IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY TYRONE SIMPSON, Petitioner, v. GARY SWARTHOUT, Respondent.	No. C 14-1060 LHK (PR) ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; DENYING CERTIFICATE OF APPEALABILITY

Petitioner, a state prisoner proceeding *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent was ordered to show cause why the petition should not be granted.[1] Respondent has filed an answer. Petitioner has filed a reply, which the court construes as a traverse. Having reviewed the briefs and the underlying record, the court concludes that petitioner is not entitled to relief, and DENIES the petition.

PROCEDURAL HISTORY

On October 6, 2010, petitioner was convicted after a jury trial of a lewd or lascivious act on a child under the age of 14 (Victim 2); sexual penetration by force, violence, duress, menace or fear of bodily injury (Victim 1); rape by force, violence, duress, menace or fear (Victim 1); and sexual battery (Victim 3). As to the charges regarding Victim 1 and Victim 2, the jury found

[1] This case was reassigned to the undersigned judge on October 9, 2014, after respondent declined to consent to magistrate judge jurisdiction.

true multiple victims enhancements. Petitioner admitted a prior strike and a prior felony conviction. On November 8, 2010, the trial court sentenced petitioner to a total term of 90 years to life plus 15 years, and 90 days in county jail for the misdemeanor sexual battery conviction.

On September 26, 2011, the California Court of Appeal reversed and remanded the case. It instructed the trial court to reduce petitioner's convictions regarding Victim 1 to the lesser included offenses of assault with intent to commit sexual penetration (count 2) and assault with intent to commit rape (count 3), and re-sentence petitioner. On November 30, 2011, the California Supreme Court denied review.

On September 10, 2012, the trial court re-sentenced petitioner, as instructed, to a total term of 33 years in prison. On November 14, 2013, the California Court of Appeal affirmed. On January 21, 2014, the California Supreme Court denied review.

Petitioner filed the underlying federal habeas petition on March 6, 2014.

BACKGROUND

The following facts are taken from the Court of Appeal's opinion in *People v. Simpson*, No. H036255, 2011 WL 4436758 (Cal. App. Sept. 26, 2011).

In May 2008, Victim 1 was 16 years old. *Id.* at *2. At that time, Victim 1 was living with her aunt and legal guardian, A. *Id.* Victim 1 referred to petitioner as "Uncle Tim." *Id.* Petitioner, who is Victim 2's father, sometimes lived with A. and Victim 1. *Id.* On May 11, 2008, Victim 1 was sleeping on the sofa, and awoke to find petitioner, who was naked, on top of her. She felt his fingers inside her vagina, noticed her pants and underwear had been removed, and her legs had been spread apart. *Id.* Victim 1 felt petitioner insert his penis about a quarter of the way into her vagina. *Id.* Victim 1 told petitioner to get off, and pushed him away. *Id.* Victim 1 grabbed her clothes and ran to her bedroom. *Id.* Petitioner entered her bedroom and told her that no one would believe her if she said anything and she should not tell anyone what happened. *Id.* Later that morning, Victim 1 told A. what had happened. *Id.* Victim 1 told A. that Victim 1 would not report it to the police, however, because Victim 1 was embarrassed and was worried about splitting up the family. *Id.*

On June 13, 2009, Victim 2, who was 13 at the time of trial, had fallen asleep on the

couch. *Id.* at *3. Around midnight or 1:00 a.m., Victim 2 woke up and felt petitioner touching her thigh over her clothing, and moving his hand toward her crotch. *Id.* Victim 2 was not sure whether petitioner's hand reached her crotch, but she kicked her legs at his hands and petitioner walked away. *Id.* Victim 2 fell back asleep after that. *Id.* When Victim 2 woke up, she told her mother what happened, and told her mother that her "private spot" itched. *Id.*

Victim 3 was visiting Victim 1 in June 2009. *Id.* One night, Victim 3 was watching television with Victim 1, but got tired and went to sleep in Victim 1's bedroom. *Id.* Around 4:00 a.m., Victim 3 woke up and petitioner was on the bed next to her, rubbing her bottom through her pajamas. *Id.* at *4. Victim 3 believes petitioner did so for about 15 seconds, but when she started to get up, petitioner quickly left the room. *Id.* Victim 3 went out to the living room where Victim 1 was sleeping, and slept next to her. *Id.* Between 7:00 and 8:00 a.m., Victim 3 woke Victim 1 up and explained to her what had happened. *Id.*

At trial, a prior victim testified that she met petitioner in 1997 when she was 15 years old at an apartment complex with her friends. *Id.* at *5. After petitioner drove the victim and her friends to get food, petitioner told the victim he wanted to talk to her. *Id.* She agreed, thinking that it would be a brief conversation. *Id.* Everyone except the victim and petitioner got out of the van, and petitioner drove down a few streets away from the apartment complex. *Id.* at *5-6. Petitioner asked the victim if she wanted to make some money, and the victim agreed as long as it was legal. *Id.* Petitioner drove onto the freeway and pulled over into a sparsely populated neighborhood. *Id.* Petitioner began touching the victim's leg, and told her that she had to show her loyalty. *Id.* The victim began to scream and cry, and petitioner told her that someone had sent him to kill her, and that she needed to prove her loyalty. *Id.* Petitioner raped the victim, and afterward, warned her not to say anything to anyone. *Id.*

The court will provide further relevant facts as necessary in the discussion section of this order.

STANDARD OF REVIEW

This court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). "Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

"[A] federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, the application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 409.

The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the United States Supreme Court as of the time of the state court decision. *Id.* at 412. Clearly established federal law is defined as "the governing legal principle or principles set forth by the [United States] Supreme Court." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

DISCUSSION

Petitioner raises the following claims in his petition: (1) the trial court erred in admitting evidence of a prior sexual offense; (2) the trial court erred in admitting evidence of child sexual

abuse accommodation syndrome (CSAAS); and (3) trial counsel rendered ineffective assistance by (a) failing to state all possible grounds to exclude CSAAS evidence, and (b) failing to object to the imposition of consecutive sentences.[2]

I. Admission of prior sexual offense evidence

Petitioner claims that the trial court should not have permitted a prior victim to testify about facts underlying petitioner's 1997 conviction for unlawful sexual intercourse by a person over 21 years old with a minor under 16 years old. Specifically, petitioner argues that the evidence should have been excluded as overly prejudicial. Petitioner states that the only similarity between the underlying convictions and the 1997 offense was that the victim in the 1997 offense was also underage at the time of the offense.

The California Court of Appeal considered this claim and rejected it. *Simpson*, 2011 WL 4436758, at *8.

The admission of evidence is not subject to federal habeas review unless a specific constitutional guarantee is violated or the error is of such magnitude that the result is a denial of the fundamentally fair trial guaranteed by due process. *See Henry v. Kernan*, 197 F.3d 1021, 1031 (9th Cir. 1999). The United States Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009). In fact, the United States Supreme Court has expressly left open the question of whether admission of propensity evidence violates due process. *Estelle v. McGuire*, 502 U.S. 62, 75 n.5 (1991). Based on the United States Supreme Court's reservation of this issue as an "open question," the Ninth Circuit has held that a petitioner's due process right concerning the admission of propensity evidence is not clearly established as required by AEDPA. *See Alberni v. McDaniel*, 458 F.3d 860, 866-67 (9th Cir. 2006); *accord Mejia v. Garcia*, 534 F.3d 1036, 1046 (9th Cir. 2008) (reaffirming *Alberni* and stating that there is "no Supreme Court precedent

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[2] Although petitioner raised two additional claims in his petition, on June 13, 2014, the court dismissed those claims (Claims 4 and 5) for failure to state a cognizable federal habeas claim. (Docket No. 5.)

establishing that admission of propensity evidence, as here, to lend credibility to a sex victim's allegations, and thus indisputably relevant to the crimes charged, is unconstitutional."). As federal courts may grant habeas relief only if a state court decision is contrary to, or an unreasonable application of clearly established federal law as determined by the United States Supreme Court, *see* 28 U.S.C. § 2254(d)(1), there can be no federal habeas relief on this claim because there is no clearly established federal law. Therefore, a state court's rejection of such a claim cannot be grounds for federal habeas relief. *Larson v. Palmateer*, 515 F.3d 1057, 1066 (9th Cir. 2008).

Furthermore, courts have "routinely allowed propensity evidence in sex-offense cases, even while disallowing it in other criminal prosecutions." *United States v. LeMay*, 260 F.3d 1018, 1025 (9th Cir. 2001)."

In sum, because the United States Supreme Court expressly has left open the question presented in the petition, the state court's rejection of petitioner's claim that the trial court's admission of propensity evidence under section 1108 violated his due process rights was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law.[3]

II. Admission of CSAAS evidence

Petitioner claims that the trial court violated his right to due process when it allowed Carl Lewis, an expert on the subject of CSAAS, to testify about CSAAS because the testimony was improper and irrelevant expert testimony, and was overly prejudicial.

At trial, Lewis testified that CSAAS "is a tool used by those dealing with child sexual

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[3] To the extent petitioner asserts that Section 1108 is unconstitutional, that claim is not properly before the court because petitioner raises it for the first time in his traverse. (Traverse at 3-4.) A traverse is not the proper pleading to raise additional grounds for relief. In order for the respondent to be properly advised of additional claims, they should be presented in an amended petition or in a statement of additional grounds. *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). Nonetheless, even assuming this claim is properly before the court, it is without merit. There is no clearly established law holding that Section 1108 is unconstitutional. Moreover, courts have considered the constitutionality of Section 1108 or its federal counterpart, Rule 414, and have consistently upheld it. *See, e.g.*, *LeMay*, 260 F.3d at 1025; *People v. Falsetta*, 21 Cal. 4th 903 (1999).

abuse intervention to not automatically rule out the possibility of such abuse due to preconceived notions of how a child victim should behave. There are five categories which comprise CSAAS: secrecy; helplessness; entrapment and accommodation; delayed, conflicted, unconvincing disclosure; and retraction." *Simpson*, 2011 WL 4436758, at *6. Lewis described each category, and explained that the categories were "intended to assist in explaining unexpected circumstances which occur regularly in cases of child sexual abuse." *Id.* at *7.

The California Court of Appeal rejected petitioner's claim. It stated that petitioner's argument that expert testimony on CSAAS was unnecessary because the behavior of child abuse victims was common knowledge of jurors is contrary to California case law. *Id.* at *13. Further, the state appellate court recognized that "testimony concerning CSAAS was helpful in explaining the different stages of reaction that some victims progress through. Jurors may have an understanding that victims of abuse are reluctant to report the offense, but they may not understand the reasons for the delayed reporting, or why the victims did not retaliate. Accordingly, the trial court could have reasonably found that the expert testimony would add to the jurors' common fund of information regarding the reactions of abuse victims." *Id.* (citation omitted). Finally, the state appellate court rejected petitioner's claim that the admission was overly prejudicial. *Id.* at *14. It reasoned that the testimony was not specific to the facts of this case, but as a general explanation of how child abuse victims may act. *Id.* It also noted that the trial court specifically instructed the jury twice on the proper use of the evidence. *Id.*

Under federal review, "[t]he admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process." *Holley*, 568 F.3d at 1101. Petitioner cites to no United States Supreme Court authority to support his claim that the trial court's decision to admit the CSAAS evidence violated his right to due process.

In addition, the Ninth Circuit has found that the admission of CSAAS evidence in child-sexual-abuse cases in federal cases is proper when "the testimony concerns general characteristics of the victims and is not used to opine that a specific child is telling the truth." *Brodit v. Cambra*, 350 F.3d 985, 991 (9th Cir. 2003) (citing *United States v. Bighead*, 128 F.3d 1329 (9th Cir. 1997) (per curiam)). Here, the trial court only allowed the CSAAS expert to

testify about the general nature of the syndrome. *Simpson*, 2011 WL 4436758, at *14. The expert explained to the jury that he did not interview any of the witnesses, investigate this case, or review any reports or transcripts from this case. *Id.* at *7. Thus, the CSAAS testimony complied with the limits set forth by the Ninth Circuit in *Brodit*, and the admission of the testimony did not violate petitioner's due process rights. *See, e.g.*, *Manson v. Grounds*, No. 12-6043 CRB (PR), 2014 WL 688614, at *7-8 (N.D. Cal. Feb. 20, 2014) (rejecting petitioner's challenge to the admission of CSAAS evidence as foreclosed by *Brodit*).

Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law.

III. Ineffective assistance of counsel

Petitioner alleges that counsel rendered ineffective assistance by: (a) failing to state all possible grounds for the exclusion of CSAAS evidence, and (b) failing to object to the imposition of consecutive sentences.

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Normally, in order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish two things. First, he must establish that counsel's performance was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing professional norms. *Id.* at 687-88. Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

A. Failing to state all possible grounds for the exclusion of CSAAS evidence

Petitioner does not elaborate on his claim. A review of the record shows that counsel objected to the inclusion of CSAAS evidence on the basis of relevance and California Evidence Code § 352. (Resp. Ex. 3 at 47.) During a hearing on the prosecution's motion to admit the CSAAS evidence, counsel also commented that expert testimony on CSAAS was unnecessary

because the subject matter was not beyond the common knowledge of the jurors. (*Id.* at 47-48.) However, counsel did not formally object on this basis.

Petitioner does not specify what other grounds counsel should have raised to exclude the CSAAS evidence. In addition, on direct appeal, petitioner conceded that the CSAAS evidence "was in accordance with guidelines set forth in applicable current California caselaw." *Simpson*, 2011 WL 4436758, at *13. Thus, petitioner fails to establish that defense counsel's failure to raise all possible grounds for the exclusion of CSAAS testimony fell below an objective standard of reasonableness. *See Toomey v. Bunnell*, 898 F.2d 741, 743 (9th Cir. 1990) (stating that a habeas petitioner has the burden of showing that counsel's performance was deficient); *see also Jones v. Gomez*, 66 F.3d 199, 205 (9th Cir. 1995) (concluding that conclusory or bald allegations of ineffective assistance of counsel do not warrant federal habeas relief).

Even assuming that counsel's performance was somehow deficient by failing to object to the CSAAS evidence on other unspecified grounds, petitioner also has the burden to show that counsel's performance was prejudicial. *See Rios v. Rocha*, 299 F.3d 796, 813 n.23 (9th Cir. 2002) (rejecting two ineffective assistance of counsel claims based on petitioner's failure to produce evidence of prejudice). Petitioner has not done so. The state appellate court rejected petitioner's ineffective assistance of counsel claim, stating that even if counsel had formally objected to the CSAAS testimony on the basis that expert testimony is no longer needed on this subject, the objection would have been meritless. *Simpson*, 2011 WL 4436758, at *13. Further, petitioner has failed to set forth any evidence suggesting that, had petitioner's counsel raised any other ground for the exclusion of CSAAS evidence, the outcome of trial would have been different.

Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law.

B. Failure to object to imposition of consecutive sentences

Petitioner claims that counsel rendered ineffective assistance when counsel failed to object to the imposition of consecutive sentences as to counts 2 and 3, both of which concerned Victim 1, imposed by the trial court after remand. Specifically, petitioner argues that counsel

should have argued that the trial court failed to establish a factual predicate for imposing consecutive sentences.

The California Court of Appeal considered and rejected this claim. Applying California law, it stated that in order for a trial court to sentence a defendant to a consecutive term under California Penal Code § 667.6(c), the trial court must state its reasons for the record. *People v. Simpson*, No. H038847, 2013 WL 6019889, *5-6 (Cal. App. Nov. 13, 2013). Further, a consecutive sentence is proper even if supported by only one aggravating factor. *Id.* at *6. Reviewing the record, the state appellate court concluded that the trial court expressly stated that it was choosing to sentence petitioner under section 667.6(c), and was going to impose a consecutive term "based on the fact that [the offenses] were separately manifested intents to do separate acts of violence against a single victim." *Id.* at *7. The state appellate court also noted that even if the trial court's statement of reasons was insufficient, because "numerous aggravating factors" were present, there was no reasonable probability that the outcome would have been different even if counsel had objected to an insufficient statement of reasons. *Id.*

As an initial matter, the United States Supreme Court has not decided what standard should apply to counsel's performance in non-capital sentencing proceedings. *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1244 (9th Cir. 2005). *Strickland* declined to "'consider the role of counsel in an ordinary sentencing, which . . . may require a different approach to the definition of constitutionally effective assistance,'" and no later United States Supreme Court decision has done so, either. *Id.* (quoting *Strickland*, 466 U.S. at 686). Consequently, there is no clearly established United States Supreme Court precedent governing ineffective assistance of counsel claims in a noncapital sentencing context. *See Davis v. Grigas*, 443 F.3d 1155, 1158-59 (9th Cir. 2006); *Cooper-Smith*, 397 F.3d at 1244-45; *cf. Daire v. Lattimore*, 780 F.3d 1215, 1221-22 (9th Cir. 2015) (intimating that *Davis* and *Cooper-Smith*'s conclusion should be re-examined in light of post-*Strickland* United States Supreme Court cases, but recognizing that "we are bound by prior panel opinions and can only reexamine them when the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority") (internal quotation marks omitted). Because there is no clearly established United

States Supreme Court standard to analyze ineffective assistance of counsel claims in a noncapital sentencing, petitioner is not entitled to habeas relief on this ground.

Alternatively, even assuming that *Strickland* applies to this claim, petitioner cannot demonstrate that counsel's performance was deficient, or that petitioner was prejudiced. In light of the state appellate court's conclusion that, based on state law, the trial court's statement of reasons was sufficient to impose consecutive sentencing, and that any objection trial counsel could have made was unlikely to change the outcome, the court cannot say that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different.

Accordingly, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law.

CONCLUSION

The petition for writ of habeas corpus is DENIED.[4]

The federal rules governing habeas cases brought by state prisoners require a district court that denies a habeas petition to grant or deny a certificate of appealability ("COA") in its ruling. *See* Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. Petitioner has not shown "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a COA is DENIED.

The clerk is instructed to enter judgment in favor of respondent, terminate all pending motions, and close the file.

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[4] Petitioner's motion for an evidentiary hearing and motion to supplement the reply are denied. In light of the court's denial of this federal habeas petition, the request for an evidentiary hearing is moot. In petitioner's motion to supplement the reply, petitioner asserts that he has new evidence to support his claim that his right to due process was violated. Petitioner provides a copy of his "new evidence" by attaching a copy of California Senate Bill No. 1058, which was approved, and codified in California Penal Code § 1473. California Penal Code § 1473 sets forth who is authorized to prosecute a state writ of habeas corpus. It is not relevant to this federal proceeding. Thus, petitioner's motion to supplement the reply is denied.

IT IS SO ORDERED.

DATED: 8/5/2015

Lucy H. Koh

LUCY H. KOH
United States District Judge