UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 14 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FRANCISCO XAVIER CARBAJAL, AKA Frank X. Carbajal, Jr., Petitioner-Appellant, v. RALPH DIAZ, Secretary of CDCR, Respondent-Appellee.	No. 20-15535 D.C. No. 1:19-cv-01628-DAD-EPG Eastern District of California, Fresno ORDER

Before: PAEZ and CALLAHAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2 and 5) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANCISCO XAVIER CARBAJAL, JR., Petitioner, v. RALPH DIAZ, Respondent.	No. 1:19-cv-01628-DAD-EPG (HC) ORDER ADOPTING FINDINGS AND RECOMMENDATION, DENYING PETITION FOR WRIT OF HABEAS CORPUS, AND DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY (Doc. No. 7)

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter was referred to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1).

On December 11, 2019, the assigned magistrate judge issued findings and recommendation recommending that the petition be denied. (Doc. No. 7.) Specifically, the magistrate judge concluded that (1) petitioner cannot bring a petition directed solely at an expired conviction and (2) petitioner previously sought and was denied federal habeas relief with respect to his current sentence. (Doc. No. 7.) The findings and recommendations were served on petitioner and contained notice that any objections were to be filed within thirty (30) days of the date of service of that order. On January 2, 2020, petitioner filed timely objections. (Doc. No. 8.)

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In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the court has conducted a *de novo* review of the case. Having carefully reviewed the entire file, including petitioner's objections, the court holds the findings and recommendation to be supported by the record and proper analysis.

In his objections, petitioner claims that he is not challenging his 1992 judgment of conviction entered in the Merced County Superior Court in Case No. 17225. Rather, petitioner contends he is challenging his 1997 judgment of conviction entered in the Merced County Superior Court in Case No. 20873. (Doc. No. 8 at 1.) The petition filed in this federal habeas action, however, clearly asserts that petitioner is challenging his 1992 conviction for violating California Penal Code § 4573.5 which was entered in Merced County Superior Court Case No. 17225 and in which plaintiff received a six-month sentence. (*See* Doc. No. 1 at 1.) Moreover, even if the pending petition did seek to challenging his 1997 conviction, petitioner is not entitled to federal habeas relief. In his objections petitioner states that he was sentenced to a two year term of imprisonment in connection with his 1997 conviction. (Doc. No. 8 at 8.) Petitioner has fully served the sentence imposed on his 1997 conviction, and he "cannot bring a federal habeas petition directed solely at [that] conviction[.]" *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 401 (2001). To the extent petitioner is arguing that the sentence he is currently serving was improperly enhanced as a result of his 1997 prior conviction which he now contends was improperly obtained, petitioner cannot satisfy the procedural prerequisites for relief under § 2254. As noted in the findings and recommendation, petitioner previously sought federal habeas relief in this court with respect to his current conviction and sentence, and thus, a challenge to his current sentence would be a "second or successive" one under 28 U.S.C. § 2244(b). Petitioner has not sought or obtained leave from the Ninth Circuit Court of Appeals to proceed with a second or successive petition. See 28 U.S.C. § 2254(b)(3)(A).

Having found that petitioner is not entitled to habeas relief, the court now turns to whether a certificate of appealability should issue. A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); 28 U.S.C.

§ 2253. Where, as here, the court denies habeas relief on procedural grounds without reaching the underlying constitutional claims, the court should issue a certificate of appealability if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). In the present case, the court finds that reasonable jurists would not find the court's determination that the petition should be denied to be debatable or wrong, or that petitioner should be allowed to proceed further.

Accordingly:

1. The findings and recommendation issued on December 11, 2019 (Doc. No. 7) are adopted;
2. The petition for writ of habeas corpus is denied;
3. The Clerk of Court is directed to close the case; and
4. The court declines to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: **February 24, 2020**

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRANCISCO XAVIER CARBAJAL, JR., Petitioner, v. RALPH DIAZ, Respondent.	Case No. 1:19-cv-01628-DAD-EPG-HC FINDINGS AND RECOMMENDATION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Francisco Xavier Carbajal, Jr. is proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. As Petitioner cannot bring a federal habeas petition directed solely at his expired 1992 conviction and given that Petitioner previously sought federal habeas relief with respect to his current enhanced sentence, the undersigned recommends dismissal of the petition.

I.

BACKGROUND

On November 15, 2019, Petitioner filed the instant federal petition for writ of habeas corpus. Therein, Petitioner states that he is challenging his 1992 conviction in the Merced County Superior Court for a violation of California Penal Code section 4573.5. Petitioner's sentence was six months. (ECF No. 1 at 1).[1] Petitioner asserts the following claims for relief: (1)

[1] Page numbers refer to ECF page numbers stamped at the top of the page.

the trial court deprived Petitioner of due process by accepting a plea that was not made intelligently and by allowing Petitioner to plead no contest to the wrong penal code section; (2) the trial court failed to ascertain a factual basis for the negotiated plea; and (3) ineffective assistance of counsel for failing to advise Petitioner of all the elements of the offense and for allowing Petitioner to plead no contest to the wrong penal code section and thus disregarding a defense based on insufficient evidence. (ECF No. 1 at 4, 6).

II.

DISCUSSION

Rule 4 of the Rules Governing Section 2254 Cases ("Habeas Rule") requires preliminary review of a habeas petition and allows a district court to dismiss a petition before the respondent is ordered to file a response, if it "plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court."

A. Expired Conviction

Here, the petition lists "the judgment of conviction you are challenging" as a 1992 Merced County Superior Court conviction for a violation of California Penal Code section 4573.5. The length of the sentence was six months. (ECF No. 1 at 1). As Petitioner has fully served the sentence imposed pursuant to this 1992 conviction, (ECF No. 1 at 11), Petitioner "cannot bring a federal habeas petition directed solely at [that] conviction[]," Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 401 (2001).

However, Petitioner notes that his 1992 conviction is being used to enhance the period of incarceration of his current conviction[2] and thus, the validity of the 1992 conviction warrants examination because the "state court has not reached the merits of Petitioner's claims [because] counsel did not carefully investigate all factual and legal defenses available to Petitioner." (ECF No. 1 at 11–12). Accordingly, the Court will construe the petition as challenging his current sentence that has been enhanced by the allegedly invalid prior 1992 conviction. See Bernhardt v.

[2] Attached to the petition is a Merced County Superior Court order, dated March 19, 2019, denying Petitioner's state habeas corpus petition. (ECF No. 1 at 14–17). Therein, the Merced County Superior Court notes that Petitioner "is serving an 8-year and 8-month sentence in Merced County case 14CR-00743, which is a 2015 conviction for violations of Penal Code sections 664/262(a), 273.5(a) with great bodily injury, and 29800(a)(1)." (ECF No. 1 at 14).

Los Angeles County, 339 F.3d 920, 925 (9th Cir. 2003) (courts have a duty to construe *pro se* pleadings and motions liberally).

In Lackawanna County, the Supreme Court held that if a state conviction "no longer open to direct or collateral attack in its own right . . . is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained." 532 U.S. at 404. However, the Supreme Court "recognize[d] an exception to the general rule for § 2254 petitions that challenge an enhanced sentence on the basis that the prior conviction used to enhance the sentence was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment, as set forth in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)." Lackawanna County, 532 U.S. at 404. The Ninth Circuit has recognized another exception to this general rule, holding that "when a defendant cannot be faulted for failing to obtain timely review of a constitutional challenge to an expired prior conviction, and that conviction is used to enhance his sentence for a later offense, he may challenge the enhanced sentence under § 2254 on the ground that the prior conviction was unconstitutionally obtained." Dubrin v. People of California, 720 F.3d 1095, 1099 (9th Cir. 2013).

Even if one of these exceptions applies, however, Petitioner still must satisfy the procedural prerequisites for relief under 28 U.S.C. § 2254. See Lackawanna County, 532 U.S. at 404 ("As with any § 2254 petition, the petitioner must satisfy the procedural prerequisites for relief including, for example, exhaustion of remedies."); Dubrin, 720 F.3d at 1099 ("Under this exception to *Lackawanna County*'s general rule, Dubrin may challenge the constitutional validity of his [expired prior] conviction, provided he has satisfied the procedural prerequisites for obtaining relief under § 2254."). As set forth below, Petitioner cannot satisfy the procedural prerequisites for relief under § 2254 because Petitioner previously sought federal habeas relief in this Court with respect to his current conviction and sentence that was enhanced by his expired 1992 conviction.

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B. Unauthorized Successive Petition

A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive petition raising a new ground unless the petitioner can show that (1) the claim rests on a new, retroactive, constitutional right, or (2) the factual basis of the claim was not previously discoverable through due diligence, and these new facts establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)–(B). However, it is not the district court that decides whether a second or successive petition meets these requirements.

Section 2244(b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." In other words, a petitioner must obtain leave from the Ninth Circuit before he can file a second or successive petition in district court. See Felker v. Turpin, 518 U.S. 651, 656–57 (1996). This Court must dismiss any second or successive petition unless the Court of Appeals has given a petitioner leave to file the petition because a district court lacks subject-matter jurisdiction over a second or successive petition. Burton v. Stewart, 549 U.S. 147, 157 (2007).

Here, Petitioner previously sought federal habeas relief in this Court with respect to his current 2015 Merced County Superior Court convictions. See Carbajal v. Kernan, No. 1:17-cv-01413-SKO (denied on the merits); Carbajal v. Diaz, No. 1:19-cv-00956-LJO-SKO (dismissed as successive).[3] Therefore, to the extent that Petitioner challenges his current sentence that was enhanced by his expired 1992 conviction, the Court finds that the instant petition is "second or successive" under 28 U.S.C. § 2244(b).

As Petitioner already filed a federal habeas petition regarding his 2015 Merced County Superior Court convictions and sentence, Petitioner cannot file another petition in this Court regarding the same convictions and sentence without first obtaining permission from the United

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[3] The Court may take judicial notice of its own records in other cases. United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

States Court of Appeals for the Ninth Circuit. Here, Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file this successive petition. Therefore, this Court has no jurisdiction to consider Petitioner's renewed application for relief under 28 U.S.C. § 2254 and must dismiss the petition. See Burton, 549 U.S. at 157.

III.

RECOMMENDATION

Accordingly, the undersigned HEREBY RECOMMENDS that that the petition for writ of habeas corpus be DISMISSED.

This Findings and Recommendation is submitted to the assigned United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within **THIRTY (30) days** after service of the Findings and Recommendation, Petitioner may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." The assigned District Judge will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **December 10, 2019**

/s/ Eric P. Grosjean
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

FRANCISCO XAVIER CARBAJAL JR.,

CASE NO: **1:19-CV-01628-DAD-EPG**

V.

RALPH DIAZ,

Decision by the Court. This action came before the Court. The issues have been tried, heard or decided by the judge as follows:

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 2/25/2020

Keith Holland
Clerk of Court

ENTERED: **February 25, 2020**

by: /s/ S. Martin-Gill
Deputy Clerk

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANCISCO XAVIER CARBAJAL, JR., Petitioner, v. RALPH DIAZ, Secretary, Respondent.	No. 1:19-cv-00956-LJO-SKO (HC) **ORDER ADOPTING FINDINGS AND RECOMMENDATIONS (Doc. No. 3)** **ORDER DISMISSING SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS** **ORDER DIRECTING CLERK OF COURT TO ENTER JUDGMENT AND CLOSE CASE** **ORDER DECLINING TO ISSUE CERTIFICATE OF APPEALABILITY**

Petitioner is a state prisoner proceeding in propria persona with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 1, 2019, the Magistrate Judge assigned to the case issued Findings and Recommendation to dismiss the petition as successive. (Doc. No. 3.) This Findings and Recommendation was served upon all parties and contained notice that any objections were to be filed within thirty (30) days from the date of service of that order. On August 22, 2019, Petitioner filed objections to the Magistrate Judge's Findings and Recommendations. (Doc. No. 5.)

In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), the Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file, including Petitioner's

objections, the Court concludes that the Magistrate Judge's Findings and Recommendation is supported by the record and proper analysis. The petition is successive and Petitioner has not obtained authorization from the Ninth Circuit to file a successive petition. Therefore, the Court is without jurisdiction to consider the petition. *Burton v. Stewart*, 549 U.S. 147, 152 (2007). Petitioner's objections present no grounds for questioning the Magistrate Judge's analysis.

In addition, the Court declines to issue a certificate of appealability. A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only allowed in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335-336 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
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> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

If a court denies a petitioner's petition, the court may only issue a certificate of appealability when a petitioner makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a substantial showing, the petitioner must establish that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting

Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

In the present case, the Court finds that Petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists would not find the Court's determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Thus, the Court DECLINES to issue a certificate of appealability.

Accordingly, the Court orders as follows:

1. The Findings and Recommendations, filed August 1, 2019 (Doc. No. 3), is ADOPTED IN FULL;
2. The petition for writ of habeas corpus is DISMISSED as successive;
3. The Clerk of Court is DIRECTED to ENTER JUDGMENT and close the file; and,
4. The Court DECLINES to issue a certificate of appealability.

This order terminates the action in its entirety.

IT IS SO ORDERED.

Dated: **August 27, 2019**

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRANCISCO XAVIER CARBAJAL, JR., Petitioner, v. RALPH DIAZ, Secretary, Respondent.	Case No. 1:19-cv-00956-SKO (HC) FINDINGS AND RECOMMENDATION TO DISMISS SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS ORDER DIRECTING CLERK OF COURT TO ASSIGN DISTRICT JUDGE [THIRTY-DAY OBJECTION DEADLINE]

On July 12, 2019, Petitioner filed the instant petition for writ of habeas corpus in this Court. Because the petition is successive, the Court will recommend it be DISMISSED.

DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing § 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990). A petition for habeas corpus should not be dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d 13, 14 (9th Cir. 1971).

A federal court must dismiss a second or successive petition that raises the same grounds as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive

petition raising a new ground unless the petitioner can show that 1) the claim rests on a new, retroactive, constitutional right or 2) the factual basis of the claim was not previously discoverable through due diligence, and these new facts establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B).

However, the district court is without jurisdiction to conduct a review of new grounds unless and until a second or successive petition is authorized by the court of appeals. Section 2244(b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." In other words, Petitioner must obtain leave from the Ninth Circuit before he can file a second or successive petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave to file the petition because a district court lacks subject-matter jurisdiction over a second or successive petition. Burton v. Stewart, 549 U.S. 147, 152 (2007); Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir. 2001).

In this case, Petitioner challenges his 2015 conviction in the Merced County Superior Court for attempted rape with great bodily injury, corporal injury to spouse with great bodily injury, and possession of a firearm by a felon. He raises six claims for relief challenging his conviction. Petitioner previously sought federal habeas relief in this Court with respect to the same conviction. See Carbajal v. Kernan, Case No. 1:17-cv-01413-SKO-HC. The petition was denied on the merits. Id.

The Court finds that the instant petition is "second or successive" under 28 U.S.C. § 2244(b). Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file his successive petition. Therefore, this Court has no jurisdiction to consider Petitioner's renewed application for relief under 28 U.S.C. § 2254 and must dismiss the petition. See Burton, 549 U.S. at 157.

ORDER

Accordingly, the Clerk of Court is DIRECTED to assign a District Judge to this case.

RECOMMENDATION

For the foregoing reasons, the Court HEREBY RECOMMENDS that the petition be DISMISSED as successive.

This Findings and Recommendation is submitted to the United States District Court Judge assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty days after being served with a copy, Petitioner may file written objections with the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: July 31, 2019

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRANK X. CARBAJAL, Jr.,

Petitioner,

v.

SCOTT KERNAN,

Respondent.

No. 1:17-cv-01413-SKO HC

ORDER DENYING PETITION FOR WRIT OF HABEA CORPUS

(Doc. 1)

Petitioner, Frank X. Carbajal, Jr., is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254.[1] In his petition, Petitioner alleges one ground for habeas relief: insufficient evidence. Having reviewed the record and applicable law, the Court will deny the petition.

I. Procedural and Factual Background[2]

Petitioner and S. married in 2008 and have one daughter. In 2014, they were living in Atwater at the residence of Petitioner's mother, Darrelle Carbajal ("Darrelle").

[1] Pursuant to 28 U.S.C. § 636(c)(1), both parties consented, in writing, to the jurisdiction of a United States Magistrate Judge to conduct all further proceedings in this case, including the entry of final judgment.

[2] The factual background, taken from the opinion of the California Court of Appeal, Fifth Appellate District, *People v. Carbajal*, (No. F071474) (Cal. App. 5th Mar. 24, 2017), is presumed to be correct. 28 U.S.C. § 2254(e)(1).

Prior to the incident that forms the basis of Petitioner's charges, S. suffered a stroke, which caused her to limp and difficulty speaking, additionally, she was unable to use her right hand or lift her right arm.

On the morning of December 3, 2014, Petitioner and S. took their daughter to school. When they returned home, Petitioner wanted to have sex, but S. declined. Petitioner was insistent, but S. repeatedly rebuffed his advances, "let[ting] him know that [they] really didn't have that kind of relationship anymore." Angered by the rejection, Petitioner forced S. into her bedroom and pushed her onto the bed. Petitioner removed both of their pants and tried to engage in intercourse.

S. struggled to fight back. When she started to cry, Petitioner stated, "Those are fake tears." S. screamed for Darrelle, Petitioner's mother, who was home at the time. Darrelle knocked on the bedroom door and asked, "Do you want me to come in?" S. responded, "Yes." Darrelle entered the bedroom, saw Petitioner on top of S., and told him to get off her. Nonetheless, Petitioner continued his attempt to have intercourse with S.

According to S., when Darrelle threatened to call the police, Petitioner stated, "If you're going to call the police, I'm going to give you a reason to call the police." According to Darrelle, Petitioner said, "If the police are going to come, I'll give a reason for them to come." Petitioner punched S.'s face multiple times before leaving the house to pick up his daughter from school. Upon his arrival, he was arrested. Petitioner did not penetrate S. at any point during the incident.

Levi Crain ("Crain"), a reserve police officer for the City of Atwater, arrived at the house at approximately 1:30 p.m. Crain noted S "had severe swelling in her face, there w[ere] multiple lacerations that were bleeding, her eyes were shut, and she couldn't talk" due to a swollen jaw.

S. was transported to the hospital, where she was interviewed by Detective Matthew Vierra ("Vierra"). According to Vierra, S. "had obvious signs of swelling to her entire face as well as dried blood in her nose and her eyes appeared to be swollen shut." Vierra "had to get almost within

a foot of her mouth in order to actually understand what she was saying."

S. stayed in the hospital overnight and was prescribed pain medication. Three months later, she "still ha[d] the black eyes, . . . [she] still ha[d] a cut on [her] forehead, and [her] face [wa]s still a little swollen on both sides."

Police interviewed Petitioner on the day of the incident. He admitted he tried to have sex with S., who did not consent and "was actively resisting." When Darrelle threatened to call the police, Petitioner "became enraged and struck [S.] approximately 12 times with a closed fist with both hands." Petitioner also admitted he stated, "If I'm going to jail, it's going to be for something I did or I deserve."

At trial, Petitioner testified that on the morning of December 3, 2014, Petitioner hugged and kissed S. and rubbed her shoulders. At one point, he followed her into her bedroom, where he "proceeded to pull her pants down and push her or lead her onto the bed . . . ." After Petitioner got on top of her, S. said, "No." Petitioner asked, "Why?" S. replied "I don't want to," so Petitioner stopped his advances. Subsequently, Darrelle entered the room "without knowing what's going on" and shouted, "Get off." She "asked [S.] if she wanted . . . the police to be called and [S.] said yes . . . ." Petitioner "felt betrayed by both of them" because he "didn't feel . . . [he] had done anything to deserve that . . . ." He "became enraged and . . . struck [S.]" "maybe a dozen times."

Petitioner pled guilty to willful infliction of corporal injury upon a spouse (Cal. Penal Code § 273.5(a)). Petitioner was additionally charged with assault with intent to commit rape, (Cal. Penal Code § 220(a)(1)), and a jury convicted him of the lesser included offense of attempted rape. The jury also found Petitioner guilty of being in possession of a firearm as a felon, (Cal. Penal Code § 29800(a)), and in connection with the corporal injury and attempted rape charges, found true the special allegations that he personally inflicted great bodily injury under circumstances involving domestic violence (Cal. Penal Code § 12022.7(e)). Petitioner received an aggregate sentence of

eight years and eight months.

On March 24, 2017, the California Court of Appeal for the Fifth Appellate District ("Court of Appeal") affirmed Petitioner's conviction. On June 14, 2017, the California Supreme Court summarily denied Petitioner's Petition for Review.

On October 20, 2017, Petitioner filed his first amended petition for writ of habeas corpus before this Court. Respondent filed a response on January 23, 2018, and Petitioner filed a reply on February 26, 2018.

II. Standard of Review

A person in custody as a result of the judgment of a state court may secure relief through a petition for habeas corpus if the custody violates the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); *Williams v. Taylor*, 529 U.S. 362, 375 (2000). On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed thereafter. *Lindh v. Murphy*, 521 U.S. 320, 322-23 (1997). Under the statutory terms, the petition in this case is governed by AEDPA's provisions because it was filed after April 24, 1996.

Habeas corpus is neither a substitute for a direct appeal nor a device for federal review of the merits of a guilty verdict rendered in state court. *Jackson v. Virginia*, 443 U.S. 307, 332 n. 5 (1979) (Stevens, J., concurring). Habeas corpus relief is intended to address only "extreme malfunctions" in state criminal justice proceedings. *Id.* Under AEDPA, a petitioner can obtain habeas corpus relief only if he can show that the state court's adjudication of his 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); *Lockyer v. Andrade*, 538 U.S. 63, 70-71 (2003); *Williams*, 529 U.S. at 413.

"By its terms, § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions set forth in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

As a threshold matter, a federal court must first determine what constitutes "clearly established Federal law, as determined by the Supreme Court of the United States." *Lockyer*, 538 U.S. at 71. In doing so, the Court must look to the holdings, as opposed to the dicta, of the Supreme Court's decisions at the time of the relevant state-court decision. *Id.* The court must then consider whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." *Id.* at 72. The state court need not have cited clearly established Supreme Court precedent; it is sufficient that neither the reasoning nor the result of the state court contradicts it. *Early v. Packer*, 537 U.S. 3, 8 (2002). The federal court must apply the presumption that state courts know and follow the law. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Petitioner has the burden of establishing that the decision of the state court is contrary to, or involved an unreasonable application of, United States Supreme Court precedent. *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996).

"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." *Lockyer*, 538 U.S. at 75-76. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, the AEDPA standard is difficult to satisfy since even a strong case for relief does not demonstrate that the state court's determination was unreasonable. *Harrington*, 562 U.S. at 102.

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III. The State Court Did Not Err in Denying Petitioner's Insufficient Evidence Claims.

Petitioner alleges two insufficient evidence claims. First, Petitioner maintains his attempted rape conviction violates his Due Process Rights because "no evidence supports the essential element that the victim not be the spouse of the perpetrator." (Doc. 1 at 4.) Petitioner is referring to California Penal Code § 261(a), which states: "Rape is an act of sexual intercourse accomplished *with a person not the spouse of the perpetrator* . . ." (emphasis added). Petitioner notes that this section of the penal code was cited on the jury instructions and verdict form, rather than California Penal Code § 262(a), which states: "Rape of a *person who is the spouse of the perpetrator* is an act of sexual intercourse accomplished" under several enumerated circumstances. (emphasis added).

Second, Petitioner contends there was insufficient evidence adduced at trial to support the great bodily injury enhancement as to the attempted rape count because "all injuries were sustained during commission of the corporal injury to spouse offense." (Doc. 1 at 4.)

Respondent counters that the Court of Appeal's rejection of Petitioner's claims was reasonable and decided as a matter of state law. (Doc. 14.)

A. Standard of Review for Insufficient Evidence Claims.

To determine whether the evidence supporting a conviction is so insufficient that it violates the constitutional guarantee of due process of law, a court evaluating a habeas petition must carefully review the record to determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Windham v. Merkle*, 163 F.3d 1092, 1101 (9th Cir. 1998). It must consider the evidence in the light most favorable to the prosecution, assuming that the trier of fact weighed the evidence, resolved conflicting evidence, and drew reasonable inferences from the facts in the manner that most supports the verdict. *Jackson*, 443 U.S. at 319; *Jones v. Wood*, 114 F.3d 1002, 1008 (9th Cir. 1997).

B. Petitioner's Marital Status

1. State Court of Appeal Opinion

The Court of Appeal rejected Petitioner's claim that there was insufficient evidence to support his attempted rape conviction:

> "To determine the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains [substantial] evidence that is reasonable, credible[,] and of solid value, from which a rational trier of fact could find that the elements of the crime were established beyond a reasonable doubt." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955, 60 Cal. Rptr. 3d 534 (*Tripp*).) We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Redmond* (1969) 71 Cal.2d 745, 755, 79 Cal. Rptr. 529, 457 P.2d 321.) "We need not be convinced of the defendant's guilt beyond a reasonable doubt; we merely ask whether '"any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [ ]' [ ]" (*Tripp*, *supra*, at p. 955, italics omitted.)
>
> "Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis what[so]ever is there sufficient substantial evidence to support it." (People v. Redmond, supra, 71 Cal.2d at p. 755.) "'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [ ] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' [ ]" (*People v. Lee* (2011) 51 Cal.4th 620, 632, 122 Cal. Rptr. 3d 117, 284 P.3d 651.)
>
> . . .
>
> As noted earlier, the crime of attempted rape requires (1) the specific intent to commit rape; and (2) a direct, although, ineffectual, act toward its commission. (*People v. Clark*, *supra*, 52 Cal.4th at p. 948.) "A defendant's specific intent to commit rape may be inferred from the facts and circumstances shown by the evidence." (*Ibid.*) "As for the requisite act, the evidence must establish that the defendant's activities went 'beyond mere preparation' and that they show the defendant was 'putting his or her plan into action.' [ ]" (*Ibid*; see, e.g., *People v. Marshall* (1997) 15 Cal.4th 1, 39, 61 Cal.Rptr.2d 84, 931 P.2d 262 ["For example, an attempted forcible rape would occur if a defendant pointed a gun at a woman and ordered her to submit to sexual intercourse, but the woman managed to escape without having been touched."].)
>
> The record, viewed in the light most favorable to the prosecution, demonstrates [Petitioner] forced S. into her bedroom to engage in sexual intercourse even though

she repeatedly expressed her unwillingness to do so. [Petitioner] shoved her onto the bed, removed her pants, got on top of her, and tried to insert his penis. S. resisted notwithstanding her physical impairments and even shed tears, but [Petitioner] did not relent. S. called out to Darrelle, who entered the room and ordered her son to get off. Once again, [Petitioner] did not relent. A rational trier of fact could find the elements of attempted rape were established beyond a reasonable doubt.

[Petitioner] points out the title of CALCRIM No. 1000 and the verdict form for [the rape charge] both cited section 261, subdivision (a)(2)[FN 7] instead of section 262, subdivision (a)(1).[FN 8][FN 9] He thereby argues he could not be convicted of attempted rape because the evidence was insufficient to prove S. was not his spouse as per section 261. We reject this assertion. In the context of a criminal attempt conviction, "[o]ther than forming the requisite criminal intent, a defendant need not commit an element of the underlying offense." (*People v. Medina* (2007) 41 Cal.4th 685, 694, 61 Cal. Rptr. 3d 677, 161 P.3d 187; accord, *People v. Herman* (2002) 97 Cal.App.4th 1369, 1385, 119 Cal. Rptr. 2d 199; *People v. Jones* (1999) 75 Cal.App.4th 616, 627, 89 Cal. Rptr. 2d 485.)[FN 10][FN 11]

FN 7. Section 261, subdivision (a)(2) reads: "Rape is an act of sexual intercourse accomplished *with a person not the spouse of the perpetrator* . . . [¶] . . . [¶] . . . [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (Italics added.)

FN 8. Section 262, subdivision (a)(1) reads: "Rape of a person *who is the spouse of the perpetrator* is an act of sexual intercourse . . . [¶] . . . [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (Italics added.)

FN 9. The jury's verdict form read: "We the jury in the above-entitled case find the defendant . . . GUILTY of a violation of Section 664/261(a)(2) . . ., Attempted rape, a felony having occurred on or about December 3, 2014.

FN 10. Whether a defendant and victim's marital status remains an element is in doubt. (See *People v. Hillard* (1989) 212 Cal.App.3d 780, 784, 260 Cal. Rptr. 625 ["It is evident that the Legislature added . . . section 262 for the sole purpose of eliminating the marital exemption for forcible spousal rape, and not to define a new separate offense, apart from rape by a stranger, of spousal rape."].)

FN 11. In addition, we are not overly concerned with the citations to section 261 in the abovementioned documents. First, while the title of CALCRIM No. 1000 – in both the standard instruction and the modified version issued in the instant case – does not expressly refer to section 262, it nonetheless specifies the instruction applies to either "Rape *or* Spousal Rape by Force, Fear, or Threats . . . ." (Italics added.) (See Judicial Council of Cal., Crim. Jury Instns. (2016) Authority to

> CALCRIM No. 1000 p. 711; *id.*, Commentary to CALCRIM No. 1000, p. 711 [annotations contain several citations to § 262].) Second, although the citation to section 261 in the verdict form is technically incorrect, this clerical error does not render the verdict uncertain and may be disregarded. (See, e.g., *People v. Reddick* (1959) 176 Cal.App.2d 806, 820, 1 Cal. Rptr. 767 ["verdict cited wrong penal statute].)

People v. Carbajal, (No. F071474) (Cal. App. 5th Mar. 24, 2017), at 8-10.

2. Denial of Petitioner's Insufficient Evidence Claim Was Not Objectively Unreasonable

Petitioner maintains the evidence presented at trial was insufficient to support his conviction for attempted rape, because the evidence failed to prove a material element of the crime—specifically, that S. was not Petitioner's spouse at the time of the attempted rape. Petitioner's argument focuses on the jury instructions and verdict form, which both cite to California Penal Code § 261(a)(2), instead of California Penal Code § 262(a)(1). Section 261(a) defines rape "with a person not the spouse of the perpetrator." By contrast, section 262(a) defines rape of a person "who is the spouse of the perpetrator."

The Court must determine whether the evidence adduced at trial is so insufficient "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n. 16. "We look to California law only to establish the elements of [attempted rape] and then turn to the federal question of whether the California Court of Appeal was objectively unreasonable in concluding that sufficient evidence supported the" conviction. *Juan H. v. Allen*, 408 F.3d 1262, 1278 n. 14 (9th Cir. 2005) (citing *Jackson*, 443 U.S. at 324 n. 16)). "[O]nce the state has spoken as to the required elements [of a crime], the federal issue of sufficiency of evidence remains: Was the evidence sufficient for a rational jury to find each required element beyond a reasonable doubt?" *Boyer v. Belleque*, 659 F.3d 957, 966 (9th Cir. 2011).

Petitioner was convicted of attempted rape. In California, "[a]n attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done

toward its commission." California Penal Code § 21a. Consequently, "[o]ther than forming the requisite criminal intent, a defendant need not commit an element of the underlying offense." *People v. Medina*, 41 Cal.4th 685, 694 (20017).

The Court of Appeal defined attempted rape as requiring, "(1) the specific intent to commit rape; and (2) a direct although ineffectual act towards its commission." *Carbajal*, (No. F071474), at 9 (citing *People v. Clark*, 52 Cal.4th 856, 948 (2011)). Further, the "specific intent to commit rape may be inferred from the facts and circumstances shown by the evidence. As for the requisite act, the evidence must establish that the defendant's activities went 'beyond mere preparation' and that they show the defendant was 'putting his or her plan into action.'" *Id.*

Here, considering the evidence in the light most favorable to the prosecution, the evidence showed beyond a reasonable doubt that Petitioner had the specific intent to commit rape and committed a direct act towards its commission. Petitioner forced S. into her bedroom, pushed her onto the bed, removed both of their pants, and got on top of her. S. told Petitioner she did not want to have sex with him, tried to fight back, and cried. Petitioner attempted to have intercourse, but did not penetrate S. during the events. Although both the jury instructions and verdict form cited to an incorrect penal code section, the jury did not have to find Petitioner was not S.'s spouse to support the attempted rape charge.

The Court of Appeal's decision was not an objectively unreasonable application of clearly established federal law nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented. For these reasons, the Court denies Petitioner's claim that there was insufficient evidence to support the attempted rape conviction.

C. <u>Injuries Inflicted During the Commission of the Attempted Rape</u>

1. <u>State Court of Appeal Opinion</u>

The Court of Appeal rejected Petitioner's claim that there was insufficient evidence to

support the great bodily injury enhancement to the attempted rape charge:

> [Petitioner] argues "[t]here was no evidence at trial that [he] inflicted great bodily injury, or any injury, on [S.] 'in the commission of the attempted rape offense." Instead, he claims the evidence established he "inflicted all of the injuries . . . only during commission of the subsequent offense of corporal injury to a spouse. . . ." We disagree.
>
> "Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years." (§ 12022.7, subd. (e).) The phrase "great bodily injury" means "a significant or substantial physical injury." (d., subd. (f); see *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047, 148 Cal.Rptr. 3d 748 ["An examination of California case law reveals that some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury.'"].) The phrase "in the commission of," which is found in other enhancement statutes (see e.g., §§ 12022, 12022.3, 12022.5, 12022.53), "has been given an expansive, not a tailored meaning" (*People v. Frausto* (2009) 180 Cal.App.4th 890, 900, 103 Cal. Rptr. 3d 231). "Temporal niceties are not determinative" (*id.* at p. 902); thus, an infliction of great bodily injury "before, during, or after the felonious act may be sufficient if it can fairly be and said that i[t] was a part of a continuous transaction" (*ibid.*)
>
> As discussed previously, substantial evidence supported the attempted rape conviction. (See *ante*, at p. 9.) Furthermore, the record – viewed in the light most favorable to the prosecution – demonstrates [Petitioner] was still attempting to rape S. on the bed when Darrelle threatened to phone the police. [Petitioner], who remained on top of S. (see *People v. Jones* (2001) 25 Cal.4th 98, 109, 104 Cal. Rptr. 2d 753, 18 P.3d 674 [commission of a sexual offense continues as long as the assailant maintains control over the victim.]), became incensed, announced his intention to comport himself in a manner that would warrant a 911 call, and struck S.'s face more than 10 times. As a result, S. sustained severe facial severe facial swelling, lacerations, and bruising around the eyes. A rational trier of fact could find – beyond a reasonable doubt – defendant inflicted great bodily injury in the commission of the attempted rape.

People v. Carbajal, (No. F071474), at 11-12.

2. <u>Denial of Petitioner's Insufficient Evidence Claim Was Not Objectively Unreasonable</u>

Petitioner does not dispute that there was sufficient evidence to support the jury's finding that he inflicted great bodily injury upon S. Instead, Petitioner argues he inflicted great bodily injury during the commission of corporal injury to a spouse, rather than during the attempted rape. (Doc. 1 at 4.) Consequently, Petitioner contends he did not inflict great bodily injury "in the commission of" attempted rape.

Petitioner contends that the Court of Appeal incorrectly interpreted the phrase "in the commission of" as set forth in California's sentencing enhancement statutes. However, the state court's interpretation of its statutory language is binding on a federal court on habeas review. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state's interpretation of state law . . . binds a federal court sitting in habeas review.").

Here, the Court of Appeal found that the infliction of great bodily injury can occur during the commission of the offense if "it can fairly be said that i[t] was a part of a continuous transaction." *People v. Carbajal*, (No. F071474), at 11-12. At the time Darrelle entered the room, after hearing S. yell for her, Petitioner was on top of S. and trying to have sex with her. Petitioner continued attempting to have sex with S. after Darrelle entered the room. When Darrelle threatened to call the police, Petitioner struck S. multiple times and caused her injuries. Based on this evidence, it was not unreasonable for the Court of Appeal to find that the great bodily injury occurred as "part of a continuous transaction" with the attempted rape.

Based on the foregoing, the Court denies Petitioner's claim that there was insufficient evidence to support a finding that Petitioner inflicted great bodily injury in the commission of attempted rape.

IV. Certificate of Appealability

A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, but may only appeal in certain circumstances. ***Miller-El v.*** *Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for

commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issues or issues satisfy the showing required by paragraph (2).

If a court denies a habeas petition, the court may only issue a certificate of appealability "if jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Although the petitioner is not required to prove the merits of his case, he must demonstrate "something more than the absence of frivolity or the existence of mere good faith on his . . . part." *Miller-El*, 537 U.S. at 338.

Reasonable jurists would not find the Court's determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Accordingly, the Court declines to issue a certificate of appealability.

V. Conclusion

Based on the foregoing, the Court hereby DENIES with prejudice the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and declines to issue a certificate of appealability. The Clerk of the Court is directed to enter judgment for the Respondent.

IT IS SO ORDERED.

Dated: **September 21, 2018**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

Filed 3/24/17 P. v. Carbajal CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO XAVIER CARBAJAL, JR.,

Defendant and Appellant.

F071474

(Super. Ct. No. 14CR-00743)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. David W. Moranda, Judge.

Lindsay Sweet, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Amanda D. Cary, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Defendant Francisco Xavier Carbajal, Jr.,[1] was charged with assault with intent to commit rape (Pen. Code, § 220, subd. (a)(1) [count 1]),[2] willful infliction of corporal injury upon a spouse (§ 273.5, subd. (a) [count 2]), and possession of a firearm by a felon (§ 29800, subd. (a)(1) [count 3]). In connection with counts 1 and 2, the information alleged he personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)).

Defendant pled guilty to count 2. Later, the jury convicted him of the lesser included offense of attempted rape on count 1, found him guilty as charged on count 3, and found the special allegations true. Defendant received an aggregate sentence of eight years eight months: a principal term of four years on count 1 plus four years for infliction of great bodily injury; and a consecutive subordinate term of eight months on count 3. Execution of punishment on count 2 was stayed pursuant to section 654.

On appeal, defendant makes several contentions. First, the trial court erroneously instructed the jury that attempted rape is a lesser included offense of assault with intent to commit rape. Second, the evidence was insufficient to prove attempted rape. Third, the evidence was insufficient to prove the infliction of great bodily injury with respect to count 1. Fourth, the abstract of judgment incorrectly displays a conviction for assault with intent to commit rape and 142 days of presentence credit.

We conclude the court properly instructed the jury that attempted rape is a lesser included offense of assault with intent to commit rape, substantial evidence supported the attempted rape conviction, and substantial evidence supported the great bodily injury

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1 We note defendant's first name is listed as "Frank" throughout the record and in the abstract of judgment. However, it appears from defendant's signature and other reliable documentation that defendant's true first name is "Francisco."

2 Unless otherwise indicated, subsequent statutory citations refer to the Penal Code.

enhancement. We agree with defendant, however, that the abstract of judgment must be corrected.

STATEMENT OF FACTS

I. Prosecution's case-in-chief.

Defendant married S. in 2008.[3] They have one daughter. At the time of the incident, the three lived in Atwater at the residence of defendant's mother Darrelle Carbajal.[4] Several months before the incident, S. suffered a stroke. As a result, she had difficulty speaking, limped, and was unable to use her right hand or lift her right arm.

On the morning of December 3, 2014, the couple took their daughter to school. Upon returning home, defendant wanted to have sex. S. declined. Although defendant was insistent, S. repeatedly rebuffed his advances, "let[ting] him know that [they] really didn't have that kind of relationship anymore." Angered by the rejection, defendant forced S. into her bedroom. He pushed her onto the bed, removed their respective pants, and tried to engage in intercourse. Meanwhile, S. struggled to fight back. When she started to cry, defendant said, "Those are fake tears." S. screamed for Darrelle, who was also at home. Darrelle knocked on the bedroom door and asked S., "Do you want me to come in?" S. responded, "Yes." Darrelle entered the bedroom, saw defendant on top of S., and told him to get off. Nonetheless, defendant continued his attempt to have sex. According to S., when Darrelle threatened to call the police, defendant remarked, "If you're going to call the police, I'm going to give you a reason to call the police."[5] He then punched S.'s face multiple times before leaving. At no point during the incident did defendant penetrate S.

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3 For purposes of protective nondisclosure, we refer to the victim by her first initial.

4 To avoid confusion, we refer to Darrelle Carbajal by her first name. No disrespect is intended.

5 According to Darrelle, defendant said, "If the police are going to come, I'll give a reason for them to come."

Levi Crain, a reserve police officer for the City of Atwater, arrived at the residence at approximately 1:30 p.m. He made contact with S. and noted "[s]he had severe swelling in her face, there was [*sic*] multiple lacerations that were bleeding, her eyes were shut, and she couldn't talk" due to a swollen jaw. A subsequent search of the home uncovered a .22-caliber rifle in a closet.

S. was transported to the hospital, where she was interviewed by Detective Matthew Vierra. According to Vierra, S. "had obvious signs of swelling to her entire face as well as dried blood in her nose and her eyes appeared to be swollen shut." In addition, he "had to get almost within a foot of her mouth in order to actually understand what she was saying." S. stayed in the hospital overnight and was prescribed pain medication. Three months later, she "still ha[d] the black eyes, . . . [she] still ha[d] a cut on [her] forehead, and [her] face [wa]s still a little swollen on both sides."

In a December 3, 2014, police interview, defendant admitted he tried to have sex with S., who did not consent and "was actively resisting." He "became enraged and struck [S.] approximately 12 times with a closed fist with both hands" when Darrelle threatened to call the police. Defendant also admitted he said, "If I'm going to go to jail, it's going to be for something I did or I deserve." He stated the rifle belonged to S., who had inherited it from her deceased brother.

II. Defense's case-in-chief.

At various times on the morning of December 3, 2014, defendant hugged and kissed S. and rubbed her shoulders. He followed her into her bedroom, where he "proceeded to pull her pants down and push her or lead her onto the bed . . . ." After defendant got on top of her, S. said, "No." Defendant asked, "Why?" S. replied, "I don't want to." Defendant stopped his advances. Subsequently, Darrelle entered the room "without knowing what's going on" and shouted, "Get off[!]" She "asked [S.] if she wanted . . . the police to be called and [S.] said yes . . . ." Defendant "felt betrayed by both of them" because he "didn't feel . . . [he] had done anything to deserve that . . . ."

He "became enraged and . . . struck [S.]" "maybe a dozen times." Defendant left the residence to pick up his daughter from school. Upon his arrival, he was arrested by law enforcement.

Defendant conceded he was previously convicted of receiving stolen property, possessing a controlled substance in jail, and neglecting or endangering a child. He asserted the rifle was an heirloom of which S. took custody as the administrator of her brother's estate. Defendant never fired the weapon or purchased ammunition for it.

DISCUSSION

I. The trial court properly instructed the jury that attempted rape is a lesser included offense of assault with intent to commit rape.

"A claim of instructional error is reviewed de novo." (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 759, citing *People v. Guiuan* (1998) 18 Cal.4th 558, 569-570; see *People v. Posey* (2004) 32 Cal.4th 193, 218 ["The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law . . . ."].)

Following the close of evidence, and outside the presence of the jury, the trial court advised the parties it would instruct that attempted rape is a lesser included offense of assault with intent to commit rape. Defendant did not object to the instruction on attempted rape.[6] Thereafter, the trial court instructed the jury, inter alia, on the crime of assault with intent to commit rape (count 1) and on the lesser included offense of attempted rape. In doing so, it defined the crime of rape. Defendant does not now assert the content of these instructions was in error. Instead, defendant argues the trial court erred when it instructed the jury on attempted rape because, he asserts, attempted rape—whether a violation of section

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[6] The Attorney General contends defendant forfeited his claim of instructional error on appeal because he did not raise an objection below. Whether defendant did or did not forfeit the claim, we conclude there was no error.

261, subdivision (a)(2) (rape of a person not the spouse of the perpetrator) or section 262 (rape of a person who is the spouse of the perpetrator)—is not a lesser included offense to assault with intent to commit rape. He reasons that attempted rape requires proof of the marital relationship, or lack of relationship, between he and the victim; assault with intent to commit rape does not.

First, the assumption upon which defendant's argument is based is that the elements of the crime of rape for assault with intent to commit rape differ from the elements of the crime of rape for attempted rape. Defendant cites no authority to support that assumption, and the assumption is incorrect. The definition of rape is the same whether the crime is attempted rape or assault with intent to commit rape, and the trial court instructed the jury accordingly.

The trial court defined the crime of rape for the jury using CALCRIM No. 1000, in relevant part, as follows: "The defendant had sexual intercourse with a woman, the woman did not consent to the intercourse, and defendant accomplished intercourse by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or someone else . . . . [¶] . . . [¶] . . . Evidence that the defendant and the woman were married is not enough by itself to constitute consent. Intercourse is accomplished by force if a person uses enough physical force to overcome the woman's will . . . . [¶] . . . [¶] The crime of attempted rape is a lesser included offense to the crime charged in [c]ount 1, assault with intent to commit rape. To prove the defendant is guilty of this crime, the People must prove that the defendant took a direct but ineffective step toward committing rape and the defendant intended to rape."

As for the crime charged in count 1 (§ 220, subd. (a)(1)), the trial court instructed the jury using CALCRIM No. 890, in relevant part, as follows: "To prove that a defendant is guilty of this crime, the People must prove that one, the defendant did an act that by its nature would directly and probably result in the application of force to a person[;] [t]wo, the defendant did that act willfully[;] [t]hree, when the defendant acted,

he was aware of the facts that would lead a reasonable person to realize that his act by nature would directly and probably result in the application of force to someone[;] [f]our, when the defendant acted, he had the present ability to apply force to a person[;] [a]nd five, when the defendant acted, he intended to commit rape. [¶] . . . [¶] To decide whether the defendant intended to commit rape, please refer to the instruction[] which defines the crime of rape."

The trial court also instructed the jury on the lesser included crime of attempted rape using CALCRIM No. 460. It told the jury, in relevant part: "The crime of attempted rape is a lesser included offense to the crime charged in [c]ount 1, assault with intent to commit rape. To prove the defendant is guilty of this crime, the People must prove that the defendant took a direct but ineffective step toward committing rape and the defendant intended to rape. [¶] . . . [¶] To decide whether the defendant intended to rape, please refer to the separate instruction that I gave you on that crime previously."

The definition of rape for the charged crime and for the lesser included crime was the same.

Second, attempted rape *is* a lesser included offense of assault with intent to commit rape. "The crime of attempted rape has two elements: (1) the specific intent to commit the crime of rape and (2) a direct, although ineffectual, act toward its commission." (*People v. Clark* (2011) 52 Cal.4th 856, 948; accord, *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1418.) "It is not necessary that there be a 'present ability' to complete the crime . . . ." (*People v. Grant* (1951) 105 Cal.App.2d 347, 356.) By contrast, the crime of assault with intent to commit rape "requires proof that an assault was committed, and that at some time during the assault it was the intention of the defendant to have sexual intercourse with his victim by force." (*People v. Clifton* (1967) 248 Cal.App.2d 126, 129.) "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) " '[A]n assault with intent to commit rape is merely an aggravated form of an attempted rape, the latter

differing from the former only in that an assault need not be shown. [Citation.] "An 'assault' with intent to commit a crime necessarily embraces an 'attempt' to commit said crime . . . ." [Citation.]' " (*People v. Ghent* (1987) 43 Cal.3d 739, 757; accord, *People v. Pierce* (2002) 104 Cal.App.4th 893, 898.)

The trial court did not error when it instructed the jury on attempted rape.

II. Substantial evidence supported defendant's attempted rape conviction.

"To determine the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains [substantial] evidence that is reasonable, credible[,] and of solid value, from which a rational trier of fact could find that the elements of the crime were established beyond a reasonable doubt." (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955 (*Tripp*).) We "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) "We need not be convinced of the defendant's guilt beyond a reasonable doubt; we merely ask whether ' "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.]' [Citation.]" (*Tripp, supra*, at p. 955, italics omitted.)

"Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis what[so]ever is there sufficient substantial evidence to support it." (*People v. Redmond, supra*, 71 Cal.2d at p. 755.) " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' [Citation.]" (*People v. Lee* (2011) 51 Cal.4th 620, 632.)

"This standard of review . . . applies to circumstantial evidence. [Citation.] If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]" (*Tripp, supra,* 151 Cal.App.4th at p. 955.)

As noted earlier, the crime of attempted rape requires (1) the specific intent to commit rape; and (2) a direct, although ineffectual, act toward its commission. (*People v. Clark, supra,* 52 Cal.4th at p. 948.) "A defendant's specific intent to commit rape may be inferred from the facts and circumstances shown by the evidence." (*Ibid.*) "As for the requisite act, the evidence must establish that the defendant's activities went 'beyond mere preparation' and that they show the defendant was 'putting his or her plan into action.' [Citation.]" (*Ibid.*; see, e.g., *People v. Marshall* (1997) 15 Cal.4th 1, 39 ["For example, an attempted forcible rape would occur if a defendant pointed a gun at a woman and ordered her to submit to sexual intercourse, but the woman managed to escape without having been touched."].)

The record, viewed in the light most favorable to the prosecution, demonstrates defendant forced S. into her bedroom to engage in sexual intercourse even though she repeatedly expressed her unwillingness to do so. Defendant shoved her onto the bed, removed her pants, got on top of her, and tried to insert his penis. S. resisted notwithstanding her physical impairments and even shed tears, but defendant did not relent. S. called out to Darrelle, who entered the room and ordered her son to get off. Once again, defendant did not relent. A rational trier of fact could find the elements of attempted rape were established beyond a reasonable doubt.

Defendant points out the title of CALCRIM No. 1000 and the verdict form for count 1 both cited section 261, subdivision (a)(2)[7] instead of section 262, subdivision

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[7] Section 261, subdivision (a)(2) reads:

(a)(1).[8,9] He thereby argues he could not be convicted of attempted rape because the evidence was insufficient to prove S. was not his spouse as per section 261. We reject this assertion. In the context of a criminal attempt conviction, "[o]ther than forming the requisite criminal intent, a defendant need not commit an element of the underlying offense." (*People v. Medina* (2007) 41 Cal.4th 685, 694; accord, *People v. Herman* (2002) 97 Cal.App.4th 1369, 1385; *People v. Jones* (1999) 75 Cal.App.4th 616, 627.)[10,11]

> "Rape is an act of sexual intercourse accomplished *with a person not the spouse of the perpetrator* . . . [¶] . . . [¶] . . . [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (Italics added.)

8 Section 262, subdivision (a)(1) reads:

> "Rape of a person *who is the spouse of the perpetrator* is an act of sexual intercourse . . . [¶] . . . [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (Italics added.)

9 The jury's verdict form read: "We the jury in the above-entitled case find the defendant . . . GUILTY of a violation of Section 664/261(a)(2) . . . , Attempted Rape, a felony, having occurred on or about December 3, 2014."

10 Whether a defendant and victim's marital status remains an element is in doubt. (See *People v. Hillard* (1989) 212 Cal.App.3d 780, 784 ["It is evident that the Legislature added . . . section 262 for the sole purpose of eliminating the marital exemption for forcible spousal rape, and not to define a new and separate offense, apart from rape by a stranger, of spousal rape."].)

11 In addition, we are not overly concerned with the citations to section 261 in the abovementioned documents. First, while the title of CALCRIM No. 1000—in both the standard instruction and the modified version issued in the instant case—does not expressly refer to section 262, it nonetheless specifies the instruction applies to either "Rape *or* Spousal Rape by Force, Fear, or Threats . . . ." (Italics added.) (See Judicial Council of Cal., Crim. Jury Instns. (2016) Authority to CALCRIM No. 1000, p. 710; *id.*, Commentary to CALCRIM No. 1000, p. 711 [annotations contain several citations to § 262].) Second, although the citation to section 261 in the verdict form is technically incorrect, this clerical error does not render the verdict uncertain and may be disregarded.

III. Substantial evidence supported the great bodily injury enhancement.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60; see *ante*, at pp. 8-9.)

Defendant argues "[t]here was no evidence at trial that [he] inflicted great bodily injury, or any injury, on [S.] 'in the commission of' the attempted rape offense." Instead, he claims the evidence established he "inflicted all of the injuries . . . only during commission of the subsequent offense of corporal injury to a spouse . . . ." We disagree.

"Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years." (§ 12022.7, subd. (e).) The phrase "great bodily injury" means "a significant or substantial physical injury." (*Id.*, subd. (f); see *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047 ["An examination of California case law reveals that some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury.' "].) The phrase "in the commission of," which is found in other enhancement statutes (see, e.g., §§ 12022, 12022.3, 12022.5, 12022.53), "has been given an expansive, not a tailored meaning" (*People v. Frausto* (2009) 180 Cal.App.4th 890, 900). "Temporal niceties are not determinative" (*id.* at p. 902); thus, an infliction of great bodily injury "before, during, or after the felonious act

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(See, e.g., *People v. Reddick* (1959) 176 Cal.App.2d 806, 820 [verdict cited wrong penal statute].)

may be sufficient if it can fairly be said that i[t] was a part of a continuous transaction" (*ibid.*).

As discussed previously, substantial evidence supported the attempted rape conviction. (See *ante*, at p. 9.) Furthermore, the record—viewed in the light most favorable to the prosecution—demonstrates defendant was still attempting to rape S. on her bed when Darrelle threatened to phone the police. Defendant, who remained on top of S. (see *People v. Jones* (2001) 25 Cal.4th 98, 109 [commission of a sexual offense continues as long as the assailant maintains control over the victim]), became incensed, announced his intention to comport himself in a manner that would *warrant* a 911 call, and struck S.'s face more than 10 times. As a result, S. sustained severe facial swelling, lacerations, and bruising around the eyes. A rational trier of fact could find—beyond a reasonable doubt—defendant inflicted great bodily injury in the commission of the attempted rape.

IV. The abstract of judgment should be corrected.

Although the jury convicted defendant of the lesser included offense of attempted rape on count 1, the abstract of judgment mistakenly indicates he violated section 220, subdivision (a). This error should be corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [courts have inherent power to correct clerical errors in abstracts of judgment].)

Finally, defendant contends he is entitled to 156 days of presentence credit rather than 142 days. The Attorney General does not object. We accept this concession.

DISPOSITION

The abstract of judgment shall be amended to show (1) in connection with count 1, defendant violated Penal Code sections 262, subdivision (a)(1) and 664; and (2) defendant is entitled to 156 days of presentence credit. The trial court is directed to prepare this corrected abstract of judgment and transmit copies thereof to the appropriate authorities. In all other respects, the judgment is affirmed.

DETJEN, J.

WE CONCUR:

GOMES, Acting P.J.

PEÑA, J.

Additional material from this filing is available in the Clerk's Office.