UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL TREJO, Petitioner-Appellant, v. RALPH DIAZ, Secretary of Prisons California Department of Corrections, Respondent-Appellee.	No. 20-55801 D.C. No. 5:19-cv-01852-DSF-JDE Central District of California, Riverside ORDER

Before: NGUYEN and FORREST, Circuit Judges.

The request for a certificate of appealability 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.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

DANIEL TREJO,

Petitioner-Appellant,

v.

RALPH DIAZ, Secretary of Prisons California Department of Corrections,

Respondent-Appellee.

No. 20-55801

D.C. No. 5:19-cv-01852-DSF-JDE
Central District of California,
Riverside

ORDER

Before: CLIFTON and BENNETT, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 3).

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

DANIEL TREJO,

Petitioner,

v.

RALPH DIAZ,

Respondent.

Case No. 5:19-cv-01852-DSF (JDE)

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the records herein, including the Petition (Dkt. 1), Respondent's the Answer (Dkt. 8), Petitioner's Traverse (Dkt. 12), the Report and Recommendation (Dkt. 14, "R&R") of the United States Magistrate Judge, and the Objection to the R&R filed by Petitioner (Dkt. 15). Having engaged in a de novo review of those portions of the R&R to which objections have been made, the Court concurs with and accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: July 16, 2020

Dale S. Fischer

Honorable Dale S. Fischer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

DANIEL TREJO,

Petitioner,

v.

RALPH DIAZ,

Respondent.

No. 5:19-cv-01852-DSF-JDE

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dale S. Fischer, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On September 26, 2019, Petitioner Daniel Trejo, proceeding pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody. Dkt. 1 ("Petition" or "Pet."). On January 17, 2020, Respondent filed an Answer. Dkt. 8. Petitioner filed his Traverse on February 18, 2020. Dkt. 12 ("Trav.").

For the reasons discussed hereafter, the Court recommends that the Petition be denied and the action be dismissed with prejudice.

II.

PROCEDURAL HISTORY

On October 15, 2015, a Riverside County Superior Court jury found Petitioner guilty of aggravated sexual assault of a child under the age of fourteen and two counts of lewd acts on a child under the age of fourteen by force. 1 Clerk's Transcript on Appeal ("CT") 196-98. On May 2, 2016, the trial court sentenced Petitioner to fifteen years to life plus twelve years in state prison. 2 CT 333-36.

Petitioner appealed his conviction and sentence to the California Court of Appeal. Respondent's Notice of Lodgment ("Lodgment") 3. On May 3, 2018, the court of appeal affirmed the judgment in all respects. Lodgment 5. A Petition for Review was denied on July 18, 2018. Lodgments 6-7.

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

The underlying facts are taken from the California Court of Appeal's opinion. Petitioner does not contest the appellate court's summary of the facts and has not attempted to overcome the presumption of correctness accorded to it. See Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (explaining that state court's factual findings are presumed correct unless petitioner "rebuts that presumption with clear and convincing evidence").

A. FACTUAL HISTORY

> Doe was born in November 1997. C.T. (Mother) was Doe's mother. [Petitioner], who was born in January 1970, was Doe's stepfather. [Petitioner] was the father of Mother's other three children.
>
> Mother met [Petitioner] in 2000 and moved in with him in 2001. Mother and [Petitioner] were married in 2001. They moved to Riverside in 2004. [Petitioner] was a father figure to Doe.

One morning, when Doe was around 11 years old, Mother had made breakfast for [Petitioner] but he had not come downstairs. She called for him and he responded from what sounded like Doe's bedroom. She confronted Doe later but Doe denied that anything had happened with [Petitioner].

In February 2014, Mother pulled Doe out of school early; Mother had a feeling that [Petitioner] had been touching Doe although she had no proof. Mother also had been told that [Petitioner] had abused two of his nieces; Mother told Doe. Mother asked Doe to please tell her if [Petitioner] had touched her. Doe responded, "Yes." Doe had fear on her face and started crying. She hugged Mother for a long time.

Doe told Mother the first time [Petitioner] touched her was when Mother went to Mexico for a funeral when Doe was five years old. Doe provided no further details. Mother spoke with the police the following day.

Doe was 17 years old at the time of trial. Between November 3, 2008, and November 2, 2010, she would have been 11 and 12 years old. She had always known [Petitioner] as her father. Doe recalled the first time that [Petitioner] touched her was when her mother went to Mexico while they still lived in Bellflower; she would have been five or six years old. He got on top of her and "lightly" touched her over her clothes. He touched her breasts.

When they moved to Riverside, she was seven years old. She had her own room. Whenever Mother left the house, [Petitioner] would come to her bedroom and try to take her pants off. She would tell him no but she could not stop him. Once he

took off her pants, he would put his penis or finger in her vagina. He would move his hand or penis in and out. She tried to move his hand, but she could not move it. He would tell her not to tell anyone. She would be sore for a few hours afterward.

While Doe was in elementary school, [Petitioner] would put his finger inside her vagina approximately one time per week. On occasion, he would stop when she told him to but would leave the room mad.

[Petitioner] put his penis in her vagina multiple times. This usually occurred while they were in her bedroom. The touching occurred during the day and at night. She would tell him to leave her alone. When she was nine or 10, she would "freeze" until it was over. When she was 11 years old, she would tell him no and try to fight him.

When she was 12 years old, Mother went to the store and Doe was in her room playing video games. [Petitioner] came into the room and tried to take her pants off. He tried to get on top of her but she started fighting him. She kept moving his hands and pulling up her pants. He finally gave up and walked out.

The last time that [Petitioner] put his penis in her vagina was when she was in sixth grade. She would have been 11 or 12 years old. She had been in her brother's room. [Petitioner] pulled her pants down and put his penis in her vagina while they were standing up. Doe was faced away from [Petitioner]. She said it hurt. She tried to get away but he held her arms so that she could not move. [Petitioner] instructed her to be quiet. No one else was at home. He eventually pulled his penis out of her and walked away. She saw something white on his penis. She was sore for one

day. When she was in sixth grade, he put his penis in her vagina once or twice each week.

When Doe was in sixth grade, [Petitioner] came into her room. He grabbed her arm and put Doe's hand in his pants; he put her hand on his penis. At the same time, he put his finger in her vagina. He used his other hand to move Doe's hand up and down on his penis. This lasted a few minutes and then he walked out. She did not say anything to [Petitioner] because she knew he would not listen.

When she was in sixth grade, [Petitioner] would touch her breasts under her bra. Prior to sixth grade, [Petitioner] had touched her breasts several times. When she was in elementary school, [Petitioner] had touched his mouth to her breasts and vagina. On one occasion, she had been in the shower while no one else was home. When she got out, he instructed her to lay down in a large closet. He put his mouth on her vagina. She wanted to run but she knew she would not get away.

On another occasion, when she was in sixth grade, he told her to go inside the closet. He told her to get on her knees and he put his penis in her mouth. He held her head and moved it back and forth on his penis. She got him to stop by backing away from him and shaking her head. She refused to open her mouth. He put his penis to her lips and told her to open her mouth. He did not ejaculate.

When she was younger she would not fight back as much because she was confused. She did not scream or hit him. She started to fight back more as she got older.

[Petitioner] told her not to tell anyone. She did not tell Mother while this was happening. Doe eventually told her friends

when she was in high school. [Petitioner] told her not to tell but never threatened her. Doe still loved [Petitioner] as her dad despite what he was doing to her.

She felt horrible when she eventually told Mother. She blamed herself that she did not say something sooner. She had not said something in the past because she was worried that her family would be broken apart. She finally told Mother because she could no longer keep it a secret.

A pretext phone call was made to [Petitioner] from Doe. Doe told [Petitioner] that she was in the counselor's office at school because the school was concerned she had been upset. She told him that she needed to talk to him. Doe told [Petitioner] a friend had talked to Doe about her friend's uncle touching her friend, "just how you did to me." [Petitioner] responded that "if you say anything . . . our whole future is over." He said it was behind them and he had apologized. He told her she should just move on.

Doe continued to tell [Petitioner] that she needed to talk to someone about it. He repeatedly told her that the family would lose their house and he would lose his workshop. [Petitioner] also told Doe that it was her fault and that she had a lot to do with "this." She asked him to apologize. He responded, "I'm—I'm sorry, okay? This happened and . . . I'm sorry, you know? For—for whatever might have happened, but you know that you're more to blame than I am." [Petitioner] refused to go into detail about what had happened.

Each time Doe accused him of touching her, he responded that she would destroy their lives if she told anyone. He promised

that if she gave him time, he would sell everything and put it in Mother's name and then she could tell someone. He continued to blame Doe and told her that Mother would be mad at her. He accused Doe of recording the conversation. He told her to make up something as to why she was upset to tell the counselor.

L.S. was one of Doe's best friends throughout middle school and high school. When L.S. was 14 or 15 years old, when she was a sophomore and Doe was a freshman, Doe told her that [Petitioner] had raped her. Doe had fear in her eyes and appeared to need help. L.S. kept it a secret. E.S. was L.S.'s sister. She was also best friends with Doe during middle and high school. When E.S. was a freshman or sophomore in high school, Doe told her that [Petitioner] had raped her between the ages of six and 12. Doe was crying. E.S. told Doe to tell Doe's mother. Doe did not want to tell because she did not want to ruin their marriage. E.S. kept it a secret.

Riverside Police Detective Laura Ellefson interviewed Doe on February 11, 2014. Doe was very reluctant to talk and it was clear she did not want to talk about the incidents with [Petitioner]. At one point, after talking about [Petitioner] putting his penis in her vagina, she started to shut down. Doe indicated he laid her down on the bed and tried to insert his penis in her vagina three or four times; [Petitioner] achieved insertion twice and it hurt. The interview ended; Doe never told Ellefson about Doe touching his penis with her mouth or [Petitioner] touching her vagina with his mouth. Doe did not tell her about any other incidents. Doe described the incident when [Petitioner] penetrated her vagina that he used one hand to hold her down.

In Detective Ellefson's experience, most incidents of sexual abuse were late-reported. It was very rare that a child reported the incidents when they happened. Further, in situations involving continuous sexual abuse, it was common for the victim to only partially disclose the abuse at first and then reveal further details. A sexual assault exam was not performed on Doe because it was unlikely to show any evidence of trauma since the last incident had occurred four years prior.

Mother denied that she ever contacted [Petitioner's] family and asked for money to have Doe recant her allegations. She did not e-mail [Petitioner's] sister and tell her if she paid Mother $100,000, she would have Doe say that [Petitioner] never touched her. The e-mail had Doe's name spelled incorrectly. Mother suspected [Petitioner] had her e-mail password because he told her he was tracking her phone.

[Petitioner] had filed for divorce in 2010 because he thought Mother was cheating on him; he dismissed it. In January 2014, he again filed for divorce and threatened to take everything. In July 2011, Mother filed a restraining order against [Petitioner] claiming that he threatened to shoot her. She removed the restraining order because [Petitioner] promised to change. No charges were brought against [Petitioner] for the nieces Mother had heard he molested. Mother had always been afraid of [Petitioner] throughout their marriage.

B. DEFENSE

[Petitioner] called Riverside Police Officer Shadee Hunt, who wrote a police report in the case on February 4, 2014, based on speaking with Doe in Doe's home. Doe never said that

[Petitioner] had threatened her. Doe never told her that [Petitioner] penetrated her vagina with his penis every week. She never spoke about forcible oral copulation. Doe did tell Officer Hunt that the abuse started when she six years old and each time he told her not to tell Mother.

Riverside Police Investigator Susan Zappia confirmed the e-mail regarding recanting Doe's testimony in exchange for money came from Mother's e-mail address. It was sent on April 27, 2014.

[Petitioner's] niece testified; she had spoken with Doe in 2013. Doe had told her that Doe did not like [Petitioner] because he tried to act like Doe's dad and punish her.

[Petitioner] testified on his own behalf. He denied he ever touched Doe inappropriately or tried to have sex with her. When asked why he said in the pretext phone call that if she said anything their future was over, [Petitioner] responded he apologized to Doe because he had accused her in 2010 of knowing that Mother was having an affair with their neighbor and Doe never told him. He had gotten angry with her. [Petitioner] also got mad at Doe in 2014 for failing to tell him that Mother was having another affair. He blamed Doe for not telling him and for the divorce. [Petitioner] admitted that he had been spying on Mother's phone; he denied he had access to her e-mail. [Petitioner] filed for divorce in 2014 because of the second affair.

[Petitioner] claimed that even though Doe talked about inappropriate touching in the pretext phone call, he was only apologizing for the arguments they had in the past. [Petitioner] believed that he would go to jail because of their arguments.

Lodgment 5 at 2-9.

IV.

PETITIONER'S CLAIMS HEREIN

1. The trial court failed to instruct on the lesser included offense of unlawful sexual intercourse with a minor three years younger than Petitioner on count one in violation of Petitioner's due process rights. Pet. at 5, 29-30.

2. The trial court failed to instruct on the lesser included offense of non-aggravated lewd acts on counts two and three in violation of Petitioner's due process rights. Pet. at 5-6, 31.

V.

STANDARD OF REVIEW

The Petition is subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") under which federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000).

Although a particular state court decision may be "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 391, 413. A state court decision

is "contrary to" clearly established federal law if it either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Brown v. Payton, 544 U.S. 133, 141 (2005); Williams, 529 U.S. at 405-06. When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by [Section] 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam).

State court decisions that are not "contrary to" Supreme Court law may only be set aside on federal habeas review "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'" Packer, 537 U.S. at 11 (quoting 28 U.S.C. § 2254(d)). An "unreasonable application" of Supreme Court law must be "objectively unreasonable, not merely wrong; even clear error will not suffice." White v. Woodall, 572 U.S. 415, 419 (2014) (internal quotation marks and citation omitted). "To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Metrish v. Lancaster, 569 U.S. 351, 358 (2013) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)). Moreover, as the Supreme Court held in Cullen v. Pinholster, 563 U.S. 170, 181, 185 n.7 (2011), review of state court decisions under § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits.

Here, Petitioner raised both claims in the California Court of Appeal on direct appeal. The court of appeal rejected these claims in a reasoned decision on

May 3, 2018. Lodgment 5. Thereafter, the California Supreme Court denied Petitioner's Petition for Review without comment or citation to authority. Lodgment 7. In such circumstances, the Court will "look through" the unexplained California Supreme Court decision to the last reasoned decision as the basis for the state court's judgment, in this case, the court of appeal's decision. See Wilson v. Sellers, 584 U.S. –, 138 S. Ct. 1188, 1192 (2018) ("[T]he federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning."); Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991). In reviewing the state court decision, the Court has independently reviewed the relevant portions of the record. Nasby v. McDaniel, 853 F.3d 1049, 1052-53 (9th Cir. 2017).

VI.

DISCUSSION

Petitioner raises two claims of instructional error, alleging that the trial court violated his due process rights by failing to instruct the jury: (1) with the lesser included offense of unlawful sexual intercourse with a minor three years younger than him on count one; and (2) with the lesser included offense of non-aggravated lewd act on counts two and three. Pet. at 5-6, 29-31. Petitioner contends "it is fundamentally unfair to use the jury's ignorance of the elements of the lesser crime to force the jury into an all-or-nothing choice" between convicting him of the greater crimes of aggravated sexual assault of a child and aggravated lewd acts and absolving him of any liability despite evidence pointing to some form of unlawful conduct involving the victim. Id. at 29-30, 32. As explained below, Petitioner is not entitled to relief on either claim.

A. The California Court of Appeal Decision

The California Court of Appeal rejected both claims of instructional error on direct appeal, concluding, in relevant part, as follows:

The trial court must instruct the jury sua sponte on the general principles of law relevant to the issues raised by the evidence. (People v. Breverman (1998) 19 Cal.4th 142, 154; see also People v. Lopez (1998) 19 Cal.4th 282, 287-288.) This obligation includes instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present. (Breverman, at p. 154.) Whenever evidence that the defendant is guilty only of the lesser offense "is 'substantial enough to merit consideration' by the jury," instructions on the lesser included offense are required. (Id. at p. 162.) "'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (Ibid.)

"We employ two alternative tests to determine whether a lesser offense is necessarily included in a greater offense. Under the elements test, we look to see if all the legal elements of the lesser crime are included in the definition of the greater crime, such that the greater cannot be committed without committing the lesser. Under the accusatory pleading test, by contrast, we look not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime." (People v. Moon (2005) 37 Cal.4th 1, 25-26.)

We review the failure to instruct on a lesser included offense de novo, viewing the evidence in the light most favorable to defendant. (People v. Millbrook (2014) 222 Cal.App.4th 1122, 1137.)

a. Forcible Rape

Section 269 provides: "(a) Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261." Section 261 provides: "(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] (2) Where 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 o[f] another." "The gravamen of the crime of forcible rape is a sexual penetration accomplished against the victim's will by means force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (People v. Griffin (2004) 33 Cal.4th 1015, 1027.)

Section 261.5, subdivision (a) defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor." It further provides that a "'minor'" is a person under the age of 18 years and an "'adult'" is anyone over the age of 18. Subdivision (c) provides that "any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony."

We need not decide whether the charged offense of aggravated sexual assault necessarily includes the lesser offense of unlawful sexual intercourse. A court is not required to instruct on a lesser included offense "when there is no evidence the offense was

less than that charged." (People v. Koontz (2002) 27 Cal.4th 1041, 1085.) Here, there is no evidence that [Petitioner] did not use force or duress to accomplish an act of sexual intercourse against Doe.

"Force" requires that the sexual intercourse be accomplished against the victim's will. (People v. Griffin, supra, 33 Cal.4th at pp. 1027-1028.) Subdivision (b) of section 261 provides that "duress" is "a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress."

Here, the evidence consisted of Doe's testimony that [Petitioner] had raped her several times. She described one incident when she was in sixth grade, and either 11 or 12 years old, when she was in her brother's room. [Petitioner] pulled down her pants and inserted his penis into her vagina while they were standing up. She tried to get away but he held down her arms so that she could not move. [Petitioner] also instructed her to be quiet.

Doe told Detective Ellefson that when she was 11 or 12 years old, [Petitioner] entered her bedroom. He "pushed" her down on the bed and took her pants and underwear down. He tried to insert his penis in her vagina several times but it only entered two times.

Doe further testified that when [Petitioner] tried to take her pants off (she did not give a date), she would tell him no; she could not stop him. She also testified that while in elementary school, when [Petitioner] put his penis in her vagina, she would tell him to

leave her alone. Although she testified that when she was nine or 10 she would "freeze" until it was over, when she turned 11 years old, she would try to fight him.

Hence, during the time period alleged in the information, when she was 11 and 12 years old, Doe testified that she fought back and tried to stop [Petitioner]. There was no evidence of lack of force when [Petitioner] had sexual intercourse with her.

Moreover, even if the use of force was not clear for all of the incidents, the evidence showed the acts of sexual intercourse were committed by duress. Here, [Petitioner] had been Doe's stepfather since she was the age of three and she considered him her father. [Petitioner] would wait until the house was empty to assault Doe. Doe explained that when she was younger, she was confused by what [Petitioner] was doing to her. Doe also testified there were times she did nothing because she knew he would not listen to her. [Petitioner] told her not to tell anyone.

Although there were no direct threats of violence, the jury could reasonably conclude that Doe was afraid of [Petitioner]. [Petitioner] held her down during one sexual encounter and she was sore after the incident. Further, Doe could reasonably conclude that if Mother found out, Mother would be upset. This was corroborated by the pretext phone call. [Petitioner] continually threatened her during the call that if she told she would lose everything and that she was to blame for the incidents. [Petitioner] had a special relationship with Doe as the only father she ever knew, and Doe admitted she still loved [Petitioner] despite what he had done to her. Doe clearly engaged in sexual intercourse under duress.

[Petitioner] contends that Doe described, generically, incidents of vaginal intercourse when she was in sixth grade but there was no mention of any type of force used. Further, there were no implied threats. In the pretext phone call, Doe never described that [Petitioner] used force or threats. As set forth ante, Doe consistently testified that she would fight [Petitioner] and try to push him off of her during the time period alleged. She explained that [Petitioner] told her not to tell anyone. The acts against Doe were committed with force or duress.

[Petitioner] argues that Doe testified regarding an incident of [Petitioner's] penis penetrating her vagina while she tried to push him away as occurring in sixth grade. [Petitioner] argues that since school "usually" starts in August or September, the abuse could have occurred prior to the time period alleged, which was November 3, 2008. However, Doe affirmatively responded that this event occurred when she was 11 or 12 years old. Doe would have turned the age of 11 in November 2008. Also, [Petitioner] only speculates that Doe's sixth grade started in August or September but no evidence supports this claim. The record reasonably supports that the incidents of [Petitioner] putting his penis in her vagina while she tried to fight him off occurred during the alleged time period.

The evidence that [Petitioner] did not use force or duress was not substantial enough to merit consideration by the jury.

b. Lewd And Lascivious Acts

Section 288, subdivision (b)(1), provides that it is a crime to willfully and lewdly commit any lewd or lascivious act upon a child who is under the age of 14 years with the intent of arousing

the sexual desires of the actor or the child "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person."

Section 288, subdivision (a), provides that it is a felony for a person to willfully and lewdly commit any lewd or lascivious act upon the body of a child who was under the age of 14 years with the intent of arousing the sexual desires of the actor or the child. Numerous courts have concluded that section 288, subdivision (a) is a lesser included offense of section 288, subdivision (b)(1). (People v. Espinoza (2002) 95 Cal.App.4th 1287, 1318-1319; People v. Ward (1986) 188 Cal.App.3d 459, 472.)

"For purposes of section 288, subdivision (b), 'duress' means '"a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." [Citations.]' [Citation.] '"The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress." [Citation.]' [Citations.] 'Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family.'" (People v. Veale (2008) 160 Cal.App.4th 40, 46, italics omitted.) "[A]s a factual matter, when the victim is as young as this victim and is molested by her father in the family home, in all but the rarest cases duress will be present." (People v. Cochran (2002) 103 Cal.App.4th 8, 16, fn. 6,

overruled on other grounds as stated in People v. Soto (2011) 51 Cal.4th 229, 248, fn. 12.)

As used in section 288, subdivision (b)(1), the term "force" means "'physical force substantially different from or substantially in excess of that required for the lewd act.'" (People v. Quinones (1988) 202 Cal.App.3d 1154, 1158, overruled on other grounds in People v. Soto, supra, 51 Cal.4th 229.)

As for the lewd acts committed against Doe, there were several. She described that he would put his finger in her vagina approximately one time each week while she was in elementary school. She would tell him to stop and on occasion he would stop. She described an incident when she was 12 years old and [Petitioner] entered her room while she was lying on her bed. [Petitioner] forced her hand into his pants and held it against his penis. She did not say anything because she knew he would not listen.

She indicated that [Petitioner] touched her breasts several times over and under her clothes. She described an incident when she had just gotten out of the shower and he instructed her to lay down on the floor. He put his mouth on her vagina. She wanted to run, but she knew she would not get away. She would wonder why he was doing this to her. In sixth grade, he forced his penis into her mouth and moved her head back and forth. She pushed away and closed her mouth. He put his penis on her lips and demanded she open her mouth.

Although not all of the incidents described by Doe involved the use of force, the evidence still established duress. Doe was only 11 and 12 years old and [Petitioner] was essentially her father. When she had tried to stop [Petitioner], he would not listen. She

> indicated either that she was confused by what he was doing because he was her father, or she wanted to tell him to stop, or run away, but she knew it would not work. [Petitioner] would threaten her that the family would be destroyed. Doe loved [Petitioner] as a father. These circumstances, that she tried to stop him but he refused, and that he held a position of authority in her life, contributed to her feeling of duress. No evidence supported that the lewd acts were committed without duress.

Lodgment 5 at 12-19.

The California Court of Appeal further concluded that any error in failing to instruct on the lesser included offenses was harmless. Lodgment 5 at 19-20 (citing Breverman, 19 Cal. 4th at 165-66; People v. Watson, 46 Cal. 2d 818, 836 (1956)). The appellate court rejected Petitioner's contentions that there was insufficient evidence of force and duress, finding "the evidence of duress for all counts was strong. Further, as to count 1, Doe consistently testified the acts were committed by force. Had the jury been instructed with the lesser offenses, it is not reasonably probable the jury would have found [Petitioner] guilty of the lesser offenses." Id. at 20. The court of appeal also rejected Petitioner's contention that the jury was faced with an "all-or-nothing" choice between the greater offenses and acquittal, concluding that "[i]f the jury had doubt as to the extent of the force or violence, or the extent of the sexual assault, it could have convicted [Petitioner] of simple assault." Id.

B. Applicable Legal Authority

Challenges to state jury instructions are generally questions of state law and thus, are not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 71-72 (1991). To merit habeas relief based on an instructional error, a petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." See id. at 72

(citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 191 (2009). Instructional errors must be considered in the context of the instructions as a whole and the trial record. McGuire, 502 U.S. at 72; Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). "Where the alleged error is the failure to give an instruction the burden on petitioner is 'especially heavy,'" Hendricks v. Vasquez, 974 F.2d 1099, 1106 (9th Cir. 1992) (as amended) (quoting Henderson v. Kibbe, 431 U.S. 145, 155 (1977)), because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Kibbe, 431 U.S. at 155. Habeas relief is warranted only where the error had "substantial and injurious effect or influence in determining the jury's verdict." Hedgpeth v. Pulido, 555 U.S. 57, 58, 61-62 (2008) (per curiam) (quoting Brecht v. Abrahamson, 507 U.S. 619, 623 (1993)); see also Clark v. Brown, 450 F.3d 898, 905 (9th Cir. 2006) (as amended).

C. Analysis

Petitioner is not entitled to habeas relief on his instructional error claims for at least three reasons. First, the United States Supreme Court has never held that a trial court's failure to instruct on a lesser included offense in a non-capital case violates due process of law. Rather, the Supreme Court has held only that the failure to give a lesser-included offense instruction supported by the evidence is constitutional error in a capital case. See Beck v. Alabama, 447 U.S. 625, 637-38 (1980); see also Hopper v. Evans, 456 U.S. 605, 611-12 (1982). In so holding, the Supreme Court expressly declined to state whether that right extended to non-capital cases. Beck, 447 U.S. at 638 n.14; see also Gilmore v. Taylor, 508 U.S. 333, 361-62 (1993) (Blackmun, J., dissenting) (observing that Beck left open question of whether due process entitles criminal defendants in non-capital cases to have jury instructions on lesser included offenses); Bortis v. Swarthout, 672 F. App'x 754 (9th Cir. 2017) (explaining that there is "no Supreme Court precedent establishing that a state trial court is

required to instruct on lesser included offenses in noncapital cases"). In the absence of Supreme Court precedent, the court of appeal's decision cannot be contrary to, or an unreasonable application of, clearly established federal law. See Wright v. Van Patten, 552 U.S. 120, 126 (2008) (per curiam); Carey v. Musladin, 549 U.S. 70, 77 (2006).

In addition, to the extent Petitioner contends that the trial court's failure to instruct the jury on the lesser included offenses deprived him of his right to present a defense (Trav. at 2), such claim fails on its merits. The Supreme Court has held, as a matter of federal criminal procedure, "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988); see also id. at 69 (White, J., dissenting) (noting that the Court "properly recognizes that its result is not compelled by the Constitution"). However, the Supreme Court has not held that such a right is guaranteed under the Constitution. To the contrary, the Supreme Court has recognized that, although the constitutional guarantee of a "meaningful opportunity to present a complete defense" encompasses the exclusion of evidence and the testimony of defense witnesses, it does not speak to "restrictions imposed on a defendant's ability to present an affirmative defense." Gilmore, 508 U.S. at 343-46 (holding that even where jury instructions "created a risk that the jury would fail to consider evidence that related to an affirmative defense," state defendant's claim of instructional error would create new rule that could not be the basis for federal habeas relief); Marquez v. Gentry, 708 F. App'x 924, 925 (9th Cir. 2018) (holding there was no federal right to present an insanity defense and explaining that the right to present a complete defense under federal law does not extend to "restrictions imposed on a defendant's ability to present an affirmative defense," but only the "exclusion of evidence" and the "testimony of defense witnesses" (quoting

Gilmore, 508 U.S. at 343-44). As such, the court of appeal's decision cannot be said to be contrary to, or an unreasonable application of, clearly established Supreme Court law. See Carey, 549 U.S. at 77.

Further, even if the failure to give a lesser included offense instruction could violate a criminal defendant's constitutional rights, Petitioner is not entitled to relief because the evidence did not support the lesser included offense instructions. The Ninth Circuit has suggested that "the defendant's right to adequate jury instructions on his or her theory of the case might, in some cases," raise a cognizable ground for federal habeas relief, provided that it is supported by the law and substantial evidence. Solis v. Garcia, 219 F.3d 922, 929-30 (9th Cir. 2000) (per curiam); see also Bradley v. Duncan, 315 F.3d 1091, 1098-99 (9th Cir. 2002).[1]

Petitioner was charged with sex crimes involving the use of force, violence, duress, menace, or fear. His defense at trial was that he had no sexual contact with Jane Doe and the victim's mother helped fabricate the charges because Petitioner filed for divorce. Having been convicted, Petitioner now asserts a different defense, claiming that while the evidence showed some unlawful sexual conduct between Petitioner and Jane Doe, the trial court was required sua sponte to instruct the jury on lesser sex crimes, not involving the use of force, violence, duress, menace, or fear. See Pet. at 5, 27, 30, 32.

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[1] The Ninth Circuit in Bradley held that "the state court's failure to correctly instruct the jury on the defense may deprive the defendant of his due process right to present a defense." 315 F.3d at 1099. The majority in a recent Ninth Circuit opinion, however, rejected reliance on Bradley because: (1) it neither cited nor examined the Supreme Court precedent directly on point, namely, McGuire, 502 U.S. at 71-72 and Gilmore, 508 U.S. at 343-44, as required in habeas review; (2) its holding primarily relied on Mathews, a direct appeal from federal district court, not a habeas case; and (3) it used pre-AEDPA case law to justify reliance on Mathews. Marquez, 708 F. App'x at 925 n.2.

In count one, Petitioner was charged with aggravated sexual assault of a child under Cal. Penal Code § 269(a)(1). 1 CT 40-41. As charged, this crime required evidence that the victim was under the age of fourteen, seven or more years younger than Petitioner, and that Petitioner raped her. In this instance, rape required evidence that the sexual intercourse was against the victim's will by means of force, violence, duress, menace, fear of injury, or threats of retaliation in accordance with Cal. Penal Code § 261(a)(2) & (6). Id. As to this count, Petitioner contends there was substantial evidence that he was guilty only of the lesser crime of unlawful sexual intercourse with a minor three years younger than him. Pet. at 30. The California legislature enacted Cal. Penal Code § 261.5 (unlawful sexual intercourse with a person under the age of eighteen) to distinguish the crime of unlawful sexual intercourse from the crime of rape, which "generally involve[s] forms of force, duress, or disability." Donaldson v. Dep't of Real Estate, 134 Cal. App. 4th 948, 958 (2005).

Petitioner was charged in counts two and three with willfully and lewdly committing a lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or child "by use of force, violence, duress, menace, or fear of immediate or unlawful bodily injury on the victim or another person" in violation of Cal. Penal Code § 288(b)(1). See 1 CT 40-41. Petitioner contends there was reasonable doubt that the lewd acts involved force, duress, menace, or threats, thus, warranting an instruction under Cal. Penal Code § 288(a). Pet. at 32. Section 288(a) is a lesser included offense of Section 288(b)(1) that lacks the element of force, violence, duress, menace, or fear. See People v. Ward, 188 Cal. App. 3d 459, 472 (1986).

The California Court of Appeal reasonably concluded that the trial court did not need to give either instruction because the evidence did not support the

instructions. First, the appellate court reasonably concluded that the acts of sexual intercourse and lewd acts were committed by duress. Duress means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or (2) acquiesce in an act to which one otherwise would not have submitted. See Cal. Penal Code § 261(b); People v. Veale, 160 Cal. App. 4th 40, 46 (2008); 1 CT 222, 224.[2] In evaluating the existence of duress, courts should consider the "total circumstances," including the age of the victim and her relationship to the defendant. Id. "When the victim is young and is molested by her father in the family home, duress will be present in all but the rarest cases." People v. Thomas, 15 Cal. App. 5th 1063, 1072-73 (2017).

Here, as the California Court of Appeal noted, Petitioner had been Jane Doe's stepfather since she was three years old. She loved him and considered him her father. 1 Reporter's Transcript on Appeal ("RT") 44, 66, 107-08, 149; 2 RT 161. Doe was five or six when the sexual abuse started and eleven or twelve at the time of the sexual abuse alleged in the Information. See 1 RT 105, 109-11. The incidents occurred when they were alone. 1 RT 120. Because of her young age and Petitioner's position of authority, Doe was particularly susceptible to being coerced. See Thomas, 15 Cal. App. 5th at 1073. The evidence demonstrates a vulnerable child who was compelled to participate in sex acts in response to parental authority, intimation to remain quiet to protect the family, and not the result of freely given consent. When she was younger, Jane Doe was confused by what Petitioner was doing to her. 1 RT 118. She was afraid of him; she would pray that it would be over soon. 1 RT 116-18; 2

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[2] With respect to lewd or lascivious acts, duress also includes threats of hardship. Veale, 160 Cal. App. at 46.

RT 161. There were times she did not say anything because she knew he would not listen to her. 1 RT 133. She wanted to run away, but she knew she had nowhere to go. 1 RT 140-41. Other times, she told him to stop; sometimes, he would leave the room looking angry, and sometimes he continued to touch her. 1 RT 115, 117-18, 121, 136. He told her not to tell anyone, especially her mother. 1 RT 138, 148-49; 2 RT 228. She was afraid to say anything because she worried that it would break up her family. See 1 RT 152. Her testimony was corroborated by a recorded pretextual telephone conversation between Petitioner and Doe, in which Petitioner repeatedly threatened Doe that her family would be destroyed if Doe said anything. Petitioner told Doe she would lose everything, her future and the future of her siblings would be over, and she was to blame. 1 CT 157-58, 160, 162-63, 166-67, 169-71, 175. The total circumstances show that these crimes were accomplished by duress.

Second, the evidence showed that during the time period alleged in the Information, when Jane Doe was eleven or twelve years old, Petitioner had sexual intercourse with her by force. As the California Court of Appeal noted, Jane Doe testified that Petitioner raped her several times. 1 RT 126-28. She described one incident when she was eleven or twelve years old when she tried to get away from Petitioner, but he held her arms so that she could not move. He instructed her to be quiet and not to say anything. 1 RT 124-26. Jane Doe described another incident to Detective Ellefson in which Petitioner pushed her down on the bed, pulled down her pants and underwear, and had sexual intercourse with her, holding her down with one hand. 2 RT 193-94. During the incident, while Petitioner was touching her, she tried to slap his hand away, but he then slapped her hand away. 2 RT 213.

Similarly, Jane Doe described instances involving lewd acts by force; where she tried to get away, moved Petitioner's hands away from her, told him to stop and leave her alone, and otherwise resisted, with Petitioner ignoring

her protests. 1 RT 117-18, 120-21, 136, 145-46. As she got older, around eleven years old, she would say no and try to fight him more. 1 RT 121-24, 146. She described an incident when Petitioner forced her to perform oral sex on him. He would use his hands to move her head back and forth. 1 RT 144-45. She explained how this abuse would stop. Doe testified that she would back away, shake her head, and close her mouth. Petitioner would get angry and try to force her to continue, ordering her to open her mouth. 1 RT 145-46.

Under the circumstances, the California Court of Appeal reasonably concluded that the proffered instructions were not warranted. Further, in light of the overwhelming evidence of duress and force, it cannot be said that the failure to give the lesser included offense instructions had "substantial and injurious effect or influence in determining the jury's verdict."

The state court's rejection of Petitioner's instructional error claims was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. Petitioner is not entitled to habeas relief.

VII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: May 28, 2020

JOHN D. EARLY
United States Magistrate Judge

Court of Appeal, Fourth Appellate District, Division Two - No. E066202

S249341

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

DANIEL TREJO, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL TREJO, Defendant and Appellant.	E066202 (Super.Ct.No. RIF1400754) OPINION

APPEAL from the Superior Court of Riverside County. Patrick F. Magers, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Gene D. Vorobyov, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

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