her to be a "good friend" with whom
19 she had no conflicts. Anna met defendant in April.
20 During the six-month period, he came to the house a few
21 times a week while Sonja lived there, sometimes with
22 Juan, more often alone. He helped by cleaning the
23 backyard once a week since Anna's husband was busy and
24 the pregnancy restricted her activities; because she did
25 not pay him and he had no car, Anna gave defendant rides
26 "[t]wice a week."

27 Anna said Anays and Angela customarily came home
28 from school by 2:45 p.m., and defendant customarily came
over in the late afternoon about three or four times a
week. Anna initially was unconcerned that the girls
spent time with defendant in the backyard since
everything seemed "normal" when she checked; she also
had been unconcerned when he was alone with Anays
outside since the yard was mostly visible from inside
and she often checked on them. Anna thought defendant
got along with both girls and spent equal time with
them, but she noted that defendant "ask[ed] more about
Anays" and why Anna paid "a lot of attention" to her.
He bought more things for Anays, promised to help Anays
build a house for the family puppy, and said Anays

1 ¹ All further calendar references are to the year 2001 unless
2 otherwise specified.

3 ² Hereinafter, we refer to the period between April and
4 November as "the six-month period."

1 reminded him of his daughter who had died. Only after
2 Anays reported having been touched did Anna learn that
3 defendant previously had been convicted of child
4 molestation.

5 Anna, her children, Sonja, Juan, and defendant
6 often did things "as a group." They all ate at a
7 Chinese restaurant once a week, and they all often went
8 to a weekend flea market. Anna testified both girls
9 were happy to receive defendant's gifts of candy and
10 bicycles. Anna first said defendant often gave Anays
11 five dollars but gave no money to Angela. On cross-
12 examination, Anna said defendant only gave Anays money
13 once and that she then asked him not to give her
14 children money.

15 Anna said she and defendant were not romantically
16 involved and her husband knew she was faithful. She
17 said her husband could "provide" for her, and she denied
18 having financial problems during the time she knew
19 defendant, taking or borrowing money from him, owing him
20 money, or picking up money at his house. Anna did admit
21 that defendant often paid the restaurant bill and
22 brought food to the house, but she denied he gave her
23 \$600 as a prepayment when she had agreed to rent him a
24 room but then said "no" once her husband rejected the
25 idea. She said defendant offered her a loan when he was
26 going to rent the room but she "didn't take it."

27 Anna described four incidents relevant to the
28 charge involving Anays.

Anna said one occurred at the flea market near the
end of the six months. She said defendant, while
hugging Anays, twice "squeeze[d] her tight and [would]
not let her loose." Anna said she spoke to defendant
about this but acknowledged she first reported the
hugging incident at trial. After the hugging but before
Anays reported the molestations, Anna was in her kitchen
when she saw defendant walk over and rub his hand up and
down Anays' bare upper thigh as she lay on a sofa
wearing shorts. When defendant sat on sofa near Anays'
feet and continued the rubbing, Anna overheard Anays
tell defendant "not to touch her legs." Anna also got
angry and "made [defendant] leave" the house. No one
else was in the room. Anna testified Sonja and Juan
were in the house and that she asked them that day if
they ever had seen defendant do anything else to Anays.
After this incident, Anna saw defendant enter the girls'

1 room without permission. While he was helping Juan,
2 Anna had given him permission to use her front bathroom.
3 Later, while Anna was towards the back doing laundry,
4 she saw defendant in the girls' room. Anna testified
5 defendant was not "where he had told [her] he was going
6 to be" and that she "took him out of there very mad."
7 Anna said defendant did not shut the door of the girls'
8 room; she was not asked nor did not say whether Anays
9 was in her room at the time defendant entered it. On
10 October 1, two days before Anays reported the touching,
11 Anays was in the backyard when defendant unexpectedly
12 arrived and said he needed to measure the broken back
13 fence. He stayed until 6:30 p.m. When he left and Anna
14 called Anays to come in from the backyard, Anays asked
15 if defendant had left because she did not want to come
16 in until he was gone. Anays seemed "mad." She refused
17 to eat and went to her room. Anna noted that, before
18 Anays reported the molestations, she had become
19 depressed, "mad" and "aggressive," and that the last few
20 times defendant came over, Anays hid or sat on the shed
21 roof to avoid being in the house with him.

22
23 Anna testified defendant telephoned after he was
24 told to leave the house, asked for forgiveness and said
25 he "had not done it with any bad intentions." On
26 October 3, he and Juan came over, but defendant only
27 stayed a half hour because Anna told Juan she "did not
28 like what was happening." While defendant was there,
Anna heard him ask Anays to come down from the shed's
roof so he could "take her to the Chinese food place"
and heard Anays said "no." After he left, Anays told
Anna she did not want defendant at the house because he
"had touched her private parts." She said he touched
her "breast area under her clothes" and below her waist
in front. She pointed to the areas without providing
many details; Anna did not ask for more since they were
crying. Anays did say the touching occurred in the
house and when he grabbed her as they played in the
yard.

23 After speaking with Anays, Anna drove off looking
24 for defendant "to hit him and insult him," but an
25 officer stopped her and asked if she felt all right.
26 When she explained her "problem," he said to go home and
27 call the police. That officer called the police, and
28 other officers came to the house that day. Anna tried
to tell a female officer everything Anays had reported,
but, because she was confused and emotional, Anna failed
to mention the leg-rubbing incident or defendant's entry

1 into the girls' room. Anna said she later mentioned the
2 leg-rubbing incident to a sheriff's technician who
served the subpoena.

3 Anna was impeached with following acts of prior bad
4 conduct: (1) she gave a false name to police in 1994,
5 (2) she took pacifiers from a market without paying in
6 2000, and (3) she fraudulently obtained \$3,895 worth of
7 food stamps and welfare checks from 1995 to 1997. Anna
8 testified she did not recall giving a false name to
9 police, she had had money to pay for the pacifiers and
did not intend to steal them, and she fraudulently
obtained government assistance because the girls' father
had left and she needed the money and that, because she
paid full restitution "before the due date," the offense
was reduced to a misdemeanor.

10 When Detective David Lee interviewed Anays at her
11 school on October 16, she described an incident at the
12 flea market when her mother, Sonja, and Juan were
13 "buying some stuff" and she was at a table next to
14 defendant. Anays said defendant told her to take off
15 her pants, touched her breast on top of her "rainbow
16 colored T-shirt," and touched her "bottom" on the part
17 she uses to "pee" on "top of the clothing." Anays said
18 neither of them said anything. Anays next described an
19 incident after school when defendant touched her while
20 she was alone in her bedroom. Anays was reading when he
21 silently entered her room. After asking where the
22 hammer was, he knelt and rubbed Anays' bare thigh with
23 his hand. Anna then called defendant, and he called
back; Anays begged him to go, but he would not leave
until Anna kept calling him. Anays described a third
incident when defendant touched her in the backyard. He
unbuttoned her shirt and tried to touch her breast so
she jumped over the fence. Anays said defendant touched
or tried to touch her "whenever he [came] over," that
she told her mother about the touching after watching a
program about a girl who got pregnant, and that her
mother then "went to find a cop."

24 A redacted copy of the statement Anays gave to
25 Officers Welker and Okubo on October 3 was admitted into
26 evidence. In it, Anays said "every time" she saw
27 defendant, including their first meeting, he touched her
28 or tried to do so. She said he repeatedly touched her
"over her clothes in her breast and vaginal area," that
he touched her vaginal area on October 1 when he tried
to get his hat back from her, and that she climbed the

1 fence and hid until he left. She said defendant touched
2 her when they were alone and sometimes at a restaurant
3 when her mother left the table. She tried putting a
4 book or blanket on her lap at home, but defendant would
5 move them to touch her. Anays said once, when she was
6 trying to call her father, who did not live at the
7 house, defendant entered her room, hung up the
8 telephone, threw her on her bed, hit her arm, and
9 threatened, "If you tell anybody, somebody might get
10 hurt because it's your fault." Anays said this threat
11 initially convinced her not to report the touching. She
12 described an incident when defendant entered her room
13 and tried to keep her there by holding the door shut;
14 she said she escaped, ran outside, hopped over the
15 fence, and hid. Anays said defendant once began to
16 unbuckle his belt while touching her but stopped when
17 Anna called her. Anays said he once tried to touch her
18 under her shirt and shorts but she pushed his hand away
19 and that he kissed her cheek and below her lips once in
20 the backyard. Anays said she decided to report the
21 touching after seeing a program about a young girl who
22 was sexually assaulted and was pregnant.

23 Anays testified at trial as follows.

24 During the time she knew defendant, he often came
25 to the house alone; he did not drive but often brought
26 his bike. Anays said defendant was nice to her and she
27 liked him "[a] little" when she first met him. Anays
28 also liked Sonja. Anays said defendant brought her
things and gave her money, but "not that much;" she
later conceded she earlier had testified he gave her
money "every time" he saw her. Anays said defendant
brought Chinese food and was nice to her mother, they
went to a Chinese restaurant every week, and on weekends
the group went to a flea market where Anna shopped.

Later in her trial testimony, Anays said she
"didn't like [defendant] . . . that much" when he gave
her things and there were "at least three times" when he
had touched her in a way that made her "uncomfortable."
She did not recall when the incidents took place but
said he touched her improperly the first time he came to
the house. She did not recall testifying at the
preliminary hearing that it was the second time he was

1 at the house.³ Anays said defendant once kissed her
2 cheek when she turned as he tried to kiss her mouth.
3 Anays said he came into her room "a lot" when no one
4 else was there, that he twice touched her in her room,
5 and that one of those times her mother "call[ed] him
6 back out." Anays did not recall if the door was open.
7 She said defendant once touched her on a day she stayed
8 home from school. Anays said another time, in the
9 middle of the six-month period, he entered her room and
10 touched her when she was leaning against the wall and
11 her knees up. He leaned over and touched the front part
12 of the body she uses to pee over her shorts. His
13 fingers were held together as his hand moved "around" in
14 "circles." This touching lasted about "a medium time,"
15 "like 20 seconds." Defendant said nothing, and Anays
16 kept "closing [her] legs." She felt "[u]ncomfortable"
17 and "wanted to yell" but did not because she "was
18 scared" of "older people." She could not recall if she
19 said anything or had tried to move his hand, but she
20 knew he stopped when Anna called his name. Anays then
21 hid under her bed, scared defendant would touch her
22 again. He came back but could not find her and did not
23 touch her again that day. On cross-examination, Anays
24 admitted at the preliminary hearing she had said the
25 touching occurred only once in the bedroom.

16 Anays testified she thought defendant also touched
17 where she pees the next day. She was inside, and her
18 mother was outside. She thought he touched her for a
19 shorter time and that he stopped when Sonja or Juan
20 called him.

19 Anays said she and defendant sometimes played alone
20 in the yard although she did not like doing so "that
21 much." She testified he briefly touched her same front
22 part another time after school while they played in the
23 yard. She thought the touching stopped when she grabbed
24 his hat, threw it away, and jumped over the fence. She
25 did not return until Angela said he was gone. On cross-
26 examination, she said she testified at the preliminary
27 hearing that she climbed the fence when he tried to
28 touch her and his hand "got about 14 inches from [her]
vagina."

³ The preliminary hearing occurred more than six months after
the charged crimes and more than eight months before Anays
testified at trial.

1 Anays testified defendant touched her at the flea
2 market while they watched the mariachi bands. Angela
3 was across from them and Anna was shopping when, under
4 the table, defendant moved a hand on her same front part
5 over her pants. He stopped when Anna returned but
6 touched her again at the flea market, perhaps a week
7 later. They were at a different table, this time with
8 Sonja and Juan. Anays said defendant moved his hand on
9 her same front part. She did not recall if anything was
10 said or if she tried to move his hand on either
11 occasion.

12 Anays was certain that, during the middle of the
13 six-month period, defendant touched her at a Chinese
14 restaurant when her mother and sister were in the
15 bathroom. He touched over her clothes where she pees,
16 and his hand moved around in a circle until Anna
17 returned. Anays first said this occurred several times
18 at the restaurant; she later seemed uncertain as to
19 whether it had been more than once.

20 Anays initially did not report the touching because
21 she was "scared." She later told her mother because she
22 got worried after seeing a program in which a young girl
23 became pregnant. She recalled telling her mother
24 defendant last touched her two days before and telling a
25 female officer everything she could remember; Anays did
26 not recall defendant threatening her or telling
27 Detective Lee that he had done so. Asked if her mother
28 told her "to tell the police that [defendant] had
touched you in a way that you didn't like," Anays
answered, "Yes." Anays explained that her mother told
her to "tell all the truth to the police." Anays
testified she told the truth to the officer, her mother
never told her "to make up a story" or "to lie about
[defendant] touching [her]," and she told the truth when
she said defendant touched her in a way that made her
feel uncomfortable.

23 Angela testified she began sharing Anays' room when
24 Sonja moved in and that she knew defendant as a friend
25 of Sonja's boyfriend. Angela liked defendant at first
26 because he was "generous" since he often gave her and
27 Anays ten or twenty dollars at the flea market. She
28 denied that defendant gave her a bike and did not recall
if he gave one to Anays. Angela said defendant spent
more time with Anays and gave Anays more money and CDs,
but she "never thought about" whether he liked Anays
"better" than her.

1 Angela testified defendant once touched her
2 inappropriately on a weekend day in the middle of the
3 six-month period when Anays was with their father and
4 Anna was driving defendant, Sonja, Angela, and Angela's
5 brother to pick up Sonja's mother. Sonja was in the
6 front passenger seat; in the back seat, Angela sat
7 behind Sonja and next to defendant. At their
8 destination, Anna went inside while Sonja stayed in the
9 car. Angela said defendant then touched the outside of
10 her legs in the mid-thigh area, that his hand touched
11 bare skin as it moved from her knees to the hem of her
12 shorts. Neither of them said anything; she pushed his
13 hand away three times, but he kept putting it back until
14 she put a towel over her legs. Angela was present when
15 Anays told their mother that defendant had touched her
16 and she saw the officers talking to Anays and Anna.
17 Angela said she did not report the leg incident that day
18 because she was "scared" that defendant would "start to
19 touch [her] again."

20 Angela said defendant often went to the girls' room
21 to talk to Anays alone and that she once entered her
22 bedroom and saw that defendant and Anays were talking.
23 Angela once saw defendant grab Anays' shoulders and hug
24 her at the flea market but said the girls never were
25 alone with him there.

26 Angela testified defendant continued to come over
27 by bicycle after Sonja moved. Angela was uncomfortable
28 with defendant before he touched her legs, and she got
29 "a feeling that he would do something wrong with [her]
30 and [Anays]" when Anays stopped speaking to him, began
31 running away from him, and refused to return until
32 Angela said he had left. Angela said Anays began to
33 avoid defendant after he had touched Angela's legs and
34 during the middle of the six-month period. Angela
35 testified that, after the police were at the house, she
36 and Anays did not talk about "it" because, if they did,
37 Anays would cry or get depressed.

38 Angela testified she did not tell Detective Lee
39 about Anays running away from defendant. She did not
40 think about it since they mostly discussed her, not
41 Anays. Lee testified that, when he interviewed Angela
42 on November 13, she said defendant had begun to move his
43 fingers under her shorts, the car was parked at a store,
44 and that Sonja was in the driver's seat. Lee said he
45 only spoke with Angela regarding Anays by asking if

1 Angela knew why he was there and by asking if Angela
2 ever saw defendant touch Anays.

3 Anna testified defendant occasionally rode in the
4 back seat with Angela. She was unsure but thought
5 Angela had done so when Anna was going to the store.
6 When the officers came to talk to about Anays, Anna did
7 not know defendant had touched Angela's legs; Angela
8 told her after talking to the police.

9 Defendant's friend Conrad Alayon described
10 defendant as a "good person." Alayon met defendant in
11 1998, they shared a room in 1999, and they lived
12 together again during 2001. Alayon testified that, for
13 a period in 2001, Anna visited defendant twice a week
14 without her children and called when she did not come
15 by. Alayon once heard Anna tell defendant she "could
16 not make ends meet." He never saw defendant give Anna
17 money, but defendant once asked him to give Anna \$200.
18 Anna came to the apartment and told Alayon she took the
19 money, but Alayon did not give it to her. During the
20 two times he helped defendant with Anna's yard work,
21 Alayon noticed that Anna's children "had a good
22 friendship" with defendant, but defendant did not play
23 with them since he and Alayon were working.

24 Public defender investigator Annabeya Ayala
25 testified that, during an unrecorded interview she
26 conducted with Anna in May 2002, Anna did not say she
27 had seen defendant touch any of her children
28 inappropriately, that she had seen him enter Anays'
bedroom, or that she had made him leave. Anna told
Ayala defendant sometimes came over unexpectedly but she
could not allow him to come by after Sonja moved since
her husband suspected she and defendant "had something
going on." Ayala did not ask Anna if defendant ever
entered Anays' room.

29 Sonja G. testified she stayed with Anna for less
30 than three months[,] she moved because Anna was not a
31 good friend, that Anna was "dangerous" and would "make
32 [] up a lot of things." On cross-examination, Sonja
33 admitted she and Anna still are on good terms, but said
34 that, if you do a favor Anna asked "everything is okay,
35 but then if you don't do her that favor, then things are
36 not that good anymore."

37 Sonja met defendant in 2000; she described him as a
38 "very good person and a very calm person." Sonja said
Anna met defendant on a day he sat in the car when Juan

1 came to visit Sonja. Anna asked them to introduce
2 defendant to her, but Juan refused to do so because Anna
3 had a husband. Anna then introduced herself and asked
4 defendant to invite her to eat. Sonja heard defendant
5 say no since they were running errands. At Anna's
6 invitation, defendant came to the house once a week on
7 the weekends, and Anna had him clean the yard.
8 Defendant occasionally came by bike but usually Anna
9 picked him up. Sonja often went out to eat with Anna,
10 the children, Juan and defendant. Sonja said only
11 defendant or Juan paid for those meals and that Anna
12 would call defendant to ask him to bring food or to take
13 her to buy food. Sonja first said Anna left the
14 children with her while doing errands but never left
15 them with defendant; Sonja later said Anna once gave
16 defendant permission to take the children to the store
17 alone.

11 Sonja never saw defendant enter the girls' room or
12 touch them inappropriately and Anna never asked if she
13 had seen him do so. Sonja said the girls always were
14 happy to see defendant since he brought food and gave
15 them money; she said Anna urged defendant to give money
16 to all her children and then took the money from the
17 boy. Sonja said defendant always gave each girl between
18 \$5 and \$25 at the flea market. Sonja never left the
19 table so the girls never were alone with defendant
20 there. When the group traveled by car, Sonja always sat
21 in back with the children while defendant sat in front
22 with Anna. Sonja did not recall a drive to her mother's
23 house when she was in the front and defendant and Angela
24 were in the back.

19 Sonja testified she lent Anna money that was not
20 repaid and that she often heard Anna ask defendant for
21 money. Three days after Anna met defendant, Sonja saw
22 him give Anna a \$400 cash loan at his apartment. Sonja
23 once saw him give Anna \$100; other times, Sonja saw
24 defendant give Anna rolled up money. Sonja said once
25 Anna met defendant she had money to eat out often and to
26 shop. Anna told Sonja she received \$200 to \$500 from
27 defendant each week; Anna told Sonja each time she got
28 the money and would laugh about it. Sonja said Anna and
her husband were separated while Sonja lived at the
house but the husband often came by in the evening.
Sonja did not know if defendant and Anna had had a
romantic relationship. She testified that, before
moving out, she warned defendant about Anna being
vindictive, but he indicated he was not concerned.

1 Sonja said that, on the weekend before defendant was
2 arrested, Anna asked him for \$300 but he only agreed to
3 give her \$100. Sonja saw Anna "crush[]" the \$100 bill
4 and turn red. Anna then either told defendant "You are
going to pay for that" or told Sonja "He's going to pay
for this." Sonja testified Anna "was after the
defendant's money."

5 Sonja admitted she pleaded guilty in June 2001 to
6 filing a false police report and to being so intoxicated
7 that she could not care for her own safety. The minute
8 order for the conviction for filing a false police
report was admitted into evidence.

9 Defendant testified he did not touch Anays or
10 Angela inappropriately "at all." He said that, a week
11 after he met Anna with Juan, she called asking him to
12 take her to lunch. He took her to lunch with Sonja,
13 Juan, Anays and Angela, and they then went to the flea
14 market, where he had a couple of beers. When Anna drove
15 him home, she and Sonja came to his room. Anna asked
16 for money as she was leaving, and Sonja was present when
17 he lent Anna \$400; he did so because he was "somewhat
18 drunk." Defendant testified that, thereafter, Anna
19 constantly called his cell phone asking for money, he
20 kept giving it to her, she never repaid him, and he
21 continued to give her money hoping she would "stop
22 bothering" him. He initially gave Anna \$200, \$300, or
23 \$400 because he had a good construction job but, toward
24 the end of the six-month period, he was giving her \$100
25 or \$150.

26 Defendant testified that, after Sonja moved, he
27 gave Anna \$600 on August 27 because she was going to
28 rent him a room, but she changed her mind the next day.
When she did not return the money, defendant decided not
to give her more. In September, defendant tried to
avoid her ongoing requests for money by turning off his
phone, but he still did her yard work, took out her
garbage, went to the flea market with the family, and
ate out with them.

29 Defendant said he usually saw Anna twice a week;
30 they ate out on Fridays and went to the weekend flea
31 market. He said he cleaned her yard on weekends but
32 then said he did so on Wednesdays. He helped because
33 Anna was a friend who was alone with children. He said
34 Anna did not have a husband but that he and she were not
35 romantically involved.

1 Defendant said Anays and Angela always were happy
2 to see him. He said he never was alone with them
3 inside, he never went to their room, he never sat on a
4 sofa with Anays, he never was alone with either girl at
5 a restaurant or the flea market, and he never was in the
6 car's back seat with Angela. He added that Anna never
7 made him leave after accusing him of rubbing Anays' leg.
8 He said Anna was a protective mother who did not allow
9 him to get close to her girls, that he never had
10 problems with girls, and that they never complained
11 about him.

12 Defendant said he touched Anays only three times,
13 that he once put his hand "over her head," he gave her a
14 kiss when he bought her a bicycle, and he once touched
15 her shoulder. He said the only time he ever played with
16 the girls was on October 1, his last time at the house.
17 There to retrieve his bike, he was at a table when Anays
18 removed his hat and gave it back a couple of times but
19 then took it and tried to get him to catch her. He said
20 he did not follow Anays when she climbed a fence but got
21 his hat back later when he was leaving; in retrieving
22 the hat, defendant first testified that he grabbed
23 Anays' arm. On cross-examination, he said he touched
24 her shoulder but not her breasts or vagina. He admitted
25 he told the police he could have "touched Anays' breasts
26 by accident" but testified he "didn't do it," and he
27 denied having shown officers how he had "grabbed Anays'
28 upper chest area above her breasts." Asked if it was
possible he touched her vagina while retrieving his hat,
defendant testified, "Maybe because it was on the ground
and I grabbed my cap, so I don't know." Defendant
denied telling the police he grabbed Anays to avoid her
falling when she jumped off the fence or that he touched
her vagina in doing so. He said Anays did jump off the
fence but not in his direction. Defendant said he had
been half asleep when interviewed at the station and did
not recall denying to police that he was at Anna's house
on October 1 or saying he had been cleaning his room
that day.⁴

Defendant testified Anna asked him for money on
October 4, and he gave her \$50 the following day.

⁴ San Jose Detective Juan Gonzalez testified he interviewed
defendant in Spanish in jail at 10:30 a.m. on October 14.
Gonzalez did not recall whether defendant was sleepy, but he said
defendant had been coherent and responsive.

1 Defendant last saw her on Sunday, October 7, when she
2 asked for \$300 because she was having furniture
3 delivered and her carpet washed. When he only gave her
4 \$100, Anna said, "I told you I needed money." When he
5 said he did not have any more, he could tell that Anna
6 was mad.⁵

7 Defendant admitted pleading guilty to child
8 molestation in 1994, but he said the mother falsely
9 accused him of molestation and told her daughter to lie
10 to get back at him. He only admitted guilt because he
11 had drunk driving tickets and did not realize the future
12 consequences of his plea. He said his public defender
13 lied when he said defendant would get a sentence of one
14 year rather than the three he received. Defendant
15 testified he realized he had to "be very careful" when
16 around Anna's girls because children "accuse you for any
17 little thing." Defendant testified that Anna, Anays,
18 and Angela all were "lying" at trial. He admitted that,
19 when stopped by police in 1994 and when arrested in this
20 case, he had lied to police by giving a false name; he
21 also admitted giving a false date of birth in 1994.

22 Detective Gonzalez testified on rebuttal that,
23 during his interview with defendant, defendant first
24 said he touched Anays only on the shoulder but then said
25 he touched her upper chest above the breast and
26 demonstrated how he touched her upper chest area with
27 two hands "just in passing." After denying he could
28 recall an incident with his cap, defendant conceded
there was such an incident but denied touching Anays'
vagina while retrieving his cap. After saying he did
not recall whether he touched her vagina, defendant next
swore he had not touched it. Once the interview ended,
he said he wanted to say something else. He then
volunteered that there had been an incident in which he
touched Anays' vagina during a "game" in which she
jumped from bars or a fence and landed on him. Asked
why he had not mentioned this incident earlier,

⁵ Detective Gonzalez testified defendant had told him that,
when Anna asked for \$600 for rent, he gave her \$50 on the Sunday
before he was arrested, but he denied Anna was mad at him for
giving her only \$50. Gonzalez also testified that, when asked
where he was on October 1, defendant first said he did not recall.
He then said Anna called him that day to go out to eat, but he had
declined because he had to clean his room; he said he was certain
he had not gone to her house that day.

1 defendant admitted he was afraid "they would get me for
2 that."

3 People v. Trujillo, 2004 WL 2365386, at *1-9 (Cal. Ct. App. Oct.
4 21, 2004) (footnotes renumbered).

5 LEGAL STANDARD

6 A federal court may entertain a habeas petition from a state
7 prisoner "only on the ground that he is in custody in violation of
8 the Constitution or laws or treaties of the United States." 28
9 U.S.C. § 2254(a). Under the Antiterrorism and Effective Death
10 Penalty Act (AEDPA) of 1996, a district court may not grant habeas
11 relief unless the state court's adjudication of the claim:

12 "(1) resulted in a decision that was contrary to, or involved an
13 unreasonable application of, clearly established Federal law, as
14 determined by the Supreme Court of the United States; or
15 (2) resulted in a decision that was based on an unreasonable
16 determination of the facts in light of the evidence presented in
17 the State court proceeding." 28 U.S.C. § 2254(d); Williams v.
18 Taylor, 529 U.S. 362, 412 (2000).
19

20 A state court decision is "contrary to" Supreme Court
21 authority, that is, falls under the first clause of § 2254(d)(1),
22 only if "the state court arrives at a conclusion opposite to that
23 reached by [the Supreme] Court on a question of law or if the
24 state court decides a case differently than [the Supreme] Court
25 has on a set of materially indistinguishable facts." Id. at 412-
26
27
28

1 13. A state court decision is an "unreasonable application of"
2 Supreme Court authority, that is, under the second clause of
3 § 2254(d)(1), if it correctly identifies the governing legal
4 principle from the Supreme Court's decisions but "unreasonably
5 applies that principle to the facts of the prisoner's case." Id.
6 at 413. The federal court on habeas review may not issue the writ
7 "simply because that court concludes in its independent judgment
8 that the relevant state-court decision applied clearly established
9 federal law erroneously or incorrectly." Id. at 411. Rather, the
10 application must be "objectively unreasonable" to support granting
11 the writ. Id. at 409. Under AEDPA, the writ may be granted only
12 "where there is no possibility fairminded jurists could disagree
13 that the state court's decision conflicts with this Court's
14 precedents." Harrington v. Richter, 131 S. Ct. 770, 786 (2011).

15
16 If constitutional error is found, habeas relief is warranted
17 only if the error had a "'substantial and injurious effect or
18 influence in determining the jury's verdict.'" Penry v. Johnson,
19 532 U.S. 782, 795 (2001) (quoting Brecht v. Abrahamson, 507 U.S.
20 619, 638 (1993)).

21
22 When there is no reasoned opinion from the highest state
23 court to consider the petitioner's claims, the court looks to the
24 last reasoned opinion of the highest court to analyze whether the
25 state judgment was erroneous under the standard of § 2254(d).
26 Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991). In the present
27
28

1 case, the highest court to issue a reasoned decision on
2 Petitioner's claims is the California Court of Appeal.

3 DISCUSSION

4 Petitioner asserts four claims for relief in his federal
5 habeas petition; however, in his traverse Petitioner concedes that
6 habeas relief is not available on two of his claims. First, the
7 petition claims relief on the theory that the trial court's
8 response to the jury question regarding Petitioner's prior
9 conviction removed the only factual question regarding the
10 conviction from consideration of the jury. In his traverse,
11 Petitioner recognizes that there is no federal constitutional
12 right to a jury determination of a prior conviction allegation.
13 Petitioner acknowledges that, instead of a jury finding, "a prior
14 conviction must itself have been established through procedures
15 satisfying the fair notice, reasonable doubt, and jury trial
16 guarantees." Jones v. United States, 526 U.S. 227, 249 (1999).
17 Petitioner does not allege that the trial court's procedure
18 violated this standard.
19
20

21 Second, in his petition, Petitioner claims that the trial
22 court erred in admitting evidence regarding a defense witness's
23 prior criminal convictions. In his traverse, Petitioner concedes
24 that there is no clearly established federal law on the issue.
25 Thus, with Petitioner's acknowledgement that relief is not
26 available under two of his asserted claims, the Court now
27 addresses the remaining two claims in turn.
28

1 I. First Ground for Relief: Admission of Evidence of
2 Petitioner's Prior Conviction

3 Petitioner argues that the trial court violated his
4 constitutional due process rights by instructing the jury that if
5 it found the other crimes evidence true by a preponderance of the
6 evidence, it could infer that Petitioner was guilty as charged.⁶
7 Respondent maintains that the jury was properly instructed, and
8 points to the split verdict as evidence that the jury did not
9 simply infer guilt based upon Petitioner's prior conviction.

10 The jury received two instructions on the issue of
11 Petitioner's prior conviction. The court read California Jury
12 Instruction, Criminal (CALJIC) 2.50.01:

13
14 If you find that the defendant committed a prior
15 sexual offense, you may, but are not required to, infer
16 that the defendant has a disposition to commit sexual
17 offenses. If you find that the defendant had this
18 disposition, you may, but are not required to, infer
19 that he was likely to commit the crimes of which he is
20 accused.

21 However, if you find by a preponderance of the
22 evidence that the defendant committed a prior sexual
23 offense, that is not sufficient by itself to prove
24 beyond a reasonable doubt that he committed the charged
25 crimes. The weight and significance of the evidence, if
26 any, are for you to decide.

27 Reporter's Transcript (RT) at 504-05. The court also read CALJIC
28 2.50.1:

26 ⁶ Petitioner does not claim relief due to the trial court's
27 admission of the evidence of the prior crime, but only due to the
28 trial court's instruction regarding the inference the jury may
draw from the evidence.

1 Within the meaning of the preceding instruction,
2 the prosecution has the burden of proving by a
3 preponderance of the evidence that the defendant
4 committed a crime or sexual offense other than those for
5 which he is on trial.

6 You must not consider this evidence for any purpose
7 unless you find by a preponderance of the evidence that
8 the defendant committed the other crime or sexual
9 offense.

10 If you find another crime was committed by a
11 preponderance of the evidence, you are nevertheless
12 cautioned and reminded that before a defendant can be
13 found guilty of any crime charged or any included crime
14 in this trial, the evidence as a whole must persuade you
15 beyond a reasonable doubt that the defendant is guilty
16 for that crime.

17 RT at 505.

18 Petitioner first argues that the jury was given conflicting
19 instructions on the burden of proof, and that the jury may have
20 found Petitioner guilty only by a preponderance of the evidence,
21 thus violating Petitioner's due process rights. This is the exact
22 argument the Ninth Circuit considered and rejected in Schultz v.
23 Tilton. There, Schultz was found guilty of committing lewd acts
24 upon three children under the age of fourteen. Schultz v. Tilton,
25 659 F.3d 941, 943 (9th Cir. 2011). In addition to the evidence of
26 the charged conduct, the prosecution provided evidence of prior
27 uncharged sexual misconduct involving two other minors. Id. The
28 jury in Schultz received a previous version of CALJIC 2.50.01,
and, after being convicted, Schultz filed a habeas petition
contending that the instruction violated his due process rights.
Id. On appeal of the denial of his petition, the Ninth Circuit

1 reviewed People v. Reliford, 29 Cal.4th 1007 (2003), a decision
2 from the California Supreme Court holding that a similar version
3 of CALJIC 2.50.01 does not violate due process, and held that the
4 state courts did not violate federal law in applying Reliford to
5 affirm Schultz's conviction. Id. at 944-45. The Ninth Circuit
6 held that the instructions taken as a whole were clear that
7 Schultz could be convicted only if the evidence established guilt
8 beyond a reasonable doubt. Id. at 945.

9
10 Petitioner distinguishes Schultz on two bases. First,
11 Petitioner notes that the instruction from Schultz is slightly
12 different from the instruction his jury received because the
13 Schultz jury received the following additional instruction:

14 If you determine an inference properly can be drawn from
15 this evidence, this inference is simply one item for you
16 to consider, along with all other evidence, in
17 determining whether the defendant has been proved guilty
beyond a reasonable doubt of the charged crime.

18 Id. at 943. Petitioner notes the absence of this instruction
19 from his trial, but does not offer any argument to explain
20 how this absence renders his conviction constitutionally
21 infirm.

22 The Court concludes that this difference in language is
23 insufficient to warrant habeas corpus relief. The language from
24 Schultz is very similar in content to this portion of CALJIC
25 2.50.1, which was given to Petitioner's jury:

26
27 If you find another crime was committed by a
28 preponderance of the evidence, you are nevertheless
cautioned and reminded that before a defendant can be

1 found guilty of any crime charged or any included crime
2 in this trial, the evidence as a whole must persuade you
3 beyond a reasonable doubt that the defendant is guilty
4 for that crime.

5 This language instructs the jury to consider the evidence of the
6 prior crime as part of the entire body of evidence before it and
7 also admonishes the jury that the evidence must prove guilt beyond
8 a reasonable doubt. This difference in language is insufficient
9 to distinguish Petitioner's case from the holding in Schultz.

10 Petitioner next distinguishes Schultz because Schultz does
11 not discuss the prosecution's explanation of the instruction,
12 whereas Petitioner contends that the prosecution in his case "made
13 a direct connection" between the preponderance burden of proof
14 instruction and how the jury could use it to find him guilty. The
15 prosecutor stated:

16 You can choose, if you believe it more likely than not.
17 If you remember the standard about a preponderance, is
18 it more likely than not that the defendant committed any
19 of the other sexual offenses. With Anays, did he commit
20 any of the offenses with Angela or with Myra J.? Is it
21 more likely he committed the offense? The law allows
22 you to make certain inferences, and these are the
23 inferences you can make if you find more likely than not
24 that he did commit other sexual offenses. This is what
25 you can do. You can pull this instruction out when you
26 are deliberating. You may infer that the defendant had
27 a disposition to commit sexual offenses, and you may
28 make the inference that he was likely to commit and did
commit the crimes that he's being charged with.

Now, not only can you make those inferences, if you believe that those other offenses occurred, more likely than not you can also use that to show he had the sexual intent when he touched Anays. You can use those other offenses to show that he had the sexual intent when he touched Angela, and you can also use those other sexual offenses as showing that absence of mistake or accident,

1 that it wasn't just an accident as the defendant wants
2 you to believe, that, oh, maybe possibly by accident it
3 happened, because I'm sorry you have already been
4 convicted of molesting a little girl years before.

5 RT at 537-38. According to Petitioner, the instruction and the
6 prosecution's explanation of the instruction encouraged the jury
7 to find Petitioner guilty based only on the inference drawn from
8 the other crimes evidence.

9 In adjudicating this claim on direct appeal, the California
10 Court of Appeal denied relief on this argument, reasoning as
11 follows:

12 We are not persuaded by this argument since the
13 jury found defendant not guilty of the lewd and
14 lascivious act charged against one of the alleged
15 victims here where the prior molestation conviction was
16 not contested and the prosecutor forcefully argued
17 defendant "molested a little girl before, and he did it
18 again. Except this time there wasn't just one victim;
19 there were two more victims." In the context of the two
20 verdicts returned in this case, we are convinced there
21 is no reasonable likelihood the jury misunderstood the
22 instructions to allow a conviction based solely upon
23 disposition evidence that was proved by less than beyond
24 a reasonable doubt.

25 Trujillo, 2004 WL 2365386, at *13 (citations omitted).

26 The Court of Appeal did not act contrary to federal law in
27 its analysis. A jury instruction that reduces the level of proof
28 necessary for a guilty verdict "is plainly inconsistent with the
constitutionally rooted presumption of innocence." Cool v. United
States, 409 U.S. 100, 104 (1972). However, a single jury
instruction should not be judged "in artificial isolation" and

1 must be considered in the context of the trial and instructions as
2 a whole. Cupp v. Naughten, 414 U.S. 141, 146-47 (1973).

3 The instructions explain the two burdens of proof and are
4 not, as Petitioner argues, contradictory. Instead, they explain
5 that the jury may infer that Petitioner was "likely to commit the
6 crimes of which he is accused," but then they immediately explain
7 that this inference is insufficient to render a guilty verdict and
8 that a finding of guilt requires proof beyond a reasonable doubt.
9 RT at 504-05. The instructions were unlike those rejected by the
10 United States Supreme Court in Francis v. Franklin, a case cited
11 by Petitioner, because, as the Supreme Court noted, those
12 instructions discussed conflicting burdens of proof and never made
13 clear which burden of proof actually controlled. Francis v.
14 Franklin, 471 U.S. 307, 322 (1985). In this case, as in Schultz,
15 the instructions made clear that Petitioner could only be
16 convicted if "the evidence as a whole 'proved [him] guilty beyond
17 a reasonable doubt of the charged crime'". Schultz, 659 F.3d at
18 945 (quoting Mendez v. Knowles, 556 F.3d 757, 770 (9th Cir.
19 2009)).

22 Additionally, there is not a "reasonable likelihood that the
23 jury understood the instructions to allow conviction based on
24 proof insufficient to meet the [beyond a reasonable doubt]
25 standard." Victor v. Nebraska, 511 U.S. 1, 6 (1994). Looking at
26 the actual verdict in this case, it is clear that the jury did not
27 simply find Petitioner guilty of the charged crimes due to a
28

1 finding that he had been previously convicted. The jury found
2 that Petitioner had been previously convicted of committing a lewd
3 or lascivious act upon a child under the age of fourteen. Clerk's
4 Transcript (CT) at 247. Had the jury simply found Petitioner
5 guilty of the charged offenses as a result of this finding, the
6 jury would have found Petitioner guilty of both charges. However,
7 the jury only found Petitioner guilty of the charge that he
8 committed a lewd or lascivious act upon Anays, and not of the
9 charge that he did so upon Angela. The Court of Appeal did not
10 violate clearly established federal law in upholding the verdict
11 on this reasoning. Accordingly, Petitioner's request for habeas
12 relief on this ground is DENIED.

14 II. Second Ground for Relief: California Penal Code Section 868.5

15 Petitioner next argues that California Penal Code section
16 868.5 is unconstitutional because it permits trial courts to allow
17 a complaining witness to testify with a support person without
18 first holding a hearing to find a need for a support person.
19 Respondent argues that Petitioner procedurally defaulted on this
20 claim because he did not object at trial and that, in any event,
21 the claim is not meritorious because the trial court did not
22 violate any clearly established federal constitutional law.

24 California Penal Code section 868.5 subdivision (a) permits a
25 prosecuting witness to have up to two support persons in
26 attendance, one of whom may accompany the witness to the witness
27 stand. Subsection (b) of the code section specifies that if the
28

1 support persons are also participating in the trial as witnesses,
2 then the court must hold a hearing and the prosecution must show
3 that the persons' attendance is desired by and will be helpful to
4 the witness. In reviewing Petitioner's claim for relief on direct
5 appeal, the California Court of Appeal provided the following
6 facts:

7
8 In the present case, the trial court held no
9 hearing and made no determination before allowing a
10 support person to accompany Anays and Angela to the
11 witness stand. When the prosecutor said she anticipated
12 there would be a non-witness support person for Anays
13 and Angela, the trial court asked for comment. Defense
14 counsel replied, "Submitted." The court then said it
15 would follow "statutory authority and allow a support
16 person or persons." Defense counsel did not object at
17 that point nor had he objected to the prosecutor's
18 earlier written request that the court "take special
19 precautions to provide for the . . . support" of Anays.
20 Before the first witness testified, the trial court
21 instructed the jury with a version of CALJIC No. 2.20
22 that lists as a factor a jury may consider in assessing
23 credibility "the witness' conduct, attitude, manner
24 while testifying." When the prosecutor called Angela to
25 the witness stand later that day and said Angela "will
26 have a victim advocate up on the stand," the defense did
27 not object. Similarly, the defense did not object when
28 the court instructed the jury that "the lady that's with
Angela,⁷ under California law under certain
circumstances[,], minors are allowed to have a support
person, and that is all this woman is doing. She's been
instructed not to communicate with the witness in any
way, other than just being with her during the
testimony." Later, when Anays took the witness stand,
the prosecutor said Anays would have "a support person
from the Victim Assistance Center." This time, the
support person introduced herself as Elvia Enrique, the
same person listed in the Clerk's Transcript as the
support person for Angela. The court did not reinstruct
the jury regarding her role but asked if Enrique knew

27 ⁷ The clerk's transcript identifies the support person for
28 Angela as Elvia Enrique.

1 what her "job as a support person . . . involves."
2 Enrique replied, "Yes." The defense did not object
3 during this colloquy. At the end of the trial, the
4 court instructed the jury that one of the listed factors
5 it could consider in determining credibility was "[t]he
6 demeanor and the manner of the witness while
7 testifying." Pursuant to CALJIC No. 2.20.1, the court
8 also told the jury how to evaluate the testimony of a
9 minor who is age ten or younger. The defense neither
10 objected to these instructions nor proposed one about
11 the support person.

12 Trujillo, 2004 WL 2365386, at *10-11. The Court of Appeal
13 reasoned that even assuming Petitioner was entitled to a hearing
14 and determination of the necessity of a non-witness support
15 person, he had waived those rights by not objecting. Id. at 11.
16 The court also held that even if Petitioner had not waived his
17 claim, any error was harmless beyond a reasonable doubt. Id.
18 Both Anays and Angela testified with a support person and the jury
19 convicted Petitioner of only one charge; thus the court reasoned
20 that the presence of the support person did not influence the
21 jury's assessment of the witnesses' credibility. Id.

22 As noted earlier, Respondent argues that this claim is
23 procedurally defaulted as barred under California's
24 contemporaneous objection rule. The procedural default analysis
25 proceeds in two steps. First, the federal court must consider
26 whether the procedural rule the state court invoked to bar the
27 claim is both "independent" and "adequate" to preclude federal
28 review. Bennett v. Mueller, 322 F.3d 573, 585-86 (9th Cir. 2003).
Once the state has adequately plead the existence of an
independent and adequate state procedural ground as a defense, the

1 burden to place that defense at issue shifts to the petitioner,
2 who "may satisfy this burden by asserting specific factual
3 allegations that demonstrate the inadequacy of the state
4 procedure, including citation to authority demonstrating
5 inconsistent application of the rule." Id. at 586. The burden
6 then shifts back to the state. "'The scope of the state's burden
7 of proof thereafter will be measured by the specific claims of
8 inadequacy put forth by the petitioner.'" Id. at 584-85 (citation
9 omitted).

11 Second, if the procedural rule invoked by the state court is
12 both adequate and independent, then the next step of the
13 evaluation requires the federal court to consider whether the
14 petitioner has established either "cause" for the default and
15 "actual prejudice" as a result of the alleged violation of federal
16 law, or that failure to consider the claim will result in a
17 fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S.
18 722, 750 (1991). If a petitioner cannot meet this burden, then
19 federal habeas review is barred. Noltie v. Peterson, 9 F.3d 802,
20 804-05 (9th Cir. 1993).

22 Respondent has adequately plead that Petitioner's claim is
23 procedurally defaulted because the state courts denied Petitioner
24 relief under the state's contemporaneous objection rule. Thus,
25 the burden shifts to Petitioner to demonstrate that the
26 contemporaneous objection rule is not adequate or independent. As
27 Petitioner acknowledges, there is recent, binding Ninth Circuit
28

1 authority affirming a longstanding holding that California's
2 contemporaneous objection rule is an independent and adequate
3 state procedural rule. See e.g. Fairbank v. Ayers, 650 F.3d 1243,
4 1256 (9th Cir. 2011) (citing Garrison v. McCarthy, 653 F.2d 374,
5 377 (9th Cir. 1981) and Melendez v. Pliler, 288 F.3d 1120, 1125
6 (9th Cir. 2002)). In his traverse, Petitioner argues that the
7 Ninth Circuit's decision is wrong; however, Petitioner provides no
8 basis upon which this Court may deviate from binding authority.
9 District courts within the Ninth Circuit must follow published
10 Ninth Circuit decisions. Gonzalez v. Arizona, 677 F.3d 383, 390
11 n.4 (9th Cir. 2012) (en banc). Accordingly, this Court can only
12 conclude that review of Petitioner's claim is procedurally
13 defaulted.
14

15 Because the claim is procedurally defaulted, Petitioner is
16 only entitled to review if he can establish either "cause" for the
17 default and "actual prejudice" as a result of the alleged
18 violation of federal law, or that failure to consider the claim
19 will result in a fundamental miscarriage of justice. Coleman, 501
20 U.S. at 750. Petitioner argues neither cause and actual prejudice
21 nor a fundamental miscarriage of justice. Accordingly, this Court
22 cannot review his claim.
23

24 Even if the Court reviewed Petitioner's claim, it could not
25 grant relief because the claim is without merit. First, both
26 parties acknowledge that there is no United States Supreme Court
27 authority addressing the constitutionality of a support person for
28

1 a victim witness and there is no authority clearly establishing
2 any right to a threshold hearing or finding of necessity. Because
3 this Court may only grant habeas relief where the state court
4 adjudication "resulted in a decision that was contrary to, or
5 involved an unreasonable application of, clearly established
6 Federal law, as determined by the Supreme Court of the United
7 States," 28 U.S.C. § 2254(d), this lack of authority is sufficient
8 for the Court to deny Petitioner's claim on the merits.
9

10 Petitioner argues that relief is available under Williams v.
11 Taylor, in which the Supreme Court articulated that a state
12 court's decision is an "unreasonable application" of established
13 federal law when the state court "unreasonably refuses to extend
14 [a legal] principle to a new context where it should apply."
15 Williams v. Taylor, 529 U.S. 362, 407 (2000). Petitioner argues
16 that the trial court's failure to hold a hearing to determine the
17 necessity of the support person ran afoul of general principles of
18 the Confrontation Clause and Petitioner's right to a fair trial
19 and the presumption of innocence.
20

21 In Maryland v. Craig the United States Supreme Court
22 explained, "The central concern of the Confrontation Clause is to
23 ensure the reliability of the evidence against a criminal
24 defendant by subjecting it to rigorous testing in the context of
25 an adversary proceeding before the trier of fact." Maryland v.
26 Craig, 497 U.S. 836, 845 (1990). The Court specified four
27 elements that serve the purpose of the Confrontation Clause:
28

1 "physical presence, oath, cross-examination, and observation of
2 demeanor by the trier of fact." Id. at 846. Petitioner
3 acknowledges that Anays and Angela were physically present when
4 they testified and that they were subjected to cross-examination.
5 Petitioner argues that the process ran afoul of the Confrontation
6 Clause because the presence of the support person "necessarily
7 impacted the jury's assessment of the demeanor and credibility of
8 this witness." Traverse at 29. However, as Respondent argues and
9 the state Court of Appeal explained in its opinion, the record
10 does not support Petitioner's contention that the support person
11 affected the jury's assessment because the same support person was
12 present for both Angela's and Anays's testimony, and the jury
13 found only Anays's testimony to be credible. Accordingly, even if
14 the Court were to review Petitioner's Confrontation Clause claim
15 on the merits, Petitioner would not be entitled to relief.

16
17
18 As noted, Petitioner also argues that the trial court's
19 failure to hold a hearing to determine the necessity of the
20 support person violated his due process right to a fair trial and
21 the presumption of innocence. In support of his argument,
22 Petitioner cites Estelle v. Williams for the idea that "courts
23 must be alert to factors that undermine the fairness of the fact
24 finding process." Estelle v. Williams, 452 U.S. 501, 505 (1976).
25 The trial court did not violate clearly established federal law
26 when it did not extend this broad language from Estelle to apply
27 to the witness support person in this case. Petitioner argues
28

1 that the presence of the support person "could only have added to
2 Anays's credibility." Traverse at 32. But again, the jury's
3 findings in this case belie that contention because the jury
4 returned a mixed verdict and the same procedure was followed for
5 the testimony of both Anays and Angela. Thus, even if the Court
6 were to review his due process arguments on the merits, Petitioner
7 would not be entitled to relief.
8

9 Accordingly, for the reasons explained above, Petitioner's
10 request for habeas relief is DENIED.

11 III. Certificate of Appealability

12 The federal rules governing habeas cases brought by state
13 prisoners require a district court that denies a habeas petition
14 to grant or deny a certificate of appealability in the ruling.
15 Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254.
16

17 A petitioner may not appeal a final order in a federal habeas
18 corpus proceeding without first obtaining a certificate of
19 appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A
20 judge shall grant a certificate of appealability "only if the
21 applicant has made a substantial showing of the denial of a
22 constitutional right." 28 U.S.C. § 2253(c)(2). The certificate
23 must indicate which issues satisfy this standard. 28 U.S.C.
24 § 2253(c)(3). "Where a district court has rejected the
25 constitutional claims on the merits, the showing required to
26 satisfy § 2253(c) is straightforward: The petitioner must
27 demonstrate that reasonable jurists would find the district
28

1 court's assessment of the constitutional claims debatable or
2 wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

3 The Court finds that reasonable jurists would not find its
4 ruling on any of Petitioner's claims debatable or wrong.
5 Therefore, a certificate of appealability is DENIED.

6 Petitioner may not appeal the denial of a certificate of
7 appealability in this Court but may seek a certificate from the
8 Court of Appeals under Rule 22 of the Federal Rules of Appellate
9 Procedure. See Rule 11(a) of the Rules Governing Section 2254
10 Cases.
11

12 CONCLUSION

13 Based on the foregoing, the Court orders as follows:

14 1. The petition for a writ of habeas corpus is denied.

15 2. The Clerk of the Court shall enter a separate judgment and
16 close the file. Each party shall bear his own costs.

17 3. A certificate of appealability is denied.

18 IT IS SO ORDERED.
19

20
21 Dated: August 5, 2015



22 _____
23 CLAUDIA WILKEN
24 United States District Judge
25
26
27
28