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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ANTHONY BOGARIN,
Petitioner,
v.
S. HATTON, Warden, et al.,
Respondents.

Case No.: 16cv2793-BTM (MSB)

ORDER:

(1) ADOPTING THE FINDINGS AND CONCLUSIONS OF UNITED STATES MAGISTRATE JUDGE;

(2) OVERRULING PETITIONER’S OBJECTIONS;

(3) DENYING PETITION FOR A WRIT OF HABEAS CORPUS; and

(4) ISSUING A CERTIFICATE OF APPEALABILITY AS TO ALL CLAIMS

Petitioner Anthony Bogarin is a state prisoner proceeding pro se and in forma pauperis with a First Amended Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 29.) He challenges his San Diego County Superior Court conviction of attempted first degree burglary for which he was sentenced to 35 years to life in prison, enhanced by two prior burglary convictions. (Id. at 1-2.) He claims insufficient evidence

1 supports the element of attempted burglary requiring a direct but ineffective step toward
2 the commission of a burglary (claim one), the admission of his two prior burglary
3 convictions to show intent unfairly portrayed him as a bad person with a criminal
4 disposition and were irrelevant since the defense conceded intent (claim two), and defense
5 counsel was ineffective in conceding intent, presenting a legally invalid defense, and
6 forgoing a viable defense (claim three). (Id. at 6-20.)

7 Respondent answers that the state court adjudication of claims one and two is neither
8 contrary to, nor an unreasonable application of, clearly established federal law, nor based
9 on an unreasonable determination of the facts, and that although state court remedies are
10 not exhausted as to claim three it fails on the merits. (ECF No. 42 at 13-22.) Petitioner
11 replies in his Traverse that he properly exhausted state court remedies as to claim three and
12 requests an evidentiary hearing. (ECF No. 47 at 6-19.)

13 United States Magistrate Judge Michael S. Berg has filed a Report and
14 Recommendation (“R&R”) finding that claim three is exhausted and an evidentiary hearing
15 is unwarranted, and recommending federal habeas relief be denied because the state court
16 adjudication of all three claims is neither contrary to, nor an unreasonable application of,
17 clearly established federal law nor based on an unreasonable determination of the facts.
18 (ECF No. 48.) Petitioner has filed Objections to the R&R contending that the denial of
19 habeas relief on the merits of his claims is fundamentally unfair, repeating his request for
20 an evidentiary hearing, and requesting a Certificate of Appealability. (ECF No. 50.)

21 The Court has reviewed the R&R pursuant to 28 U.S.C. § 636(b)(1), which provides
22 that: “A judge of the court shall make a de novo determination of those portions of the
23 report or specified proposed findings or recommendations to which objection is made. A
24 judge of the court may accept, reject, or modify, in whole or in part, the findings or
25 recommendations made by the magistrate judge. The judge may also receive further
26 evidence or recommit the matter to the magistrate judge with instructions.” 28 U.S.C.
27 § 636(b)(1). Having conducted a de novo review of the R&R, the Court **ADOPTS** the
28 Magistrate Judge’s findings and conclusions in full, **OVERRULES** Petitioner’s

1 Objections, **DENIES** the First Amended Petition for a Writ of Habeas Corpus, and
2 **ISSUES** a Certificate of Appealability as to all claims.

3 As recounted in the R&R, the evidence showed that Petitioner knocked and rang the
4 doorbell of a house about 25 times, jiggled the door knob and pushed against the door, and
5 walked to the side of the house where he moved trash cans from in front of a gate leading
6 into the backyard, which frightened the sole occupant at the time, Christina Galvan, into
7 calling the police. (ECF No. 48 at 3-4.) The police encountered Petitioner, who matched
8 Galvan’s description, riding a bicycle about a block away, who told them he was looking
9 for work and had only knocked once on the door. (Id.) Despite defense counsel’s pre-trial
10 offer to concede Petitioner initially harbored the intent to burglarize the house but did not
11 take a direct step toward a burglary, and despite defense counsel’s opening statement that
12 “intent is not the issue,” the prosecutor was allowed to introduce evidence of two prior
13 burglary convictions which the jury was instructed and reminded by both attorneys could
14 only be considered for their similarities to the instant crime to show intent to commit
15 burglary. (Id. at 5, 24.) The victim of the first prior testified she and her six-year old
16 daughter were home when a man rang the doorbell at least 12 times, knocked on the door
17 at least five times, and repeatedly jumped up to look through the window on top of her
18 door, and that she and her daughter hid underneath a car in the garage and called the police.
19 (Id. at 5.) Petitioner was arrested inside the house, which he had tried to enter by breaking
20 a bathroom window while standing on garbage cans before climbing over a gate into the
21 backyard and entering through a sliding door. (Id.) The second prior involved a man who
22 returned home to find broken glass on the floor and Petitioner inside his house. (Id.)

23 The prosecutor argued that Petitioner’s acts of attempting to ascertain whether the
24 house was occupied by knocking and ringing the doorbell, attempting to force his way
25 through the front door, and attempting to enter the backyard by moving the trash cans away
26 from the gate, were direct steps toward a burglary. (Id. at 5-6.) Defense counsel argued in
27 closing that Petitioner “at least at some point was intending to do something, intending to
28 do something against the law, but he did not follow through, and therefore he is not guilty

1 of attempted burglary,” and argued that unlike his prior offenses he did not jump a gate,
2 break a window, enter the backyard or the house, and knocking on a door and ringing a
3 doorbell is at best an indication of planning or intent, not a direct step toward a burglary.
4 (Id. at 6.) Counsel argued that even if Petitioner initially intended to burglarize the house
5 as he had done in the past, he changed his mind and left freely and voluntarily before he
6 committed a direct step towards a burglary. (Id.)

7 Petitioner claims here that insufficient evidence was presented to support an element
8 of attempted burglary (requiring proof beyond a reasonable doubt that he took a direct but
9 ineffective step toward the commission of a burglary which would ordinarily result in a
10 completed crime unless interrupted), arguing that the evidence showed he abandoned any
11 burglary attempt independent of any outside influence or occurrence prior to committing a
12 direct step (claim one), he was denied due process by the introduction of evidence of his
13 two prior burglary convictions because they were only relevant to intent which the defense
14 conceded and therefore unfairly showed he was bad person with a criminal disposition
15 (claim two), and he received ineffective assistance of counsel due to defense counsel:
16 (a) presenting a nonviable defense of conceding he approached the house with the intent of
17 burglarizing and abandoning the attempt before taking a direct but ineffective step toward
18 committing a burglary, which (in contrast to his argument in claim one), amounted to a
19 concession of guilt due to the strong evidence he took a direct step, and (b) failed to argue
20 he was in the neighborhood with a work crew all week and had knocked on the door
21 believing he was reporting for work (claim three). (ECF No. 29 at 6-20.)

22 The state appellate court opinion, the last reasoned state court decision as to claims
23 one and two, states:

24 The evidence supports findings Bogarin approached Galvan’s house
25 and, over a period of five minutes, rang its doorbell about 25 times, repeatedly
26 knocked on the front door, jiggled the doorknob, and leaned or pushed into
27 the door with his shoulder about four times. The evidence also supports a
28 finding Bogarin then went to the side of the house and moved two trash cans
that were positioned directly in front of a locked gate before leaving the
premises. The jury could reasonably infer Bogarin had the specific intent to

1 burglarize Galvan's house when he approached it. It could also reasonably
2 infer that he committed direct but ineffectual acts toward the commission of
3 that burglary when he presumably attempted to ascertain whether anyone was
4 home by repeatedly ringing the doorbell and knocking on the front door,
5 jiggled the doorknob and leaned or pushed into the door with his shoulder in
6 an unsuccessful attempt to open the door, and moved the two trash cans in
7 front of the side gate in an unsuccessful attempt to enter the backyard through
8 the gate, which he discovered was locked. Considering the evidence and
9 inferences therefrom favorably to support the jury's verdict, we conclude the
10 jury reasonably found Bogarin committed direct but ineffectual acts toward
11 the commission of a burglary of Galvan's house. The jury could reasonably
12 find, contrary to Bogarin's assertion, that his acts were more than mere
13 preparation for a burglary of Galvan's house.

14 Bogarin also argues the evidence is insufficient to support a finding he
15 took a direct step toward the commission of a burglary because there is no
16 evidence his completion of the burglary was prevented by an extraneous or
17 outside influence or circumstance (e.g., a discovery or being frightened off by
18 anyone) and instead supports only an inference he voluntarily abandoned his
19 plan to burglarize Galvan's house before committing any direct step toward
20 its commission. However, as stated above, voluntary abandonment after a
21 direct step toward commission of a burglary is not a defense to a charge of
22 attempted burglary. (*Dillon*, supra, 34 Cal.3d at pp. 454-455.) In any event,
23 the jury could reasonably infer Bogarin voluntarily abandoned his efforts to
24 burglarize Galvan's house because his attempt was frustrated by the locked
25 front door and then the locked side gate.

26 (ECF No. 11-10, Lodgment No. 8, People v. Bogarin, No. D067390, slip op. at 4-9.)

27 With respect to claim two, the appellate court found:

28 Based on our review of the record, we conclude Bogarin probably
would not have obtained a more favorable verdict had the evidence of his two
prior burglaries been excluded. In his counsel's opening statement and
closing argument, the element of specific intent was, in effect, conceded. On
the charge of attempted burglary, the crux of the case therefore was whether
he took any direct but ineffectual step toward the commission of a burglary.
The jury heard the testimony of Galvan and her father, which provided strong
proof that Bogarin's actions at Galvan's house were not merely in preparation
for a burglary, but instead were direct steps toward the commission of a
burglary. The jury could reasonably infer Bogarin repeatedly rang the
doorbell and knocked on the door to ascertain whether anyone was inside the
house. The jury could further reasonably infer he jiggled the doorknob and

1 pushed or leaned against the door four times in an attempt to break into the
2 house. The jury could also reasonably infer that when he was unsuccessful in
3 doing so, he went around the side of the house and moved the two trash cans
4 in an attempt to access the backyard and house through the side gate, but
5 abandoned his attempt to burglarize the house after finding the gate was
6 locked. It is unlikely the evidence of Bogarin's two prior burglaries would
7 have changed the jury's inferences regarding his actions in the instant case.
8 Alternatively stated, it is highly unlikely the jury would instead have inferred
9 all of those actions by Bogarin were merely in preparation for, and not direct
10 steps toward, the commission of a burglary. We conclude any error by the
11 court in admitting the evidence of his two prior burglaries was not prejudicial
12 and does not require reversal of his conviction of attempted burglary. (*People*
13 *v. Rivera, supra*, 41 Cal.3d at p. 393; *People v. Watson, supra*, 46 Cal.2d at p.
14 836.)

15 (ECF No. 11-10, Lodgment No. 8, People v. Bogarin, No. D067390, slip op. at 9-17.)

16 The Magistrate Judge correctly found that Petitioner had failed to satisfy the
17 provisions of 28 U.S.C. § 2254(d) with respect to the state appellate court adjudication of
18 claim one because that adjudication is consistent with Jackson v. Virginia, 443 U.S. 307,
19 324 (1979) (holding that federal habeas petitioners bear a heavy burden of demonstrating
20 the evidence is so lacking that no rational trier of fact would convict), and was not based
21 on an unreasonable determination of the facts. (ECF No. 48 at 9-15.) The Magistrate
22 Judge also correctly found Petitioner could not satisfy 28 U.S.C. § 2254(d)(1) with respect
23 to claim two because there is no clearly established federal law regarding the admission of
24 propensity evidence, and that he did not satisfy 28 U.S.C. § 2254(d)(2) because the factual
25 findings of the state court were objectively reasonable, but even if he could satisfy either
26 provision he had not established a federal constitutional violation because the admission of
27 his prior burglary convictions was not fundamentally unfair since the jury was instructed
28 and repeatedly reminded they were only relevant to the issue of intent to commit burglary,
which was conceded by the defense and established by other evidence, and because defense
counsel used them to support a defense that his current actions were so unlike his prior
burglaries that he had abandoned his burglary attempt in this case prior to making a direct
act toward a burglary. (Id. at 15-25.) The objections to claims one and two are overruled.

1 With respect to claim three, ineffective assistance of counsel for presenting a defense
2 conceding Petitioner approached the house with the intent to burglarize it but contending
3 he abandoned the effort prior to taking a direct step towards a burglary, and failing to argue
4 he approached the house looking for work, the Court adopts the findings and conclusions
5 of the Magistrate Judge that this claim is exhausted and that defense counsel’s strategy
6 amounted to an informed trial tactic precluding federal habeas relief under 28 U.S.C.
7 § 2254(d). (ECF No. 48 at 30-35.) Petitioner argues in his Objections that denial of this
8 claim is fundamentally unfair because counsel should have presented a defense that he
9 knocked on the door looking for work rather than conceding he intended to burglarize the
10 house but eventually abandoned the attempt. (ECF No. 50 at 8-12.) In light of the contrast
11 between his statement to the police when he was initially contacted that he only knocked
12 on the door once, and the occupant’s testimony that he knocked and rang the doorbell 25
13 times each before walking around to the side of the house, which itself is strong evidence
14 of intent to burglarize, he has not overcome his heavy burden of demonstrating that
15 informed, tactical decisions by counsel of this nature are virtually unassailable. See
16 Strickland v. Washington, 466 U.S. 668, 689 (1984). The Court overrules Petitioner’s
17 objections and denies habeas relief as to claim three for the reasons set forth in the R&R.

18 The Magistrate Judge correctly found that an evidentiary hearing is not warranted
19 because Petitioner’s claims can be denied without further development of the record. (ECF
20 No. 48 at 35.) Petitioner asserts in his Objections that an evidentiary hearing may be in
21 order if he has presented a viable claim. (ECF No. 50 at 12.) The Court overrules
22 Petitioner’s objection in this regard and declines to hold an evidentiary hearing for the
23 reasons set forth in the R&R.

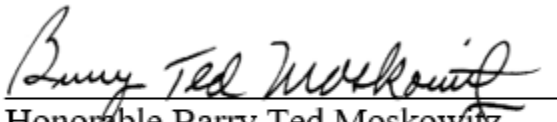
24 Finally, Petitioner states that “his issues may warrant further inquiry, and reasonable
25 jurists could debate whether he has made a case for further proceedings.” (Id.) The Court
26 construes this as a request for a Certificate of Appealability. “[T]he only question [in
27 determining whether to grant a Certificate of Appealability] is whether the applicant has
28 shown that jurists of reason could disagree with the district court’s resolution of his

1 constitutional claims or that jurists could conclude the issues presented are adequate to
2 deserve encouragement to proceed further.” Buck v. Davis, 580 U.S. ___, 137 S.Ct. 759,
3 773 (2017). The standard required for granting a Certificate of Appealability is “relatively
4 low,” and “[t]he Court must resolve any doubts regarding the propriety of a COA in the
5 petitioner’s favor.” Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002). The Court
6 issues a Certificate of Appealability as to all claims.

7 **CONCLUSION AND ORDER**

8 The Court **ADOPTS** the findings and conclusions of the Magistrate Judge in full,
9 **OVERRULES** Petitioner’s Objections, **DENIES** the First Amended Petition for a Writ of
10 Habeas Corpus for the reasons set forth in the R&R, and **ISSUES** a Certificate of
11 Appealability as to all claims in the First Amended Petition.

12 Dated: June 22, 2020

13 
14 Honorable Barry Ted Moskowitz
15 United States District Judge
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