

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PREN NOTHNAGEL,	)	No. C 12-5976 CW (PR)
	)	
Petitioner,	)	ORDER DENYING PETITION FOR A
	)	WRIT OF HABEAS CORPUS
v.	)	
	)	
CLIFF ALLENBY,	)	
	)	
Respondent.	)	
_____	)	

INTRODUCTION

Petitioner seeks federal habeas relief from his civil detention under California’s Sexually Violent Predator Act (SVPA), California Welfare and Institutions Code sections 6600-04, as amended in 2006 by SB1128 and Proposition 83. For the reasons set forth below, the petition for such relief is DENIED.

BACKGROUND

Petitioner is civilly committed at Coalinga State Hospital as a sexually violent predator (SVP). An SVP is an individual “who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or

1 she will engage in sexually violent criminal behavior." Cal.  
2 Welf. & Inst. Code § 6600(a).

3 In March 2009, a Humboldt County Superior Court jury found  
4 true a petition that Petitioner, who was then sixty-five years  
5 old, is an SVP. The trial court committed him to an indeterminate  
6 term in a facility to be designated by the California Department  
7 of Mental Health (DMH). Pet. at 2; Ans., Ex. A at 326.

8 Evidence presented at his civil commitment trial included the  
9 testimony of two psychologists, Drs. Jeremy Coles and Craig  
10 Updegrove. The two interviewed Petitioner, reviewed his criminal  
11 history, which included five criminal convictions for committing  
12 lewd and lascivious behavior with a child, and evaluated his risk  
13 of reoffending.  
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15  
16 Petitioner's criminal history is as follows. In 1975,  
17 Petitioner approached several eight- and nine-year-old boys and  
18 began masturbating in front of them. He had one of the boys touch  
19 his penis. Petitioner was consequently convicted of two counts of  
20 loitering where children were present. Ans., Ex. J, Vol. 4 at  
21 812-13.  
22

23 In 1978, Petitioner was arrested for masturbating in front of  
24 children in a park. He plead guilty to indecent exposure and was  
25 placed on probation. Id. at 813.

26 In 1991, Petitioner befriended eleven-year-old Cody, gave him  
27 candy and pornography, and, over a matter of several months,  
28

1 engaged in masturbation, oral copulation, and sodomy. On one  
2 occasion, Petitioner tied the child up. He threatened to "hunt  
3 down" and kill Cody if he told anyone. Id. at 814; Ex. A at 26.  
4 Petitioner was convicted of five counts of lewd and lascivious  
5 conduct with a child and sentenced to sixteen years in prison.  
6 Id., Ex. A at 6.  
7

8 In 2006, Petitioner, then sixty-two, approached several young  
9 boys and asked if they wanted to see pornography. The boys ran  
10 away and reported the incident. Petitioner plead guilty to one  
11 count of attempting to annoy or molest a child and was sentenced  
12 to two years in prison. Id., Ex. J., Vol. 4 at 817-18; Pet., Ex.  
13 2A. Coles and Updegrave evaluated his risk of reoffending using  
14 actuarial risk formulas, one of which was the Static 99. They  
15 gave Petitioner a score of eight and seven (out of a possible  
16 twelve), respectively. Both scores indicate "high risk of  
17 reoffending." Ans., Ex. J, Vol. 4 at 828-29; Vol. 5 at 957.  
18

19 Coles and Updegrave also considered Petitioner's age. They  
20 rejected the idea that his age was a protective factor in lowering  
21 his risk of reoffending. Id., Vol. 4 at 822. Though they  
22 acknowledged that he did not actually molest anyone in 2006 when  
23 he was 62 years old, they noted that he exhibited the same "MO" as  
24 he had in prior offenses. Id. at 818. Also, because Petitioner  
25 has denied committing any sexual offenses and rejected the idea  
26 that he needs treatment, the doctors were not convinced that he  
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1 would voluntarily seek treatment if released. Id. at 836.

2  
3 Based on this and other evidence, both Coles and Updegrave  
4 testified at the 2009 commitment proceeding that Petitioner had  
5 pedophilia and was likely to engage in sexually violent predatory  
6 criminal acts as a result of this disorder. Id. The doctors  
7 further explained that pedophilia is a chronic condition that  
8 individuals can manage, but that it can never go into remission.  
9 Id. at 821.

10  
11 Petitioner, who represented himself at trial, presented the  
12 testimony of two psychologists, Drs. James Park and Otto Vanoni.  
13 Both also diagnosed pedophilia. Id. at 667; Vol. 5 at 1027.  
14 However, Dr. Park believed Petitioner's pedophilia was in  
15 remission. Id., Vol. 4 at 668. Both doctors concluded that he  
16 did not have a high risk of reoffending in a sexually violent  
17 predatory manner if released. Id. at 670; Vol. 5 at 1030. They  
18 also found his age to be a significant protective factor because  
19 the likelihood of reoffending drops dramatically after the age of  
20 sixty. Id., Vol. 4 at 659; Vol. 5 at 1030. They also were  
21 convinced Petitioner's 2006 offense was not indicative of the  
22 desire to reoffend; rather, it was simply a "stupid" offense with  
23 no evidence supporting the desire to molest. Id., Vol. 4 at 667-  
24 68; Vol. 5 at 1029. Petitioner and his doctors asserted that he  
25 had gained empathy and an understanding about the effects of his  
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1 offenses on the victims. Id., Vol. 4 at 672; Vol. 5 at 1031.

2  
3 The jury, as noted above, found that Petitioner was an SVP.  
4 He appealed his 2009 civil commitment judgment. In 2010, the  
5 state appellate court affirmed in part, reversed in part, remanded  
6 the case to the trial court for consideration of Petitioner's  
7 equal protection claim, but stayed the trial court proceedings  
8 until the state supreme court decided People v. McKee, 207 Cal.  
9 App. 4th 1325 (2012). Ans., Ex. E. The state supreme court  
10 denied his petitions for review and for habeas corpus. Id., Exs.  
11 G and I.  
12

13 In 2011, he filed a federal habeas petition, which this Court  
14 dismissed without prejudice to refile after the state supreme  
15 court decided McKee. When McKee became final, Petitioner refiled  
16 his federal petition.  
17

18 Petitioner raises twenty-seven claims for federal habeas  
19 relief. These fall into five categories: (I) challenges to the  
20 constitutionality of the SVPA; (II) challenges to prior  
21 convictions; (III) sufficiency of the evidence; (IV) specific  
22 trial errors; and (V) Sixth Amendment claims.  
23

#### 24 STANDARD OF REVIEW

25 Under the Anti-Terrorism and Effective Death Penalty Act of  
26 1996 (AEDPA), a district court may not grant a petition  
27 challenging a state conviction or sentence on the basis of a  
28 claim that was reviewed on the merits in state court unless the

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

12  
13 A state court decision is "contrary to" Supreme Court  
14 authority, that is, falls under the first clause of § 2254(d)(1),  
15 only if "the state court arrives at a conclusion opposite to that  
16 reached by [the Supreme] Court on a question of law or if the  
17 state court decides a case differently than [the Supreme] Court  
18 has on a set of materially indistinguishable facts." Williams  
19 (Terry), 529 U.S. at 412-13. A state court decision is an  
20 "unreasonable application of" Supreme Court authority, falling  
21 under the second clause of § 2254(d)(1), if it correctly  
22 identifies the governing legal principle from the Supreme Court's  
23 decisions but "unreasonably applies that principle to the facts  
24 of the prisoner's case." Id. at 413. The federal court on  
25 habeas review may not issue the writ "simply because that court  
26 concludes in its independent judgment that the relevant  
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1 state-court decision applied clearly established federal law  
2 erroneously or incorrectly." Id. at 411. Rather, the  
3 application must be "objectively unreasonable" to support  
4 granting the writ. Id. at 409. Under 28 U.S.C. § 2254(d)(2),  
5 a state court decision "based on a factual determination will not  
6 be overturned on factual grounds unless objectively unreasonable  
7 in light of the evidence presented in the state-court  
8 proceeding." Miller-El, 537 U.S. at 340; see also Torres v.  
9 Prunty, 223 F.3d 1103, 1107 (9th Cir. 2000).

11 DISCUSSION

12 I. Constitutionality of the SVPA

13 Petitioner claims that the SVPA violates the (A) ex post  
14 facto, (B) double jeopardy, (C) due process, (D) excessive bail,  
15 and (E) equal protection clauses.<sup>1</sup> The state appellate court  
16 rejected Claims A, B, and C: "the SVPA does not contravene due  
17 process, ex post facto, or double jeopardy principles." Ans.,  
18 Ex. E at 1. The state supreme court summarily denied all claims,  
19 including the one regarding bail. Id., Ex. G.

21 A. Ex Post Facto  
22

23  
24 <sup>1</sup>Petitioner asserts that the SVPA discriminates against low income  
25 offenders. Pet. at 16. It is true that one of the evidentiary  
26 considerations in determining civil commitment is whether the defendant  
27 possessed the necessary resources to undertake treatment voluntarily.  
28 Ghilotti v. Superior Court, 27 Cal. 4th 888, 929 (2002). Petitioner's  
claim is without merit. In Petitioner's case, his prior offenses and  
responses to current evaluations were far more powerful factors in his  
detention than his income. The state court's rejection of this claim  
was reasonable and is therefore entitled to AEDPA deference.  
Accordingly, this claim is DENIED.

1           Petitioner claims that the 2006 changes to the SVPA violate  
2 the ex post facto clause by eliminating the biannual judicial  
3 proceeding previously required to extend an SVP's commitment.  
4 Pet. at 5-6.

5           The ex post facto clause applies only to punishment for  
6 criminal acts, whether punishment for an act not punishable at  
7 the time it was committed, or punishment additional to that then  
8 prescribed. Collins v. Youngblood, 497 U.S. 37, 42 (1990). To  
9 determine what constitutes punishment in an ex post facto claim  
10 analysis, the Supreme Court has applied the double jeopardy  
11 "intent-effects" test set out in United States v. Ward, 448 U.S.  
12 242, 248-49 (1980); see also Smith v. Doe, 538 U.S. 84, 92  
13 (2003). The two-pronged Ward test requires that the Court  
14 inquire (1) whether the legislature intended to impose punishment  
15 and, if not, (2) whether the sanction is so punitive in purpose  
16 or effect as to negate the state's intent to deem it civil.  
17 Smith, 538 U.S. at 92. The Court may reject the legislature's  
18 intent under the second "effects" prong only where there is "the  
19 clearest proof" to support such a finding. Id.

20           The SVPA is a non-punitive statute under the initial intent  
21 prong of the Ward test. First, the SVPA is placed within the  
22 California Welfare and Institutions Code, rather than  
23 California's criminal code, differentiating it from the state's  
24 laws intended to punish criminal acts. Second, language in  
25 Proposition 83 described the SVPA as designed to "commit and  
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1 control" as opposed to "punish." Ballot Pamp., Gen. Elec. (Nov.  
2 7, 2006) text of Prop. 83, § 2(h), p. 127. The people of  
3 California approved Proposition 83 in 2006, amending the SVPA and  
4 thus expressing their intent that it serve as a civil commitment  
5 statute rather than as a mechanism to punish criminal conduct.

6 Under the second Ward prong, the SVPA's effects are not so  
7 punitive as to overcome the Act's civil intent. In assessing a  
8 law's effects, the Court shall consider the following test:  
9

10 Whether the sanction involves an affirmative disability  
11 or restraint, whether it has historically been regarded  
12 as a punishment, whether it comes into play only on a  
13 finding of scienter, whether its operation will promote  
14 the traditional aims of punishment – retribution and  
15 deterrence – whether the behavior to which it applies  
16 is already a crime, whether an alternative purpose to  
17 which it may rationally be connected is assignable for  
18 it, and whether it appears excessive in relation to the  
19 alternative purpose assigned . . . .

20 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). The  
21 most relevant factors of this test are "whether, in its necessary  
22 operation, the regulatory scheme has been regarded in our history  
23 and traditions as a punishment; imposes an affirmative disability  
24 or restraint; promotes the traditional aims of punishment; has a  
25 rational connection to a nonpunitive purpose; or is excessive  
26 with respect to this purpose." Smith v. Doe, 538 U.S. 84, 97  
27 (2003).

28 Consideration of these factors indicates that the SVPA's  
effect is non-punitive. First, while the SVPA involves an  
affirmative disability or restraint, civil commitment of sexually

1 violent predators has been historically regarded as a legitimate  
2 non-punitive governmental objective. Kansas v. Hendricks, 521  
3 U.S. 346, 363 (1997).

4 Second, the SVPA cannot be said to serve the penological  
5 purpose of deterrence or retribution. It does not deter because  
6 commitment is contingent on the inability to control sexually  
7 violent urges. The threat of commitment is not likely to deter  
8 SVPs from sexually violent crime because they, by definition,  
9 cannot control their impulses. Also, the SVPA commitment is  
10 based on a currently "diagnosed mental disorder" rather than a  
11 finding of scienter. Cal. Welf. & Inst. Code § 6600(a)(1), (c).  
12 This lack of a scienter requirement in the SVPA suggests that the  
13 statute is not intended to promote the penological purpose of  
14 retribution.  
15

16  
17 Finally, the duration of an SVPA commitment is both related  
18 to the Act's rehabilitative purpose and not excessive because  
19 commitment is conditional upon a current mental disorder. Id.  
20 §§ 6605, 6608. The former may not continue without the latter.  
21 In sum, consideration of the relevant Mendoza-Martinez factors  
22 strongly indicates that the SVPA's effects are civil.  
23

24 It is important to note that the United States Supreme Court  
25 denied a habeas challenge in circumstances similar to those  
26 presented by Petitioner. In Hendricks, the Supreme Court upheld  
27 a Kansas civil commitment statute under the Ward "intent-effects"  
28 test. The Court reasoned that the potential for indefinite

1 confinement showed the rehabilitative, rather than punitive,  
2 purpose of the statute. Hendricks, 521 U.S. at 361-62. In  
3 addition, the Court found that the statute did not have a  
4 retroactive effect because confinement was conditioned upon a  
5 determination that the person was currently suffering from a  
6 mental disorder. Id. The SVPA mirrors the Kansas statute in  
7 that there is a potential for indefinite confinement but the  
8 commitment lasts only so long as the detainee suffers from an  
9 ongoing, diagnosed mental disorder.  
10

11 Accordingly, the state court's rejection of Petitioner's ex  
12 post facto claim was reasonable and is entitled to AEDPA  
13 deference. This claim is DENIED.  
14

15 B. Double Jeopardy

16 Petitioner claims that the SVPA violates the double jeopardy  
17 clause, arguing that "saying [civil] detention is not punishment  
18 because it is civil is a farce." Pet. at 10.

19 Habeas relief is not warranted here. Conduct may be subject  
20 to both a criminal penalty and a separate civil remedy without  
21 running afoul of the double jeopardy clause's prohibition on  
22 multiple criminal punishments for the same offense. Hudson v.  
23 United States, 522 U.S. 93, 99 (1997). In Hendricks, the Supreme  
24 Court rejected a double jeopardy claim because the challenged  
25 statute was based on "the stated purposes of the commitment,  
26 namely, to hold the person until his mental abnormality no longer  
27 causes him to be a threat to others." Hendricks, 521 U.S. at  
28

1 363.

2 Also, the lack of an annual review in California's SVPA  
3 alone does not alter its non-punitive nature. Duration and  
4 purpose of confinement under the SVPA are analogous to that of  
5 the statute upheld in Hendricks because commitment lasts only as  
6 long as the SVP is a threat. Id. at 348.

7  
8 The state court's rejection of this claim was therefore  
9 reasonable and is entitled to AEDPA deference. Accordingly,  
10 Petitioner's double jeopardy claim is DENIED.

11 C. Due Process

12 Petitioner claims that the SVPA violates his due process  
13 rights because "all it takes for the D.A. to win is [to] rehash  
14 past sexual crimes," annual reviews are just "rubber stamps"  
15 based on prior sexual conduct, there "is no realistic hope of  
16 gaining freedom from the 'treatment' at Coalinga State Hospital,"  
17 and SVP trials are "kangaroo courts where everyone knows the  
18 outcome before the trial begins." Pet. at 13, 15, and 27. He  
19 also claims that the SVPA violates his substantive due process  
20 rights. Id. at 5.

21  
22 Habeas relief is not warranted here. First, Petitioner's  
23 allegations are conclusory. Rather than posing general  
24 allegations, a federal habeas petition "is expected to state  
25 facts that point to a real possibility of constitutional error."  
26 Mayle v. Felix, 545 U.S. 644, 655 (2005) (internal quotation  
27 marks and citation omitted). Conclusory allegations, such as  
28

1 those, are not sufficient.

2 Second, the allegations contain no showing that Petitioner's  
3 due process rights were violated. He does not allege, for  
4 instance, that he did not receive notice or an opportunity to  
5 respond, or that the state failed to follow the proper statutory  
6 procedures. SVPA procedural safeguards include a requirement  
7 that the accused receive diagnoses from two psychiatrists or  
8 psychologists, assistance of counsel, trial by jury on proof  
9 beyond a reasonable doubt, and a unanimous verdict. Hubbart v.  
10 Knapp, 379 F.3d 773, 781 (9th Cir. 2004); Cal. Welf. & Inst. Code  
11 §§ 6602, 6604. The record indicates that all the proper  
12 procedures were followed and the appropriate evidentiary  
13 standards were used.  
14  
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16 Third, Petitioner's allegations that the process is only a  
17 rubber stamp and a "rehash" of prior offenses is not accurate.  
18 In fact, the Act "precludes commitment based solely on evidence  
19 of . . . prior crimes." Hubbart v. Superior Court, 19 Cal. 4th  
20 1138, 1163-64 (1997). Petitioner's detention was based on many  
21 factors, including evaluations by mental health professionals,  
22 his age, and his prior offenses.  
23

24 Fourth, his allegations regarding treatment are conclusory.  
25 He fails to point to specific facts about treatment and how it is  
26 ineffective or why success is unrealistic. Also, this claim is  
27 foreclosed by Supreme Court precedent: "we have never held that  
28 the Constitution prevents a State from civilly detaining those

1 for whom no treatment is available, but who nevertheless pose a  
2 danger to others." Hendricks, 521 U.S. at 366.

3  
4 Fifth, his substantive due process claim is foreclosed by  
5 Hendricks. In that case, the Supreme Court rejected such a  
6 challenge to a Kansas state statute similar to the SVPA:

7  
8 lack of volitional control, coupled with a prediction  
9 of future dangerousness, adequately distinguishes  
10 Hendricks from other dangerous persons who are perhaps  
11 more properly dealt with exclusively through criminal  
12 proceedings. Hendricks' diagnosis as a pedophile,  
13 which qualifies as a "mental abnormality" under the  
14 Act, thus plainly suffices for due process purposes.

15 Id. at 360.

16 The state court's rejection of these claims was therefore  
17 reasonable and is entitled to AEDPA deference. Petitioner's due  
18 process claims are DENIED.

19 D. Excessive Bail

20 Petitioner's claim that bail was excessive under the Eighth  
21 Amendment is DENIED. Pet. at 11. The custody that is subject to  
22 challenge in this federal habeas proceeding is not the state  
23 court's bail order because that order was rendered moot by  
24 Petitioner's subsequent civil commitment as an SVP. Petitioner  
25 can now only challenge the proceeding that resulted in his  
26 subsequent custody. See 28 U.S.C. § 2254(a). The state court's  
27 rejection of this claim was therefore reasonable and is entitled  
28 to AEDPA deference.

E. Equal Protection

1           Petitioner claims that the SVPA violates his right to equal  
2 protection because "sex offenders have a lower recidivism rate  
3 than any other criminals except murderers." Because it lacks a  
4 rational basis, the Act "creates an arbitrary and capricious  
5 class of persons." Pet. at 5.

6           The equal protection clause prohibits the arbitrary and  
7 unequal application of state law, "essentially a direction that  
8 all persons similarly situated should be treated alike." City of  
9 Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

10           Petitioner's claim fails as a matter of law because he does  
11 not identify persons who are similarly situated, such as other  
12 civil detainees. His comparison of SVPs to criminals is inapt.  
13 Civil and criminal detention are different by definition, as  
14 shown in the Court's discussion of his ex post facto claim in  
15 Section I.A.

16           Furthermore, even if Petitioner had identified similarly  
17 situated persons (such as other civil detainees), his equal  
18 protection claim is foreclosed by Ninth Circuit precedent.  
19 "[T]he Sexually Violent Predator Act does not create a capricious  
20 custody scheme in violation of equal protection tenets." Taylor  
21 v. San Diego County, 800 F.3d 1164, 1170 (9th Cir. 2015).

22           The state court's rejection of this claim was therefore  
23 reasonable and is entitled to AEDPA deference. This claim is  
24 DENIED.

25           II. Prior Convictions  
26  
27  
28

1           Petitioner challenges his 2006 conviction for attempting to  
2 annoy or molest a child. He asserts that he was given no warning  
3 of a possible future SVP commitment when he plead guilty in 2006;  
4 an indefinite civil detention is disproportionate to the crime he  
5 committed in 2006; and that his 2006 arrest was a "springboard"  
6 for the ultimate civil commitment. Pet. at 11-12, and 15.

7  
8           Habeas relief is not warranted here. First, Petitioner  
9 cannot challenge his 2006 conviction by way of the instant  
10 federal habeas action because his prior conviction may be  
11 regarded as conclusively valid:

12           [W]e hold that once a state conviction is no longer  
13 open to direct or collateral attack in its own right  
14 because the defendant failed to pursue those remedies  
15 while they were available (or because the defendant did  
16 so unsuccessfully), the conviction may be regarded as  
17 conclusively valid.

18           Lackawanna County District Attorney v. Coss, 532 U.S. 394, 403-04  
19 (2001) (citation omitted).<sup>2</sup> Because Petitioner has not shown  
20 that any of his prior convictions is still open to direct or  
21 collateral attack, he cannot challenge any of them here.  
22 Accordingly, his claims that he would not have plead guilty in  
23 2006 or that the 2006 conviction was a springboard to the SVP  
24 determination cannot be the basis for federal habeas relief.

25           Second, Petitioner's claim that his indefinite detention is

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26           <sup>2</sup>The only exception to this rule is when a petitioner asserts  
27 denial of assistance of counsel in violation of the Sixth Amendment.  
28 Lackawanna, 532 U.S. at 404 (discussing "special status" of claims  
under Gideon v. Wainwright, 372 U.S. 335 (1963)). Here, Petitioner  
has not asserted that he was denied the assistance of counsel.

1 disproportionate to his 2006 crime is without merit. His  
2 detention is not punishment for his 2006 crime, and therefore his  
3 detention cannot be disproportionate. The civil detention was  
4 imposed because he was adjudged an SVP, his 2006 conviction being  
5 just one of the considerations the jury took into account.  
6

7 The state appellate court's rejection of these claims was  
8 therefore reasonable and is entitled to AEDPA deference. This  
9 claim is DENIED.

10 III. Sufficiency of the Evidence

11 Petitioner asserts that there was insufficient evidence to  
12 classify him as an SVP. Specifically he alleges that the jury's  
13 determination was not supported by evidence; the finding that he  
14 had a mental illness was fabricated to keep him indefinitely  
15 detained; Coles's and Updegrove's evaluations were invalid  
16 because they were less thorough than those used by the defense's  
17 psychologists; and the evaluation methods used by the DMH are  
18 invalid. Pet. at 2, 6-8.  
19

20 Petitioner's claims are wholly conclusory. First, the  
21 record flatly contradicts his claim that there was nothing to  
22 support a finding that he was an SVP. Petitioner's criminal  
23 history and the evaluations by two psychologists provided  
24 evidentiary support.  
25

26 Second, the record also flatly contradicts his claim that a  
27 finding of mental illness was fabricated. All four psychologists  
28 diagnosed pedophilia and Petitioner has pointed to no evidence of

1 fabrication.

2 Third, Petitioner's claim that the prosecutor's  
3 psychologists' evaluations were not sufficiently thorough is  
4 entirely conclusory. He says only that his psychologists used  
5 more tests and interviewed him more thoroughly. He fails to  
6 point to specific evidence showing exactly how the prosecutor's  
7 psychologists' tests were not thorough and how those deficiencies  
8 rendered their evaluations invalid.  
9

10 His fourth claim that the DMH evaluation methods are invalid  
11 is also conclusory and therefore fails to meet the specificity  
12 requirements of Mayle, 545 U.S. at 655.

13 The state court's rejection of these claims was therefore  
14 reasonable and is entitled to AEDPA deference. These claims are  
15 DENIED.  
16

17 IV. Trial Errors

18 Petitioner claims that there were several trial errors:  
19 (A) perjured and biased testimony; (B) instructional error;  
20 (C) the improper exclusion of evidence; and (D) the improper  
21 admission of prejudicial evidence.<sup>3</sup> Pet. at 6-7, 11, 12-13, and  
22

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23 <sup>3</sup>Petitioner also asserts that his rights were violated because he  
24 was denied access to the law library. Pet. at 12. The only  
25 evidence he cites is his request for a copy of the Constitution and  
26 Bill of Rights, to which the jail staff responded, "We do not have a  
27 law library." Id., Ex. 6. Petitioner fails to show precisely how  
28 this deprivation adversely affected his defense. Also, at trial  
Petitioner had a copy of the Constitution, which of course included  
the Bill of Rights, which he marked as an exhibit and tried to enter  
into evidence. Ans., Ex. J, Vol. 6 at 1189. Finally, Faretta v.  
California, 422 U.S. 806 (1975), does not clearly establish a right  
to law library access for a self-representing criminal defendant.

1 15-16.

2 A. Perjured and Biased Testimony

3 Petitioner asserts that Dr. Updegrove and Dr. Coles were  
4 dishonest about the percentage of people diagnosed with SVP out  
5 of the total number of persons they examine per year. Pet. at 7.  
6 He further asserts that they were biased (and greedy) because  
7 they were paid employees of the DMH. Id.

8  
9 Habeas relief is not warranted here. Petitioner alleges  
10 that Updegrove stated that he "referred 5% of people he examined  
11 to SVP trials . . . when in fact he referred 20%." Id. He also  
12 alleges that Dr. Coles testified that he "referred 3% of people  
13 he examined to SVP trial . . . when he actually referred 14%."  
14 Id.

15  
16 Petitioner bases his percentages on DMH documents that give  
17 Coles's and Updegrove's evaluation outcome percentages. Id.,  
18 Exs. 3A and 3B. These documents, however, do not provide a time  
19 frame within which the statistics can be evaluated. For example,  
20 Updegrove was speaking of the evaluations he made between 2007  
21 and 2009. Ans., Ex. J, Vol. 5 at 917. Petitioner's document,  
22 however, appears to cover a larger time frame. Because the  
23 document does not contradict Updegrove's testimony, Petitioner  
24 has not shown that the testimony was false.  
25

26  
27 \_\_\_\_\_  
28 Kane v. Garcia Espitia, 126 S. Ct. 407, 408 (2005). This claim is  
DENIED.

1           Petitioner also misstates the meaning of Coles's testimony.  
2 His "3%" was the percentage of findings based on the total number  
3 of persons referred state-wide, not those referred by Coles  
4 personally. Id., Vol. 4 at 805-06. Again, Petitioner fails to  
5 provide any evidentiary support for his claim that Coles and  
6 Updegrove presented false testimony.  
7

8           The state court's rejection of this claim was therefore  
9 reasonable and is entitled to AEDPA deference. Accordingly, this  
10 claim is DENIED.

11           B.    Instructional Error

12           Petitioner asserts that the judge "made himself the highest  
13 law in the land!" when he gave the following standard jury  
14 instruction (CALCRIM No. 200): "You must follow the law as I  
15 explain it to you even if you disagree with it. If you believe  
16 the attorneys or Respondent's comments on the law conflict with  
17 my instructions, you must follow my instructions." Pet. at 11;  
18 Ans., Ex. J, Vol. 6 at 1208.  
19

20           Habeas relief is not warranted here. First, it is not clear  
21 what constitutional violation Petitioner is asserting. Because  
22 his claim is conclusory and lacks detail, it fails to meet the  
23 specificity requirements of Mayle, 545 U.S. at 655. Second,  
24 insofar as Petitioner claims that the court's instruction  
25 violated due process, it is without merit. The trial court gave  
26 a standard instruction, one given to ensure that the jury applies  
27 the correct legal standard rather than whatever standard counsel  
28

1 or witnesses have suggested is the correct one. In no way then  
2 has Petitioner shown that this instruction so infected the entire  
3 trial that the resulting conviction violates due process. See  
4 Estelle v. McGuire, 502 U.S. 62, 72 (1991).

5 The state court's rejection of this claim was therefore  
6 reasonable and is entitled to AEDPA deference. Accordingly, this  
7 claim is DENIED.

8  
9 C. Exclusion of Evidence

10 Petitioner asserts the court erred because he was barred  
11 from showing the jury a document regarding the recidivism rates  
12 of sex offenders. Pet. at 12. When Petitioner sought to  
13 introduce the document at trial, the trial court asked, "What is  
14 it? What is the source or what is the title of it?" Petitioner  
15 responded:  
16

17 I didn't have the first page on here. I forget what the  
18 exact title is. It is not just Ohio - it gives a  
19 National Department of Justice - it gives the  
20 recidivism rate from the reports they have. It is not  
21 just Ohio it is other states there. It is very  
22 important about the - it goes into a little about the  
23 constitution and so on here. It is very relevant to  
24 this case showing the recidivism rate, showing what  
25 studies use is a lot lower than what people think.

26 Ans., Ex. J, Vol. 6 at 1188. The trial court excluded this  
27 evidence because it lacked a proper foundation and was hearsay.  
28 Id. at 1190. Though it was excluded as evidence, Petitioner was  
allowed to read the document to the jury. Id., Ex. 5 at 1076-80.

The exclusion of evidence does not violate the due process

1 clause unless "it offends some principle of justice so rooted in  
2 the traditions and conscience of our people as to be ranked as  
3 fundamental." Montana v. Egelhoff, 518 U.S. 37, 43 (1996)  
4 (quotation omitted). The defendant, not the state, bears the  
5 burden to demonstrate such a violation. Id. at 47. "While the  
6 Constitution thus prohibits the exclusion of defense evidence  
7 under rules that serve no legitimate purpose or that are  
8 disproportionate to the ends that they are asserted to promote,  
9 well-established rules of evidence permit trial judges to exclude  
10 evidence if its probative value is outweighed by certain other  
11 factors such as unfair prejudice, confusion of the issues, or  
12 potential to mislead the jury." Holmes v. South Carolina, 547  
13 U.S. 319, 326 (2006).

14  
15  
16 In deciding if the exclusion of evidence violates the due  
17 process right to a fair trial or the right to present a defense,  
18 a reviewing court balances five factors: (1) the probative value  
19 of the excluded evidence on the central issue; (2) its  
20 reliability; (3) whether it is capable of evaluation by the trier  
21 of fact; (4) whether it is the sole evidence on the issue or  
22 merely cumulative; and (5) whether it constitutes a major  
23 part of the attempted defense. Chia v. Cambra, 360 F.3d 997,  
24 1004 (9th Cir. 2004); Drayden v. White, 232 F.3d 704, 711 (9th  
25 Cir. 2000).

26  
27 Habeas relief is not warranted here. None of the Chia  
28 factors weighs in Petitioner's favor. First, the document had at

1 best only slight probative value. Such statistics show a general  
2 trend. They do not indicate with any precision whether  
3 Petitioner is likely to reoffend. Second, the document was not  
4 reliable. Petitioner had no personal knowledge of how the  
5 document was created or how the results were calculated. For  
6 this same reason, it could not be evaluated by the trier of fact.  
7 The last two factors are not relevant. The issue at trial was  
8 whether Petitioner, based on the specific circumstances of his  
9 case, was likely to reoffend, not whether, generally speaking,  
10 sex offenders were likely to reoffend.  
11

12 Furthermore, Petitioner's presentation of the evidence to  
13 the jury renders moot any claim that the "exclusion" of the  
14 evidence adversely affected his trial.  
15

16 The state court's rejection of this claim was therefore  
17 reasonable and is entitled to AEDPA deference. Accordingly, this  
18 claim is DENIED.  
19

20 D. Admission of Prejudicial Evidence

21 Petitioner claims that the trial court violated his due  
22 process rights when it admitted (1) a confidential report from  
23 1992, and (2) documentary evidence containing allegations of  
24 sodomy and violence.<sup>4</sup> Pet. at 12, 13-14, and 15-16.  
25

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26 <sup>4</sup>Petitioner alleges that "invalid evidence" was admitted. The  
27 only example he gives is Updegrave's testimony, based on a 1992  
28 report, that Petitioner was "virtually unable to function in the  
adult world." Pet. at 15. Petitioner has not shown why this  
evidence is invalid, or how its admission violated his federal  
constitutional rights. The claim is DENIED.

1           1.    Report

2           Prior to trial, Petitioner moved to exclude a 1992 report  
3 regarding whether Petitioner should be placed on supervised  
4 probation. The trial court admitted the report:

5           Mr. Nothnagel seeks to have that report excluded and  
6 not considered by the expert witnesses because he says  
7 that he was told that it was a confidential report. I  
8 don't believe that is the law. In fact, the report was  
9 submitted to the Court to determine the eligibility as  
10 to whether Mr. Nothnagel was eligible to be placed on  
11 supervised probation. It wasn't a report that was  
12 generated pursuant to a treatment plan – typically, if  
13 a psychologist is providing treatment, there are  
14 certain confidentiality that arise. But in this  
15 case, there – this was not the purpose of the report.  
16 The report was to aid the Court in deciding whether Mr.  
17 Nothnagel should be placed on probation. Because it  
18 wasn't pursuant to a court-ordered treatment plan,  
19 there's no patient-psychologist privilege.

20           Ans., Ex. J, Vol. 4 at 615. At trial, Petitioner objected to the  
21 1992 report because he thought it was confidential. Here, he  
22 claims that the report should have been updated by its preparer,  
23 as required by California Welfare and Institutions Code section  
24 6603.

25           Habeas relief is not warranted here. First, the report was  
26 not confidential, but rather was prepared for court use. Second,  
27 the SVPA does not require that old evaluations be updated.  
28 Rather, the statute merely allows the prosecutor to request that  
the DMH update its evaluations. Cal. Welf. & Inst. Code  
§ 6603(c)(1). Furthermore, that section applies only to reports  
prepared under California Welfare and Institutions Code section

1 6601, not to reports regarding a person's eligibility for  
2 supervised probation.

3 The state court's rejection of this claim was therefore  
4 reasonable and is entitled to AEDPA deference. Accordingly, this  
5 claim is DENIED.

6  
7 2. Documentary Evidence

8 The documents at issue here are part of the court file on  
9 Petitioner's 1991 offenses. In 1992, Petitioner plead guilty to  
10 five counts of oral copulation with 11-year-old Cody. According  
11 to the probation report, Cody stated in an interview that he  
12 engaged in mutual acts of oral copulation with Petitioner. He  
13 also stated that one time Petitioner tied him up and ejaculated  
14 in his mouth. Another time, Petitioner sodomized him and  
15 threatened to kill him if he told anyone. Ans., Ex. A at 26.

16  
17 At trial, the court admitted this documentary evidence,  
18 which includes his answers to a lie detector test, over  
19 Petitioner's objections:

20 Well, basically, the law says that the existence of the  
21 predicate offenses, which are the [Cal. Penal Code §]  
22 288 charges [for lewd and lascivious acts with person  
23 under the age of fourteen], and the details underlying  
24 the offenses may be established by multiple-level  
25 hearsay evidence, such as transcripts or preliminary  
26 hearings, trial, probation reports, sentencing reports,  
27 mental health evaluations, sometimes police reports.  
28 That's under Welfare and Institutions Code Section 6600  
Subsection (a) subsection (3), People versus Otto,  
O-T-T-O, 26 Cal.4th 200 at 208. Those cases in - and  
that statute stands for the proposition that the  
defendant in a case such as this has no due process  
right to confront and cross-examine witnesses.  
Statements and police reports are used by the expert

1 witnesses in determining whether the defendant is an  
2 SVP. Statements are admissible under the Welfare and  
3 Institutions Code Section 6600(a)(3) provided they have  
4 some basis of reliability.

5 Ans., Ex. J, Vol. at 752.

6 Here, Petitioner claims that the evidence should have been  
7 excluded as unreliable. He offers nothing to support this,  
8 however, aside from conclusory allegations. His claim, then,  
9 fails to meet the specificity requirements of Mayle, 545 U.S. at  
10 655. Also, the Supreme Court "has not yet made a clear ruling  
11 that admission of irrelevant or overtly prejudicial evidence  
12 constitutes a due process violation sufficient to warrant  
13 issuance of the writ." Holley v. Yarborough, 568 F.3d 1091, 1101  
14 (9th Cir. 2009).

15 Any claim that the admission of this evidence violated his  
16 rights under the confrontation clause or the rule against the  
17 admission of hearsay is without merit. First, the Sixth  
18 Amendment's confrontation clause does not apply to civil  
19 commitment proceedings, at which only the protections of due  
20 process apply. U.S. Const. amend. VI. ("In all criminal  
21 prosecutions, the accused shall enjoy the right . . . to be  
22 confronted with the witnesses against him"); Carty v. Nelson, 426  
23 F.3d 1064, 1073 (9th Cir. 2005). Second, the Ninth Circuit has  
24 held that the rule in People v. Otto, 26 Cal. 4th 200 (2001), the  
25 California Supreme Court case under which the trial court  
26 admitted the hearsay evidence, sufficiently protects a person's  
27  
28

1 due process rights of confrontation. Id. at 1074-75.

2 Furthermore, any claim that the state court erred in  
3 admitting the evidence under state law is not remediable on  
4 federal habeas review. The state appellate court's ruling that  
5 the evidence was properly admitted under state law binds this  
6 federal habeas court. Bradshaw v. Richey, 546 U.S. 74, 76  
7 (2005). Finally, only if there are no permissible inferences  
8 that the jury may draw from the evidence can its admission  
9 violate due process. Jammal v. Van de Kamp, 926 F.2d 918, 920  
10 (9th Cir. 1991). Here, the jury could have made permissible  
11 inferences regarding Petitioner's criminal history.

12  
13 The state court's rejection of this claim was therefore  
14 reasonable and is entitled to AEDPA deference. Accordingly, this  
15 claim is DENIED.

16  
17 V. Sixth Amendment Claims

18 Petitioner claims that (A) standby and appellate counsel  
19 rendered ineffective assistance; and (B) the trial court violated  
20 his rights in various ways.

21 A. Standby and Appellate Counsel

22 1. Standby Counsel

23  
24 Petitioner claims that his standby counsel was never present  
25 in court. Even if he had a right to standby counsel, Petitioner  
26 has not detailed how standby counsel's absence adversely affected  
27 his defense. The claim, then, fails to meet the specificity  
28 requirements of Mayle, 545 U.S. at 655. Also, the appointment of

1 standby counsel was for the benefit of the administration of  
2 justice, not to help Petitioner. Courts appoint standby counsel  
3 "to relieve the judge of the need to explain and enforce basic  
4 rules of courtroom protocol or to assist the defendant in  
5 overcoming routine obstacles that stand in the way of the  
6 defendant's achievement of his own clearly indicated goals."

7 McKaskle v. Wiggins, 465 U.S. 168, 184 (1984).

8  
9 The state appellate court's denial of this claim was  
10 therefore reasonable and is entitled to AEDPA deference.  
11 Accordingly, this claim is DENIED.

12 2. Appellate Counsel

13 Petitioner claims that appellate counsel rendered  
14 ineffective assistance by refusing to appeal any issues other  
15 than unfairness and unequal protection of the law. (Pet. at  
16 13.)<sup>5</sup>

17  
18 Claims of ineffective assistance of appellate counsel are  
19 reviewed according to the standard set out in Strickland v.  
20 Washington, 466 U.S. 668, 687-88 (1984). A defendant therefore  
21 must show that counsel's advice fell below an objective standard  
22 of reasonableness and that there is a reasonable probability

23  
24 \_\_\_\_\_  
25 <sup>5</sup> Petitioner's claim that California's First District Appellate  
26 Court refused to let him add his own brief or to discharge his  
27 appointed counsel, Pet. at 3, is DENIED. Because the right to  
28 counsel on appeal is founded in the due process clause of the  
Fourteenth Amendment, rather than the Sixth Amendment right to  
counsel, "none of the Sixth Amendment's protections, including a  
criminal defendant's qualified right to choice of counsel, extends  
to a criminal appeal." Tamalini v. Stewart, 249 F.3d 895, 901 (9th  
Cir. 2001).

1 that, but for counsel's unprofessional errors, he would have  
2 prevailed on appeal. Miller v. Keeney, 882 F.2d 1428, 1434 (9th  
3 Cir. 1989).

4 It is important to note that appellate counsel does not have  
5 a constitutional duty to raise every nonfrivolous issue requested  
6 by defendant. See Jones v. Barnes, 463 U.S. 745, 751-54 (1983);  
7 Gerlaugh v. Stewart, 129 F.3d 1027, 1045 (9th Cir. 1997); Miller,  
8 882 F.2d at 1434. Appellate counsel therefore will frequently  
9 remain above an objective standard of competence and have caused  
10 his client no prejudice for the same reason -- because he  
11 declined to raise a weak issue. Id.

12 Habeas relief is not warranted here. As discussed at length  
13 above, none of Petitioner's claims has merit. Therefore,  
14 appellate counsel's failure to raise these claims on appeal  
15 cannot constitute ineffective assistance of counsel.

16 The state court's rejection of this claim was therefore  
17 reasonable and is entitled to AEDPA deference. Accordingly, this  
18 claim is DENIED.

19  
20  
21 B. Trial Court

22 Petitioner claims that the trial court violated his Sixth  
23 Amendment rights by denying his requests (1) to change counsel;  
24 and (2) for the appointment of advisory counsel.

25  
26 1. Motion to Change Counsel

27 Petitioner claims that the trial court violated his Sixth  
28 Amendment rights when it denied his motion to change counsel.

1 The relevant facts are as follows. Petitioner was represented by  
2 Kevin Robinson, a public defender. Petitioner filed a motion to  
3 change counsel. He told the trial court that he objected to  
4 Robinson because he would not allow Petitioner to present opening  
5 or closing arguments or otherwise address the jury. Robinson  
6 responded that he told Petitioner that as long as he was  
7 represented by counsel he could not address the jury in the ways  
8 he suggested. Robinson did say, however, that he told Petitioner  
9 that he could address the jury through his testimony, if he took  
10 the stand. The trial court denied the motion to change counsel.  
11 However, the trial court explained to Petitioner that when "being  
12 represented by counsel, you have the right to testify, . . . tell  
13 the jury what you'd like to have them hear and be told, but  
14 counsel does conduct the proceedings and do make the arguments,  
15 statements." Ans., Ex. J. Vol. 2 at 281. Subsequently  
16 Petitioner signed a Faretta waiver to represent himself. Id. at  
17 290-929.  
18  
19

20 When a defendant voices a seemingly substantial complaint  
21 about counsel, the trial judge should make a thorough inquiry  
22 into the reasons for the defendant's dissatisfaction. The  
23 inquiry only need be as comprehensive as the circumstances  
24 reasonably permit, however. King v. Rowland, 977 F.2d 1354, 1357  
25 (9th Cir. 1992). In determining whether the trial judge should  
26 have granted a motion for substitution of counsel, the reviewing  
27 habeas court may consider the extent of the conflict, whether the  
28

1 trial judge made an appropriate inquiry into the extent of the  
2 conflict, and the timeliness of the motion to substitute counsel.  
3 Daniels v. Woodford, 428 F.3d 1181, 1197-98 (9th Cir. 2005). The  
4 ultimate inquiry is whether the Petitioner's Sixth Amendment  
5 right to counsel was violated. Schell v. Witek, 218 F.3d 1017,  
6 1024-25 (9th Cir. 2000). In other words, the habeas court  
7 considers whether the trial court's denial of or failure to rule  
8 on the motion "actually violated [the criminal defendant's]  
9 constitutional rights in that the conflict between [the criminal  
10 defendant] and his attorney had become so great that it resulted  
11 in a total lack of communication or other significant impediment  
12 that resulted in turn in an attorney-client relationship that  
13 fell short of that required by the Sixth Amendment." Id. at  
14 1026.  
15

16  
17 Habeas relief is not warranted here. The record shows that  
18 the trial court's denial of the motion was reasonable: the trial  
19 court inquired into the basis of Petitioner's motion, and assured  
20 him that Robinson provided correct legal advice. That Robinson  
21 would not allow Petitioner to act in a way contrary to court  
22 procedure does not show that there was an impediment that  
23 resulted in an attorney-client relationship that fell short of  
24 that required by the Sixth Amendment. Robinson informed his  
25 client that he could address the jury, but that he had to do so  
26 in a court-appropriate way.  
27

28 The state court's rejection of this claim was therefore

1 reasonable and is entitled to AEDPA deference. Accordingly, this  
2 claim is DENIED.

3 2. Appointment of Advisory Counsel

4 Petitioner's claim that the trial court violated his Sixth  
5 Amendment rights by failing to appoint advisory counsel is  
6 DENIED. There is no constitutional right to the appointment of  
7 advisory counsel. United States v. Kienenberger, 13 F.3d 1354,  
8 1356 (9th Cir. 1994). Petitioner has a right to represent  
9 himself or be represented by counsel and "[t]he failure of the  
10 trial court to give him a 'hybrid' representation to which he was  
11 not legally entitled did not violate his Sixth Amendment right to  
12 counsel." Yokely v. Hedgepeth, 801 F. Supp. 3d 925, 945 (C.D.  
13 Cal. 2011).

14 The state court's denial of this claim was therefore  
15 reasonable and is entitled to AEDPA deference. Accordingly, this  
16 claim is DENIED.

17 CONCLUSION

18 The state court's denial of Petitioner's claims did not  
19 result in a decision that was contrary to, or involved an  
20 unreasonable application of, clearly established federal law, nor  
21 did it result in a decision that was based on an unreasonable  
22 determination of the facts in light of the evidence presented in  
23 the state court proceeding. Accordingly, the petition is DENIED.

24 A certificate of appealability will not issue. Reasonable  
25 jurists would not "find the district court's assessment of the  
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constitutional claims debatable or wrong." Slack v. McDaniel,  
529 U.S. 473, 484 (2000). Petitioner may seek a certificate of  
appealability from the Court of Appeals.

The Clerk shall enter judgment in favor of Respondent, and  
close the file.

IT IS SO ORDERED.

DATED: February 2, 2016



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CLAUDIA WILKEN  
United States District Judge