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ORDER OF THE NINTH CIRCUIT DENYING PENDING MOTIONS AS MOOT (JANUARY 28, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEREMY J. GODWIN,

Petitioner-Appellant,

v.

DAVE DAVEY, Warden,

Respondent-Appellee.

No. 18-55236

D.C. No. 3:16-cv-02650-BAS-KSC
Southern District of California, San Diego

Before: CANBY and GRABER, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

ORDER OF THE DISTRICT COURT OF CALIFORNIA (FEBRUARY 16, 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEREMY J. GODWIN,

Petitioner,

v.

DAVE DAVEY, Warden,

Respondent.

Case No. 16-cv-2650-BAS-KSC

Before: Hon. Cynthia BASHANT,
United States District Judge.

Petitioner Jeremy J. Godwin filed a Petition for a Writ of Habeas Corpus (the "Petition") pursuant to 28 U.S.C. § 2254. (ECF No. 1.) Presently before the Court is a Report and Recommendation (R&R) from Magistrate Judge Karen Crawford recommending denial of the Petition. (ECF No. 13.) Petitioner has filed an objection ("Objection") to portions of the R&R and also requests a certificate of appealability in connection with a denial of the Petition. (ECF No. 14.) For the reasons stated herein, the Court overrules the Objection, approves and adopts the R&R in its entirety,

denies the Petition, and denies the Petitioner a certificate of appealability.

I. Background

In 2013, Petitioner was convicted by a jury in the California Superior Court of two counts of aggravated sexual assault of a child with oral copulation, four counts of forcible lewd act on a child, and one count of child molestation with a prior conviction. (ECF No. 13 at 2.) He was sentenced to 334 years to life. (*Id.*) Petitioner appealed his judgment of conviction to the California Court of Appeal on November 1, 2013, in which his conviction was affirmed and his sentence modified to dismiss the habitual sexual offender offense. (*Id.*) The California Supreme Court subsequently denied Petitioner's appeal of that ruling. (*Id.*)

On October 26, 2016, Petitioner filed the instant Petition, raising multiple claims for relief, including violations of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights. (ECF No. 1.) Respondent filed a response to the Petition and submitted a lodgment of relevant exhibits. (ECF Nos. 9, 10.) Petitioner filed a traverse to this Response. (ECF No. 12.)

After a review of all materials in this case, Judge Crawford issued an R&R recommending denial of the Petition on all grounds raised. (ECF No. 13.) Objections to the R&R were due within 45 days of its issuance. (*Id.*) Petitioner timely filed his Objection. (ECF No. 14.) No replies were filed to that objection, and no further objections to the R&R were filed. The Court now considers the R&R and Petitioner's Objection.

II. Legal Standard

The Court reviews de novo those portions of an R&R to which objections are made. 28 U.S.C. § 636-(b)(1). The Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.* "The statute makes it clear," however, "that the district judge must review the magistrate judge's findings and recommendations *de novo* if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in original); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (concluding that where no objections were filed, the district court had no obligation to review the magistrate judge's report). "Neither the Constitution nor the statute requires a district judge to review, de novo, findings and recommendations that the parties themselves accept as correct." *Reyna-Tapia*, 328 F.3d at 1121. This legal rule is well-established in the Ninth Circuit and this district. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005) ("Of course, de novo review of a[n] R & R is only required when an objection is made to the R & R."); *Nelson v. Giurbino*, 395 F. Supp. 2d 946, 949 (S.D. Cal. 2005) (Lorenz, J.) (adopting report in its entirety without review because neither party filed objections to the report despite the opportunity to do so); *see also Nichols v. Logan*, 355 F. Supp. 2d 1155, 1157 (S.D. Cal. 2004) (Benitez, J.).

III. Discussion

A. The Court Overrules Petitioner's Objection

The Objection raises four challenges to the R&R. The Court conducts a *de novo* review of those portions

of the R&R that Petitioner has challenged and overrules the Objection as to each.

1. Challenges to the Sufficiency of the Evidence Underlying Convictions

Petitioner objects to the R&R's conclusions regarding two challenges he raises to the sufficiency of the evidence underlying his convictions for duress and sexual assault. Petitioner's challenges turn on the provision of federal habeas relief under *Jackson v. Virginia*, 443 U.S. 307 (1979). In a *Jackson* habeas challenge to the sufficiency of the evidence supporting a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318-19. A finding that the evidence was insufficient "is in effect a determination that the government's case was so lacking that the trial court should have entered a judgment of acquittal." *McDaniel v. Brown*, 558 U.S. 120, 131 (2010). Review of a *Jackson* challenge is doubly deferential not only because deference must be afforded to the factfinder, but because deference is also due to determinations of state courts. *See Coleman v. Johnson*, 566 U.S. 650, 651 (2012) ("*Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference."); *see also* 28 U.S.C. § 2254(d). In addition, under AEDPA, a federal habeas court's inquiry is "even more limited" because the court "ask[s] only whether the state court's decision was contrary to or reflected an unreasonable application of *Jackson* to the facts of a particular case." *Emery v. Clark*, 643 F.3d 1210, 1213-14 (9th Cir. 2011). With these principles in mind, the Court turns to Petitioner's objections to

the R&R's conclusions regarding this evidence sufficiency challenges.

a. Sufficiency of Evidence Regarding Duress

Petitioner objects to R&R's conclusion that the California Court of Appeal's decision that a rational juror could infer duress was not objectively unreasonable. (ECF No. 14 at 1.) Petitioner asserts that "the court unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979) to the facts in this case." (*Id.* at 2.) He claims that there was insufficient evidence that he engaged in behavior that constitutes duress under California Penal Code Section 288, which he states "requires purposeful behavior to coerce a minor into sexual acts." (*Id.)* Specifically, Petitioner contends that there was no testimony that the appellant engaged in such purposeful behavior. The Court overrules Plaintiff's objection.

The requirements of California law are clear. California Penal Code 288(a) makes it unlawful for person to "willfully and lewdly commit[ ] any lewd or lascivious act" on a minor with the "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." Cal. Pen. Code § 288(a). Subsection (b) provides additional penalties if that crime is committed with the use of, *inter alia*, force, duress, or fear of "immediate and unlawful bodily injury on the victim." Cal. Pen. Code § 288(b)(1). Duress is defined as "the *use* of a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]." *People v. Soto*, 245 P.3d 410, 421

n.9 (Cal. 2011) (emphasis added). A finding of duress under Subsection (b) is to be made by considering the totality of the circumstances, taking into account, for example, the age of the victim, the relationship between the victim and the defendant, the relevant size difference, and the age disparity. *See People v. Veale*, 160 Cal. App. 4th 40, 46 (Cal. Ct. App. 2008).

Here, the R&R correctly concludes that, under the totality of the circumstances presented, the California Court of Appeal's determination that there was sufficient evidence for the jury to convict Petitioner of duress was not objectively unreasonable. (ECF No. 13 at 11-14.) In particular, the Court of Appeal identified Doe's testimony that she feared harm from the Petitioner and felt incapable of telling the Petitioner "No." (ECF No. 10-45 at 6059, 6074, 6096-97, 6104.) The Court of Appeal also observed that Doe described Petitioner's volatile and violent behavior against her and her mother. (ECF No. 10-8 at 12.) The Court of Appeal noted that the sexual abuse against Doe started when she was a young child and continued until she was 14. (*Id.*) The Court of Appeal determined that the jury could find that Petitioner "psychologically coerced" Doe "by creating an atmosphere of fear in the family so that she would be intimidated, compliant, and secretive about the sexual activity." (*Id.* at 12-13.) Petitioner offers no challenge to this testimony and the inferences that a rational trier of fact may draw from it, other than to cursorily assert that it cannot support his conviction. This Court is not convinced. As the R&R correctly concluded, this Court must presume that the trier of fact resolved any competing inferences from the evidence adduced in favor of convicting the Petitioner. (ECF No. 13 at 14.)

Accordingly, the Court approves and adopts the R&R's recommendation to deny habeas relief based on insufficient evidence from which a rational juror could infer duress. (ECF No. 13 at 14.)

b. Sufficiency of Evidence for Aggravated Sexual Assault Conviction

Petitioner also objects to the R&R's conclusion regarding the sufficiency of the evidence underlying his conviction for aggravated sexual assault. (ECF No. 14 at 2.) Petitioner asserts that Doe's testimony was not refreshed and the state court's finding to the contrary is based on an unreasonable interpretation of the record. (ECF No. 14 at 2.) The basis for this contention is that although Doe testified that there was a time when the Petitioner orally copulated her, she did not testify about when the incident occurred and could not say where in or at which house the incident occurred. (*Id.*) The Court overrules Petitioner's objection.

The R&R expressly considered Petitioner's argument that certain evidence was required for the jury to convict him and correctly rejected that argument. Under *People v. Jones*, general testimony from a minor subject to repeated acts of molestation may support a conviction if the victim can testify to: (1) the kind of acts committed, (2) the number of acts committed with sufficient certainty, and (3) the general time period when the acts occurred. 51 Cal. 3d 294, 316 (Cal. 1990). Petitioner acknowledges this standard but asserts that "in this case" the jury needed to make specific findings regarding location of the challenged acts. (ECF No. 12 at 7.) Petitioner's objection to the R&R is premised on his view about the law requires

for a conviction. As the R&R correctly concluded, Petitioner's objection that Doe did not testify where in the house the incident occurred is premised on a requirement that simply does not exist under *Jones*. (ECF No. 13 at 16.)

Petitioner's argument regarding the time period of the acts is also unavailing and the Court overrules his objection on this point. As the R&R observed, Doe testified as to the general time period when the acts occurred, specifically that she recalled being nine to ten years old, and that she did not recall any other acts around that time. (*Id.*) Here, Petitioner's argument appears to be that Doe was required to testify as to a precise date range of "between July 1, 2002 and November 19, 2003." (ECF No. 12 at 7.) This is also not required under California law. *Jones* identified as examples of permissible testimony statements like "the summer before my fourth grade" or "during each Sunday morning after he came to live with us." 51 Cal. 3d at 316. Doe's testimony regarding her age is akin to these examples. The R&R correctly concluded that Doe's testimony satisfied the *Jones* general time requirement. The R&R also observed that the prosecution chose to use the location of the molestation and when the family lived there as a chronological reference point for the count. (ECF No. 13 at 16.) The R&R correctly determined that the Court of Appeal did not err when it concluded that a rational juror could ascertain how old Doe was when she lived at certain locations. (*Id.*) Accordingly, the Court approves and adopts the R&R's recommendation to deny habeas relief on the basis of insufficient evidence to support Petitioner's conviction for aggravated sexual assault. (*Id.* at 17.)

2. Admission of Details Surrounding Prior Conviction as Violation of Due Process

Petitioner objects to the R&R's conclusion that the admission of details regarding his prior conviction for molesting Doe was not error. (ECF No. 14 at 3.) Plaintiff concedes that the admission of propensity evidence has not been found to violate the Due Process Clause, yet argues that statements by police Detective Crisp based on Petitioner's "supposedly taped unsubstantiated confession" "so infected the entire trial the resulting conviction violates due process under *Estelle v. McGuire*, 503 U.S. 62, 67 (1991)" and habeas relief is required. (ECF No. 12 at 8; ECF No. 14 at 3.) Plaintiff's objection is not to a specific factual finding, but rather whether, as a matter of law, the admission of this type of evidence violates the Due Process Clause. The Court overrules Plaintiff's objection.

In his appeal to the California Court of Appeal, Petitioner asserted that the admission of the propensity evidence under California Evidence Code Section 1108 prevented him from receiving a fair trial. (ECF No. 10-45 at 15.) The Court acknowledged that evidence should not be admitted in cases where its admission would result in a fundamentally unfair trial. (*Id.* at 17.) The Court, however, determined that the admission of the evidence against Petitioner was proper because the evidence was probative as the evidence of the prior and current molestation evidence were of a similar nature and there was no undue prejudice from relying on "highly relevant" prior molestation evidence. (*Id.* at 19.)

Here, as the R&R correctly observed, a habeas petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due

process." (ECF No. 13 at 19 (quoting *Langford v. Day*, 113 F.3d 1380, 1389 (9th Cir. 1997)).) In accord with this limitation on federal habeas relief, the admission of certain evidence may entitle a petitioner to relief only where the evidence "so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 503 U.S. at 72. The contours of when such infection occurs are not settled for all types of evidence. As the R&R correctly observed, no clearly established Supreme Court precedent has found that admission of propensity evidence violates the Constitution and the very case on which Petitioner purports to rely expressly left open this issue. (ECF No. 13 at 20.) Indeed, *Estelle* states that "we express no opinion whether a state law would violate the Due Process Clause if it permitted the use of prior crimes evidence to show propensity to commit a charged crime." 502 U.S. at 75 n.5. The Ninth Circuit and numerous district courts in this circuit have rejected claims for habeas relief premised on admission of propensity evidence for this very reason. *See, e.g., Foy v. Gipson*, 609 Fed. App'x 903 (9th Cir. 2015) (no habeas relief on claim that admission of propensity evidence violated defendant's right to due process because *Estelle*'s reservation of the question whether propensity evidence violates due process "forecloses the conclusion that the state court's decision was contrary to, or an unreasonable application of, clearly established federal law); *Munoz v. Gonzales*, 596 Fed. App'x 588 (9th Cir. 2015) (even if admission of evidence of prior auto theft was improperly admitted to show propensity, habeas relief foreclosed because *Estelle* reserved the question whether propensity evidence violated due process); *Maldonado v. Frauenheim*, No. 15-cv-03002-EMC, 2017 WL 1163844, at *15 (N.D. Cal. Mar. 29,

2017) (denying habeas petition asserting, *inter alia*, due process violation for admission of propensity evidence on ground that the California Court of Appeal's rejection of the claim was not contrary to or an unreasonable application of clearly established law as set forth by the Supreme Court).

In view of this precedent, Petitioner's objection has no grounding in established Supreme Court precedent and denial of habeas relief is appropriate. The Court overrules the objection. Accordingly, the Court approves and adopts the R&R's recommendation to deny habeas relief for alleged violations of the Fifth and Fourteenth Amendments due to admission of propensity evidence related to Petitioner's prior conviction of a sex offense against Doe. (ECF No. 13 at 21.)

3. Prejudice from Inadmissible Opinion Testimony Despite Jury Instructions to Disregard

Lastly, Petitioner reiterates his claim that despite admonitions by the state trial court for the jury to disregard two statements by Detective Crisp that the Petitioner fits the profile of a child molester, he was deprived of his federal constitutional rights to due process and a fair trial. (ECF No. 14 at 3.) Petitioner argues that the jury necessarily credited Detective Crisp's "highly inflammatory profile evidence, despite any instruction to the contrary." (*Id.* at 4.) Petitioner objects to the R&R's conclusion that Detective Crisp's statements do not rise to the level of prejudice contemplated in *Bruton v. United States*, 391 U.S. 123 (1968), and *Gray v. Maryland*, 523 U.S. 185 (1997). (*Id.* at 3.) Petitioner asserts that the R&R improperly construed these precedents as limited to use of co-

defendant confessions at joint trials when, according to him, their holdings are applicable to any case where the evidence is so prejudicial that an instruction to disregard is futile. (*Id.* at 4.) The Court overrules these objections to the R&R.

The basis of Petitioner's claim for relief here is that during the trial resulting in the convictions he challenges, the prosecution called Detective Crisp to testify about his prior interactions with the Petitioner. (ECF No. 13 at 21.) Detective Crisp provided testimony regarding his investigation of child molestation allegations in 1998 involving the Petitioner and Jane Doe. The detective stated that Petitioner fit the profile of a sexual predator and child molester. (*Id.* at 21-22.) The state trial court struck the testimony from the record after an objection from defense counsel and instructed the jury to disregard the statement. (*Id.* at 22.) Thereafter, the detective once more stated, in reference to Petitioner, that "he fit a profile." (*Id.*) Defense counsel moved to strike, which the state trial court did with a further instruction to the jury to disregard the statement. (*Id.*) Defense counsel then moved for a mistrial because of the statements, which the trial judge denied on the ground that the jury could be instructed again to disregard the statements; such an instruction was provided. (*Id.* at 22-23.) On appeal from the conviction, the California Court of Appeal upheld the denial of the motion for mistrial on the ground that the detective's statements were not so prejudicial that they could not be cured. (*Id.* at 23.)

In his federal habeas petition, Petitioner contends that the California Court of Appeal erred. (ECF No. 1 at 15.) Petitioner asserts that during his first trial, "only the fact of his prior conviction" was heard by

the jury and no conviction resulted. (ECF No. 12 at 9.) Petitioner assumes that Detective Crisp's inadmissible statements that Petitioner fit the profile of child molester, along with the admission of details of the prior conviction, necessarily resulted in his second conviction and therefore were nothing but prejudicial.

The R&R correctly rejected Petitioner's reliance on *Bruton* and *Gray*. (ECF No. 13 at 26-27.) This Court's reasons, however, differ from those in the R&R. It is a general rule that a jury is presumed to understand and follow instructions, including instructions to disregard inadmissible evidence inadvertently presented to it. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Richardson v. Marsh*, 481 U.S. 200, 211 (1989); *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987). The Supreme Court recognized in *Bruton* that although this presumption is "justified" in "many circumstances," there are circumstances when the risk that the jury will not follow instructions is "so great, and the consequences of the failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 155. In *Bruton* and *Gray*, the Supreme Court held that the use of a confession by a co-defendant for which cross-examination was foreclosed violated the defendant's Sixth Amendment rights under the Confrontation Clause. *Id.*; *Gray*, 523 U.S. at 194. In both cases, the Supreme Court observed that limiting instructions to the jury could not overcome the prejudice resulting from the introduction of such confessions. *Bruton*, 391 U.S. at 135-36; *Gray*, 523 U.S. at 192. Petitioner points to no Supreme Court cases extending *Bruton* and *Gray* beyond the particular set of circumstances presented in those cases. This is fatal to Petitioner's claim for

habeas relief on the ground that the Court of Appeal erred in denying a motion for mistrial on the ground that the stricken testimony could not be cured by proper instructions to the jury. The general rule remains that "juries are presumed to following their instructions." *Richardson*, 481 U.S. at 211. There was no basis for the California Court of Appeal to depart from this general rule.

To the extent that *Bruton* and *Gray* could be extended beyond the context of a co-defendant's confession against another co-defendant, Petitioner's arguments are removed from the Sixth Amendment violations underlying the rationale for *Bruton* and *Gray*. As the Ninth Circuit has recognized, "Bruton's inability to cross-examine his codefendant was a necessary premise of the Court's holding in that case." *Hayes v. Ayers*, 632 F.3d 500, 513 (9th Cir. 2011). In *Hayes*, the Ninth Circuit in part rejected a claim to habeas relief raised under *Bruton* and *Gray* because the petitioner "failed to identify any witness he was denied the opportunity to cross-examine." *Id.* at 514. Likewise, Petitioner here fails to identify how his Sixth Amendment right to cross-examine was infringed, instead anchoring his claim in a generalized notion of due process. (*See* ECF No. 1 at 15-16.) Petitioner cannot in fact assert a Sixth Amendment claim here because the testimony he challenges was in fact excluded by the state trial court as inadmissible and the jury was given limiting instructions. The Ninth Circuit recognized in *Hayes* that the complete exclusion of inadmissible evidence "ease[s] the jurors' task of ignoring it by allowing them to disregard it entirely." 632 F.3d at 514. "In sum, the confrontation right at stake in *Bruton* and *Gray* in not implicated in this

case." *Id.* Accordingly, the Court overrules Petitioner's objection to the R&R's conclusion that the Court of Appeal did not err in upholding the denial of the motion for a mistrial on the basis of the inadmissible testimony of Detective Crisp subject to limiting jury instructions.

B. The Court Otherwise Approves and Adopts the R&R

Petitioner does not object to the remaining conclusions and recommendations in the R&R. These recommendations include denial of the Petitioner's claims for relief regarding (1) an alleged improper denial of release of juror information, (2) the sentencing court's reconsideration of evidence excluded at trial on *Miranda* grounds, (3) the restitution award, and (4) cumulative error. Because no party has objected to these portions of the R&R and the conclusions underlying them, the Court may adopt these recommendations on that ground alone. *See Reyna-Tapia*, 328 F.3d at 1121. However, having reviewed the Petition, the Response, the R&R, and the supporting papers, the Court concludes that Judge Crawford's recommendations are reasoned and sound. Accordingly, the Court approves and adopts all remaining recommendations in the R&R. With no basis for habeas relief, the Court approves and adopts the recommendation to deny the Petition.

C. Certificate of Appealability

In his Objection, the Petitioner expressly requests that this Court issue a certificate of appealability if the Petition is denied. (ECF No. 14 at 4.) He contends that his Objection and pleadings show that substantial

evidence supports his claims and that reasonable jurists could differ in deciding whether he is entitled to habeas relief. (*Id.* at 5.) Pursuant to Rule 11 of the Rules following 28 U.S.C. § 2254, a district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A habeas petitioner may not appeal the denial of a habeas petition concerning detention arising from state court proceedings unless he obtains a certificate of appealability from a district or circuit court judge. 28 U.S.C. § 2253 (c)(1)(A); *see also United States v. Asrar*, 116 F.3d 1268, 1269-70 (9th Cir. 1997). The district court may issue a certificate of appealability if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this threshold showing, a petitioner must show that: (1) the issues are debatable among jurists of reason, (2) that a court could resolve the issues in a different manner, or (3) that the questions are adequate to deserve encouragement to proceed further. *Maciel v. Cate*, 731 F.3d 928, 932 (9th Cir. 2013). Having considered the issues raised in the Petition, the Court denies Petitioner's request for a certificate as to all issues for which the R&R recommends a denial of the Petition and to which Petitioner did not object. As to the recommendations on issues for which Petitioner has objected, the Court finds that Petitioner has failed to make a substantial showing of the denial of a federal constitutional right on any issue raised in the Petition. The Court does not find that reasonable jurists could find debatable the Court's assessment of the claims raised in the Petition.

IV. Conclusion & Order

For the foregoing reasons, the Court HEREBY ORDERS that:

1. The Petitioner's Objections to the R&R are OVERRULED (ECF No. 14);
2. The Court APPROVES AND ADOPTS IN ITS ENTIRETY the R&R (ECF No. 13);
3. The Court DENIES the Petition for a Writ of Habeas Corpus (ECF No. 1); and
4. The Court DENIES Petitioner a Certificate of Appealability as to all issues raised in the Petition.

IT IS SO ORDERED.

/s/ Cynthia Bashant
United States District Judge

Dated: February 16, 2018

REPORT AND RECOMMENDATION RE PETITIONER'S WRIT OF HABEAS CORPUS (NOVEMBER 21, 2017)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEREMY J. GODWIN,

Petitioner,

v.

DAVE DAVEY, Warden,

Respondent.

Case No. 3:16-cv-02650-BAS-KSC

Before: Hon. Karen S. CRAWFORD,
United States Magistrate Judge.

Petitioner Jeremy J. Godwin, a state prisoner represented by counsel Marilee Marshall, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 challenging his conviction in California Superior Court[1] of two counts of aggravated sexual assault of a child with oral copulation, four counts of forcible lewd act on a child, and one count of child molestation with a prior conviction. He raises seven claims for relief asserting, *inter alia*, violations of his

[1] Case No. JCF25781

Fourth, Fifth, Sixth, and Fourteenth Amendment rights.

This Court has reviewed the Petition, Respondent's Answer, Traverse, and accompanying lodgments and exhibits. For the reasons discussed in greater detail below, the Court recommends the Petition for a Writ of Habeas Corpus be DENIED.

PROCEDURAL BACKGROUND

Petitioner, Jeremey J. Godwin, is in the custody of respondent based upon a July 15, 2013 judgment in California Superior Court of Imperial County in which a jury convicted him of two counts of aggravated sexual assault of a child with oral copulation, four counts of forcible lewd act on a child, and one count of child molestation with a prior conviction. Petitioner was sentenced to 334 years to life. [Doc. No. 10-52, at p. 7124].

Petitioner appealed the judgment of conviction in the California Court of Appeal on November 1, 2013.[2] The conviction was affirmed, but the sentence was modified to dismiss the habitual sex offender sentence. [Doc. No. 10-75]. Petitioner sought further direct review of the decision on appeal by the California Supreme Court.[3] On August 26, 2015, the petition was denied. [Doc. No. 10-77].

On October 26, 2016, petitioner filed a petition for a writ of habeas corpus in the Southern District of California. [Doc. No. 1].

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[2] Case No. D064909.

[3] Case No. S227407.

FACTUAL BACKGROUND

The California Court of Appeals' unpublished opinion sets forth a summary of facts for this case. [Doc. 10-8, at 2-10]. This Court gives deference to the state court's findings of fact and presumes them to be correct; petitioner may rebut the presumption of correctness, but only by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) (West 2006); *see also Parke v. Raley*, 506 U.S. 20, 35-36 (1992). This Court has conducted an independent review of the trial record and confirms the Court of Appeals' factual findings comport with the record. The following facts are taken from the California Court of Appeals' Opinion and Decision affirming the judgment in the trial court:

> Jeremy Godwin [was convicted] of various sex offenses arising from his molestation of Jane Doe. . . .
>
> Doe, age 20 at the time of trial, testified about numerous acts of molestation committed by her father (defendant) that started when she was a small child and continued until she was 13 years old.
>
> Doe recalled an incident when she was "really small" when she and defendant were riding in a vehicle in the desert and defendant placed his hand between her legs and was "playing with [her] vagina . . . through [her] clothes." Consistent with this memory, Doe's mother testified that when Doe was five years old, she told her mother that defendant had been touching her "down there," pointing to her vaginal area. The matter was investigated; defendant was arrested; and in

1998 he pled guilty to committing a lewd act against Doe.

Because of his 1998 lewd act conviction, defendant was removed from the family for four years; the family received counseling; and defendant reunited with the family in about January 2002. Doe's mother testified she did not divorce defendant at the time because "[t]here was doubt," explaining that defendant told her he did not commit the molestation, "everything was just misconstrued," and he only pled guilty so she could be reunited with their children.

Doe recalled another incident that occurred when she was about nine years old and her brother was about three or four years old. On this occasion, Doe and her brother were not wearing clothes, she was on top of her brother, and her father was with them in the room. She did not remember further details, except that her brother's penis and her vagina were somehow "involved."

The remaining acts of molestation described by Doe occurred at the family's home on Cedar Avenue where they moved in July of 2002 when Doe was almost 10 years old, and at the family's home on Walnut Avenue where they moved in November 2003 when Doe was 11 years old.

During an incident at the Cedar residence, Doe woke up in the middle of the night on the couch, and defendant was "making out" with her, with his tongue in her mouth and

his arms around her. The incident made her feel "uncomfortable." On another occasion, defendant performed oral sex by putting his mouth on Doe's vagina.

During an incident at the Walnut residence, Doe woke up on her parents' bed, and the defendant was on top of her with is penis in her vagina. Doe felt "very violated and very upset." On another occasion he had her sit on top of a scanner and he scanned her vagina. On several occasions he woke her up so she could watch pornography with him. She felt "very uncomfortable" watching the pornographic movies, but felt "too afraid to say no."

Also, on multiple occasions at the Walnut residence defendant had Doe give him "blow jobs" when they were in his bathroom. He tried to ejaculate in her mouth; "usually, it ended up in a towel or some article of clothing"; and on one occasion he ejaculated "out on [her] chest." This conduct made Doe feel "gross," "very uncomfortable," and disgusted.

During another incident defendant brought a dog into his bedroom and told Doe to "get down on all fours" because he wanted to "put the dog on top of [her] and put the dog[']s penis in . . . somewhere." Doe refused, and defendant instead got "on all fours" and had the dog get on top of him. Doe felt "really grossed out."

Doe recalled several other incidents of sexual molestation at the Walnut residence, including an incident in defendant's bedroom when he put vibrators on her vagina; another incident in the bedroom when he put his finger in her vagina; and several incidents in the bedroom and living room when he would masturbate in front of her. Doe testified she did not know whether defendant molested her "every week or every month" while they lived at the Walnut residence, but she knew it happened "at least a few times in one month, and few can be anywhere from two to ten times."

Regarding her relationship with her father, Doe testified he was the primary caregiver for her and her brother. Her mother was frequently gone from home at work and they were not emotionally close. When Doe was small, she and defendant were "very close," and she loved him and was like a friend to her. As Doe got older, she did not feel as close to him; she did not know how to feel about him; and she knew that what was occurring was not right.

Doe did not recall defendant using physical discipline with her, but she testified she was afraid of him when she was growing up because she was not "sure what he could do." She remembered an incident in which defendant tied her and her mother to the bed in his bedroom. Her father and mother engaged in loud arguments; there was a lot of shouting, slamming of doors, and slamming

of hands on tables; and defendant was sometimes violent. For example, on one occasion he held her mother in a headlock and on another threw a chair. During the headlock incident, her mother yelled that Doe should call 911 an when Doe went to get the phone, defendant threw the phone.

Doe's mother confirmed that she was often gone from home at work, including at night, and defendant took care of the children when she was not at home. Consistent with Doe's testimony, Doe's mother testified there was always a lot of pushing, shoving, throwing of objects, and screaming between her and defendant, and during the incident when she asked Doe to call 911 defendant pulled the phone out of the wall and threw it.

Doe testified she did not know what to do about the molestation because defendant was her father and she had been taught to respect her elders; she had never gone against him because she was afraid of him; she did not know "how to go about confronting the issue"; and she was afraid to say anything to other adults because they knew her father and she was afraid there would be a "back lash" against her. She thought if she told someone, her father would find out and he would get in trouble or do something to hurt her, and people would think differently of her and not believe her.

When Doe was 14 years old, she finally told her father she would no longer engage in the sexual activity. This occurred when he

asked her to go with him into the bedroom, which usually meant "something would happen"; she did not want to go; to try to coax her into the bedroom he grabbed her cat; she asked him for her cat back and hit him in the back; and she then told him she was not going to "do anything anymore" and she was "done with that kind of thing." After this, defendant stopped molesting her. Doe grew closer to her father again and felt safer, but in the back of her mind she worried and was afraid the molestation would resume. She and her father did not talk about the molestation but "just swept it under the rug and pretended" it was not there.

In 2008 or 2009, when Doe was about 16 or 17 years old, her mother moved out of the family home because her parents were getting divorced. Doe was allowed to choose which parent to live with, and she chose to live with defendant. Doe testified she was "very confused" about what she should do; she "just wanted to survive and be safe"; and she elected to live with defendant because the molestation had stopped and defendant was more financially secure than her mother.

However, there was one more incident in September 2009. While Doe and defendant were in the car in the desert, he masturbated in front of her. Doe "looked away and pretended [she] wasn't there and tried to just get away from it mentally." She felt "upset and disgusted." Because of this incident and because she and her father were arguing a

lot about her behavior, in October 2009 she moved in with her mother. As Doe was growing up, she told a few people about the molestation, including her cousin, her high school boyfriend, and two close friends. Doe's cousin and boyfriend testified to confirm the disclosure. In 2010, near the time when she was graduating from high school, Doe made a full disclosure during a long conversation with her high school boyfriend. During this time period she refused to continue visiting with her father, and after an emotional confrontation with her parents during a child custody exchange in a parking lot, she asked her mother to contact the authorities so she could talk to them.

Doe testified she felt relieved after finally disclosing the molestation; when she disclosed she was not living with her father and felt safer; but she still felt vulnerable because if her father "really wanted to do something, he would find a way." A child sexual assault expert testified that delayed disclosure of sexual abuse is a typical disclosure pattern for children. Regarding the long-term psychological impact of the molestation, Doe testified, "I have tried to forget a lot of the things about what has happened . . . because it makes me feel a lot of things that I don't want to feel." She explained: "[I]t [is] very hard for me to feel kind of normal, and I feel more like there [are] some aspects of my life that aren't going to be normal, like my sex life with whoever I get

married to is not going to be normal and that I am always going to have little triggers that make me remember what happened and stress me out or make me cry. I find it hard to actually speak with counselors about this kind of thing and people in general, but more so [with] counselors and therapists. I feel like I am very much going to have a lot of emotional and maybe psychological damage for the rest of my life from all of this."

Defense

The defense presented testimony from several witnesses (including a sheriff's deputy, a social worker, and defendant's mother, brother, and girlfriend) who had contact with Doe during her childhood. These witnesses variously testified that Doe never mentioned, and on occasion denied, any further molestation after defendant's 1998 conviction, and they did not observe anything to suggest defendant was continuing to molest Doe. The defense also called a psychiatrist who testified that unsubstantiated reports of child sexual abuse are more likely to occur when there are child custody disputes.

STANDARD OF REVIEW

Federal habeas corpus relief is available only to those who are in custody in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984). "[A] mere error of state law is not

a denial of due process." *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982) (internal quotations omitted).

This Petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 327 (1997). AEDPA imposes a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (internal citations and quotations omitted). Under AEDPA, a habeas petition "on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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)(1)-(2). For purposes of § 2254(d)(1), "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Therefore, a lack of controlling Supreme Court precedent can preclude habeas corpus relief. *Wright v. Van Patten*, 552 U.S. 120, 126 (2008).

The AEDPA standard is highly deferential and "difficult to meet." *Harrington v. Richter*, 562 U.S. 86, 100 (2011). For mixed questions of fact and law, federal habeas relief may be granted under the "contrary to" clause of § 2254 if the state court applied a

rule different from the governing law set forth in Supreme Court cases, or decided a case differently than the Supreme Court on a set of materially indistinguishable facts. *Bell v. Cone*, 535 U.S. 685, 694 (2002). The focus of inquiry under the "contrary to" clause is "whether the state court's application of clearly established federal law is objectively unreasonable." *Id.* "[A]n unreasonable application is different from an incorrect one." *Id.* In other words, federal habeas relief cannot be granted simply because a reviewing court concludes based on its own independent judgment that the state court decision is erroneous or incorrect. *Id.* Habeas relief is only available under § 2254(d)(1) "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with Supreme Court precedents. *Harrington*, 562 U.S. at 101.

Where there is no reasoned decision from the state's highest court, a federal court "looks through" to the "last reasoned state-court opinion" and presumes it provides the basis for the higher court's denial of a claim or claims. *Ylst v. Nunnemaker*, 501 U.S. 797, 805-06 (1991). If the state court does not provide a reason for its decision, the federal court must conduct an independent review of the record to determine whether the state court's decision is objectively unreasonable. *Crittenden v. Ayers*, 624 F.3d 943, 947 (9th Cir. 2010). To be objectively reasonable, a state court's decision need not specifically cite Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002). "[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent]," the state court's decision will not be "contrary to clearly established Federal law." *Id.*

DISCUSSION

Godwin raises eight claims in his Petition: (1) insufficient evidence to support a conviction of forcible sex acts; (2) insufficient evidence to support a conviction for aggravated sexual assault because the complaining witness could not recall one of the alleged sexual misconducts; (3) violation of Fifth and Fourteenth amendment due process rights in the admission of a prior conviction; (4) violation of due process rights under the Fifth, Sixth, and Fourteenth Amendments to a fair trial because a witness twice stated the petitioner fit the profile of a child molester; (5) improper denial of a request for release of jury information; (6) improper consideration of an un-*Mirandized* statement during sentencing; (7) imposition of $400,000 in damages when the complaining witness did not ask for restitution; and, (8) cumulative error because of claims one through seven. [Doc. No. 1, at pp. 6-11; at pp. 9-22].

Respondent argues the following: claims one, two, five, seven, and eight are meritless; claim three is precluded; claim four has no basis for relief, or, in the alternative, constitutes harmless error; and, claim six is unsupported by precedent and thus harmless error. [Doc. No. 9-1, at pp. 13-49].

A. Grounds One and Two Alleging Insufficiency of Evidence

Petitioner argues in Ground One that there was insufficient evidence for a conviction of forcible sex acts because no evidence supported coercive or forceful conduct. [Doc. No. 1, at p. 6]. Specifically, he contends there was insufficient evidence for the jury to make a finding of duress, which is defined as "the use of a

direct or implied threat of force, violence, danger, hardship, or retribution sufficient to cause a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]." *Id.; See also People v. Soto*, 51 Cal.4th 229, 246, n. 9 (2011).

Petitioner argues in Ground Two that there was insufficient evidence to support a guilty verdict of aggravated sexual assault because the complaining witness was unable to independently recall the incidence of oral copulation. [Doc. No. 1, at p. 11].

1. Legal Standard

The California Supreme Court denied petitioner's request for appeal. [Doc. No. 1077]. Therefore, this Court must "look through" the silent denial to the appellate court's reasoning to determine the grounds for relief. *Ylst*, 501 U.S. 804, n.3 (1991).

The Due Process Clause of the Fourteenth Amendment protects defendants from convictions "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he was charged." *In re Winship*, 397 U.S. 358, 364 (1970). During habeas review, a petitioner alleging insufficiency of evidence may obtain relief only if "it is found upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. Reversal on an insufficiency of evidence claim is, in essence, a "determination that the government's case against the defend-

ant was so lacking that the trial court should have entered a judgment of acquittal." *McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (quoting *Lockhart v. Nelson*, 488 U.S. 33, 39 (1988)) (internal citations omitted).

The jury bears the burden of deciding "what conclusions should be drawn from evidence admitted at trial" and a habeas court can set aside a jury verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (*per curiam*). "The reviewing court must respect the exclusive province of the fact finder to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts" by assuming that the jury resolved all conflicts in support of the verdict. *United States v. Hubbard*, 96 F.3d 1223, 1226 (9th Cir. 1996); *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995). If the record supports competing inferences, the court "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326. The court applies the standard to the applicable state law that defines the elements of the crime. *Id.* at 324 n.16; *see also Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004) (*en Banc*).

A further "layer of deference" exists under AEDPA. *Juan H. v. Allen*, 408 F.3d 1262 (9th Cir. 2005) (as amended). Habeas relief is not warranted unless "the state court's application of the *Jackson* standard [was] objectively unreasonable." *Id.* at 1274-75 n. 13 (internal citations omitted); *see also Cavazos*, 565 U.S. at 2 ("[A] federal court may not overturn a state

court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.") (internal citations omitted).

2. Analysis of Petitioner's Contention of Insufficient Evidence to Support a Jury Finding of Duress

The California Court of Appeal neither applied a standard contrary to Supreme Court precedent nor failed to identify the jury's conclusion as one with which no rational trier of fact could have agreed. *Cavazos*, 565 U.S. at 2.

California Penal Code Section 288(a) sets out the crime for lewd and lascivious acts, while subsection (b) provides additional penalties if the crime is committed with the use of, *inter alia*, force, duress, or fear of "immediate and unlawful bodily injury on the victim." Petitioner asserts that the evidence adduced at trial was insufficient to support a finding of duress under § 288(b) because the "conduct by [petitioner] [ ] was entirely unrelated to his sexual activity with the victim." [Doc. No. 1, at p. 10].

Petitioner takes issue, in particular, with the perceived reliance by the jury on Doe's testimony that she was afraid of petitioner due to his "tumultuous relationship with Doe's mother." [*Id.*]. Pointing to *People v. Soto*, he argues the jury finding of duress and subsequent upholding by the California Court of Appeal is inconsistent with the holding that "the language of section 288 and the clear intent of the Legislature [dictate] the focus must be on the defendant's wrongful act, not the victim's response to it." 51 Cal.4th

229, 246 (2011). Petitioner argues that because Doe did not testify any of his "behavior or words" were "by design, intended to scare Doe and impel her cooperation in the sexual misconduct[,]" the jury finding should be overturned. [Doc. No. 1, at p. 11] (emphasis added).

On direct appeal, the California Court of Appeal noted the element of duress allowed for a totality of circumstances analysis. [Doc. No. 10-8, at 11-12]; *See People v. Veale*, 160 Cal.App.4th 40, 46 (2008). Specific factors may be considered in sexual misconduct cases when evaluating duress under California law, including: the age of victim, the relationship between the victim and the defendant, the relative size difference, and the age disparity. *Id.* Doe testified on more than one occasion she felt "grossed out" and uncomfortable during each act of misconduct. [Doc. No. 10-45, at pp. 6055, 6059-60, 6062]. Doe repeatedly testified she felt incapable of telling her father, "No." [*Id.* at 6059, 6074, 6096-97, 6104]. Of note, Doe stated:

> I was afraid that maybe word would get back to my dad, maybe he would get me in trouble or something, hurt me, or do something to hurt me. On top of that, I don't think I trusted people enough to share that kind of thing with. It was also information that made me very different about myself. I was always afraid of people knowing about it or maybe thinking something different about me.

[*Id.* at pp. 6096-97] (emphasis added). Moreover, Doe "described [petitioner's] volatile and at times violent behavior, including tying [both she and her] mother to the bed, throwing a chair, holding her mother in a

headlock[,] and pulling the phone out of the wall." [Doc. No. 10-8, at p. 12].

Given the totality of evidence in the record from Doe's testimony, the Court of Appeal found sufficient evidence to support the jury's finding of duress, noting in support of its conclusion:

> The sexual abuse started when Doe was a small child and continued until she was finally able to assert herself enough to confront defendant at age 14. Doe testified she found the activity "gross," "disgust[ing]," and "upset[ting]," but she was too afraid of defendant to protest the molestation, and she worried if she told someone he might hurt her. She explained she did not know what he was capable of doing, and she described his volatile and at times violent behavior, including tying her mother and her to the bed, throwing a chair, holding her mother in a headlock and pulling the phone out of the wall.

[*Id.* at p. 12].

Thus the jury was well within its rights to "deduce that although [petitioner] may not have overtly forced Doe to engage in sexual activity, he psychologically coerced her by creating an atmosphere of fear within the family so that she would be intimidated, compliant, and secretive about the sexual activity." [*Id.* at 12-13]. This Court agrees with the Court of Appeal.

Petitioner's argument that *Soto* dictates this Court should find there was insufficient evidence is inaccurate. The *Soto* court writes, "[b]ecause duress is measured by a purely objective standard, a jury

could find that the defendant used threats or intimidation to commit a lewd act without resolving how the victim subjectively perceived or responded to this behavior." *Soto*, 51 Cal.4th at 245-46. Doe testified to witnessing violent acts throughout her childhood committed by petitioner and how those acts, in turn, instilled fear in her. The jury was entitled to conclude from Doe's testimony that petitioner created an environment in which Doe would remain quiet about any molestations for fear of violence consistent with what she had previously experienced and witnessed. To the extent competing inferences could be drawn from Doe's testimony, this Court presumes the jury resolved any conflict in favor of the prosecution. *Jackson*, 443 U.S. at 326.

Petitioner further relies on *People v. Espinoza*, 95 Cal.App.4th 1287 (2002) and *People v.* Hecker, 219 Cal.App.3d 1238 (1990). The *Espinoza* Court held that there was insufficient evidence to support a finding of duress because "no evidence was introduced to show that [the 12 year-old victim's fear of the defendant] was based on anything defendant had done other than to continue to molest her." *Espinoza*, 95 Cal.App.4th at 1321. The evidence adduced in *Espinoza* was that the defendant was victim's father, the defendant was physically larger than her, and the victim was "limited intellectual[ly]." *Id.* Without more, the *Espinoza* court found the evidence insufficient to support a § 288(b) finding. *Id.* at 1321-1322. Similarly, in *Hecker*, there was no evidence the victim was threatened by the defendant, nor did the victim testify she was afraid of the defendant. *Hecker*, 219 Cal.App.3d at 1250. Instead, the victim merely testified she "felt 'psychologically pressured' and 'subconsciously afraid' of

the defendant. *Id.* The evidence in the record did not allow a fact finder to conclude even the bare minimum of an "implied threat of force, violence, danger, hardship or retribution." *Id.* (internal citations omitted).

Here, as noted above, Doe not only testified she was afraid of petitioner, but she also testified to witnessing multiple instances when petitioner was physically violent in the home. It was not unreasonable for a jury to conclude petitioner's actions furthered an environment that would actively discourage Doe from speaking out about the molestations, and fear the ramifications were she to do so. Again, while competing inferences might be drawn from the evidence adduced, this Court "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326.

Viewing the evidence in the light most favorable to the prosecution, and resolving all competing inferences in favor of the existing resolution, it was not objectively unreasonable for the California Court of Appeal to conclude that there was sufficient evidence from which a rational juror could infer duress and convict Petitioner. *See* 28 U.S.C. § 2254; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Accordingly, the Court RECOMMENDS this claim be DENIED.

3. Analysis of Petitioner's Contention of Insufficient Evidence Due to Limited Testimony Regarding an Incidence of Sexual Assault in Count One

In claim two, Petitioner argues there was insufficient evidence to support his conviction for aggravated sexual assault in Count One because Jane Doe could not recall specific facts regarding the place and time of an incidence of oral copulation. [Doc. No. 1, at p. 11]. During the trial, Doe's recollection was refreshed using a transcript of the testimony she had given in petitioner's prior trial. [Doc. No. 10-44, at p. 6079].

The California Supreme Court addressed, in *People v. Jones*, the issue of repeated acts of molestation of a minor that are "essentially indistinguishable," and the inherent difficulty in parsing individual instances of abuse over an extended period of time. 51 Cal.3d 294, 299-300 (1990). Testimony from a victim in such cases is adequate to support conviction only when the victim is able to testify to (1) the kind of acts committed; (2) the number of acts committed with sufficient certainty to support each of the counts alleged in the information; and, (3) the general time period when the acts occurred. *Id.* at 316. In *Jones*, the victim recalled multiple instances of oral copulation only, which occurred once or twice a month at five locations. *Id.* at 322. The victim could not remember, nor did he testify to, the "exact time, place, or circumstance of [the] assaults." *Id.* Rather, the charging document provided start and end dates for the periods during which the alleged acts occurred. The California Supreme Court held the jury findings of guilt were supported by the victim' s testimony that the moles-

tations "occurred during the periods specified in [the] four counts of the information." *Id.*

Upon review of an insufficiency of evidence claim regarding repeated sexual misconduct against a minor, courts look to the entire record to determine if a "rational trier of fact could find the defendant guilty beyond a reasonable doubt." *Id.* at 314. All evidence is viewed in the light most favorable to the prosecution. *Id.*

Petitioner raises a number of arguments related to Doe's testimony, most of which turn on her inability to independently recall an act of oral molestation, and her inability to state with specificity the exact location and time of the molestation. [Doc. No. 1, at pp. 11-12]. Petitioner contends the Court of Appeal misapplied *Jones* and the jury needed to find the alleged act of oral copulation occurred (1) in the bedroom; (2) at the Cedar Street house; and, (3) between July 1, 2002, and November 19, 2003. [Doc. No. 12, at p. 7].

That Doe recalled the instance of oral copulation only after having her recollection refreshed with her prior testimony does not indicate there was insufficient evidence to support the jury finding. Petitioner cites no authority for the proposition that a witness whose recollection is refreshed from their prior testimony supports a finding of insufficient evidence. What petitioner, in effect, asks is for this Court to reevaluate the credibility of Doe's testimony. This is something that federal courts in habeas review have been explicitly prohibited from considering. *See Marshall v. Longberger*, 459 U.S. 422 (1983). Thus petitioner's argument regarding Doe's refreshed recollection is unavailing.

Petitioner's additional arguments are that Doe's testimony, and the evidence in the record regarding the incidence of oral copulation failed to meet the burden identified by the California Supreme Court in *Jones.* Petitioner both overstates and misstates the specificity of evidence required for the prosecution to meet its burden. As noted, *Jones* requires a victim testify to (1) the kinds of acts committed; (2) the number of acts committed with sufficient certainty to support each of the counts alleged in the information; and, (3) the general time period when the acts occurred. *Jones*, 51 Cal.3d at 316. Doe clearly testified to the kind of act committed and the number of times the molestation occurred with respect to Count 1. [Doc. No. 10-45, at p. 6082]. The prosecution need not have produced evidence of the location of the charged molestation. That the prosecution decided to include the location of the molestation, the Cedar Avenue address, in Count 1 was not a required element under *Jones*:

> The fact that she could not recall in <u>which room</u> it occurred does not defeat the support for a finding that defendant engaged in oral copulation with Doe at the Cedar residence. Even though the information alleged the incident occurred in the bedroom, no such finding was needed to support the jury's verdict.

[Doc. No. 10-75, at p. 14]. Thus, the Court of Appeal's determination was correct.

Finally, Doe testified to the general time period when she lived at the Cedar Avenue residence. She recalled being nine to ten years old during that time. [Doc. No. 10-45, at p. 6055, 6084]. She also testified

to living at the Cedar Avenue address for one year and that, upon moving to the Walnut Avenue address, she recalled being eleven years old and in the sixth grade. [*Id.* at 6053]. The prosecution decided to use the location of the molestation —the Cedar Avenue home—and the time frame during which the family lived there as the chronological reference point for Count 1. *Jones* is clear that the time frame need only be general. Moreover, the risk of the jury having convicted petitioner by relying on events charged in a different count are minimal because "the other allegations involved different locations, time periods, and/or sexual acts." [Doc. No. 10-75, at p. 15]. Doe recalled her age when the charged molestation occurred, and could not remember any other instance of oral copulation around that time. The Court of Appeal did not err when it determined a rational juror could do the simple math to determine how old Doe was when the family lived at different locations.

This Court defers to the factual determinations by the jury and can find no basis upon which to conclude the jury's conclusions were objectively unreasonable. *See Jackson*, 443 U.S. at 326. The Court of Appeal's rejection of petitioner's claim was neither contrary to, nor an unreasonable application of, clearly established law.

Accordingly, the Court RECOMMENDS this claim be DENIED.

B. Ground Three Alleging Improper Admission of Prior Conviction

In claim three, Petitioner alleges violations of his Fifth and Fourteenth Amendment due process rights because the trial court judge admitted evidence of the

facts underlying his prior conviction of a sex offense against Jane Doe. [Doc. No. 1, at pp. 13-14].

1. Background Re Admission of Propensity Evidence

Before petitioner's trial, the prosecution stated its intention to introduce detailed testimony of petitioner's prior conviction in 1998—which included a confession—for molesting the victim in the instant case. [Doc. No. 10-42, at pp. 5904-05]. Petitioner opposed the admission of the specifics of the prior conviction arguing it was highly prejudicial:

> Again, your Honor, I would object. It is extremely prejudicial to my client, especially given the fact that we are going to stipulate that he has been previously convicted [of] a sex offense as to this particular victim. That admission of the prior, coupled with the detective's testimony, which is [ ] extremely prejudicial would not allow my client to have a fair trial. [California Evidence Code Section] 352 would urge that [the People's request be denied].

[*Id.* at p. 5905]. After considering the arguments from the prosecution and petitioner's counsel, the trial court ruled that the evidence would be admitted under California Code of Evidence § 1108[4,5]:

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4 [sic, Original document does not have a fn 4.]

5 California Evidence Code § 1108(a) states in pertinent part: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by section 1101, if the evidence is not admissible pursuant to

And I think the way I look at it, the conviction is an admission that he did a touching. It could mean a lot of different things. That doesn't put any detail in front of the jury.

And the issue in 1108-and it is a statute that completely changed the dynamics of any type of a sex offense, whether it is a rape case or child molest, that basically the jury is now allowed to hear. And it's been upheld as constitutional, and the People are allowed to admit into evidence things that they never were before, and they are allowed to do it for propensity, to show that the defendant had a propensity to commit these types of acts.

So the only discretion the Court has is to make a determination as to whether or not under 352 of the evidence code, the Court should exclude it because the prejudicial value is outweighed by the probative value. And when you say "prejudicial value," it is not the fact that it hurts the defendant's case. It is things that would be prejudicial over and above the fact that it goes to show propensity.

And I don't see anything here that would be

Section 352." Cal. Evid. Code § 1108(a) (West 2009). Section 352 is the California Evidence equivalent of Federal Rule of Evidence 403, and states in pertinent part: "A court may, in its own discretion, choose to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Cal. Evid. Code. § 352 (West 2009).

unduly prejudicial because the only reason it is being admitted is to show that he had this propensity or proclivity to touch the daughter in a sexual manner, and he admitted that.

It is really not contested. So I don't think it is going to take an undue or an inordinate amount of time. I think the best way to prove it is the defendant—basically, he's telling the detective and I read the statement—what he did. He describes what he did in his own words. So I don't think there's any question that that is the most accurate way of proving it is to let the defendant speak for himself. And in essence, that's what he's doing in this interview. And even though it is very harmful to the defense case, that is why it is admissible.

And I think under the 352 analysis, I can't consider the fact that it just hurts the defense case. I have to look at undue prejudice, things that any prejudice that would occur over and above the fact that it shows a propensity.

So I am not finding any significant undue prejudice in this case, and I don't think that the admission of the fact that he was convicted of it really wipes away the need for that type of evidence because the admission or the conviction doesn't really give details. It just admits that he committed that crime. It could be a one-time touching. It could be less than that. But I think his statements are more probative of the way that this evi-

> dence should come in.
>
> So my decision, after evaluating all of the circumstances, is to allow that evidence to come in. And the prior molestation of the same victim, using the defendant's words, and then also the admission, I think it should come in on the fresh complaint.
>
> [. . .] And to the extent you find Ms. Stanford, the probation officer, I have to know what she was going to say. I do remember reading the report. But if I remember correctly, in the probation report, he says things like "I couldn't help myself."
>
> And the reality is—and he says some similar things in the interview with Detective Crisp is that what he is saying that he has this propensity. He is admitting his propensity with reference to, at least, her. And that really make it extremely probative, unfortunately, for your client. But that is the reality of it. And there's nothing unduly prejudicial about that.
>
> Now, does that mean he still has it today? Well, that's the issue in the case. And so you're going to have to refute that. That would be your position.
>
> But I think I have to let it in, given the case law and the statutory law that requires it.

[Doc. No. 10-42, at pp. 5905-08]. Petitioner contends the trial court's decision is unconstitutional because the evidence admitted "is so unduly prejudicial that it render[ed] [his] trial unfair." [Doc. No. 1, at p. 14].

2. Analysis

"[The Supreme Court] has stated many times that federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (internal citations omitted). A habeas petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due process." *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997). Instead, he must show that the state court decision "violated the Constitution, laws, or treaties of the United States." *Little v. Crawford*, 449 F.3d 1075, 1083 (9th Cir. 2006) (quoting *Estelle*, 502 U.S. at 72 (1991)). Thus, a petitioner's entitlement to habeas relief turns not on whether a state evidentiary law has been violated, but whether the admission of the evidence "so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72 (internal citations omitted); *see also Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998) ("[The federal court's] role is limited to determining whether the admission of evidence rendered the trial so fundamentally unfair as to violate due process.").

At present, no clearly established Supreme Court precedent has held that the admission of propensity evidence violates the Constitution. *See e.g.*, *Cogswell v. Kernan*, 645 Fed. App'x 624, 627 (9th Cir. 2016); *Alberni v. McDaniel*, 458 F.3d 860, 863-64 (9th Cir. 2006). Indeed, the Supreme Court expressly left the issue open regarding whether the admission of propensity evidence constitutes a Due Process Clause violation. *Estelle*, 502 U.S. 62, 75 n. 5 ("[W]e express no opinion whether a state law would violate the Due Process Clause if it permitted the use of prior crimes evidence to show propensity to commit a charged

crime."). Even were the Ninth Circuit to hold unconstitutional the admission of such evidence, "[i]n cases where the Supreme Court has not adequately addressed a claim, [a circuit court] may not use its own precedent to find a state court ruling unreasonable." *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th. Cir. 2009) (*quoting Carey v. Musladin*, 549 U.S. 70, 77 (2006)). Notwithstanding the Supreme Court's prohibition, Ninth Circuit precedent "squarely forecloses [the] argument" that admitting propensity evidence violates the Due Process Clause. *Mejia v. Garcia*, 543 F.3d 1036, 1046 (9th Cir. 2008); *see also Greel v. Martel*, 472 Fed. App'x 503, 504 (9th Cir. 2012). The Ninth Circuit considered the issue in the context of Federal Rule of Evidence 414—on which California Evidence Code Section 1108 is based—and concluded "there is nothing fundamentally unfair about the allowance of propensity evidence [so long] as the protections of Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury." *U.S. v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001). In *LeMay*, the Court determined that "[t]he evidence the defendant had sexually molested his cousins in 1989 was indisputably relevant to the issue of whether he had done the same to his nephews in 1997." *Id.* Finally, even if the evidence admitted was plainly prejudicial, that alone is insufficient for habeas relief. *Holley*, 568 F. 3d at 1101 ("The 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.").

Petitioner argues the trial court's admission of this prior conviction constitutes a Due Process Clause

violation, and thus warrants habeas relief. The Supreme Court has not spoken to whether the admission of propensity evidence constitutes a Due Process Clause violation. Therefore, the Court of Appeal's decision to let the admission of evidence stand was neither contrary to, nor an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court.

Accordingly, the Court RECOMMENDS this claim be DENIED.

C. Claim Four Alleging Prejudice from Inadmissible Opinion Testimony Heard by the Jury

In claim four, petitioner alleges a violation of his Fifth, Sixth, and Fourteenth Amendment rights due to two inadmissible statements made by prosecution witness, Detective Crisp, in the presence of the jury. [Doc. No. 1, at p. 9]. Petitioner contends the trial court erred as mistrial was "the only appropriate available remedy" given the "substantial prejudice" plaintiff suffered from the comments that were heard by the jury. [Doc. No. 12, at p. 15].

1. Background Re Opinion Testimony

During the trial proceedings, the prosecution called Detective Crisp to testify to prior interactions with petitioner. [Doc. No. 10-45, at pp. 6239-6262]. Specifically, he provided testimony regarding his investigation of child molestation allegations in 1998 involving both petitioner and Jane Doe.[6] [*Id.* at p.

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[6] The investigation of Detective Crisp was what led to petitioner's 1998 conviction, which was discussed earlier in this Report and Recommendation, Section B, *supra*.

6241]. Petitioner takes issue with the following excerpts from Detective Crisp's testimony:

> Well, throughout the training and everything else, we—when you train in child molest cases, you have to go over prior cases and the profiles of a sexual predator and child molester, things like that. And throughout all of my interviews and interrogations, I had never met someone sitting next to me that was the profile.

[*Id.* at p 6242] (emphasis added).

Defense counsel objected on the basis that Detective Crisp's testimony inappropriately called for an expert witness opinion. [*Id.* at pp. 20-21]. The court sustained the objection, ordered the testimony stricken from the record, and admonished the jury to disregard what they heard. [*Id.* at 22-25].

Later, Detective Crisp testified to the following:

> Well, I knew from the beginning that Mr. Godwin, the first few minutes of the interview, that he was fighting with himself whether to be there or not, whether to answer any questions or not. And that's why I reassured him that it was voluntarily. I want to use the words that I used earlier that were thrown out, but he fit a profile.

[*Id.* at 6261:6-12] (emphasis added). Counsel for petitioner, again, moved to strike and the court again sustained and further admonished the jury. [*Id.* at p. 13-17].

After Detective Crisp testified, counsel for petitioner moved off-record for mistrial. [Doc. No. 10-46,

at pp. 6384-85]. The trial court denied the motion, reasoning:

> The court will deny the motion for a mistrial and the testimony was stricken. If you request, you can prepare a specific instruction to remind the jurors that that testimony was stricken and to disregard it. I don't feel that the comments give rise to any—and it will not affect your client's ability to get a fair trial given the circumstances of the testimony and all of the things considered. There is a typical instruction that is given regarding striking of testimony and considering it for, you know—but if you want a pinpoint instruction on that, you are more than welcome to prepare that.

[*Id.* at p. 5-18].

In keeping with the court's prior statement on the record, the trial judge provided a specific instruction to the jury regarding Detective Crisp's stricken testimony, admonishing the jury to abide by the following:

> During the testimony of prosecution, a witness, retired Detective Brad Crisp, I ordered portions of the testimony stricken from the record. You must disregard those portions of testimony and must not consider that testimony for any purpose.

[Doc. No. 10-47, at pp. 6675-76].

Petitioner appealed from his conviction, arguing, *inter alia*, the denial of his motion for mistrial was inappropriate because of the stricken testimony from

Detective Crisp. [Doc. No. 10-71, at p. 50]. The Court of Appeal rejected this argument, holding that Detective Crisp's statements about the defendant "fitting the profile" were not "so prejudicial that the effect of the testimony could not be cured." [Doc. No. 10-75, at 22].

Petitioner contends habeas relief is warranted because the trial court should have granted his motion for a mistrial[7] [Doc. No. 12, at 9] because Detective Crisp's stricken testimony was overly prejudicial. [Doc. No. 1, at p. 9] ("[P]rofile evidence is inherently prejudicial because it requires the jury to accept an erroneous starting point in its consideration of the evidence").

2. Legal Standard

It is well established that habeas relief is granted only where errors lie for violation of the Constitution, laws, or treaties of the United States. *See Estelle*, 502 U.S. at 68. State court decisions on state law are not typically a basis for such relief. *See id.* (A state error may rise to the level of a federal due process

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[7] Upon review of both the Petition and Traverse, petitioner primarily argues that the testimony of Detective Crisp was overly prejudicial, thus warranting habeas relief. However, the heading for the relevant section of petitioner's Traverse reads: "Given That Crisp's Misconduct, [sic] Deprived Petitioner of a Fair Trial and Due Process, Mistrial Was the Only Available Remedy." [Doc. No. 12, at p. 9]. While not clearly stated, the Court construes the Petition and Traverse to argue the denial of his motion for mistrial by the trial court is an independent basis for habeas relief. The Court analyzes the two arguments in Section C, *infra,* due to the tight nexus between the trial court's handling of Detective Crisp's testimony and the subsequent decision to deny the motion for mistrial.

violation if it rendered the trial arbitrary or involved "fundamental unfairness"). Additionally, a habeas petitioner may not transform a state law issue into a federal claim just by claiming a due process violation. *See Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1997). The admission or exclusion of evidence typically falls outside the scope of federal habeas relief. *See e.g.*, *Cogswell v. Kernan*, 645 Fed. App'x 624, 627 (9th Cir. 2016); *Tinsley v.* Borg, 895 F.2d 520, 530 (1990) (finding exclusion of proffered defense testimony was proper absent a prejudicial effect to warrant a due process violation).

The Supreme Court has made few rulings on evidentiary issues as a basis for violations of the Due Process Clause. Following *Estelle*, the Supreme Court denied certiorari in at least four different cases in which it might have further clarified the constitutional harms from the admission of propensity evidence. *See Alberni*, 458 F.3d at 866. The Ninth Circuit has read *Estelle* to dictate habeas relief for the admission of evidence only when "[the evidence in question] render[s] the trial fundamentally unfair." *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995) (citing *Estelle*, 502 U.S. at 67-68). More clear, however, is the Supreme Court's approval of "well-established rules of evidence [that] permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *See Holmes v. South Carolina*, 547 U.S. 319, 326-27 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 689-690 (1986)).

Defendants have the right to an impartial jury that will return a verdict solely on the evidence produced at trial. *See Turner v. Louisiana*, 379 U.S.

466, 472-73 (1965). Yet where a trial court issues instructions or admonishments, a jury is also presumed to understand and follow the trial court's instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *Richardson v. Marsh*, 481 U.S. 200, 211 (1989); *see also Greer v. Miller*, 483 U.S. 756, 766 n. 8 (1987) ("We normally presume a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it . . . ").

3. Analysis

Petitioner argues that Detective Crisp's remarks, twice heard by the jury, could not be "unrung," regardless of the steps taken by the trial court. [Doc. No. 1, at p. 9]. Despite the trial court striking the testimony from the record, admonishing the jury to disregard what they heard, and issuing an instruction reminding the jury to disregard the testimony, petitioner contends the jurors could not follow the cautionary instructions and the testimony was still considered and used in rendering the Petitioner's conviction. [Doc. No. 12, at pp. 9-10]. Thus, petitioner argues the properly excluded testimony had a prejudicial effect on the jury for which mistrial was the only appropriate remedy. [*Id.* at p. 9].

Petitioner raised this argument with the Court of Appeal, which disagreed. It determined the trial court did not abuse its discretion in denying the motion for mistrial. [Doc. No. 10-8, at p. 21]. The Court of Appeal opined:

> The record shows no abuse of discretion or deprivation of a fair trial based on the trial court's denial of the mistrial motion. The jury was repeatedly told to disregard any

> stricken testimony, and it was given a special pinpoint instruction to remind them to disregard Detective Crisp's stricken testimony.
>
> [. . .]
>
> We are not persuaded by defendant's contention that Detective Crisp's statements that defendant fit the child molester profile are so prejudicial that the effect of the testimony could not be cured. The trial court could reasonably assess that given the evidence properly presented to the jury, the profile statements were of minor significance. The jury knew that defendant admitted to molesting Doe when she was about five years old, and heard testimony to support that he resumed the molestation when Doe was about nine to 13 years old upon his return to the family home. Thus, the jury was presented with extensive evidence showing defendant's pattern of ongoing molestation.
>
> [. . .]
>
> [ ] Detective Crisp's references to a child molester profile were brief and non-descriptive, and the jury was quickly admonished not to consider them.

[*Id.* at pp. 21-22].

The Court of Appeal's determination is reasonable. A motion for mistrial should be granted only if a trial court reasons an admonishment or instruction would not suffice. *See People v. Collins*, 49 Cal.4th 175, 198

(2010). Incurability is inherently speculative, and trial courts are accordingly "vested with considerable discretion in ruling on mistrial motions." *Id.* And to the extent petitioner alleges the trial court's ruling regarding the denial of mistrial violated state law, habeas relief is unavailable. *See Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010) ("it is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts"); *Estelle*, 502 U.S. 62, 67-78 (1991) (mere errors in the application of state law are not cognizable on habeas review).

Here, the trial court not only struck the testimony from the record, but also issued a further instruction when charging the jury. [Doc. No. 10-47, at pp.-6675-76]. Those steps were appropriate methods to overcome the potential prejudice suffered by plaintiff from Detective Crisp's testimony. Further, a jury is presumed to follow a trial court's instructions, and this Court sees no basis to find the jury did not do so in petitioner's case. *Weeks*, 528 U.S. at 234.

Petitioner relies primarily on two United States Supreme Court cases—*Bruton v. United States*, 391 U.S. 123 (1968) and *Gray v. Maryland*, 523 U.S. 185 (1997)—to support his contention that the admonishments and instructions were improper. Petitioner writes in his traverse:

> Petitioner quoted *Bruton* [ ] for the proposition that juries sometimes cannot follow limiting instructions. Respondent, citing *Richardson v. Marsh,* 418 U.S. 200 (1987) asserts that the jury is presumed to follow jury instructions. [ ] However, as later recognized in *Gray v. Maryland* [ ] 'there are

> some contexts in which the risk that the jury will not, or cannot follow instructions is so great and the consequences so vital to the defendant that the practical and human limitations of the jury system cannot be ignored. *Gray* at 190 citing *Bruton* at 125.
>
> Here, the jury could not help but credit Crisp's highly inflammatory profile evidence, despite any instruction to the contrary.

[Doc. No. 12, at pp. 9-10].

Petitioner's reliance on *Bruton* and *Gray* is misplaced; neither case exhorts this Court to grant habeas relief. The Supreme Court in *Gray*, characterized *Bruton* as follows:

> *Bruton* involved two defendants accused of participating in the same crime and tried jointly before the same jury. One of the defendants had confessed. His confession named and incriminated the other defendant. The trial judge issued a limiting instruction, telling the jury that it should consider the confession as evidence only against the codefendant who had confessed and not against the defendant named in the confession. *Bruton* held that, despite the limiting instruction, the Constitution forbids the use of such a confession in the joint trial.

523 U.S. at 188. The scope of *Bruton* was narrowed further in *Richardson v. Marsh*, in which the Court considered a redacted confession of a codefendant in a joint trial. 481 U.S. 200 (1987). The Court determined that the dictates of the Confrontation Clause are not violated "by the admission of a nontestifying

codefendant's confession with a proper limiting instruction when [ ] the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211. The facts of *Gray*, like those of *Bruton* and *Richardson*, also pertain to redacted confessions of a codefendant in a joint trial. 523 U.S. at 188-89. Petitioner omits the context in which the Court made the pronouncement upon which he relies in his Petition and Traverse.[8]

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8 For reference, this Court provides herein below the relevant portions of *Gray* that cite *Bruton* here:

> This Court held that, despite the limiting instruction, the introduction of Evans' out-of-court confession at Bruton's trial had violated Bruton's right, protected by the Sixth Amendment, to cross-examine witnesses. [*Bruton v. United States*], at 137, 88 S. Ct., at 1628. The Court recognized that in many circumstances a limiting instruction will adequately protect one defendant from the prejudicial effects of the introduction at a joint trial of evidence intended for use only against a different defendant. *Id.* at 135, 88 S. Ct., at 1627-1628. But it said:
>
> > "[There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect. . . . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id. at* 135-136, 88 S.Ct., at 1628 (citations omitted).

Neither *Gray* nor *Bruton* were cases in which the litigants sought habeas relief. Moreover, the testimony at issue and potential prejudice therefrom in those cases is substantially different from and greater than the testimony here at issue. While petitioner is correct that there are circumstances in which the potential for prejudice is so great that "the practical and human limitations of the jury system cannot be ignored," the circumstances presented from Detective Crisp's testimony do not rise to the level contemplated in such Supreme Court precedent. *Id. at* 190.

Thus, for the reasons discussed above, this Court agrees the stricken testimony does not warrant habeas relief. Given the strength of the evidence, the defendants' admission to earlier molestation of Doe, the trial court's prompt admonishment, later instruction that counsel for petitioner was allowed to draft, and the jury's findings, the court concludes that any error the trial court may have committed in denying the mistrial motion based on Detective Crisp's testimony did not have a substantial and injurious effect on the jury's verdict. Petitioner is not entitled to habeas relief on this claim.

Accordingly, the state court's rejection of petitioner's claim was reasonable, and the Court RECOMMENDS this claim be DENIED.

The Court found that Evans' confession constituted just such a "powerfully incriminating extrajudicial statemen[t]," and that its introduction into evidence, insulated from cross-examination, violated Bruton's Sixth Amendment rights. *Id. at* 135, 88 S. Ct., at 1627.

Gray v. Maryland, 523 U.S. 185, 190 (1998).

D. Ground Five Regarding Alleged Improper Denial of Release of Juror Information

Petitioner seeks habeas relief from the trial court decision to deny petitioner's request for juror information to determine the extent to which the alleged juror misconduct of one juror interfered with the jury or deliberation process. [Doc. No. 1, at p. 17].

The United States Supreme Court has yet to determine whether a state court rule limiting post-verdict contact with jurors can rise to the level of a federal constitutional violation. *See White v. Woodall*, 572 U.S. ___, 134 S. Ct. 1697 (2014) (holding that "if a habeas court must extend a rationale before it can apply to the facts at hand," then by definition the rationale was not 'clearly established at the time of the state-court decision"), quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004). "[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. . . . [r]ather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003) (internal citations omitted).

However, the Supreme Court has addressed the potential Due Process Clause violations associated with a trial court's failure to grant an evidentiary hearing to investigate jury misconduct. *See Smith v. Phillips*, 455 U.S. 209, 102 (1982); *Remmer v. United States*, 347 U.S. 227 (1954). In *Smith*, the defendant was convicted of two counts of murder and one count of attempted murder. *Smith*, 455 U.S. at 210. Following the verdict, the defendant learned a juror had applied for a position as a felony investigator with the district

attorney's office that prosecuted the case. *Id.* at 212. The defendant also learned the existence of the application was made aware to the prosecution attorneys during the trial, but they nonetheless chose not to bring it to the attention of the defense or the court. *Id.* at 212-13. The trial court held a hearing after the defense filed a motion to set aside the verdict, at which both the juror and prosecutors testified. *Id.* at 213. After the hearing, the trial court denied the motion determining that, while the prosecution clearly were wrong to withhold the information, the application did not suggest any inability to remain impartial or premature assignation of guilt. *Id.* In describing the appropriate steps the trial court took to investigate the matter, the Supreme Court explained:

> Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case.

Id. at 217. Thus "[a]n evidentiary hearing is not mandated every time there is an allegation of jury misconduct or bias." *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) (emphasis in original); *see also United States v. Dutkel*, 192 F.3d 893, 894-95 (9th Cir. 1999) (holding that *Remmer* stands for the proposition that a hearing is mandated only in those circumstances where jury tampering is at issue). The Ninth Circuit has more recently clarified that habeas relief may be unavailing where a trial court engages

in a mid-trial interview of a potentially biased juror for any misconduct, determines the trial may proceed with the jury as presently constituted, and subsequently issues a curative instruction. *Tracey v. Palmateer*, 341 F.3d 1037, 1044-45 (9th Cir. 2003).

Petitioner presented this claim for review to the California Supreme Court, and to the state appellate court on direct appeal. [Doc. No. 10-75, at pp. 10-77]. The California Court of Appeal denied the claim on the merits in a reasoned opinion, and the state supreme court summarily denied the petition for review without a statement of reasoning or citation of authority. [*Id.*].

The Court will look through the silent denial by the state supreme court and apply 28 U.S.C. § 2254(d) to the appellate court opinion, *Ylst v. Nunnemaker*, 501 U.S. 797, 803-06 (1991), which stated:

> Defendant asserts the trial court erred by denying his posttrial request for identifying information for the jurors so his counsel could investigate whether the jury was impacted by juror misconduct.
>
> **A. Background**
>
> **1. Questioning of Juror No. 4 During Jury Deliberations**
>
> After the first day of jury deliberations (a Friday) and when the jury had been dismissed for the weekend, two jurors stayed behind in court, indicating that they wanted to talk to the court. The court instructed the bailiff to tell them to put their concerns in writing.

Each juror wrote the court a note, stating that Juror No. 4 had overheard the victim speaking to others in the hallway; Juror No. 4 was having difficulty being objective; and although Juror No. 4 was "trying his best to be honest [and] fair" he was finding it hard to "'unring the bell.'" [FN 8] The court told counsel it would thank the two jurors for the notes and dismiss them for the weekend, and when the proceedings resumed it would question Juror No. 4 to determine if he "has been compromised." Defense counsel responded that he would like the court to also "inquire whether the jurors have been tainted if he made any comments other than he can't be fair." The court stated it was "reluctant to get any detail, especially at this juncture."

[FN 8] One note said: "During deliberations Juror 4 (I believe) had overheard [Doe] speaking to others in the hall during the trial. Now he is having difficulty, it seems, being objective with the facts of what he heard. He is trying his best to be honest and fair but has used the term 'finding it hard to unring the bell' when talking about it." The other note said: "One of the jurors has admitted to overhearing the victim speaking about the case in the hallway. He is struggling to remain objective during deliberation."

When the proceedings resumed on Monday, the court told counsel it would question Juror No. 4, and counsel could submit any questions to the court that they wanted the court

to ask. When Juror No. 4 was brought into the courtroom, the court told him that it had received information that he may have "overheard something by . . . [Doe] in the hallway," and asked if this was true. Juror No. 4 said that when he walked out of the jury room to get some water, he heard "one of the persons say, 'You should say this because he's going to say this.' Juror No. 4 then "turned right back around and went inside." The court asked, "So is that basically the extent of what you heard?" and Juror No. 4 answered yes. The court pointed out that the instructions tell the jurors to disregard anything they might hear from a party or witness other than when court is in session, and asked Juror No. 4 if he was "having any trouble disregarding it." Juror No. 4 responded, "No, not at all." Satisfied with this response, the court directed the jury to resume deliberations, including Juror No. 4.

The court told counsel that in its view the inquiry was sufficient; Juror No 4 was not troubled by what he inadvertently overheard and was following the instruction to disregard it; the court did not believe it was "in any . . . way affecting the jury"; and if it did affect the jury it would be to the prosecution's detriment by suggesting someone was telling the complaining witness to say certain things that might not be true. When the court asked if there was any motion or other action it should take, both the prosecutor and defense counsel responded no. Defense coun-

sel elaborated, "It just appears from Juror Number 4's statement that he didn't hear the substance of what was indicated. So I agree with the Court. I believe he can be fair."

2. Post-trial Request for Juror Identifying Information

After the jury returned its guilty verdict, defense counsel filed a motion requesting disclosure of the jurors' addresses and telephone numbers so he could interview them and determine if there were grounds for a new trial motion based on the juror misconduct reflected in the two notes from the jurors concerning Juror No. 4. Defense counsel stated it was never established who instructed Doe regarding what Doe should say, and he needed to interview the jurors to ascertain "exactly what transpired in the jury room," including information about how adamant Juror No. 4 was that he could not be fair, exactly what he told the other jurors he overheard, and how his statements impacted the ability of each juror and the jury as a whole to be fair.

The court denied the motion for release of juror identifying information, finding defendant had not made a prima facie showing of good cause for disclosure. The court stated its questioning of Juror No. 4 revealed no juror misconduct had occurred, and the "vague non-specific suppositions" of the other two jurors were "effectively put to rest" by the court's questioning of Juror No. 4, whom the court found to be credible. Further, defense

counsel had the opportunity to submit questions to Juror No. 4, acknowledged that Juror No. 4 had not heard any substantive information, agreed that Juror No. 4 could be fair, and did not request further inquiry or that Juror No. 4 be removed.

B. Relevant Law

To protect a juror's right to privacy, a court is not allowed to release juror identifying information unless specific statutory requirements have been satisfied. (*See People v. Carrasco* (2008) 163 Cal.App.4th 978, 989-990.) The defendant must make a prima facie showing of good cause for disclosure, and if this requirement is met and there is no compelling reason against disclosure, the court must set the matter for a hearing where jurors can protest the disclosure. (Code Civ. Proc., § 237, subds. (b), (c).) To meet the initial prima facie burden, the defendant must make a "'sufficient showing to support a reasonable belief that jury misconduct occurred, . . . and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial.'" (*Carrasco*, *supra*, at p. 990; Code Civ. Proc., § 206, subd. (g); *see People v. Johnson* (2013) 222 Cal.App. 4th 486, 497.)

The right to an impartial jury requires that the jury decide the case solely on the evidence adduced at trial and that it not be influenced by any extrajudicial communications. (*People v. Cissna* (2010) 182 Cal.App.

4th 1105, 1115.) The existence of juror misconduct, including the inadvertent receipt of extrajudicial information, creates a rebuttable presumption of prejudice; the presumption is rebutted if the record shows "'there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment.'" (*People v. Gamache* (2010) 48 Cal. 4th 347, 397-398; *In re Hamilton* (1999) 20 Cal.4th 273, 295-296.) The likelihood of juror bias must be substantial; the courts do not reverse a jury verdict merely because there is some possibility a juror was improperly influenced. (*People v. Danks* (2004) 32 Cal.4th 269, 305.)

If the record shows that investigation of alleged juror misconduct would not reveal anything prejudicial, the trial court may deny the petition for disclosure of juror identifying information. (*People v. Box* (2000) 23 Cal.4th 1153, 1222-1223.) On appeal, we defer to the court's credibility resolutions and review the court's disclosure ruling under the deferential abuse of discretion standard. (*People v. Pride* (1992) 3 Cal.4th 195, 260; *People v. Carrasco*, *supra*, 163 Cal.App.4th at p. 991.)

C. Analysis

Here, two jurors told the court that Juror No. 4 heard communications with Doe in the hallway, and although he was trying to be fair, he was struggling to be objective. The two reporting jurors did not indicate that Juror No. 4 had told any jurors the con-

tents of what he overheard, and the two jurors made no suggestion that they, or any other jurors, had been exposed to information that affected their impartiality. Rather, their sole concern was with the difficulties of Juror No. 4. When the court questioned Juror No. 4, he assured the court he had disregarded the statements he had heard, and the court credited this assurance. When the court asked counsel if they wanted the court to do anything further, both counsel responded no, and defense counsel explicitly stated he thought Juror No. 4 could be fair.

From the information received from the two jurors who reported their concerns and the questioning of Juror No. 4, the trial court could reasonably assess that Juror No. 4 was not exposed to anything that ultimately overwhelmed his ability to be impartial. The court could deduce that the difficulties observed on Friday by the two reporting jurors were resolved by Juror No. 4 (who was reportedly trying hard to be impartial) by the time the court questioned him on Monday. This is supported by the fact that neither the prosecutor nor defense counsel expressed any concerns about Juror No. 4 after the court questioned him.

As to the matter of the jury's impartiality as a whole, the court could consider that if Juror No. 4 had conveyed any information to the other jurors that might have affected their ability to be fair, the two reporting jurors would have apprised the court of this

> concern given the diligence with which they reported their concerns about Juror No. 4. The failure of the two reporting jurors to raise any concerns about the impartiality of the jury as a whole supports that Juror No. 4's statements to the jury had no effect on anyone but him. This conclusion is supported by the fact that although defense counsel initially requested that the court inquire about the impact on the other jurors, he did not renew this request after the court questioned Juror No. 4. Although defense counsel filed a posttrial motion seeking to further explore the matter, his failure to raise any concerns at the time Juror No. 4 was questioned suggests that Juror No. 4's demeanor and responses satisfied him that there had been no impact on the impartiality of the jury.
>
> Although additional questioning of Juror No. 4 and/or other jurors would have been helpful to create a more complete record, the court and counsel's handling of the matter revealed sufficient information to rebut the presumption of prejudice arising from Juror No. 4's exposure to extrajudicial information. The court reasonably found that defendant did not make a prima facie showing of prejudicial juror misconduct, and accordingly did not abuse its discretion in denying the request for disclosure of juror identifying information.

[Doc. No. 10-75, at pp. 23-29].

The Court defers to the trial judge's determination that the only juror who was exposed to the post was able to remain impartial. *See Miller v. Fenton*, 474 U.S. 104, 114 (1985) (holding that a state trial judge is in a far superior position to assess juror bias than federal habeas judges); *see also Austad v. Risley*, 761 F.2d 1348, 1350 (9th Cir. 1985) ("The Supreme Court has clearly established that the determination of a juror's partiality or bias is a factual determination to which section 2254(d)'s presumption of correctness applies."), citing *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). In *Palmateer*, as in the present case, the Court interviewed a juror to determine if the conversation he overheard jeopardized their ability to remain objective. *Palmateer*, 341 F.3d at 1038-39. By contrast, however, defense counsel in *Palmateer* strenuously objected to the trial continuing and moved for a mistrial. *Id.* Petitioner's counsel raised no such similar objection before the trial court following the court's examination of the witness. [Doc. No. 10-75, at p. 24]. The trial court in this case was neither required to hold an evidentiary hearing, nor to grant petitioner's request for juror information in light of the earlier rulings.

Moreover, this Court agrees with the Court of Appeal's well-reasoned analysis of the facts and conduct of the trial court. The Court of Appeal accurately notes that no juror ever expressed concern over the impartiality of the jury as a whole. [*Id.* at 28]. This Court finds that petitioner has failed to demonstrate that the state court adjudication of this claim is contrary to, or involves an unreasonable application of, clearly established federal law, or is based on an unreasonable determination of the facts.

Accordingly, this Court RECOMMENDS this claim be DENIED.

E. Claim Five Re Sentencing Court's Consideration of Evidence Excluded at Trial on *Miranda* Grounds

Petitioner argues he is entitled to a new sentencing hearing due to violations of his Fifth and Fourteenth Amendment rights from the sentencing court's consideration of a "non-*Mirandized*" statement he made to a correctional officer. [Doc. No. 1, at pp. 18-19]. Petitioner cites no caselaw in support of his contention that habeas relief is warranted for the court's use of the non-*Mirandized* statement other than *Miranda v. Arizona*, 384 U.S. 436 (1966). Respondent cites to *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014), in a conclusory fashion for the proposition that grounds for relief are not clearly established.

1. Background

During Petitioner's sentencing hearing, his mother, Judith Rippetoe, spoke to the court in his defense. [Doc. No. 10-52, at pp. 7072-76]. She stated petitioner pled guilty to the molestations in 1998 to ensure any charges against his wife, Alma Godwin, would be dismissed. [*Id.* at 7072]. She further claimed, *inter alia*, Ms. Godwin "turned her children against their father" and "is very capable [at] brainwashing people into believing what she wants them to." [*Id.*]. In sum, Ms. Rippetoe asserted petitioner never committed the acts for which he pled guilty in 1998, nor the acts in the present case from which he lodges the instant Petition. [*Id.* at pp. 7074-75].

Following Ms. Rippetoe's statements, the sentencing court noted it was permitted to consider a state-

ment deemed inadmissible at trial for a *Miranda* violation. [*Id.* at pp. 707780]. The prosecution argued for the court to consider the statement made by petitioner to Correctional Officer Pope:

> And I would ask the Court to consider that statement. When he was booked into county jail, he was being interviewed by Correctional Officer Pope, and Correctional Officer Pope testified in a 402 hearing in the first trial, and he stated that he was getting his information to know where to place him inside the jail, and at one point this Correctional Officer Pope said, "Did you do it?" And he said, "Yes, and I even brought in the dog."
>
> Correctional Officer Pope got mad. He testified he got upset, and he had to stop the conversation because he could feel himself getting upset at the defendant.
>
> And so I would ask you to consider that with all of the other evidence presented at trial, understanding why it was not allowed in trial at the time. It was a violation of his Miranda rights.

[*Id.* at 7077-78]. The sentencing court then explained the basis upon which it could consider the statement made by petitioner:

> I will state that to the extent that I can consider the testimony that was not allowed at trial, I would only be considering that on the issue of the credibility of the statement that he didn't do it or that it wasn't true, not for the truth of the matter.

> As far as the crimes where the jury found the defendant guilty, what I am considering is the evidence that was presented at trial, and so I am not going to consider the un-Mirandized statement as proof that he did or did not commit the offenses.
>
> I think the evidence at trial speaks to that significantly enough. But I will consider it for purposes of credibility as to the statements made regarding Ms. Rippetoe and then leave it at that.

[*Id.* at p. 7080-81].

The court subsequently sentenced petitioner to a term of 334 years to life [*Id.* at p. 7124] after providing a lengthy rationale, portions of which are excerpted below:

> All right. As far as the sentencing is concerned, this case covers almost two decades of time period, actually more than two decades in people's lives.
>
> It has a tortured history from the Court's observation and understanding of the case, and I did, during the course of the trial, I looked at the records and the pleadings as well as issues regarding what happened in the first case, because it related to the second case, based upon evidentiary issues that were applicable to the second case specifically, and primarily the statement from the testimony regarding what the Court characterized as a confession made by Mr. Godwin in the 1998 case to Detective Crisp.

And then Detective Crisp after the Court and both counsel litigated the admissibility of that, the Court found that that was admissible evidence, and the record is very clear as to what the Court's reasoning was for that.

But it is very clear to the Court that Mr. Godwin molested the victim in this particular case, [Doe], as it relates to the 1998 case.

And it is not just his plea that he entered into in 1998. It was his confession where he voluntarily went to the police department and gave a very detailed statement that was, although the recording was lost in the interim years, there was a transcript made at the time, a verbatim transcript that survives. The Court has reviewed that. Detective Crisp testified to the contents of that interview, and it was very clear that the import of that was that Mr. Godwin admitted significant acts of child molestation to the same victim, who is the victim in this case.

He entered a plea. He pled guilty. And he received treatment through health professionals to try to alleviate the issues that caused him to molest the victim in the 1990s when she was five years of age and younger.

Essentially the victim doesn't even remember those events because of either the passage of time or the emotional harm that was caused by that, but nonetheless, she may have disclosed it initially, but the bottom line is that we know it occurred. And it occurred in much more significant, on a number of

occasions based upon the statements made by Mr. Godwin.

And the import of what Detective Crisp testified to in my own review of the transcript of that in connection with the motion hearing, in hearings regarding the admissibility of that, that is basically what Mr. Godwin was saying was he couldn't help himself, that he was, had it within him to have the urges to molest children.

And he was asking for help at the time, and we all know the history of what occurred thereafter, is that the district attorney's office is filing charges against Mr. Godwin, he entered into a plea agreement where he pled to one count.

[. . .]

I don't find that was the case. Looking at all the evidence, there is really overwhelming evidence that in 1998, in that decade that he molested Doe. We have his own confession to Detective Crisp. We have his plea which is another confession or admission that he did that.

We have the independent statements he made to his probation officer, and then we also have the statements that he made to the treating mental health professional to that effect, and he did all of that voluntarily.

The testimony regarding the statement to Detective Crisp was that he voluntarily went to the police department and told about his

problem, as he characterized it. And he received a tremendous benefit from that cooperative effort that he had.

[. . .]

He's been convicted of seven separate offenses by this jury, this Court heard testimony on, and I would characterize the molestations which the jury found the defendant guilty on, the amended count applicable to the jury's verdict counts 1 through 7, is that the-or the seven counts as found by the jury is that they were, by any sense, they were horrific acts by somebody who was clearly and unquestionably a child molester, who could not or would not be helped, and that was the conduct. That's the way I called the conduct.

So to the extent Mr. Godwin's family members, and they—I don't doubt that they believe what they are saying. They are just wrong.

They are just wrong as to whether or not he is a child molester, whether or not he's committed these acts. It is clear to the Court and it was clear to the jury that Mr. Godwin molested his own daughter repeatedly, that he did it over a significant period of time in different locations, that he knew what he was doing, he planned out many of them, not all of them, and he did it repeatedly for his own sexual gratification.

The nature of the molestations was horrific, and there was even testimony of an animal involved, and it just doesn't get worse than the conduct that Mr. Godwin engaged in in

> this particular case.
>
> Each of the facts that were found true by the jury that the Court is going to sentence on, they were all separate. They were spaced in some cases by extended periods of time. It wasn't like one incident where there were multiple acts on one occasion. There was actually probably many, many actions, but only one was charged for each block of time.
>
> So the acts that the jury found true and beyond a reasonable doubt were just one of many that he engaged in for a period of many, many years.
>
> I do find that given all the evidence in the case, including the statements made by Mr. Godwin in the 1998 case that were admitted before the jury in this trial, as well as considering all of the evidence that was presented during the course of the trial including the victim's testimony, that the acts were committed.
>
> There's no question in the Court's mind that they are, they were true, that he was properly convicted. The victim was very credible as far as her telling what she could about when they occurred.

[*Id.* at pp. 7082-89] (emphasis added).

2. Legal Standard for the Application of Supreme Court Precedent to a Particular Set of Facts

The Supreme Court has rejected what it termed the "unreasonable-refusal-to-extend" rule where a

state court could be deemed to have erred under ADEPA if it "unreasonably refuse[s] to extend a legal principle to a new context where it should apply." *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014) (internal citations omitted). By definition, a rationale is not clearly established if a habeas court must "extend a rationale 1 to apply it to the facts at hand." *Id.* at 1706 (emphasis added). Section 2254(d)(1) does not require an identical fact pattern for a legal rule to apply, but "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement on the question." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (emphasis added). Indeed, "an 'unreasonable application' of those holdings must be 'objectively unreasonable', not merely wrong; even 'clear error' will not suffice." *White*, 134 S. Ct. at 1702 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003)). Put differently, "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborogugh v. Alvarado*, 541 U.S. 652, 666 (2004). As discussed in greater detail, *infra*, petitioner's arguments would ultimately require this Court to "extend" federal law, rather than "apply" it. And while a persuasive argument can be made for petitioner's position, the determination by the trial court and Court of Appeal were not "so lacking in justification" that there was no "possibility for fairminded disagreement on the question." *Harrington*, 562 U.S. at 103.

3. Determining Clearly Established Supreme Court Precedent Regarding a Sentencing Court Considering Non-*Mirandized* Statements

The instant question for petitioner's claim for habeas relief is whether the sentencing court's consideration of the non-*Mirandized* statement made to a correctional officer violated petitioner's constitutional rights. Specifically, whether the decision by the California Court of Appeal was contrary to clearly established federal law as interpreted by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). Only if there exists a constitutional violation of Supreme Court precedent must this Court then engage in an analysis for harmless error. *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). No Supreme Court case explicitly addresses this question. Most relevant are a series of cases addressing the appropriateness of considering non-*Mirandized* statements at a sentencing hearing in a capital case, and the kinds of inferences that can be appropriately drawn from a defendant's decision not to testify at their sentencing hearing. *See Carter v. Kentucky*, 450 U.S. 288 (1981) (holding that if a defendant chooses not to testify, he has the right to a no adverse-inference instruction during the guilt phase of a trial); *Estelle v. Smith*, 451 U.S. 454 (1981); *Mitchell v. U.S.*, 526 U.S. 314 (1999); *White v. Woodall*, 134 S. Ct. 1697 (2014).

In *Estelle*, the matter before the Court was whether the introduction of an involuntary and non-*Mirandized* pretrial psychiatric examination at the sentencing phase of petitioner's capital murder case violated his right against self-incrimination under the Fifth Amendment. The Court found "no basis to distinguish" between the phases of "a capital murder

trial," and "[g]iven the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees." *Estelle*, 451 U.S. at 463. Determining that the state could not rely on the non-*Mirandized* statements for purposes of demonstrating "future dangerousness"—a required element to sentence petitioner to death under Texas law—the Court affirmed the district and appellate court's decisions to grant the writ. *Id.* at 468.

The Court later expanded the holding of *Estelle*, explaining that "[a]lthough *Estelle* was a capital case, its reasoning applies with full force [in the non-capital case] here, where the Government seeks to use petitioner's silence to infer commission of disputed criminal acts." *Mitchell*, 526 U.S. at 329. The question before the *Mitchell* Court was whether a sentencing court could draw an adverse inference from a defendant's silence when determining facts that might impact the severity of a defendant's sentence. *Id.* at 317. The petitioner pled guilty to four counts of drug distribution: one count for distribution of five or more kilograms of cocaine, and three counts for distribution of cocaine within 1,000 feet of a school or playground. *Id.* The plea did not specify a sum-certain of distributed cocaine, leaving the amount to be determined at the sentencing hearing. *Id.* At sentencing, petitioner proffered no evidence, nor did she testify to counter the government's contentions about the quantity of drugs distributed. *Id. at* 319. "[The] Petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime" which were left to be determined at the sentencing stage of the case. *Id.* at 327. The district judge used the petitioner's decision

not to testify as basis to draw conclusions that negatively impacted her. *Id.* The court of appeals upheld the district court and the Supreme Court reversed and remanded. *Id.* The Court "decline[d] to adopt an exception for the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime." *Id* at 328 (emphasis added). A sentencing court cannot rely on a defendant's decision not to testify at a sentencing hearing to draw an adverse inference regarding a fact or detail of the crime for which a defendant is charged if the fact or detail would serve to exacerbate the defendant's punishment.

In *White v. Woodall*, the Supreme Court carefully parsed *Carter*, *Estelle*, and *Mitchell*, clarifying that habeas relief is *not* warranted where a state sentencing court fails to issue a no-adverse-inference instruction in the penalty phase of a capital case. 134 S. Ct. at 1702. The petitioner pleaded guilty to capital murder, capital kidnapping, and first-degree rape. *Id.* at 1701. He did not testify during the sentencing portion of his case and he requested a "blanket no-adverse-inference instruction," which the court denied. *Id.* at 1704. The Court reasoned that the Kentucky Supreme Court' s conclusion was "not contrary to the actual holding of [*Carter*, *Estelle*, or *Mitchell*]." *Id.* In its analysis, the majority explained how then-existing Supreme Court precedent was not so clear as to preclude "any possibility for fairminded disagreement." *Id.* at 1703 (quoting *Harrington*, 131 S. Ct. at 787).

First the majority turned to *Mitchell*, reasoning the *Mitchell* Court's holding that adverse inferences regarding "factual determinations respecting the circumstances and details of the crime," *Mitchell*, 526

U.S. at 328, necessarily "leaves open the possibility" for some types of permissible inferences. *White*, at 1703. The Majority further notes the *Mitchell* Court made an express reservation: "whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of [a] downward adjustment . . . is a separate question . . . not before us, and we express no view on it. *Mitchell*, at 328. The Court emphasized the reservation for two reasons: (1) "if *Mitchell* suggests that *some* actual inferences might be permissible at the penalty phase, it certainly cannot be read to require a *blanket* no-adverse-inference instruction at every penalty phase"; (2) to the extent any adverse inferences could be drawn from petitioner's silence, they would fall within the class of inferences appropriate under *Mitchell* because petitioner pleaded guilty to all charges, including aggravating circumstances. *Id.* at 1704. In a case where "every relevant fact on which [the state bears] the burden of proof [is established,] there are reasonable arguments that the logic of *Mitchell* does not apply." *Id.* The facts of *Estelle* did not involve an adverse inference from a defendant's silence, but rather whether a non-*Mirandized* statement could be submitted to a jury at the sentencing phase of a capital trial. Therefore, "whatever *Estelle* said about the Fifth Amendment", it does not demand no-adverse-inference instructions in all cases at sentencing. *Id.* at 1704.

Justice Scalia, writing for the *White* majority concluded:

> Perhaps the logical next step from *Carter*, *Estelle*, and *Mitchell* would be to hold that the Fifth Amendment requires a penalty-

> phase no-adverse-inference instruction in a case like this one; perhaps not. Either way, we have not yet taken that step, and there are reasonable arguments on both sides—which is all Kentucky needs to prevail in this AEDPA case. The appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by § 2254(d)(1).

Id. at 1707. Since the Kentucky Supreme Court's rejection of petitioner's arguments were not unreasonable, the United States Supreme Court did not turn to address whether the trial court's "putative error" was harmless. *Id.*

Should this Court determine the sentencing court erred, however, harmless error analysis will be necessary. All federal constitutional errors do not "automatically require reversal of a conviction." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). Two types of constitutional errors exist: structural error and trial error. Structural error implicates constitutional precepts so fundamental to a fair trial that infraction could never be seen as harmless (*e.g.*, deprivation of counsel or the denial of a trial by an impartial judge). *See Chapman v. California*, 386 U.S. 18, 23 (1967). Structural errors requires automatic reversal. *See Fulminante*, 499 U.S. at 290. All other errors are trial errors and can "quantitatively [be] assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 306. Only when an error has a "substantial and injurious effect" on the verdict may habeas relief be granted. *Brecht v. Abra-*

hamson, 507 U.S. 619, 631 (1993) (citing to *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

4. Whether a Non-*Mirandized* Statement May Be Heard at a Sentencing Hearing in a Non-Capital Case Is Clearly Established Supreme Court Precedent

Petitioner argues the sentencing court's determination that "the statement was harmless beyond a reasonable doubt was an unreasonable determination of the facts in light of the record and an unreasonable application of *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)]." [Doc. No. 1, at p. 19]. His argument turns on the assertion that Ms. Rippetoe's credibility as to petitioner's innocence "was irrelevant for any purpose that should have influenced a decision to impose multiple consecutive terms." [*Id.*]. Thus he contends the sentencing court's consideration of the non-*Mirandized* statement in any capacity "violated petitioner's right to Due Process" warranting a new sentencing hearing. [*Id.*].

Respondent rejoins on two grounds. [Doc. No. 9-1, at pp. 44-45]. First, that petitioner failed to identify any Supreme Court precedent to support his contention that *Miranda* applies "in a sentencing hearing in a non-capital case." [*Id.* at p. 44]. Second, even assuming there was constitutional error, "any error was clearly harmless beyond a reasonable doubt" as determined by the California Court of Appeal. [*Id.*]. The Court turns first to the question of whether the right was clearly established as petitioner contends. Whether any error was harmless is addressed in sub-section five, *infra.*

Petitioner presented this claim for review to the California Supreme Court, and to the state appellate court on direct appeal. [Doc. Nos. 10-75, 10-77]. The California Court of Appeal denied the claim on the merits in a reasoned opinion, and the California Supreme Court summarily denied the petition for review without a statement of reasoning or citation of authority. [*Id.*]. The Court will look through the silent denial by the California Supreme Court and apply 28 U.S.C. § 2254(d) to the California Court of Appeal opinion, *Ylst*, 501 U.S. at 803-06, which "[a]ssum[ed], without deciding, that at sentencing the court could not properly consider defendant's non-*Mirandized* admission to the correctional officer." [Doc. No. 10-75, at p. 32]. The Court of Appeal did note, however, that "there is case authority indicating a sentencing court in a noncapital case may in some circumstances properly consider a defendant's non-*Mirandized* statements." [*Id.* at p. 32 n. 10]. Assuming a violation existed, the Court of Appeal offered no extended discussion for its reasoning and quickly turned to the question of harmless error. [*Id.* at p. 32].

Upon review of existing Supreme Court precedent, this Court finds the Court of Appeal erred in assuming a *Miranda* violation arose from the sentencing court's consideration of petitioner's statement to Correctional Officer Pope. The existing caselaw regarding the question of a sentencing court's consideration of a non-*Mirandized* statement at a sentencing is not "contrary to, or [ ] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

To agree with the Court of Appeal, this Court would need to read *Estelle* and *Mitchell* together using a mode of legal analysis similar to what the Supreme Court expressly rejected in *White v. Woodall.* 134 S. Ct. at 1707. *Estelle* stands for the proposition that a non-*Mirandized* statement introduced in the penalty phase of a capital case constitutes a violation of one's right against self-incrimination under the Fifth Amendment. 451 U.S. at 462. *Mitchell*, in turn, stands for the proposition that a defendant has a Fifth Amendment right to be free from adverse inferences regarding the factual details and circumstances of a crime at the sentencing phase of a non-capital case. 526 U.S. at 329. Where "every relevant fact on which [the state bears] the burden of proof [is established, however,] there are reasonable arguments that the logic of *Mitchell* does not apply." *White v. Woodall*, 134 S. Ct. at 1704. To find the sentencing court violated petitioner's Fifth Amendment rights, this Court would have to read *Estelle* and *Mitchell* to dictate that a sentencing court's consideration of petitioner's non-*Mirandized* statement in a non-capital trial where "every relevant fact on which the state [bore] the burden of proof [was established]"—as it was here—violates the Fifth Amendment. *Id.* While a strong argument can be made in favor of petitioner's contentions, the Supreme Court has "not yet taken that step, and there are reasonable arguments on both sides." *White* at 1707. The reasoning of the Court of Appeal was cursory, at best, and ultimately "[t]he appropriate time to consider the question as a matter of first impression would be on direct review," not in the context of AEDPA. *Id.* To the extent petitioner seeks habeas relief under § 2254(d)(1), the Court finds that Supreme Court precedent is not "beyond

any possibility for fairminded disagreement on the question." *Harrington* 562 U.S. at 103 (emphasis added).

Therefore, the Court RECOMMENDS petitioner's claim for relief insofar as it asserts the Court of Appeal violated clearly established Supreme Court precedent be DENIED.

5. Harmless Error Analysis

Petitioner further asserts that the Court of Appeal's harmless error analysis was misguided and overlooked an unreasonable sentencing decision by the lower court. [Doc. No. 1, at p. 19]. Respondent contends the sentencing decision would have been identical had the court not admitted the non-*Mirandized* statement. [Doc. No. 9-1, at p. 44]. In an abundance of caution, this Court reviews the Court of Appeal's decision for harmless error, despite the finding discussed in Section D, 4, *supra.*

The Court will look through the silent denial by the California Supreme Court and apply 28 U.S.C. § 2254(d) to the Court of Appeal's decision, which stated:

> Assuming, without deciding, that at sentencing the court could not properly consider defendant's non-*Mirandized* admission to the correctional officer, the record shows defendant's incriminating statements to the correctional officer were of minimal consequence at the sentencing hearing; hence, any error was harmless beyond a reasonable doubt. (*People v. Thomas* (2011) 51 Cal.4th 449,498 [harmless beyond a reasonable doubt

standard applies to Miranda error at penalty phase of capital case].) [FN 10]. The court emphasized that it was considering the non-*Mirandized* admission for the narrow purpose of evaluating the credibility of defendant's mother's belief that defendant was innocent. When the court explained the reasoning underlying its sentencing decisions, it focused on the evidence presented at trial and other matters properly before it. The court delineated its view of the trial evidence, found Doe to be credible, and concluded defendant's guilt was clearly established.

[FN 10] Although we need not decide the issue, we note there is case authority indicating a sentencing court in a noncapital case may in some circumstances properly consider a defendant's non-*Mirandized* statements. (*United States v. Graham-Wright* (6th Cir. 2013) 715 F.3d 598, 601-604; *People v. Petersen* (1972) 23 Cal.App.3d 883,896; *see generally White v. Woodall* (2014) ___ U.S. ___ [134 S. Ct. 1697, 1703] [although privilege against self-incrimination applies at penalty phase, it may not apply in the same manner as at guilt phase].

We have no doubt the court's sentencing decision would have been the same even without consideration of defendant's admission to the correctional officer. There is no basis for reversal of the sentence on this ground. [FN 11].

[FN 11] Given our holding, we need not evaluate the People's contention of forfeiture con-

cerning this issue.

[Doc. No. 10-75, at pp. 32-33] (emphasis added).

This Court agrees with the Court of Appeal's determination. In its statements on the record, the sentencing court focused exclusively on the volume of evidence introduced in the case at trial, and the findings of guilt on all counts by the jury. The statement the court considered effectively spoke to two issues: (1) an admission of guilt, and (2) that petitioner had in some way involved an animal in one instance of molestation. [Doc. No. 10-52, at p 1077]. When conducting a harmless error analysis, a court must evaluate whether the purported error "had substantial and injurious effect or influence in determining the jury's influence." *Brecht v. Abrahamson*, 507 U.S. 623, 637 (1993). Given that this is a sentencing hearing, the more appropriate standard is articulated by the Supreme Court in *Apprendi v. New Jersey*, which requires a court "consider the evidence presented at sentencing hearings," 530 U.S. 466, 647 (2000), and determine whether "a judge was presented with sufficient documents at sentencing—including the original conviction and any documents evidencing a modification, termination, or revocation of probation—to enable a reviewing or sentencing court to conclude that a jury would have found the relevant fact beyond a reasonable doubt." *Butler v. Curry*, 528 F.3d 624, 647, n. 14 (2008). Error under *Apprendi* exists when a sentencing court considers a fact not submitted to the jury "that increased the penalty for a crime beyond the prescribed statutory maximum". *Id.* at 490. No such error exists here.

First, the two "facts" arguably contained in the admitted statement were not at issue. Petitioner had

been convicted on all counts for which he was tried when presented before the sentencing hearing. Thus to the extent the court relied on the statement in question for any purpose beyond that contained in the record—to weigh the credibility of Ms. Rippetoe's testimony regarding petitioner's total innocence—the statement established no new fact. Petitioner was convicted of the charged crimes by a jury. Second, the jury had also heard testimony regarding the contention petitioner tried to incorporate an animal into an act of molestation. The victim, Doe, testified to the event[9] and the jury found petitioner guilty of the

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[9] The portion of the trial testimony from Doe is excerpted below:

> [Prosecutor]: Do you remember anything else of a sexual nature happening at 930 Walnut?
>
> [Doe]: There was a time he brought a dog in the house.
>
> Q: Tell me about that.
>
> A: I don't remember exactly what was said. But I remember he wanted me to get down on all fours, and he wanted to put the dog on top of me and put the dogs penis in-I don't know where, but he wanted the penis to go somewhere.
>
> Q: And where did this happen?
>
> A: In the bedroom, master bedroom.
>
> Q: And do you remember if anything happened after you got on all fours?
>
> A: I don't—I think I said no, and I didn't end up getting on all fours. And I think if I remember correctly, he had the dog get on top of him instead.
>
> Q: Did he do anything when the dog got on top of him?

crimes charged pertaining to the relevant time period. [Doc. No. 10-48, at pp. 6814-19]. Thus, it was not the first time the court was apprised of petitioner's inclusion of an animal in a molestation involving Doe. The sentencing court found Doe credible, and the detailed and careful parsing of the facts for which petitioner was found guilty were discussed at length by the sentencing court. [Doc. No. 10-52, at pp. 7082-89]. This Court agrees that the introduction of the statement was harmless, and the ultimate sentence imposed would have been no different if the statement had been precluded.

Accordingly, the Court RECOMMENDS that petitioner's claim for relief due to the admission of the non-*Mirandized* statement be DENIED.

F. Claim Six Alleging *Apprendi* Violation Re Restitution Award

Petitioner challenges the imposition of a victim restitution award of $400,000. [Doc. No. 1, at pp. 20-22]. Even though this claim is based on Supreme Court law, it is not cognizable on federal habeas review. A federal court may entertain a habeas petition "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 Ninth Circuit has held that "§ 2254(a) does not confer jurisdiction over a state prisoner's in-custody challenge to a restitution order imposed as part of a

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A: I don't remember exactly what happened after that. I just remember I was really grossed out.

[Doc. No. 10-44, at pp. 6061-62].

criminal sentence." *Bailey v. Hill*, 599 F.3d 976, 981-82 (9th Cir. 2010); *see also United States v. Thiele*, 314 F.3d 399, 400 (9th Cir. 2002) (claim challenging a restitution fine is not cognizable basis for habeas relief because such claims do not challenge the validity or duration of confinement); *United States v. Kramer*, 195 F.3d 1129, 1130 (9th Cir. 1999); *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998) (imposition of a fine is "merely a collateral consequence of conviction" and, as such, is not sufficient to establish federal habeas jurisdiction). Petitioner's sole claim does not provide a cognizable basis for habeas relief. Petitioner is, therefore, not entitled to relief with regard to his third claim.

Moreover, to the extent petitioner alleges a violation of the Eighth Amendment, this Court also recommends petitioner's claim be denied. "The Eighth Amendment provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' U.S. Const. amend. VIII." *Norris v. Morgan*, 622 F.3d 1276, 1285 (9th Cir. 2010). To establish an Eighth Amendment violation, a fine must be "'grossly disproportional to the gravity of a defendant's offense.'" *United States v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (applying the Eighth Amendment's excessive fines clause to punitive forfeitures)). Given that petitioner was convicted of committing multiple counts of child molestation of his daughter, the $400,000 victim restitution order imposed by the state court was not so grossly disproportionate to his offenses that it violates the Eighth Amendment.

Accordingly, the Court RECOMMENDS that petitioner's claim be DENIED.

G. Claim Six Alleging Cumulative Error

"Cumulative error applies where, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors has still prejudiced a defendant." *Jackson v. Brown*, 513 F.3d 1057, 1085 (9th Cir. 2008) (quoting *Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th Cir. 2000)). As both the state court and respondent correctly note, cumulative error is unavailing. Indeed, the single error identified by the Court of Appeal—the allegedly inappropriate introduction of a non-*Mirandized* statement at the sentencing hearing—was determined not to be a violation of clearly established Supreme Court precedent as discussed in Section D, *supra.* Thus because no errors occurred, no cumulative error is possible. *Hayes v. Ayers*, 625 F.3d 500, 523-24 (9th Cir. 2011) (stating that "[b]ecause we conclude no error of constitutional magnitude occurred, no cumulative prejudice is possible.").

Accordingly, the Court RECOMMENDS that petitioner's claim be DENIED.

CONCLUSION

This Court submits this Report and Recommendation to United States District Judge Bashant under 28 U.S.C. § 636(b)(1) and Local Civil Rule 7.21(d)(4) of the United States District Court for the Southern District of California. For the reasons outlines above, IT IS HEREBY RECOMMENDED that the Court issue an order (1) approving and adopting this Report

and Recommendation; and, (2) DENYING the Petition for Writ of Habeas Corpus.

IT IS HEREBY ORDERED THAT no later than 45 days from the issuance of this order, any party may file written objection with the District Court and serve a copy on all parties. The document should be entitled "Objections to Report and Recommendation."

IT IS FURTHER ORDERED THAT any reply to the objections shall be filed with the District Court and served on all parties no later than ten days after being served with the objections. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the District Court's order. *See Turner v. Duncan*, 158 F.3d 449, 445 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

IT IS SO ORDERED.

/s/ Karen S. CARWFORD
United States Magistrate Judge

Dated: November 21, 2017

ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW (AUGUST 26, 2015)

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff–Respondent,

v.

JEREMY JAMES GODWIN,

Defendant–Appellant.

No. S227407

Fourth Appellate District, Division One
D064909

Petition for review denied.

OPINION OF THE COURT OF APPEALS
STATE OF CALIFORNIA
(MAY 18, 2015)

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff–Respondent,

v.

JEREMY JAMES GODWIN,

Defendant–Appellant.

No. D064909

(Super. Ct. No. JCF25781)

Before: HALLER, Acting P.J.,
MCDONALD, J., IRION, J.

APPEAL from a judgment of the Superior Court of Imperial County, Christopher J. Plourd, Judge. Affirmed as modified.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson,

Kristine A. Gutierrez, and Lynne G. McGinnis, Deputy Attorneys General.

Jeremy Godwin appeals from a judgment convicting him of various sex offenses arising from his molestation of Jane Doe.[1] He argues there is insufficient evidence to support the jury's finding that he used duress to commit the molestation, and insufficient evidence that one of the alleged counts occurred. Further, he asserts the court erred by (1) allowing admission of the details of his prior sex offense conviction; (2) denying his mistrial motion based on stricken testimony that he fit the profile of a child molester; and (3) denying his posttrial request for disclosure of juror identifying information.

As to sentencing, defendant contends (1) the court erred in considering evidence that was excluded at trial on *Miranda*[2] grounds; (2) a $400,000 restitution award to the victim must be reversed due to a violation of the *Apprendi*[3] rule and insufficiency of the evidence, and (3) the trial court should have dismissed, rather than stayed, sentences imposed under the Habitual Sex Offender statute.

We find no reversible error except for defendant's challenge to his habitual sex offender sentences. Because the trial court sentenced defendant under the One Strike sex offender scheme, we agree the habitual sex offender sentences should be dismissed. We modify the judgment to dismiss the habitual sex offender sentences, and as so modified affirm the judgment.

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[1] We refer to the victim as Jane Doe to preserve her anonymity.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] *Apprendi v. New Jersey* (2000) 530 U.S. 466.

FACTUAL AND PROCEDURAL BACKGROUND

Doe, age 20 at the time of trial, testified about numerous acts of molestation committed by her father (defendant) that started when she was a small child and continued until she was 13 years old.

Doe recalled an incident when she was "really small" when she and defendant were riding in a vehicle in the desert and defendant placed his hand between her legs and was "playing with [her] vagina . . . through [her] clothes." Consistent with this memory, Doe's mother testified that when Doe was five years old, she told her mother that defendant had been touching her "down there," pointing to her vaginal area. The matter was investigated; defendant was arrested; and in 1998 he pled guilty to committing a lewd act against Doe.[4]

Because of his 1998 lewd act conviction, defendant was removed from the family home for four years; the family received counseling; and defendant reunited with the family in about January 2002. Doe's mother testified she did not divorce defendant at this time because "[t]here was doubt," explaining that defendant told her he did not commit the molestation, "everything was just misconstrued," and he only pled guilty so she could be reunited with their children.

Doe recalled another incident that occurred when she was about nine years old and her brother was about three or four years old. On this occasion, Doe and her

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[4] At the current trial, Doe did not recall the events surrounding defendant's 1998 conviction. We set forth the facts concerning this prior conviction in more detail below when describing the prior sex offense evidence admitted at trial.

brother were not wearing clothes, she was on top of her brother, and her father was with them in the room. She did not remember further details, except that her brother's penis and her vagina were somehow "involved."

The remaining acts of molestation described by Doe occurred at the family's home on Cedar Avenue where they moved in July of 2002 when Doe was almost 10 years old, and at the family's home on Walnut Avenue where they moved in November 2003 when Doe was 11 years old.

During an incident at the Cedar residence, Doe woke up in the middle of the night on the couch, and defendant was "making out" with her, with his tongue in her mouth and his arms around her. The incident made her feel "uncomfortable." On another occasion, defendant performed oral sex by putting his mouth on Doe's vagina.

During an incident at the Walnut residence, Doe woke up on her parents' bed, and defendant was on top of her with his penis in her vagina. Doe felt "very violated and very upset." On another occasion he had her sit on top of a scanner and he scanned her vagina. On several occasions he woke her up so she could watch pornography with him. She felt "really uncomfortable" watching the pornographic movies, but felt "too afraid to say no."

Also, on multiple occasions at the Walnut residence defendant had Doe give him "blow jobs" when they were in his bathroom. He tried to ejaculate in her mouth; "usually, it ended up in a towel or some article of clothing"; and on one occasion he ejaculated "out on

[her] chest." This conduct made Doe feel "gross," "very uncomfortable," and disgusted.

During another incident defendant brought a dog into his bedroom and told Doe to "get down on all fours" because he wanted to "put the dog on top of [her] and put the dog[']s penis in . . . somewhere." Doe refused, and defendant instead got "on all fours" and had the dog get on top of him. Doe felt "really grossed out."

Doe recalled several other incidents of sexual molestation at the Walnut residence, including an incident in defendant's bedroom when he put vibrators on her vagina; another incident in the bedroom when he put his finger in her vagina; and several incidents in the bedroom and living room when he would masturbate in front of her. Doe testified she did not know whether defendant molested her "every week or every month" while they lived at the Walnut residence, but she knew it happened "at least a few times in one month, and few can be anywhere from two to ten times."

Regarding her relationship with her father, Doe testified he was the primary caregiver for her and her brother. Her mother was frequently gone from home at work and they were not emotionally close. When Doe was small, she and defendant were "very close," and she loved him and he was like a friend to her. As Doe got older, she did not feel as close to him; she did not know how to feel about him; and she knew that what was occurring was not right.

Doe did not recall defendant using physical discipline with her, but she testified she was afraid of him when she was growing up because she was not "sure what he could do." She remembered an incident

in which defendant tied her and her mother to the bed in his bedroom. Her father and mother engaged in loud arguments; there was a lot of shouting, slamming of doors, and slamming of hands on tables; and defendant was sometimes violent. For example, on one occasion he held her mother in a headlock and on another occasion threw a chair. During the headlock incident, her mother yelled that Doe should call 911 and when Doe went to get the phone, defendant threw the phone.

Doe's mother confirmed that she was often gone from home at work, including at night, and defendant took care of the children when she was not at home. Consistent with Doe's testimony, Doe's mother testified there was always a lot of pushing, shoving, throwing of objects, and screaming between her and defendant, and during the incident when she asked Doe to call 911 defendant pulled the phone out of the wall and threw it.

Doe testified she did not know what to do about the molestation because defendant was her father and she had been taught to respect her elders; she had never gone against him because she was afraid of him; she did not know "how to go about confronting the issue"; and she was afraid to say anything to other adults because they knew her father and she was afraid there would be a "back lash" against her. She thought if she told someone, her father would find out and he would get in trouble or do something to hurt her, and people would think differently of her and not believe her.

When Doe was 14 years old, she finally told her father she would no longer engage in the sexual activity. This occurred when he asked her to go with him into

the bedroom, which usually meant "something would happen"; she did not want to go; to try to coax her into the bedroom he grabbed her cat; she asked him for her cat back and hit him in the back; and she then told him she was not going to "do anything anymore" and she was "done with that kind of thing." After this, defendant stopped molesting her. Doe grew closer to her father again and felt safer, but in the back of her mind she worried and was afraid the molestation would resume. She and her father did not talk about the molestation but "just swept it under the rug and pretended" it was not there.

In 2008 or 2009, when Doe was about 16 or 17 years old, her mother moved out of the family home because her parents were getting divorced. Doe was allowed to choose which parent to live with, and she chose to live with defendant. Doe testified she was "very confused" about what she should do; she "just wanted to survive and be safe"; and she elected to live with defendant because the molestation had stopped and defendant was more financially secure than her mother.

However, there was one more incident in September 2009. While Doe and defendant were in the car in the desert, he masturbated in front of her. Doe "looked away and pretended [she] wasn't there and tried to just get away from it mentally." She felt "upset and disgusted." Because of this incident and because she and her father were arguing a lot about her behavior, in October 2009 she moved in with her mother.

As Doe was growing up, she told a few people about the molestation, including her cousin, her high school boyfriend, and two close friends. Doe's cousin and

boyfriend testified to confirm the disclosure. In 2010, near the time when she was graduating from high school, Doe made a full disclosure during a long conversation with her high school boyfriend. During this time period she refused to continue visiting with her father, and after an emotional confrontation with her parents during a child custody exchange in a parking lot, she asked her mother to contact the authorities so she could talk to them.

Doe testified she felt relieved after finally disclosing the molestation; when she disclosed she was not living with her father and felt safer; but she still felt vulnerable because if her father "really wanted to do something, he would find a way." A child sexual assault expert testified that delayed disclosure of sexual abuse is a typical disclosure pattern for children.

Regarding the long-term psychological impact of the molestation, Doe testified, "I have tried to forget a lot of the things about what has happened . . . because it makes me feel a lot of things that I don't want to feel." She explained: "[I]t [is] very hard for me to feel kind of normal, and I feel more like there [are] some aspects of my life that aren't going to be normal, like my sex life with whoever I get married to is not going to be normal and that I am always going to have little triggers that make me remember what happened and stress me out or make me cry. I find it hard to actually speak with counselors about this kind of thing and people in general, but more so [with] counselors and therapists. I feel like I am very much going to have a lot of emotional and maybe psychological damage for the rest of my life from all of this."

Prior Sex Offense Evidence

In January 1998, Detective William Crisp conducted a recorded one-hour interview with defendant regarding the molestation allegation that resulted in his 1998 conviction. When Crisp asked defendant why the molestation happened, defendant responded he had an urge and he fought it all the time; it was a shameful act and he did not talk about it to anyone; there were times when the opportunity arose and he could not stop himself; and after a "certain point where once you are doing it, you just want to keep doing it." Defendant told Crisp that the molestation occurred during two periods of time between October 1996 and December 1997; it happened about eight or nine times; and it included such activities as rubbing, caressing, inserting his finger in Doe's rectum, placing his penis between her thighs up against her vagina, and ejaculation. Detective Crisp provided additional details concerning what defendant said during the interview, including about the nature of his relationship with his wife, further information about when and how the molestation occurred and his feelings about it, and the measures he took to hide the sexual activity.

Defense

The defense presented testimony from several witnesses (including a sheriff's deputy, a social worker, and defendant's mother, brother, and girlfriend) who had contact with Doe during her childhood. These witnesses variously testified that Doe never mentioned, and on occasion denied, any further molestation after defendant's 1998 conviction, and they did not observe anything to suggest defendant was continuing to molest Doe. The defense also called a psychiatrist who testified

that unsubstantiated reports of child sexual abuse are more likely to occur when there are child custody disputes.

Jury Verdict and Sentence[5]

For the incident with Doe and her brother, defendant was convicted of forcible lewd act on a child under age 14 between August 2000 and August 2002 (count 6). For the incidents at the Cedar residence, defendant was convicted of (1) aggravated sexual assault on a child under age 14 and at least 10 years younger than the defendant (forcible oral copulation in the bedroom, count 1), and (2) forcible lewd act on a child (kissing Doe on the couch, count 3) between July 2002 and November 2003. For the incidents at the Walnut residence, defendant was convicted of (1) aggravated sexual assault (forcible oral copulation in the bathroom, count 2), (2) two counts of forcible lewd act (penile/vaginal penetration, count 4, and ejaculation on the chest, count 5), and (3) child molestation with a prior conviction (incident with the dog, count 7) between November 2003 and August 2006.

The aggravated sexual assault by forcible oral copulation offenses (Pen. Code,[6] §§ 269, subd. (a)(4), 288a, subd. (c)(2); counts 1 and 2) and the various forcible lewd act offenses (§ 288, subd. (b)(1), counts 3 through 6) were premised on the theory that defendant committed the offenses through the use of duress.

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[5] Defendant was tried in two trials. At his first trial, the jury acquitted him of some counts and deadlocked on others. At retrial, the jury convicted him as charged

[6] Subsequent unspecified statutory references are to the Penal Code.

The jury also found true that defendant was convicted of a lewd act offense in 1998 for purposes of a prior sex offense conviction allegation, One Strike sex offender allegation, habitual sex offender allegation, and prior strike allegation.

The trial court sentenced defendant to a term of 300 years to life, plus a determinate term of 34 years. The court's sentencing order included an award of $400,000 in direct victim restitution to Doe for her noneconomic losses.

DISCUSSION

I. Sufficiency of the Evidence

Challenging his convictions of aggravated sexual assault and forcible lewd act (counts 1 through 6), defendant asserts the record does not support that he used duress to commit the molestation. He also argues there is insufficient evidence to support the occurrence of the count 1 incident (oral copulation in the Cedar Avenue bedroom).

In reviewing a challenge to the sufficiency of the evidence, we examine the entire record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) It is the exclusive province of the jury to determine credibility and to resolve evidentiary conflicts and inconsistencies, and we presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*Ibid.*; *People v. Young* (2005) 34 Cal.4th 1149, 1181.) If the circumstances reasonably justify the jury's findings, reversal

is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*Nelson*, *supra*, at p. 210.)

A. Sufficiency of the Evidence to Show Duress

For purposes of child molestation offenses, duress means the defendant's "'use of a direct or implied threat of force, violence, danger, hardship or retribution sufficient to cause a reasonable person to do or submit to something that he or she would not otherwise do or submit to.'" (*People v. Soto* (2011) 51 Cal.4th 229, 246, fn. 9, italics and brackets omitted.) To determine the existence of duress, the totality of the circumstances should be considered, including the age of the victim, the defendant's relationship to the victim, and relative size and age disparities. (*People v. Neale* (2008) 160 Cal.App.4th 40, 46-49.) "'The very nature of duress is psychological coercion'" (*id.* at p. 48), and in the context of child molestation "it is the defendant's menacing behavior that aggravates the crime. . . ." (*People v. Soto*, *supra*, 51 Cal.4th at p. 243). A child under age 14 is deemed legally incapable of giving consent, and accordingly evidence showing the defendant's use of duress is not obviated by the fact that the child may have appeared to consent. (*Id.* at pp. 245-246 [the child's consent or lack thereof is immaterial; the focus is on the conduct of the defendant].)

There is sufficient evidence to support the jury's finding of duress. The sexual abuse started when Doe was a small child and continued until she was finally able to assert herself enough to confront defendant at age 14. Doe testified she found the activity "gross," "disgust[ing]," and "upset[ting]," but she was too afraid of defendant to protest the molestation, and she

worried if she told someone he might hurt her. She explained she did not know what he was capable of doing, and she described his volatile and at times violent behavior, including tying her mother and her to the bed, throwing a chair, holding her mother in a headlock and pulling the phone out of the wall.

The jury was entitled to credit Doe's claims that she feared her father because of his demonstrated potential for violence, and she did not like the sexual activity but was too afraid to protest it. From this evidence, the jury could reasonably deduce that although defendant may not have overtly forced Doe to engage in the sexual activity, he psychologically coerced her by creating an atmosphere of fear within the family so that she would be intimidated, compliant, and secretive about the sexual activity. This supports a finding that defendant used duress to molest Doe.

B. Sufficiency of the Evidence for Count 1

Defendant argues the record does not support the jury's finding that the count 1 incident—involving an allegation of oral copulation in the Cedar residence bedroom actually occurred.

Count 1 alleged that "on or about" between July 1, 2002 and November 19, 2003, defendant committed oral copulation in the bedroom at the Cedar residence. During direct examination of Doe, the prosecutor summarized the incidents described by Doe so far in her testimony that occurred at the Cedar residence, and when he asked if she remembered anything else, Doe responded no. After refreshing her recollection by having her read a portion of her transcribed testimony at another proceeding, Doe testified there was an incident at the Cedar residence when defendant "was

giving [her] oral sex," explaining "[h]is mouth was on my vagina." When the prosecutor asked where in the Cedar house this occurred, Doe responded "I don't remember exactly where it was in the house."[7]

Defendant asserts the testimony for count 1 was imprecise as to date and location. He also cites Doe's initial failure to recollect the incident and a portion of her testimony suggesting she did not remember at which house it occurred. He contends it is impossible to distinguish count 1 from the other counts and to calculate whether the charge was filed within the applicable statute of limitations period.

As to the dates of occurrence, Doe testified she was 10 years old when she lived at the Cedar residence; they lived at the Cedar residence for about one year; and they moved to the Walnut residence when she was 11 years old. Doe's mother testified the family lived at the Cedar residence from July 2002 until November 2003. Based on Doe's date of birth in August 1992,

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[7] The colloquy was as follows: "[Prosecutor:] . . . [W]e just left off with refreshing your recollection regarding an incident that *occurred at . . . Cedar*?" [¶] [Doe:] Yes. [¶] [Prosecutor:] Can you explain to us what happened? [¶] [Doe:] There was a time when my dad was giving me oral sex. [¶] [Prosecutor:] Okay. And when you say giving you oral sex what do you mean by that? [¶] [Doe:] His mouth was on my vagina. [¶] [Prosecutor:] And where was this at? Where was [this] at in the *house on . . . Cedar*? Do you remember? [¶] [Doe:] I don't remember exactly where it was in the house. [¶] [Prosecutor:] And it was in the house? [¶] [Doe:] Yes. It was in the house. [¶] [Prosecutor:] *You don't remember what house*? [¶] [Doe:] No." (Italics added.)

We note the prosecutor's last question asking if she did not remember "what house" appears to be a non-sequitur, since the entire line of questioning was focused on an incident at the Cedar house.

she was 10 years old between August 2002 and August 2003. This evidence, combined with Doe's testimony that there was oral copulation at the Cedar residence, supports the allegation that oral copulation occurred during the approximate dates of July 2002 and November 2003, when Doe was about 10 years old, and when the family was living at the Cedar residence. (*See People v. Jones* (1990) 51 Cal.3d 294, 316 [testimony identifying general timeframe when molestation occurred is sufficient].)

As to the location of the incident, Doe initially indicated it occurred at the Cedar residence. The fact that she could not recall in which room it occurred does not defeat the support for a finding that defendant engaged in oral copulation with Doe at the Cedar residence. Even though the information alleged the incident occurred in the bedroom, no such finding was needed to support the jury's verdict. Further, there was no possibility the jury would convict on count 1 based on events associated with another count because count 1 was the only allegation involving oral copulation at the Cedar residence between July 2002 and November 2003. The other allegations involved different locations, time periods, and/or sexual acts.

Defendant's challenges based on Doe's initial inability to recollect the incident, and his claim that she did not know at which residence the incident occurred, are likewise unavailing. On appeal, we draw all inferences in favor of the judgment and inconsistencies in the evidence are not fatal to the verdict. (*See People v. Young*, *supra*, 34 Cal.4th at p. 1181.) Doe's refreshed memory of the incident is sufficient to support a finding that it occurred. Further, although there is brief testimony suggesting Doe did not remem-

ber at which house the incident occurred (*see* fn. 7, *ante*), her affirmative acknowledgement in another portion of her testimony that it occurred at the Cedar residence supports the verdict on count 1.

II. Admission of Prior Sex Offense Evidence

Defendant argues the court abused its discretion and deprived him of a fair trial when it admitted evidence concerning the facts of his 1998 lewd act conviction. He posits that even if his prior sex offense conviction was generally relevant under Evidence Code section 1108 to prove his propensity to commit sexual offenses, the court should have admitted only the fact of his prior conviction and should not have permitted "wholesale admission" of the details underlying his conviction.

A. Background

Prior to trial, defendant offered to stipulate to the existence of his 1998 sex offense conviction, but requested that the court exclude evidence of the facts underlying the conviction on the grounds that they were unduly remote, highly inflammatory, and more prejudicial than probative. The trial court rejected his request, finding the evidence was highly relevant under Evidence Code section 1108 to show he had a propensity to molest his daughter and it was not unduly remote or prejudicial. The court noted that admission of only the sex offense conviction could suggest defendant merely engaged in a "one-time touching," whereas defendant's statements to Detective Crisp were extremely probative to show his propensity to molest his daughter.

B. Governing Law

Evidence Code section 1108 sets forth an exception to the general rule against the use of evidence of a defendant's misconduct apart from the charged offense to show a propensity to commit crimes. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1159-1160.) When a defendant is charged with a sex offense, Evidence Code section 1108 allows admission of evidence of other sex offenses to prove the defendant's disposition to commit sex offenses, subject to the trial court's discretion to exclude the evidence under Evidence Code section 352. (Evid. Code, § 1108, subd. (a); *People v. Lewis* (2009) 46 Cal.4th 1255, 1286.) Evidence Code section 1108 is premised on the recognition that sex offense propensity evidence is critical in sex offense cases given the serious and secretive nature of sex crimes. (*People v. Falsetta* (1999) 21 Cal.4th 903, 918 (*Falsetta*).) When applying Evidence Code section 1108 in a particular case, a defendant's fair trial rights are safeguarded by requiring the trial court to engage in a careful weighing process under Evidence Code section 352 to determine whether the probative value is substantially outweighed by the danger of undue prejudice, confusion, or time consumption. (*Falsetta*, at pp. 916-917.)

Based on Evidence Code section 1108, the presumption is in favor of the admissibility of other sex offense evidence; however, the evidence should not be admitted in cases where its admission could result in a fundamentally unfair trial. (*People v. Loy* (2011) 52 Cal.4th 46, 62; *Falsetta*, *supra*, 21 Cal.4th at p. 917.) When evaluating the other sex offense evidence, relevant factors include "its nature, relevance, and possible remoteness, the degree of certainty of its commission

and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission. . . . " (*Falsetta*, at p. 917.)

The Evidence Code section 352 "'determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.'" (*Falsetta*, *supra*, 21 Cal.4th at pp. 917-918.) On appeal we will not disturb the trial court's ruling unless the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Lewis*, *supra*, 46 Cal.4th at p. 1286.)

C. Analysis

In support of his claim that the trial court should have excluded the details of his 1998 sex offense conviction, defendant argues the circumstances of the prior conviction overshadowed the evidence of the current charges and there was a significant danger the jury would convict him based on his prior misconduct rather than on the evidence concerning the current charges. He contends the details of his prior sex offense conviction were highly inflammatory; of stronger evidentiary weight than the evidence of the current charges; unduly remote; and likely to cause the jury to want to punish him for the prior offense because he was allowed to return home after his conviction.

The trial court was not required to reach these conclusions. As set forth above, at trial Doe's mother

described Doe's disclosure of the molestation giving rise to the 1998 conviction, and Detective Crisp provided a detailed description of defendant's recorded statements admitting this molestation, describing how it occurred, and explaining the difficulty he had in controlling his sexual urges toward his daughter. The court could reasonably conclude that these details were highly relevant to show that defendant had a strong propensity to molest his daughter, which propensity evidence is expressly admissible under Evidence Code section 1108. As found by the trial court, if the jury was merely told that defendant had previously been convicted of molesting Doe, without the details concerning the extent of the molestation and defendant's overpowering pedophilic feelings towards his daughter, it would have been deprived of compelling evidence that supported the prosecution's charges that the molestation resumed once defendant returned to the family home. Neither the prosecutor nor the court is required "to accept a stipulation that would deprive the state's case of its evidentiary persuasiveness or forcefulness." (*People v. Rogers* (2013) 57 Cal.4th 296, 329-330; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1100.)

The fact that the propensity evidence was of significant detriment to the defense case does not render it unduly prejudicial. Undue prejudice does not exist merely because highly probative evidence is damaging to the defense case, but rather arises from evidence that uniquely tends to evoke an emotional bias against the defendant or cause prejudgment of the issues based on extraneous factors. (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439.) This is not a case where the prior sex offense evidence was so egregious as compared to the charged sex offenses that it might

have caused the jury to convict based on the prior offenses regardless of the evidence supporting the current charges. The prior and current molestation evidence were of a similar nature, and the court reasonably found no undue prejudice arising from the highly relevant prior molestation evidence.

Also, the evidence was not unduly remote. The record shows that the prior molestation occurred when Doe was about four and five years old; thereafter defendant was out of the family home for about four years; and when he returned to the home he quickly resumed the behavior by molesting Doe when she was about nine years old. This shows a continuity of misconduct by defendant that obviates any claim of remoteness.

Finally, we reject defendant's contention that the trial court failed to engage in the required careful weighing of probative value and the potential for prejudice. The record reflects the court understood its duty and weighed the evidence under Evidence Code section 352. The court did not abuse its discretion in admitting the details of defendant's prior molestation of his daughter.

III. Denial of Mistrial Based on Stricken Testimony that Defendant Fit Child Molester Profile

Defendant argues the court erred in denying his motion for a mistrial after Detective Crisp twice testified that defendant fit the profile of a child molester. Although the court struck the testimony and admonished the jury to disregard it, defendant contends the testimony so infected the trial with unfairness that its prejudicial impact could not be cured.

While questioning Detective Crisp, the prosecutor asked if he remembered interviewing defendant about the 1998 molestation allegation even though it has been "quite some time" since this occurred. Detective Crisp answered yes, explaining that the interview was "disturbing"; his training in child molestation cases included learning about child molester profiles; and throughout all of his other interviews he had never met someone who "was the profile." Defense counsel objected, and the court sustained the objection, struck the last answer, and instructed the jury to disregard it.

Thereafter, at the conclusion of his questioning on direct examination, the prosecutor asked Detective Crisp if there was anything else about the interview with defendant that he remembered. Detective Crisp responded: "I knew from . . . the first few minutes of the interview, that he was fighting with himself whether to be there or not, whether to answer my questions or not. And that's why I reassured him that it was voluntarily. I want to use the words that I used earlier that were thrown out, but he fit the profile." Defense counsel objected and moved to strike the testimony, and the court responded, "Same ruling. The jurors are asked to disregard that last portion."

Defendant thereafter moved for a mistrial based on the jury hearing the stricken testimony that he fit the profile of a child molester. The court denied the motion, finding the stricken comments did not affect the fairness of the trial, and told defense counsel that upon request it would give a pinpoint instruction reminding the jurors the testimony was stricken and they should disregard it.

"'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. . . . Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions . . . . ' [Citation.] A motion for a mistrial should be granted when ""a [defendant's] chances of receiving a fair trial have been irreparably damaged."'" (*People v. Collins* (2010) 49 Cal.4th 175, 198.)

The record here shows no abuse of discretion or deprivation of a fair trial based on the trial court's denial of the mistrial motion. The jury was repeatedly told to disregard any stricken testimony, and it was given a special pinpoint instruction to remind them to disregard Detective Crisp's stricken testimony. During the instructions at the beginning of trial, the jury was told: "If I order testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose." When Detective Crisp made the two statements that defendant fit a child molester profile, the court immediately sustained defense counsel's objections, struck the testimony, and told the jury to disregard it. During the instructions just prior to deliberations, the court again told the jury: "During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. . . . If I ordered testimony stricken from the record, you must disregard it and must not consider it for any purpose." Further[,] at this juncture the court gave the special pinpoint instruction stating: "During the testimony of prosecution witness [r]etired Detective Brad Crisp, I ordered portions of the testimony stricken from the record. You must disregard

those portions of testimony and must not consider that testimony for any purpose." We presume the jurors followed these repeated admonitions to disregard stricken testimony. (*People v. Cox* (2003) 30 Cal.4th 916, 961.)

We are not persuaded by defendant's contention that Detective Crisp's statements that defendant fit a child molester profile were so prejudicial that the effect of the testimony could not be cured. The trial court could reasonably assess that given the evidence properly presented to the jury, the profile statements were of minor significance. The jury knew that defendant had admitted to molesting Doe when she was about five years old, and heard detailed testimony to support that he resumed the molestation when Doe was about nine to 13 years old upon his return to the family home. Thus, the jury was presented with extensive evidence showing defendant's pattern of ongoing molestation. Further, this is not a case where the jury was exposed to a lengthy delineation of inadmissible profile evidence. (*See*, *e.g.*, *People v. Robbie* (2001) 92 Cal.App.4th 1075, 1081-1084.) Rather, Detective Crisp's references to a child molester profile were brief and non-descriptive, and the jury was quickly admonished not to consider them.

Although Detective Crisp's repeat of testimony that had been stricken is not to be condoned, the trial court reasonably concluded that his passing references to defendant fitting a child molester profile did not undermine the fairness of defendant's trial.

IV. Posttrial Denial of Request for Juror Identifying Information

Defendant asserts the trial court erred by denying his posttrial request for identifying information for the jurors so his counsel could investigate whether the jury was impacted by juror misconduct.

A. Background

Questioning of Juror No. 4 During Jury Deliberations

After the first day of jury deliberations (a Friday) and when the jury had been dismissed for the weekend, two jurors stayed behind in court, indicating that they wanted to talk to the court. The court instructed the bailiff to tell them to put their concerns in writing. Each juror wrote the court a note, stating that Juror No. 4 had overheard the victim speaking to others in the hallway; Juror No. 4 was having difficulty being objective; and although Juror No. 4 was "trying his best to be honest [and] fair" he was finding it hard to "'unring the bell.'"[8] The court told counsel it would thank the two jurors for the notes and dismiss them for the weekend, and when the proceedings resumed it would question Juror No. 4 to

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[8] One note said: "During deliberations Juror 4 (I believe) had overheard [Doe] speaking to others in the hall during the trial. Now he is having difficulty, it seems, being objective with the facts of what he heard. He is trying his best to be honest and fair but has used the term 'finding it hard to unring the bell' when talking about it." The other note said: "One of the jurors has admitted to overhearing the victim speaking about the case in the hallway. He is struggling to remain objective during deliberation."

determine if he "has been compromised." Defense counsel responded that he would like the court to also "inquire whether the jurors have been tainted if he made any comments other than he can't be fair." The court stated it was "reluctant to get any detail, especially at this juncture."

When the proceedings resumed on Monday, the court told counsel it would question Juror No. 4, and counsel could submit any questions to the court that they wanted the court to ask. When Juror No. 4 was brought into the courtroom, the court told him that it had received information that he may have "overheard something by . . . [Doe] in the hallway," and asked if this was true. Juror No. 4 said that when he walked out of the jury room to get some water, he heard "one of the persons say, 'You should say this because he's going to say this.'" Juror No. 4 then "turned right back around and went inside." The court asked, "So is that basically the extent of what you heard?" and Juror No. 4 answered yes. The court pointed out that the instructions tell the jurors to disregard anything they might hear from a party or witness other than when court is in session, and asked Juror No. 4 if he was "having any trouble disregarding it." Juror No. 4 responded, "No, not at all." Satisfied with this response, the court directed the jury to resume deliberations, including Juror No. 4.

The court told counsel that in its view the inquiry was sufficient; Juror No 4 was not troubled by what he inadvertently overheard and was following the instruction to disregard it; the court did not believe it was "in any . . . way affecting the jury"; and if it did affect the jury it would be to the prosecution's detriment by suggesting someone was telling the complaining

witness to say certain things that might not be true. When the court asked if there was any motion or other action it should take, both the prosecutor and defense counsel responded no. Defense counsel elaborated, "It just appears from Juror Number 4's statement that he didn't hear the substance of what was indicated. So I agree with the Court. I believe he can be fair."

Posttrial Request for Juror Identifying Information

After the jury returned its guilty verdict, defense counsel filed a motion requesting disclosure of the jurors' addresses and telephone numbers so he could interview them and determine if there were grounds for a new trial motion based on the juror misconduct reflected in the two notes from the jurors concerning Juror No. 4. Defense counsel stated it was never established who instructed Doe regarding what Doe should say, and he needed to interview the jurors to ascertain "exactly what transpired in the jury room," including information about how adamant Juror No. 4 was that he could not be fair, exactly what he told the other jurors he overheard, and how his statements impacted the ability of each juror and the jury as a whole to be fair.

The court denied the motion for release of juror identifying information, finding defendant had not made a prima facie showing of good cause for disclosure. The court stated its questioning of Juror No. 4 revealed no juror misconduct had occurred, and the "vague nonspecific suppositions" of the other two jurors were "effectively put to rest" by the court's questioning of Juror No. 4, whom the court found to be credible. Further, defense counsel had the opportunity to submit

questions to Juror No. 4, acknowledged that Juror No. 4 had not heard any substantive information, agreed that Juror No. 4 could be fair, and did not request further inquiry or that Juror No. 4 be removed.

B. Relevant Law

To protect a juror's right to privacy, a court is not allowed to release juror identifying information unless specific statutory requirements have been satisfied. (*See People v. Carrasco* (2008) 163 Cal.App.4th 978, 989-990.) The defendant must make a prima facie showing of good cause for disclosure, and if this requirement is met and there is no compelling reason against disclosure, the court must set the matter for a hearing where jurors can protest the disclosure. (Code Civ. Proc., § 237, subds. (b), (c).) To meet the initial prima facie burden, the defendant must make a "'sufficient showing to support a reasonable belief that jury misconduct occurred, . . . and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial.'" (*Carrasco*, *supra*, at p. 990; Code Civ. Proc., § 206, subd. (g); *see People v. Johnson* (2013) 222 Cal.App.4th 486, 497.)

The right to an impartial jury requires that the jury decide the case solely on the evidence adduced at trial and that it not be influenced by any extrajudicial communications. (*People v. Cissna* (2010) 182 Cal. App.4th 1105, 1115.) The existence of juror misconduct, including the inadvertent receipt of extrajudicial information, creates a rebuttable presumption of prejudice; the presumption is rebutted if the record shows "'there is no substantial likelihood that any juror was improperly influenced to the defendant's

detriment.'" (*People v. Gamache* (2010) 48 Cal.4th 347, 397-398; *In re Hamilton* (1999) 20 Cal.4th 273, 295-296.) The likelihood of juror bias must be substantial; the courts do not reverse a jury verdict merely because there is some possibility a juror was improperly influenced. (*People v. Danks* (2004) 32 Cal.4th 269, 305.)

If the record shows that investigation of alleged juror misconduct would not reveal anything prejudicial, the trial court may deny the petition for disclosure of juror identifying information. (*People v. Box* (2000) 23 Cal.4th 1153, 1222-1223.) On appeal, we defer to the court's credibility resolutions and review the court's disclosure ruling under the deferential abuse of discretion standard. (*People v. Pride* (1992) 3 Cal.4th 195, 260; *People v. Carrasco*, *supra*, 163 Cal.App.4th at p. 991.)

C. Analysis

Here, two jurors told the court that Juror No. 4 heard communications with Doe in the hallway, and although he was trying to be fair, he was struggling to be objective. The two reporting jurors did not indicate that Juror No. 4 had told any jurors the contents of what he overheard, and the two jurors made no suggestion that they, or any other jurors, had been exposed to information that affected their impartiality. Rather, their sole concern was with the difficulties of Juror No. 4. When the court questioned Juror No. 4, he assured the court he had disregarded the statements he had heard, and the court credited this assurance. When the court asked counsel if they wanted the court to do anything further, both counsel

responded no, and defense counsel explicitly stated he thought Juror No. 4 could be fair.

From the information received from the two jurors who reported their concerns and the questioning of Juror No. 4, the trial court could reasonably assess that Juror No. 4 was not exposed to anything that ultimately overwhelmed his ability to be impartial. The court could deduce that the difficulties observed on Friday by the two reporting jurors were resolved by Juror No. 4 (who was reportedly trying hard to be impartial) by the time the court questioned him on Monday. This is supported by the fact that neither the prosecutor nor defense counsel expressed any concerns about Juror No. 4 after the court questioned him.

As to the matter of the jury's impartiality as a whole, the court could consider that if Juror No. 4 had conveyed any information to the other jurors that might have affected their ability to be fair, the two reporting jurors would have apprised the court of this concern given the diligence with which they reported their concerns about Juror No. 4. The failure of the two reporting jurors to raise any concerns about the impartiality of the jury as a whole supports that Juror No. 4's statements to the jury had no effect on anyone but him. This conclusion is supported by the fact that although defense counsel initially requested that the court inquire about the impact on the other jurors, he did not renew this request after the court questioned Juror No. 4. Although defense counsel filed a posttrial motion seeking to further explore the matter, his failure to raise any concerns at the time Juror No. 4 was questioned suggests that Juror No. 4's demeanor and responses satisfied him that there had been no impact on the impartiality of the jury.

Although additional questioning of Juror No. 4 and/or other jurors would have been helpful to create a more complete record, the court and counsel's handling of the matter revealed sufficient information to rebut the presumption of prejudice arising from Juror No. 4's exposure to extrajudicial information. The court reasonably found that defendant did not make a prima facie showing of prejudicial juror misconduct, and accordingly did not abuse its discretion in denying the request for disclosure of juror identifying information.

V. Sentencing Issues

A. Sentencing Court's Consideration of Evidence Excluded at Trial on Miranda Grounds

Defendant argues that when making its sentencing decisions, the court erred by considering his pretrial admission that he molested his daughter, which had been excluded from the prosecution's case-in-chief on *Miranda* grounds.

1. Background

Prior to trial, defendant moved to exclude a correctional officer's testimony about an admission that defendant made when he was arrested in 2010 for the current charges and brought to jail for booking. According to the correctional officer, during a routine booking inquiry about the reason for defendant's arrest (designed to determine whether an inmate should be segregated for safety reasons), defendant said he was arrested for molesting his daughter. As the officer continued to inquire about what happened and whether defendant did it, defendant told the officer that the charges were true and he provided details until the

officer became upset and told defendant not to tell him anything more.

The prosecution conceded the evidence was inadmissible in the prosecution's case-in-chief because defendant had earlier invoked his *Miranda* right to silence and he was not provided additional *Miranda* warnings when he made the admission.[9]

At sentencing after the jury's guilty verdict—for purposes of evaluating the credibility of defendant's mother's claim at the sentencing hearing that defendant had never molested Doe—the court stated it would consider the correctional officer's statement that defendant admitted molesting Doe when he was booked for the current charges. While addressing the court at sentencing, defendant's mother stated that when defendant pled guilty in 1998 he "took the fall in order to keep his family together," explaining that he pled guilty so his children would be taken out of foster care and returned to his wife, charges which had also been filed against his wife would be dismissed, and his wife (who was not a citizen) would not be deported. Defendant's mother maintained that Doe's mother was responsible for the molestation charges against defendant, and in support raised a variety of claims concerning the bad character of Doe's mother and her influence on Doe.

After hearing the statements from defendant's mother and other individuals, the court said that it

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[9] The correctional officer's testimony about defendant's non-*Mirandized* admissions was presented during an Evidence Code section 402 hearing at defendant's first trial, at which time the court excluded the testimony. At defendant's second trial, the prosecutor conceded the evidence was inadmissible.

would consider defendant's excluded admission to the correctional officer solely for purposes of evaluating the credibility of defendant's mother's claim that defendant never molested Doe. The court emphasized that when evaluating the crimes of which defendant was convicted by the jury, it would not consider the non-*Mirandized* admission but would only consider the evidence presented at trial.

Thereafter, the court explained at length the reasoning underlying its sentencing decisions. The court rejected the claim that defendant pled guilty in 1998 to protect his wife from being prosecuted. The court stated it was "very clear" from defendant's various statements (including to Detective Crisp, a mental health professional, and a probation officer) that he committed the molestation charged in the 1998 case; during this time period defendant explained his inability to control his urges and he requested and received mental health treatment; and he served about eight months in jail and was eventually reunited with his family. When defendant returned to his family, he resumed the molestation, committing it on multiple occasions; the jury convicted him of seven separate offenses; and the offenses were "horrific acts by somebody who was clearly and unquestionably a child molester, who could not or would not be helped. . . . "

The court elaborated that although defendant's family members may believe he is not a child molester, it was clear to the court that defendant "molested his own daughter repeatedly, that he did it over a significant period of time in different locations, that he knew what he was doing, he planned out many of them, not all of them, and he did it repeatedly for his own sexual gratification. . . . [¶] . . . [H]e just chose

not to seek help, which he was very well aware of, he knew where he could get it. . . . He chose instead to revictimize [Doe] over again. . . . [¶] The nature of the molestations was horrific, and there was even testimony of an animal involved, and it just doesn't get worse than the conduct [defendant] engaged in in this particular case. [¶] Each of the facts that were found true by the jury that the Court is going to sentence on, they were all separate. . . . [¶] So the acts that the jury found true beyond a reasonable doubt were just one of many that he engaged in for a period of many, many years. [¶] I do find that given all the evidence in the case, including the statements made by [defendant] in the 1998 case that were admitted before the jury in this trial, as well as considering all of the evidence that was presented during the course of the trial including the victim's testimony, that the acts were committed. [¶] . . . The victim was very credible as far as her telling what she could about when they occurred. [¶] She testified as to each of the actions. She had made disclosures to people early on. And she ultimately made disclosures and reported it to law enforcement when she became older and was able to detail those out in more particularities." (Italics added.)

The court set forth additional matters concerning the case, including a statutory requirement that it impose consecutive sentences, and ultimately imposed a term of 300 years to life plus a 34-year determinate term.

2. Analysis

Assuming, without deciding, that at sentencing the court could not properly consider defendant's

non-*Mirandized* admission to the correctional officer, the record shows defendant's incriminating statements to the correctional officer were of minimal consequence at the sentencing hearing; hence, any error was harmless beyond a reasonable doubt. (*People v. Thomas* (2011) 51 Cal.4th 449, 498 [harmless beyond a reasonable doubt standard applies to *Miranda* error at penalty phase of capital case].)[10] The court emphasized that it was considering the non-*Mirandized* admission for the narrow purpose of evaluating the credibility of defendant's mother's belief that defendant was innocent. When the court explained the reasoning underlying its sentencing decisions, it focused on the evidence presented at trial and other matters properly before it. The court delineated its view of the trial evidence, found Doe to be credible, and concluded defendant's guilt was clearly established.

We have no doubt the court's sentencing decision would have been the same even without consideration of defendant's admission to the correctional officer. There is no basis for reversal of the sentence on this ground.[11]

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[10] Although we need not decide the issue, we note there is case authority indicating a sentencing court in a noncapital case may in some circumstances properly consider a defendant's non-*Mirandized* statements. (*United States v. Graham-Wright* (6th Cir. 2013) 715 F.3d 598, 601-604; *People v. Petersen* (1972) 23 Cal.App.3d 883, 896; *see generally White v. Woodall* (2014) ___ U.S. ___ [134 S. Ct. 1697, 1703] [although privilege against self-incrimination applies at penalty phase, it may not apply in the same manner as at guilt phase].)

[11] Given our holding, we need not evaluate the People's contention of forfeiture concerning this issue.

B. Challenges to $400,000 Victim Restitution Award

Section 1202.4 requires the trial court, in conjunction with sentencing, to order the defendant to pay restitution to the victim to compensate the victim for economic loss suffered as a result of the defendant's conduct. (§ 1202.4, subd. (f).) Further, when (as here) a defendant is convicted of violating section 288 (lewd act on a child), the court is required to include noneconomic losses in the victim restitution award. (§ 1202.4, subd. (f)(3)(F).)[12]

On appeal, defendant raises an *Apprendi* challenge to the victim restitution award, and contends the

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[12] Section 1202.4 states in relevant part: "(a) . . . [¶] (3) The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay . . . the following: [¶] . . . (B) Restitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment. . . . [¶] . . . (f) . . . in every case in which a victim has suffered economic loss as a result of the victim's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. . . . [¶] (1) The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. . . . [¶]. . . . (3) To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but not limited to, all of the following: [¶]. . . . (F) Noneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288."

amount of the award is unsupported by the record and excessive.

1. *Apprendi* Challenge

Defendant argues the victim restitution award to Doe for her noneconomic losses violated his jury trial rights under *Apprendi* because the trial court, not the jury, made the findings concerning the award.

Under *Apprendi* and its progeny, a defendant has the right to have the jury, not the trial court, decide any facts that increase the defendant's punishment beyond the maximum punishment that could otherwise be imposed based on the jury verdict alone. (*Alleyne v. United States* (2013) 133 S. Ct. 2151, 2158, 2160 (*Alleyne*); *Southern Union Company v. U.S.* (2012) 132 S. Ct. 2344, 2350 (*Southern Union*); *People v. Black* (2007) 41 Cal.4th 799, 812.) The *Apprendi* rule is designed to safeguard a defendant's right to have a jury decide all the elements of an offense beyond a reasonable doubt, and it extends the jury factfinding requirement to sentencing factors that are viewed as akin to elements of the offense because they increase the punishment for the offense above what is otherwise statutorily prescribed. (*Alleyne*, *supra*, at pp. 2157-2160; *see Oregon v. Ice* (2009) 555 U.S. 150, 170.) Thus, when a statute requires the trial court to increase the punishment based on a finding beyond the jury's verdict, or forbids the trial court from increasing the penalty without the particular finding, the finding is deemed to equate with an element of the offense that must be decided by the jury, not the court. (*See Alleyne*, *supra*, at pp. 2155, 2153-2161; *People v. Black*, *supra*, at p. 812; *People v. Kramis* (2012) 209 Cal.App.4th 346, 350-351.)

For example, in *Alleyne*, the court held the jury, not the trial court, had to find whether the defendant brandished, rather than merely used, a firearm so as to increase a mandatory minimum sentence from five years for firearm use to a mandatory minimum sentence of seven years for firearm brandishing. (*Alleyne*, *supra*, 133 S. Ct. at pp. 2155-2156, 2160 [jury verdict finding firearm use did not permit increased sentence based on court's finding of brandishing].) Similarly, in *Southern Union*, the court held the jury, not the trial court, had to make findings as to precisely how many days a defendant violated an environmental statute that prescribed a fine for each day of violation. (*Southern Union*, *supra*, 132 S. Ct. at pp. 2349-2351 [jury verdict finding violations during two-year period, without specifying number of days violations occurred, did not permit daily fines based on court's determination of number of days].)

However, there are a variety of circumstances in which the *Apprendi* jury factfinding requirement does not apply. For example, the *Apprendi* rule does not apply to judicial factfinding that involves a discretionary selection of a sentence or fine within a range prescribed by statute, rather than a mandatory augmentation of the penalty based on specified facts. (*Southern Union*, *supra*, 132 S. Ct. at pp. 2352, fn. 5, 2353; *Alleyne*, *supra*, 133 S. Ct. at pp. 2161, fn. 2, 2163; *People v. Kramis*, *supra*, 209 Cal.App.4th at pp. 349-352; *see People v. Sandoval* (2007) 41 Cal.4th 825, 844, 846-847.) Also, the rule does not apply to a consequence imposed on the defendant that is collateral to the particular statutorily prescribed penalty for the offense and that does not involve factual determinations historically reserved for jury resolution. (*Oregon v. Ice*, *supra*, 555

U.S. at pp. 163-164, 168-172 [judicial factfinding for consecutive rather than concurrent sentences outside *Apprendi*]; *People v. Mosley* (2015) 60 Cal.4th 1044, 1059-1060 [judicial fact finding for discretionary sex offender residency restriction outside *Apprendi*].) Further, *Apprendi* does not apply to a consequence imposed on the defendant that the Legislature did not intend to be a penalty, and that is not so onerous or in the nature of a traditional penalty as to be deemed a penalty in effect. (*Mosley*, *supra*, at pp. 1062-1069 [discretionary sex offender residency restriction is regulatory scheme to protect public and is not penalty for *Apprendi* purposes].)

Applying these *Apprendi* principles, numerous state and federal courts (including California courts) have concluded that direct victim restitution awards fall outside the parameters of the *Apprendi* jury factfinding requirement. (*People v. Wasbotten* (2014) 225 Cal.App.4th 306, 308-309 [*Apprendi* does not apply to direct restitution award for economic losses]; accord *People v. Sweeny* (2014) 228 Cal.App.4th 142, 155; *People v. Pangan* (2013) 213 Cal.App.4th 574, 585-586; *People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1184; *People v. Millard* (2009) 175 Cal.App.4th 7, 35-36; *United States v. Rosbottom* (5th Cir. 2014) 763 F.3d 408, 420; *United States v. Green* (9th Cir. 2013) 722 F.3d 1146, 1148-1151; *United States v. Day* (4th Cir. 2012) 700 F.3d 713, 732; *United States v. Wolfe* (7th Cir. 2012) 701 F.3d 1206, 1216-1218; *People v. Commonwealth v. Denehy* (Mass. 2014) 2 N.E.3d 161, 173-175; *State v. Huff* (Kan. App. Ct. 2014) 336 P.3d 887, 901-903; *see People v. Smith* (2011) 198 Cal.App.4th 415, 433-434 [jury trial right under California Con-

stitution for civil cases does not apply to victim restitution award for noneconomic losses in criminal cases].)

The victim restitution statute at issue here (§ 1202.4, subd. (f)(3)(F)) directs the court to compensate the victim for noneconomic losses when a defendant violates section 288. Thus, the jury's section 288 guilty verdict authorizes the award, and the court merely determines the existence and amount of the noneconomic loss. In this circumstance, the court is not making a factual finding that mandates an increase in the particular statutory penalty prescribed for the offense that would otherwise apply, nor is it encroaching upon an area of factfinding traditionally reserved for the jury. Rather, the court is exercising its discretion to assess and calculate the victim's losses so as to impose a consequence that is collateral to the penalty prescribed for the offense. (*People v. Millard*, *supra*, 175 Cal.App.4th at p. 36 [victim restitution "does not constitute a sentencing choice by the trial court" within the meaning of the *Apprendi* rule]; *Commonwealth v. Denehy*, *supra*, 2 N.E.3d at p. 174 ["We distinguish [victim] restitution from punishments such as imprisonment and criminal fines that are accompanied by statutory prescriptions."].) As recognized by the United States Supreme Court in *Oregon v. Ice* when concluding consecutive sentences were outside *Apprendi*: "Trial judges often find facts about . . . orders of restitution. . . . Intruding *Apprendi*'s rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings." (*Oregon v. Ice*, *supra*, 555 U.S. at pp. 171-172.)

Further, a victim restitution award is designed as a civil remedy to compensate the victim for his or her losses, and it is not so onerous or akin to traditional

punishment as to be deemed penal in effect. (*People v. Wasbotten*, *supra*, 225 Cal.App.4th at p. 309; *People v. Pangan*, *supra*, 213 Cal.App.4th at p. 585; *People v. Millard*, *supra*, 175 Cal.App.4th at pp. 35-36; *see People v. Harvest* (2000) 84 Cal.App.4th 641, 647-650 [victim restitution is not punishment for double jeopardy purposes; "unlike a [restitution] fine, victim restitution is not expressly and statutorily defined as punishment," and it "is compensation, which does not involve an affirmative disability or restraint, and which Has Not Historically Been Regarded as Punishment"].) As our court explained in *Millard*, the "primary purpose of victim restitution hearings is to allow the People to prosecute an expedited hearing before a trial court to provide a victim with a civil remedy for . . . losses suffered, and not to punish the defendant for his or her crime. . . . [¶] To the extent a victim restitution order has the secondary purposes of rehabilitation of a defendant and/or deterrence of the defendant and others from committing future crimes, those purposes do not constitute increased punishment of the defendant . . . ." (*People v. Millard*, *supra*, 175 Cal.App.4th at pp. 35-36.)

Defendant argues that although a victim restitution award for *economic* damages may be nonpunitive, a victim restitution award for *noneconomic* damages should be deemed punitive for *Apprendi* purposes. In support, he argues the noneconomic loss award applies only to defendants convicted of violating section 288; the amount of the award turns on factors related to the circumstances of the crime such as its duration or severity; and there is no "built-in proportionality limitation" since it is not based on actual, demonstrated loss. We are not persuaded. As we explained above, a

victim restitution award—whether it be for noneconomic or economic losses—involves factual determinations that are collateral to the particular punishment prescribed for the offense; the award is intended to equate with civil compensation rather than a penalty; and it is not so harsh or in the nature of traditional punishment as to necessitate a penalty classification.

The court's factual findings concerning the direct victim restitution award did not invoke the *Apprendi* rule. Given our holding, we need not address the Attorney General's contention of forfeiture.

2. Claim that Restitution Amount Is Unsupported and Excessive

Defendant argues the $400,000 restitution award for noneconomic damages must be stricken because it is unsupported by the record and excessive. He contends there was no substantial evidence that Doe suffered lasting psychological harm, noting she did not appear at the sentencing or restitution hearing, she did not submit a claim, and there was evidence that she was doing well, including attending college, working, and maintaining a stable relationship. He also claims the court failed to adequately explain how it calculated the amount. Further, he asserts that contrary to the holding in *People v. Smith*, *supra*, 198 Cal.App.4th at page 436, the amount of the noneconomic damage award should be evaluated under an abuse of discretion standard rather than a shocking-to-the-conscience standard.

We need not evaluate the standard of review because the record supports the $400,000 award even under an abuse of discretion standard. (*See People v. Giordano* (2007) 42 Cal.4th 644, 665 ["No abuse of

that discretion occurs as long as the determination of . . . loss is reasonable, producing a non–arbitrary result."].) The court reasonably determined that defendant's conduct of molesting Doe during a large part of her childhood caused serious psychological harm and emotional distress to her, and hence a substantial noneconomic loss award was warranted.

At trial Doe described the lack of sexual normalcy and emotional anguish that she has experienced because of the molestation and that she will likely continue to experience for the rest of her life. She expressed similar sentiments when interviewed by probation officers in 2012 and 2013. When interviewed in 2012, Doe initially "expressed courage" and stated she was "ready to be interviewed in order to put this incident behind her." However, when she started talking to the probation officer about the molestation, this "caused her to completely break down and cry. She managed to keep her composure at times and would take breaks in order to catch her breath. [She] was able to carry out the interview and wiped her tears after every statement she made. [¶] . . . [She] wanted to make the court aware that this incident has affected her tremendously. . . . [¶] . . . [N]ow [as] an adult [she] realizes the horrible nightmare she lived with her father." Doe also told the probation officer she wanted defendant to receive a life sentence, noting that the time defendant would have served pursuant to his earlier guilty plea (later withdrawn) would have been "minimal compared to the time she suffered and will continue to suffer for the remainder of her life." During the 2013 interview, Doe told the probation officer that she is trying to move on with her life; she has yet to undergo counseling "due to her mistrust of men" and

she hopes to seek counseling once she finds a suitable counselor; and she "has been permanently impacted to the point [that] talking about it causes emotional pain to return."

At the restitution hearing, defense counsel objected to the court's tentative decision to award $500,000 for noneconomic losses, and requested that the court reduce the award to $250,000. The court stated it had considered Doe's trial testimony and her statements to the probation officers concerning the impact of defendant's conduct on her. Further, it had reviewed civil jury instructions concerning the calculation of past and future emotional distress damages, including CACI No. 3905A and the life expectancy table included in the CACI instructions.[13] Based on these considerations, the court concluded $400,000 was an appropriate amount for noneconomic damages.

Doe's statements at trial and to the probation officers support that she has suffered severe emotional trauma because of the molestation, and that the effects of the trauma will likely endure throughout her life. The court was entitled to credit these statements that defendant's conduct had caused serious, lasting psychological distress to her. Further, the court explained its calculation method, stating that it relied on the guidelines used to determine past and future emotional distress damages in the civil context. Defendant has not shown that the court abused its

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[13] CACI No. 3905A states that there is no fixed standard for noneconomic damages; the trier of fact must use its judgment to decide a reasonable amount based on the evidence and common sense; and recovery for future damages requires proof that the person is reasonably certain to suffer that harm.

discretion or otherwise erred in awarding $400,000 for noneconomic losses.

C. Habitual Sex Offender Sentences Should Be Dismissed Given Imposition of Sentence Under the One Strike Sex Offender Scheme

For each of counts 1 through 6, the court imposed a sentence of 25 years to life under the One Strike sex offender statute (§ 667.61) based on defendant's commission of a statutorily specified sex offense under a statutorily specified circumstance, and doubled each sentence (to 50 years to life) under the Three Strikes statute based on defendant's prior strike conviction (§ 667, subd. (e)(1)). Additionally for each of these counts, the court imposed another sentence of 25 years to life under the Habitual Sex Offender statute (§ 667.71) based on defendant's prior sex offense conviction, and doubled the sentence (to 50 years to life) under the Three Strikes statute. The court then stayed the habitual sex offender sentences under section 654. Defendant argues the trial court was required to dismiss, rather than stay, the sentences imposed under the Habitual Sex Offender statute.

There is a split in authority among the lower appellate courts as to whether the court should stay or dismiss sentences when both the Habitual Sex Offender statute and the One Strike sex offender statute apply. (Compare *People v. Snow* (2003) 105 Cal.App.4th 271, 281-283 [dismiss] and *People v Johnson* (2002) 96 Cal.App.4th 188, 207-209 [dismiss], with *People v. Lopez* (2004) 119 Cal.App.4th 355, 360-366 [stay] and *People v. McQueen* (2008) 160 Cal.App.4th 27, 34-38 [stay].)

Our court has twice concluded that when both the One Strike sex offender sentencing scheme and the alternative Habitual Sex Offender sentencing scheme apply to a defendant's case, the trial court should select which sentencing scheme to apply and then dismiss the sentences for the alternative sentencing scheme. (*People v. Snow*, *supra*, 105 Cal.App.4th at p. 283 ["Under circumstances in which the alternative sentencing schemes of section 667.61 and 667.71 apply, the sentencing court has discretion to choose one of the sentencing schemes[,] and then must strike or dismiss, rather than stay, the sentence under the other."]; *People v. Johnson*, *supra*, 96 Cal.App.4th at pp. 207-209.) In the interests of consistency within our division, we conclude this is the appropriate procedure to follow unless and until the California Supreme Court resolves the issue otherwise. Accordingly, we shall modify the judgment to order that the habitual sex offender sentences on counts 1 through 6 be dismissed.

VI. Cumulative Effect of Errors

Defendant contends the cumulative effect of errors at the guilt and sentencing phases of his trial violated his constitutional due process right to a fair trial. We have corrected the error concerning the habitual sex offender sentences. The sole remaining possible error was the trial court's reference at sentencing to defendant's non-*Mirandized* admission, which was of minor significance in light of the record as a whole.

Defendant's claim based on the cumulative effect of error is unavailing.

DISPOSITION

The judgment is modified to dismiss the habitual sex offender sentences imposed under section 667.71. As so modified, the judgment is affirmed.

Haller
Acting P. J.

WE CONCUR:

McDonald
Judge

Irion
Judge

TESTIMONY OF DETECTIVE,
TRIAL TRANSCRIPT
(JULY 3, 2013)

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE
COUNTY OF IMPERIAL
DEPARTMENT 2

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

JEREMY JAMES GODWIN,

Defendant.

Case No. JCF25781

Jury Trial Day 7

Reporter's Transcript
Wednesday, July 3, 2013

Before: Hon. Christopher J. Plourd, Judge

For the People:

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District Attorney
by: Jodi Miller
Deputy District Attorney
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For the Defendant:

Jason Amavisca
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[Trial Transcript, p. 6242]

MS. MILLER: May the record reflect that the witness has identified the defendant?

THE COURT: The record will so reflect.

BY MS. MILLER:

Q. Now, do you remember speaking with him on that day? It has been quite some time? Do you remember speaking with him?

A. Yes, I do.

Q. And how do you remember speaking with him?

A. The reason I remember it is because the interview itself was disturbing.

Q. When you say disturbing, what do you mean?

A. Well, throughout the training and everything else, we-when you train in child molest cases, you have to go over prior cases and the profiles of a sexual predator and child molester, things like that. And throughout all of my interviews and interrogations, I had never met someone sitting next to me that was the profile.

MR. AMAVISCA: I will object. Calls for expert testimony.

THE COURT: Sustained. The last answer will be stricken. The jury will be asked to disregard it. Ask your next question.

BY MS. MILLER:

Q. Were you disturbed at the content of the interrogation?

A. Yes.

Q. Okay. Now, did you ask him what brought the molest on, why they happened?

A. Yes, I did.

Q. What did he tell you?

A. He didn't know how it started. It just started. He felt it started, it was there. The opportunity was there and he felt that need.

Q. Did he tell you when the first molest occurred?

A. Yes.

Q. And what did he tell you?

A. Maybe it was October of '96. Okay.

Q. And did he tell you where the first incident occurred?

A. Yes.

Q. And what did he tell you?

A. In his home.

Q. And did he tell you who was home at the time?

A. Just him and the victim.

Q. And did he name the victim?

A. Jaime.

Q. And did he tell you what happened?

A. Yes.

Q. And what did he tell you?

A. He said the first time was basically just rubbing and caressing; rubbing her down there. He motioned her crotch area.

Q. Referring to her vagina?

A. Yes.

Q. Did he say how often something like this would happen?

A. Throughout the interview that changed slightly, but basically in the beginning, he was saying it was, you know, several months apart.

Q. Okay. Did you ask him why something like this would continue to happen?

A. Yes.

Q. And what did he tell you?

A. He said he had an urge and that he fought it all the time. And then there were certain times when the opportunity arose that he couldn't fight the urge. That's when it would happen.

Q. Did he say whether he could help himself from doing it?

A. No, he couldn't.

Q. Did he say whether he thought about molesting his four-year-old daughter often?

A. Yes.

Q. And what did he tell you?

A. Yes. He thought about it often frequently.

Q. And did you ask him if he ever told anybody what was happening, or told anybody about his thoughts?

A. Yes, I did. He said, No. I believe he said it was a shameful act and he wouldn't talk to anybody about it. Didn't talk to anybody about it.

Q. Now, talking about the first time he molested Jaime in October of 1996, did you speak with him about Alma's work schedule at that time?

A. Yes.

Q. And what did he tell you?

A. She was working a lot. She was driving back and forth to Yuma and to El Centro working. So she was gone a lot.

Q. Did he say whether that affected their marriage?

A. Yes.

Q. And how did that affect their marriage?

A. Their sex life was nonexistent.

Q. Did you ask him how long this went on for, Alma's heavy work schedule and the nonexistent sex life?

A. I believe it was four months.

Q. Okay. And did you ask him whether he molested Jaime during those four months?

A. Yes.

Q. And what did he tell you?

A. He said, yes. I believe it was four or five times during that period of time.

Q. Okay. And did he describe the molest to you, what he did?

A. Yes.

Q. And what did he tell you?

A. He said that he would do the rubbing and caressing. And that he would place his penis between Jaime's thighs. I asked him about lubrication. He said he didn't need lubrication because the thighs-there's a lot of, I forget, a lot of give or slip. But there's a lot of give in the thighs so he didn't need lubrication.

And that, also, he felt that if he used lubrication on her thighs that it may cause a problem with him, his penis going somewhere where it shouldn't go.

Q. And did he tell you where the molest would occur within the house?

A. In the bathroom.

Q. Okay. Did he tell you why he performed the molest in the bathroom?

A. Because it was on the linoleum and it is easier to cleanup.

Q. Okay. Did he tell you what he meant by that, easier to cleanup?

A. His ejaculations.

Q. And did he talk about cleaning up after the molest?

A. Yes.

Q. And what did he tell you about that?

A. Well, he would clean himself and he would clean either the shower, his daughter, or clean her up. He mentioned that he tried to cleanup all the evidence as best as possible and put the clothes back on her like she had been to try and mask or cover that nothing had happened; make it appear that nothing had happened.

Q. And did he tell you whether he molested her in the daytime or at night time? Was there a specific time when he would molest her?

A. He said that the time of day wasn't the issue. It was just whenever he had a couple hours where Alma was out of the house and that he knew that he wasn't going to be disturbed for a couple of hours.

Q. Okay. Did you ask him whether or not he said anything to Jaime regarding the molest?

A. He told her not to tell anybody.

Q. Okay. Now, did you ask him if there were any other incidents that occurred after January 1997?

A. Yes.

Q. And what did he tell you?

A. It started up again in June of '97.

Q. Did he tell you why? Okay, prior to June-between January and June, did he state whether any molests occurred?

A. He stated no.

Q. Did he tell you why there was that long time-frame with no molesting her?

A. Well, his wife Alma was pregnant, and he told me that she had a really rough pregnancy and that she was sick all the time. So her being home sick, left him no opportunity.

Q. Okay. And did he talk about whether he was used to molesting her? Did he talk about whether he doing it. Did he use words like failing to resist?

A. Yes.

Q. And can you explain that?

A. Well, throughout the conversation, he made different statements about his need. His constant thinking about the molests, and that he was constantly resisting that urge. He wanted to resist but it would get to a certain point where he couldn't resist.

Q. And did he say what specifically what he was, what was hard to resist?

A. The molestation of Jaime.

Q. Did he talk about having an ache?

A. Yes.

Q. And can you tell me what he said about having an ache?

A. Basically when he would go for a period of time where he fought the urge. He would have an ache to do it again. And that that was his when he couldn't fight it anymore is when he had that ache.

Q. Did he use the word downfall?

MR. AMAVISCA: Objection, your Honor. Leading.

THE COURT: Overruled.

THE WITNESS: Yes, that's when he fought the urge. He described it as he had the ache, and that having a downfall, which referring to him molesting Jaime again. That would be that is what he said was his downfall.

BY MS. MILLER:

Q. Now, did he talk about the molest, how many times he molested Jaime between June or July of 1997 to the date of the interview, which was on January 16, 1998?

A. Yes, I believe that was four times.

Q. And did you ask him when the last time prior to the interview was?

A. Yes, I did.

Q. And what did he tell you?

A. He said it was November/December after Thanksgiving before Christmas. And then I believe he said he thought it might have been November 29th or 30th.

Q. And did you ask him where the last time occurred? Where the last time he molested Jaime was?

A. Yes.

Q. And what did he tell you?

A. I believe that time was in the hallway in the bathroom.

Q. Now, did you ask him whether the three or four times that he molested her between June or July

of 1997 and November of 1997, did you ask him how spread out over time the molest occurred?

A. He made a statement of he didn't know what the calculations were on that, but that they spread out throughout that time. He made a statement that there was never any time within the same week, but that it was spread out.

Q. Did he say why it was spread out?

A. Opportunity and his urge. He would fight it so long and then once the opportunity came up, then he was able to have the time to molest Jaime again.

Q. And did he talk to you about whether Alma confronted him about molesting Jaime?

A. Yes.

Q. And what did he tell you?

A. I believe that was in April of '97. Alma confronted him and he, of course, denied it. And he basically got huffy with her and he said he left and went fishing or something like that.

Q. Did you state whether she ever confronted him again?

A. I don't believe so. I don't recall.

Q. Now, did he tell you whether he ever inserted anything into Jaime, into her rectum or her vagina?

A. Yeah.

Q. And what did he tell you?

A. The last incident between November and December, he told me that he had inserted his finger into Jaime's rectum.

Q. And did he tell you how many times this would occur?

A. He stated that it was just the one time.

Q. Did he say why it was just the one time?

A. Because she asked him to stop and he was afraid that she would tell.

Q. And did he say whether Jaime told him that it hurt when he did that?

A. He said, I believe he told, he did not tell me that she said it hurt. But that the statement that he made that he stopped because he believed it was a physical problem for her and I took that to mean that it hurt her, that he understood it could hurt her.

Q. Did you ask her whether he used anything before he stuck his finger into her rectum?

A. Yes.

Q. What did he tell you?

A. He said he retrieved a bottle of lotion from the shelf. There was a little shelf in the hallway outside the bathroom and there was a bottle of lotion that they kept there and he used lotion on his finger.

Q. And did you ask him whether he planned this?

A. Yes, I did.

Q. And what did he tell you?

A. No. He said no, that it just popped into his head.

Q. Did he tell you which finger he inserted into Jaime's rectum?

A. His pinky finger.

Q. Thank you. Did he tell you whether he did anything else to her after inserting his finger into her?

A. Yes. After he removed his pinky finger from her rectum, he continued by placing his penis between her thighs up against her vagina until the point that he was, I believe he described it as, he would get close to ejaculating, then he would pull away.

Q. And did you ask him whether she had clothes on at the time?

A. Yes.

Q. And what did he tell you?

A. No, she was naked. They were both naked.

Q. And did he tell you how they would be become naked?

A. He would have her take her clothes off.

Q. Okay. And did he tell you what he did after he was done molesting her?

A. Shower her, put her clothes back on, and clean things up.

Q. Okay. And did you ask him whether he ever ejaculated after each incident of molest?

A. He said he did either on to the floor or into the toilet on all occasions except maybe one or two.

Q. And did you ask him why on those two occasions he didn't ejaculate?

A. Yes.

Q. And what did he tell you?

A. I don't recall his answer.

Q. Will referring to the transcript refresh your recollection?

A. Yes.

Q. And if you can look on page 35.

A. Yes.

Q. And what did he tell you?

A. He said he either chose not to or Jaime didn't want to continue.

Q. Did he ever state whether he ejaculated on to Jaime?

A. He stated, no.

Q. Did he ever state he was close?

A. Yes.

Q. And how did he describe that?

A. He described it as getting close to ejaculating and then moving back away from her when he ejaculated.

Q. Did he tell you what Jaime called her vagina at the time?

A. Yes.

Q. And what did he tell you?

A. Coochie.

Q. Did he say whether Jaime ever said anything to him about her coochie?

A. Yes.

Q. And what did he tell you?

A. He said at one point that Jaime asked him to put his whaa-whaa, which I believe was their word for his penis, into her coochie.

Q. Did he tell you whether he ever did that?