Appendix II

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE TYRONE SHIPLEY, Petitioner-Appellant, v. D. HOLBROOK, Respondent-Appellee.	No. 21-56386 D.C. No. 2:20-cv-02496-JAK-LAL Central District of California, Los Angeles ORDER

Before: IKUTA and LEE, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIE T. SHIPLEY, JR., Petitioner, v. D. HOLBROOK, Warden, CSP-CVSP, Respondent.	Case No. LACV 20-2496-JAK (LAL) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On March 16, 2020, Willie T. Shipley, Jr. ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). On March 15, 2021, Respondent filed an Answer to the Petition.[1] On April 8, 2021, Petitioner filed a Traverse. Thus, this matter is ready for decision.

[1] In the interim, the previously assigned magistrate judge granted Petitioner's request to stay these proceedings while he exhausted some of his claims in the state courts.

II.

PROCEDURAL HISTORY

On September 20, 2016, Petitioner was convicted after a jury trial in the Los Angeles County Superior Court of seven counts of forcible rape,[2] two counts of sexual penetration by a foreign object,[3] one count of kidnapping to commit rape,[4] one count of forcible oral copulation,[5] and one count of first degree residential robbery.[6] (Volume 2 Clerk's Transcript ("CT") at 457-61, 484, 486, 488.) On November 10, 2016, the trial court sentenced Petitioner to a state prison term of six years plus 125 years to life. (2 CT at 473-80, 484-507.)

Petitioner appealed his convictions to the California Court of Appeal. (Lodgments 14-16.) On September 21, 2018, the California Court of Appeal affirmed the judgment. (Lodgment 3.)

Petitioner then filed a petition for review in the California Supreme Court. (Lodgment 4.) On December 12, 2018, the California Supreme Court denied the petition. (Lodgment 5.)

Next, Petitioner filed a habeas corpus petition in the California Court of Appeal. (Lodgment 6.) On September 5, 2019, the California Court of Appeal denied the petition. (Lodgment 7.)

Then, Petitioner filed a habeas corpus petition in the California Supreme Court. (Lodgment 8-9.) On February 11, 2020, the California Supreme Court denied the petition. (Lodgment 9.)

Finally, Petitioner filed a second habeas corpus petition in the California Supreme Court. (Lodgment 17.) On January 20, 2021, the California Supreme Court denied the petition. (Lodgment 18.)

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[2] Cal. Penal Code § 261(a)(2).

[3] Cal. Penal Code § 289(a)(1).

[4] Cal. Penal Code § 209(b)(1).

[5] Cal. Penal Code § 288a(c)(2)(A).

[6] Cal. Penal Code § 211.

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

This Court has independently reviewed the state court record. Based on this review, this Court adopts the factual discussion of the California Court of Appeal's opinion on direct review in this case as a fair and accurate summary of the evidence presented at trial:[7]

1. *Prosecution Case*

a. *Victim Testimony*

Monica F. met appellant at a gas station in April or May 2015. They exchanged telephone numbers. A month later, appellant texted Monica to invite her to a "big party" in Hollywood. When she and her friends arrived at the location, there were only three people there, plus appellant. Monica sat and talked with appellant by the pool, but when he exposed himself and attempted to kiss her, she said "no" and that she did not want to "do that." Later, under the guise of showing her where the bathroom was, appellant led her to a bedroom, shut the door, sat her down on the bed, threw himself on top of her and started kissing her and touching her vaginal area. His fingers penetrated her. Monica again said she did not want to have sex with him. Appellant lifted himself, took his shirt off and slammed a gun down on a table near the bed. Monica said "no" again, but became afraid when appellant reached in the direction of the gun. She closed her eyes and felt appellant's penis inside her. She told him to get off and managed to push him off after several attempts. She told him he needed to use a condom. When appellant left to find one, Monica went into the bathroom and discovered her cell phone was dead. She went downstairs, but could not convince her friends to leave. Monica ran up to the bedroom to retrieve her cell phone. Appellant

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[7] "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary . . . ." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Thus, Ninth Circuit cases have presumed correct the factual summary set forth in an opinion of the state appellate court under 28 U.S.C. §2254(e)(1). See, e.g., Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted).

followed her, again placed the gun on the bedside table, and forced her to have intercourse, this time using a condom. When she told him to stop and tried to turn away, he gestured toward the gun. Monica did not scream for help because she was afraid appellant would hurt her friends. After ejaculating, appellant unsuccessfully tried to force Monica to perform oral sex.

After sexually assaulting Monica, appellant accused her of taking money from him and slammed the gun down on a counter. Later, when Monica and her friends tried to leave, he blocked the doorway, pushed her and grabbed her purse. Monica borrowed her friend's phone to call 911. When Monica got her purse back, after police arrived and arrested appellant, her cell phone and $90 were missing.

Sendy C. testified that on July 19, 2014, she went to a bar in downtown Los Angeles with her two cousins. She met appellant, and they danced. He bought her a drink. When the bar was closing, she went with appellant and his friends to a nearby pizza restaurant. Afterward, she got into appellant's friend's car expecting to be taken back to the bar to meet her cousins. Instead, the driver took her to appellant's apartment. During the drive, Sendy repeatedly asked to be dropped off. She called her boyfriend, but when she tried to talk, appellant grabbed her phone and started acting angry. He told her to "shut up." He also prevented her from calling 911 by grabbing her phone. When appellant's friend parked near appellant's apartment, Sendy tried to run. Appellant grabbed her and Sendy, who was only four feet, eleven inches tall, became afraid. She went with appellant inside his apartment. Once inside, she said "you don't have to do this." Appellant pulled her pants and underwear down and put on a condom. Sendy ran screaming to the door, but could not open it. Appellant told her to "shut up" and put his hand over her mouth. He grabbed her and threw her on the floor. She stopped screaming because she "didn't want to die." Appellant then put her on

his bed face down, and put his penis in her vagina while she quietly cried. Appellant stayed on top of her after he ejaculated. Sendy did not move because she did not want to anger him. A short time later, appellant had intercourse with her again.

At the preliminary hearing,[8] Graciela V. testified that she met appellant in October 2010, when she was 21, on a street near her gym. She gave him her telephone number and they called and texted each other in the weeks that followed. On October 19, 2010, she called appellant because she was upset and wanted to talk to someone, and went with him to his house. There were other people in the house at the time. Graciela and appellant went to his room to continue their conversation. Appellant suddenly became aggressive and grabbed her. Graciela told him to stop and said she wanted to go home. Appellant pushed her to the floor. She managed to get away from him and run to the door, but it was locked. She screamed and pounded on it. Appellant told her to shut up, called her "bitch" and "whore," and pushed her down on the bed. She begged him to stop. He forced her to perform oral sex on him. He pulled off her sweatpants and put his fingers inside her vagina, before inserting his penis into her vagina. She cried and repeatedly asked him to leave her alone. After he finished, he continued to behave aggressively toward her; she was afraid he was going to beat her but instead, he showed her some paperwork that he claimed established he was disease free.

Officers Christian Olivos and Jose Vizcarra, who interviewed Graciela on October 19, recalled she was shaken and crying. Shamsah Barolia, a nurse practitioner, testified she conducted an examination of Graciela early in the morning on October 20, 2010. Graciela told Barolia that appellant called her a

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[8] As discussed below, the prosecution team could not locate Graciela at the time of trial. The trial court ruled that she was unavailable and allowed the prosecution to introduce her preliminary hearing testimony at trial.

"bitch," told her to "shut up," forced her head to his penis, pulled down her sweatpants, and put his penis inside of her.

Kassie M. testified that she met appellant at a gas station in Lakewood in January 2009, when she was 22. They exchanged telephone numbers. Appellant called and invited Kassie to a "get together" at his apartment. Appellant was alone in his apartment when she arrived with her baby. After they bought and drank some brandy, appellant followed her into the bathroom and started fondling her. Kassie objected, telling him she was not there for that. But he pushed her toward the mirror, pulled down her pants and put his penis in her vagina. After appellant ejaculated, Kassie went to attend to her baby. She did not believe appellant would let them leave. Later, appellant grabbed her by the hair, pushed her down on a mattress and had intercourse with her again. Kassie started crying. She did not fight because she was concerned about what might happen to her baby. Kassie went to the police to report appellant's conduct, but after appellant called her, apologized and said he did not want his life ruined, she told the police she wanted to drop the charges.[9]

b. *Evidence of Uncharged Offense*

Gloria Tatum testified that on October 26, 2006, Adrianna O., her roommate, came home "shocked" and "in another world." Adrianna said: "They raped me." Tatum asked "who?" Adrianna became teary and said "Junior." Tatum knew appellant as "Junior." Tatum and her sister went to appellant's home, a block away, to confront him, but he did not answer the door. Tatum called the police. The officers who responded, Brian Churchill and Christopher Jongsomjit, testified and described Adrianna as "very upset" and crying.

[9] All four women immediately told friends or family and law enforcement personnel that they had been raped by appellant, and all underwent sexual assault examinations, which included taking swabs for forensic examination. Appellant's DNA was found on or inside all four women. Appellant told the nurse who swabbed him to obtain DNA for testing purposes that he "finger-banged" Graciela.

Adrianna was taken for a rape exam. Page Courtemanche, the nurse practitioner who examined Adrianna, testified that Adrianna was tearful and shaking. She had abrasions and lacerations on her neck and arm, and tenderness in her hip. Courtemanche took swabs of secretions on Adrianna's body. The swabs were tested and appellant's DNA was found.

[2]. *Defense Evidence*

Appellant's stepfather, Calvin Robinson, testified that in October 2010, he was living with appellant. He recalled appellant coming home with a young woman, introducing her, and taking her to his bedroom. The woman came downstairs once to use the bathroom and then returned upstairs. Robinson heard no yelling, door pounding or other commotion. Robinson testified that appellant's bedroom door had no locks or latches.

(Lodgment 3 at 3-8 (footnote omitted).)

IV.

PETITIONER'S CLAIMS

Petitioner raises the following claims for habeas corpus relief:

(1) The trial court violated Petitioner's rights to due process and confront witnesses by allowing the admission at trial of a victim's preliminary hearing testimony;

(2) The trial court violated Petitioner's rights to due process, a fair trial, and confront witnesses by allowing the admission of evidence of an uncharged crime under California Evidence Code section 1108;

(3) Petitioner's trial counsel operated under a conflict of interest;

(4) Petitioner was denied his right to an impartial jury; and

(5) The trial court violated Petitioner's right to self-representation by denying his motion pursuant to People v Marsden.[10]

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[10] 2 Cal.3d 118 (1970).

V.

STANDARD OF REVIEW

A. 28 U.S.C. § 2254

The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> (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
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> (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). If these standards are difficult to meet, it is because they were meant to be. As the United States Supreme Court stated in Harrington v. Richter,[11] while the AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings[,]" habeas relief may be granted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with United States Supreme Court precedent. Further, a state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.[12]

B. Sources of "Clearly Established Federal Law"

According to Williams v. Taylor,[13] the law that controls federal habeas review of state court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court

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[11] 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).

[12] 28 U.S.C. § 2254(e)(1).

[13] 529 U.S. 362, 412, 120 S. Ct. 1495, 146, L. Ed. 2d 389 (2000).

decisions "as of the time of the relevant state-court decision." To determine what, if any, "clearly established" United States Supreme Court law exists, a federal habeas court also may examine decisions other than those of the United States Supreme Court.[14] Ninth Circuit cases "may be persuasive."[15] A state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, if no Supreme Court decision has provided a clear holding relating to the legal issue the habeas petitioner raised in state court.[16]

Although a particular state court decision may be both "contrary to" and an "unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings under Williams.

A state court decision is "contrary to" clearly established federal law if the decision 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.[17] If a state court decision denying a claim is "contrary to" controlling Supreme Court precedent, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)."[18] 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."[19]

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'"[20]

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14 LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).

15 Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

16 Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S. Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators' courtroom conduct, the state court's decision could not have been contrary to or an unreasonable application of clearly established federal law).

17 Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06).

18 Williams, 529 U.S. at 406.

19 Early, 537 U.S. at 8.

20 Id. at 11 (citing 28 U.S.C. § 2254(d)).

Accordingly, this Court may reject a state court decision that correctly identified the applicable federal rule but unreasonably applied the rule to the facts of a particular case.[21] However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable" under Woodford v. Visciotti.[22] An "unreasonable application" is different from merely an incorrect one.[23]

Where, as here with respect to Claims One and Two, the California Supreme Court denied the claim without comment, the state high court's "silent" denial is considered to be "on the merits" and to rest on the last reasoned decision on the claim.[24] In the case of Claims One and Two, this Court looks to the grounds the California Court of Appeal stated in its decision on direct review.[25]

Where, as here with respect to Claims Three through Five, the state courts have supplied no reasoned decision for denying the petitioner's claim on the merits, this Court must perform an "'independent review of the record' to ascertain whether the state court decision was objectively unreasonable."[26]

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[21] See Williams, 529 U.S. at 406-10, 413.

[22] 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

[23] Williams, 529 U.S. at 409-10.

[24] See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); Wilson v. Sellers, ___ U.S. ___, 138 S. Ct. 1188, 200 L. Ed. 2d 530 (2018).

[25] See Robinson v. Ignacio, 360 F.3d 1044, 1055 (9th Cir. 2004) (federal habeas court reviews the "last reasoned decision" by the state court) (citing Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002)). To the extent Claims Four and Five are unexhausted, as Respondent argues (Answer at 4 n.3, 21-23), this Court denies the claims on the merits because Petitioner has failed to present even a colorable claim for relief. Cassett v. Stewart, 406 F.3d 614, 623-24 (9 Cir. 2005). Because the claims are unexhausted, this Court reviews them de novo. See Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004) (review is de novo when a state court has not reached the merits of an issue).

[26] Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (citing Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000)).

VI.

DISCUSSION

A. Preliminary Hearing Testimony

1. Background

In Claim One, Petitioner argues the trial court violated his rights to due process and confront witnesses by finding Graciela V. to be an unavailable witness and allowing the prosecution to present her preliminary hearing testimony at trial. (Petition at 5.)

In its decision on direct review, the California Court of Appeal accurately detailed the procedural history related to the trial court's decision to allow the admission at trial of Graciela's preliminary hearing testimony, as follows:

> Before the preliminary hearing testimony of Graciela V. was read into evidence, the prosecution called Gregory Hernandez, a senior investigator for the District Attorney's office, to describe his efforts to locate her. Hernandez testified that he attempted to find Graciela between August 23[, 2016, the day jury selection began in Petitioner's trial] and [August] 30, 2016. He went to her last known address and was told by her brother-in-law that she was no longer living there. Hernandez obtained Graciela's cell phone number and spoke to her once on the morning of August 23. She said she would not be coming to court, that she wanted to get the incident "behind her," that she did not believe testifying would benefit her, and that Hernandez could not make her testify. After that conversation, Hernandez called Graciela's cell phone multiple times from different numbers, but she did not answer his calls. After discovering the identity of her boyfriend and his cell phone number and address, Hernandez called the boyfriend and went to his home twice. The boyfriend did not respond to his calls; Hernandez did not find him at his home address. Hernandez also attempted to obtain information on Graciela or her whereabouts from multiple websites, and left messages for her to contact him with multiple family members.

> After hearing this testimony, defense counsel contended the investigator "threw in the towel too early." The prosecutor observed that even had Graciela been located, Code of Civil Procedure section 1219 prevented the court from holding her in contempt for refusing to testify. The court took the matter under submission.
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> Before the court ruled, the prosecution re-called Hernandez. Hernandez testified that he had made additional attempts to contact Graciela that day (September 7) and the previous day: calling her and her boyfriend's numbers again, speaking to her boyfriend's father, going again to Graciela's last-known address and speaking to neighbors, who confirmed she no longer lived there. Despite these efforts, Hernandez remained unable to locate Graciela. The court found Graciela to be unavailable as a witness under Evidence Code section 240, subdivision (a)(5) and found that the prosecution had exercised due diligence in attempting to locate her and to induce her to come to court.

(Lodgment 3 at 8-10 (footnote omitted).)

In her preliminary hearing testimony, as read to Petitioner's jury at trial, Graciela detailed how she met Petitioner and how he ultimately forced her to orally copulate him, digitally penetrated her, and raped her. (Volume 4 Reporter's Transcript ("RT") at 2753-2805.)

2. State Court Opinion

On appeal, the California Court of Appeal rejected Petitioner's claim, finding the prosecution team exercised due diligence in attempting to secure the presence of Graciela as a witness at trial and, in light of the prosecution team's inability to locate her, the trial court properly admitted Graciela's preliminary hearing testimony. (Lodgment 3 at 11-14.)

3. Confrontation

To the extent Petitioner argues the trial court violated Petitioner's right to confront witnesses, his claim does not warrant federal habeas relief.

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a. Legal Standard

The Confrontation Clause of the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[27] In Crawford v. Washington,[28] the United States Supreme Court established that the admission of "testimonial" out-of-court statements is barred under the Confrontation Clause.[29] However, the Supreme Court in Crawford recognized an exception to this rule where the witness is "unavailable" and the defendant had a prior opportunity to cross-examine the witness.[30] Thus, where the witness is deemed unavailable, the Confrontation Clause typically is not violated by the admission at trial of earlier preliminary hearing testimony where the witness testified under oath before a judicial tribunal, the defendant was represented by counsel, and the defense had an adequate opportunity for cross-examination.[31]

"[A] witness is not 'unavailable' for purposes of the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[32] However, "the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising."[33]

Moreover, where AEDPA's deferential standard of review applies, a federal habeas court may not overturn a state court's decision on a question of a witness's unavailability merely because the federal court identifies additional steps that might have been taken to locate the

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[27] U.S. Const. amend. VI.

[28] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[29] Id. at 50-53.

[30] Id. at 53-59.

[31] See California v. Green, 399 U.S. 149, 165, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (finding that preliminary hearing testimony, taken "under circumstances closely approximating those that surround the typical trial," would have been admissible if witness was unavailable).

[32] Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

[33] Hardy v. Cross, 565 U.S. 65, 71-72, 132 S. Ct. 490, 181 L. Ed. 2d 468 (2011) (per curiam); see also Green, 399 U.S. at 188-89 n.22 (Harlan, J., concurring) ("[t]he lengths to which the prosecution must go to produce a witness before it may offer evidence of an extra-judicial declaration is a question of reasonableness"; and "[a] good-faith effort is, of course, necessary, and added expense or inconvenience is no excuse"; and "[i]t should also be open to the accused to request a continuance if the unavailability is only temporary").

witness; rather, under AEDPA, if the state court decision was reasonable, it cannot be disturbed.[34] In this context, the Ninth Circuit has also noted that the "good faith" and "reasonableness" of efforts to locate an unavailable witness "are terms that demand fact-intensive, case-by-case analysis, not rigid rules."[35]

b. Analysis

On the facts presented here, the state courts reasonably found that the prosecution team made a good-faith effort to obtain Graciela's presence at trial. Investigator Hernandez attempted to locate Graciela at every location and through any contact person he could discover, but to no avail. The Constitution requires no more. Under such circumstances, the admission of Graciela's earlier preliminary hearing testimony, at which time Graciela was subject to cross-examination by Petitioner's counsel, does not offend the Confrontation Clause.

4. Due Process

To the extent Petitioner argues the admission of Graciela's preliminary hearing testimony violated his right to due process, his claim still fails.

The United States Supreme Court "has not yet made a clear ruling that admission of irrelevant or overly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ."[36] "Absent such 'clearly established Federal law,' we cannot conclude that the state court's ruling was an 'unreasonable application.'"[37]

Even under circuit precedent, the admission of evidence can violate due process "only when there are *no* permissible inferences the jury may draw from the evidence."[38] Here, Graciela's preliminary hearing testimony detailing her sexual assault by Petitioner certainly supported an inference that Petitioner committed the crimes charged against him with respect to

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[34] Hardy, 565 U.S. at 71-72.

[35] Christian v. Rhode, 41 F.3d 461, 467 (9th Cir. 1994).

[36] Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009).

[37] Id.

[38] Windham v. Merkle, 163 F.3d 1092, 1103 (9th Cir. 1998) (original emphasis; citation and internal quotations omitted); see also Estelle v. McGuire, 502 U.S. 62, 70, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Graciela. Accordingly, even under circuit precedent, the admission of the evidence did not violate due process.

Therefore, the state courts' denial of Claim One was not contrary to or an unreasonable application of clearly established federal law. Habeas relief is not warranted.

B. Uncharged Crime Evidence

1. Background

In Claim Two, Petitioner argues the trial court violated his rights to due process, a fair trial, and confront witnesses by admitting evidence of the uncharged rape of Adrianna under California Evidence Code section 1108. (Petition at 5-6.)

In its decision on appeal, the California Court of Appeal accurately detailed the procedural history related to the trial court's decision to admit the other crimes evidence under Evidence Code section 1108, as follows:

> Prior to trial, appellant moved under Evidence Code section 352 to exclude evidence of . . . the 2006 incident involving Adrianna . . . . The court . . . found the Adrianna incident to be "relevant as to intent," and further found that its "probative value outweigh[ed] any prejudice," as it was "similar in its facts, and . . . not particularly inflammatory when compared to the charged crimes." The court specifically found the evidence admissible under Evidence Code section 1108.
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> During the trial, the prosecution informed the court that Adrianna was unavailable to testify, as she had gone to Mexico and was not responding to calls. The defense objected to having Gloria Tatum relate Adrianna's statements to her that she had been raped by "Junior." The court ruled that the statements were admissible under Evidence Code section 1240 as spontaneous statements and as a "fresh complaint."

(Lodgment 3 at 14-15 (footnote omitted).)

Tatum then testified that Adrianna had come home looking like she was in a state of shock before tearing up and saying a man Tatum knew to be Petitioner raped Adrianna. (5 RT at 3609-13.) Tatum called the police and went to Petitioner's apartment to confront him, but he did not answer the door. (5 RT at 3613-15.) Tatum further testified that she saw the police talk to Adrianna and she accompanied Adrianna to the hospital. (5 RT at 3615.)

Los Angeles Police Officers Brian Churchill and Christopher Jongsomjit testified that they responded to the call for assistance, found Adrianna to be upset and crying, took Adrianna for a rape examination, and booked the rape kit into evidence. (5 RT at 3356-66.)

Nurse practitioner Page Courtemanche testified that she conducted Adrianna's sexual assault examination, described the process of conducting the examination of Adrianna and collecting specimens for forensic testing, and detailed her observations of Adrianna's emotional state and physical injuries as reflected in the examination report. (5 RT at 3392-93, 3403-09.)

2. State Court Opinion

The California Court of Appeal denied Petitioner's claim on appeal, finding that the evidence of the uncharged rape was admissible under state evidentiary rules and did not violate federal confrontation principles because none of the witnesses to testify on the matter provided any hearsay testimony. (Lodgment 3 at 14-20.)

3. Confrontation

To the extent Petitioner argues the admission of evidence of Adrianna's rape through other witnesses violated his right to confront witnesses against him, his claim fails. As the United States Supreme Court explained in Crawford, the primary concern of the Confrontation Clause is the admission of "testimonial hearsay."[39] Thus, the analysis of a Confrontation Clause claim requires a preliminary determination as to whether a contested statement (1) is hearsay and (2) is "testimonial" within the meaning of Crawford.

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[39] Crawford, 541 U.S. at 53 ("even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object").

Here, except for Tatum's testimony that Adrianna stated Petitioner raped her, the testimony related to Adrianna was not hearsay. Hearsay is a statement made by a non-testifying declarant that a party offers to prove the truth of the matter asserted in the statement.[40] The witnesses at issue here, however, testified to their own actions and observations following Petitioner's rape of Adrianna. They did not testify to any statements by a non-testifying declarant.

As for Tatum's testimony regarding Adrianna's statement that Petitioner raped her, Adrianna's statement was not testimonial. Under the primary purpose test, statements are testimonial: (1) "when they result from questioning, 'the primary purpose of [which was] to establish or prove past events potentially relevant to later criminal prosecution,'" and (2) "when written statements are 'functionally identical to live, in-court testimony,' 'made for the purpose of establishing or proving some fact' at trial."[41] Adrianna's statement to Tatum does not qualify as testimonial under the primary purpose test because Adrianna did not make the statement to anyone working with law enforcement[42] and the circumstances of Adrianna's statement indicates she did not intend for it to be a solemn declaration made for the purposes of proving any fact in a future trial.[43]

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[40] Fed. R. Evid. 801; Cal. Evid. Code § 1200.

[41] Lucero v. Holland, 902 F.3d 979, 989 (9th Cir. 2018), cert. denied, — U.S. —, 139 S. Ct. 1180, 203 L.Ed.2d 216 (2019) (citations omitted); see Ohio v. Clark, 576 U.S. 237, 135 S. Ct. 2173, 2179, 192 L.Ed.2d 306 (2015) (discussing primary purpose test).

[42] See Giles v. California, 554 U.S. 353, 376, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008) ("[s]tatements to friends and neighbors about abuse and intimidation" are not testimonial.); see also Schubert v. Warner, 605 F. App'x 688 (9th Cir. 2015) (finding that statements to a family friend were non-testimonial and stating, "No Supreme Court authority has held that statements made to someone other than law enforcement personnel are testimonial."); Saechao v. Oregon, 249 F. App'x 678, 679 (9th Cir. 2007) (a conversation "between two friends, without any active participation by a government official" was non-testimonial).

[43] See Michigan v. Bryant, 562 U.S. 344, 381, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) ("For an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; and [s]he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused . . . . That is what distinguishes a narrative told to a friend over dinner from a statement to the police.") (Scalia, J., dissenting); see also United States v. Palamarchuk, 791 F. App'x 658, 662 (9th Cir. 2019) ("a conversation between friends over dinner" is non-testimonial); Lara v. Allison, 617 F. App'x 769, 770 (9th Cir. 2015) ("statements [made] during an unprompted, informal conversation between coworkers at their place of employment" are non-testimonial).

Because the testimony regarding Petitioner's rape of Adrianna did not contain testimonial hearsay, its admission did not violate Petitioner's confrontation rights as protected by Crawford.

4. Due Process

Petitioner also fails to show the admission of evidence regarding his rape of Adrianna violated his due process rights.

The United States Supreme Court has never held that the admission of other bad acts evidence to prove propensity violates a criminal defendant's federal constitutional due process right to a fair trial.[44] In the absence of such "clearly established Federal law as determined by the United States Supreme Court," Petitioner is not entitled to federal habeas relief.[45] Significantly, to the extent Ninth Circuit law addresses the constitutionality of evidentiary rules allowing for the admission of evidence of other sex offenses committed by a defendant, the Ninth Circuit has found such statutes permissible.[46]

Therefore, the state courts' denial of Claim Two was not contrary to or an unreasonable application of clearly established federal law. Habeas relief is not warranted.

C. Conflict

1. Background

In Claim Three, Petitioner argues his trial counsel operated under a conflict of interest, alleging counsel had represented a prosecution witness. (Petition at 6.)

During a lunch break in trial on September 12, 2016, Petitioner's trial counsel became aware of a conflict. (5 RT at 3381-82.) Immediately upon return from the break, trial counsel informed the trial court that a witness who had already testified at trial against Petitioner "is a public defender client." (5 RT at 3381-82.) Although Petitioner's trial counsel did not disclose

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[44] See Estelle, 502 U.S. at 75 n.5 ("[W]e express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime").

[45] See Carey v. Musladin, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Moses v. Payne, 555 F.3d 742, 758-59 (9th Cir. 2009); Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir. 2008) (where the Supreme Court has "expressly left [the] issue an 'open question,'" habeas relief is unavailable).

[46] United States v. LeMay, 260 F.3d 1018, 1026-27 (9th Cir. 2001) (rejecting due process challenge to analogous federal statute).

which prosecution witness was represented by the Public Defender's Office, the trial court and the prosecutor assumed it was Stephanie Hernandez, who had a misdemeanor conviction for making a criminal threat. (5 RT at 3383-84, 3387.) The trial court further assumed Petitioner's trial counsel did not personally represent the witness in question and did not possess any privileged information regarding the witness, as trial counsel had been unaware of the conflict until after the witness testified at trial. (5 RT at 3386.) Given those circumstances, the trial court denied trial counsel's request to withdraw. (5 RT at 3386-87.)

Petitioner's trial counsel then went in camera with the trial court to make a record, but the trial court's ruling remained the same. (5 RT at 3387-88.) Pursuant to the request of Petitioner's trial counsel, the trial court agreed to admonish the jury that Stephanie Hernandez was convicted of misdemeanor criminal threats in 2014, that she had been placed on probation, and that she had a pending court date for a violation of that probation. (5 RT at 3388-90.)

2. Legal Standard

The Sixth Amendment right to counsel includes the right to be represented by counsel with undivided loyalties.[47] When notified of an actual or potential conflict of interest, "a trial court has the obligation 'either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel."[48] "If the trial court fails to undertake either of these duties, the defendant's Sixth Amendment rights are violated."[49]

Moreover, to prove an ineffective assistance of counsel claim premised on an alleged conflict of interest, a habeas petitioner must "establish that an actual conflict of interest adversely affected his lawyer's performance."[50] That is, a habeas petitioner "must demonstrate that his

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[47] Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); Campbell v. Rice, 408 F.3d 1166, 1170 (9th Cir. 2005) (en banc); Lewis v. Mayle, 391 F.3d 989, 995 (9th Cir. 2004).

[48] Campbell, 408 F.3d at 1170 (quoting Holloway v. Arkansas, 435 U.S. 475, 484, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)).

[49] Campbell, 408 F.3d at 1170; Holloway, 435 U.S. at 484.

[50] Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); Morris v. State of Cal., 966 F.2d 448, 455 (9th Cir. 1991); see also Mickens v. Taylor, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) ("[T]he Sullivan standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance.").

attorney made a choice between possible alternative courses of action that impermissibly favored an interest in competition with those of the client."[51] When a habeas petitioner "shows that a conflict of interest actually affected the adequacy of his representation [,]" he "need not demonstrate prejudice in order to obtain relief"; however, until the habeas petitioner "shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance."[52] "An actual conflict must be proved through a factual showing on the record."[53]

Absent a showing that an alleged conflict adversely affected the trial counsel's performance, the mere fact that a different attorney from trial counsel's office represented a prosecution witness is insufficient to show an actual conflict.[54]

3. Analysis

Here, the trial court considered the matter of the potential conflict, allowed Petitioner's trial counsel to make a record on the matter, and conclude, with the support of state precedent, the risk presented by the alleged conflict was too remote to warrant removing counsel. The trial court was not obligated to do anything more with respect to its consideration of the alleged conflict.[55]

Moreover, Petitioner has not alleged, let alone proven, that the alleged conflict had any adverse impact on his trial counsel's performance on Petitioner's behalf. This is insufficient to establish ineffective assistance as a result of the alleged conflict.[56]

Accordingly, habeas relief is not warranted on Claim Three.

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[51] McClure v. Thompson, 323 F.3d 1233, 1248 (9th Cir. 2003); Washington v. Lampert, 422 F.3d 864, 872 (9th Cir. 2005); see also United States v. Wells, 394 F.3d 725, 733 (9th Cir. 2005) ("[T]o prove an adverse effect, the defendant must show that 'counsel was influenced in his basic strategic decisions' by loyalty to another [interest].'") (citation omitted).

[52] Sullivan, 446 U.S. at 349-50; Washington, 422 F.3d at 872.

[53] Morris, 966 F.2d at 455.

[54] Clark v. Chappell, 936 F.3d 944, 986-87 (9th Cir. 2019).

[55] Campbell, 408 F.3d at 1170.

[56] Clark, 936 F.3d at 986-87.

D. Impartial Jury

In Claim Four, Petitioner argues he was denied his right to a fair and impartial jury. (Petition at 6.) Petitioner's exact argument is unclear, although he appears to be complaining about the jury selection process. Petitioner's vague and conclusory claim does not warrant habeas relief.[57] Nevertheless, this Court has reviewed the record and finds no error with respect to the fairness or impartiality of the jury.

Accordingly, habeas relief is not warranted on Claim Four.

E. Marsden/Faretta

Finally, in Claim Five, Petitioner argues the trial court violated his right to self-representation by refusing to consider his motions to substitute counsel made pursuant to People v. Marsden.[58] Petitioner's claim invokes two distinct legal principles: the right to self-representation under Faretta v. California[59] and the right to the effective assistance of counsel under the Sixth Amendment.

1. Faretta

a. Background

Before trial, despite being represented by trial counsel, Petitioner attempted to file his own motions. (2 RT at A-1-A-2.) When the trial court asked Petitioner why he wanted to file motions on his own rather than through his counsel, Petitioner stated he wanted to represent himself. (2 RT at A-2.) The trial court then warned Petitioner of the dangerous of self-representation and provided him with the paperwork to make the election to represent himself. (2 RT at A-2-A-4.) Petitioner filled out the paperwork and discussed it with the trial court. (2 RT at A-5.)

During his discussions with the trial court about his decision to represent himself, Petitioner made complaints about his appointed counsel. (2 RT at A-7.) The trial court

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[57] See James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (conclusory allegations lacking factual support do not provide a sufficient basis for habeas corpus relief).

[58] 2 Cal.3d 118 (1970).

[59] 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

explained to Petitioner that there was a difference between a request for self-representation and a request to substitute counsel. (2 RT at A-7-A-8.) Petitioner stated that he understood and wanted to proceed with self-representation. (2 RT at A-8-A-9.)

The trial court again warned Petitioner of the dangerous of self-representation. (2 RT at A-9-A-12.) Petitioner indicated he understood and again stated his desire to represent himself. (2 RT at A-9, A-12.) The trial court granted Petitioner's request and relieved Petitioner's trial counsel. (2 RT at A-12.) Petitioner then again attempted to express complaints about his trial counsel, but the trial court explained they were done discussing counsel because Petitioner had elected to represent himself. (2 RT at A-14.)

After the parties discussed the motions Petitioner wished to file and began selecting court dates to hear the various motions, Petitioner informed the trial court, "Your honor, you can let [trial counsel] take over. . . . I'm sorry. You can just let him take over." (2 RT at A-25.) The trial court confirmed that is what Petitioner wanted to do, declared that Petitioner had abandoned his right to represent himself, and reappointed the previously appointed trial counsel. (2 RT at A-25.)

b. Analysis

In Faretta, the United States Supreme Court interpreted the right to counsel to encompass "an independent constitutional right" of the accused to represent himself at trial, and thus waive the right to counsel.[60] However, even after invoking the right to self-representation, a defendant may later withdraw the request and abandon his Faretta rights.[61] This is exactly what Petitioner did here. The trial court did not deny Petitioner's Faretta rights. Rather, the trial court granted Petitioner's request to represent himself and only reappointed counsel after Petitioner unequivocally abandoned his Faretta rights and asked that counsel represent him.

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[60] Id. at 806.

[61] See Sandoval v. Calderon, 241 F.3d 765, 774-75 (9th Cir. 2000).

2. Marsden

a. Legal Standard

The denial of a motion to substitute counsel implicates a defendant's Sixth Amendment right to counsel and is properly considered in federal habeas.[62] The Ninth Circuit has held that when a defendant voices a seemingly substantial complaint about counsel, the trial judge should make a thorough inquiry into the reasons for the defendant's dissatisfaction.[63] However, the inquiry need only be as comprehensive as the circumstances reasonably would permit.[64]

If a state court denies a motion to substitute counsel, the ultimate inquiry in a federal habeas proceeding is whether the petitioner's Sixth Amendment right to counsel was violated.[65]

b. Analysis

Here, Petitioner did not lodge a motion to substitute counsel pursuant to Marsden. Although, as mentioned above, Petitioner made some complaints against his trial counsel at the time he moved to represent himself, the trial court clarified with Petitioner whether he was invoking his Faretta rights or whether he was seeking to substitute counsel. Petitioner confirmed he wanted to represent himself pursuant to Faretta. Furthermore, at no other time during trial did Petitioner seek substitution of counsel. Accordingly, Petitioner cannot show the trial court erred by denying a motion to substitute counsel.

Nevertheless, even if Petitioner could show his complaints about trial counsel amounted to a Marsden motion, which the trial court should have considered, his claim still fails. Petitioner has not alleged, and this Court has not found based on its review of the record, that Petitioner's trial counsel was absent or incompetent in any manner. Thus, Petitioner has not shown that any alleged mishandling of a Marsden motion resulted in the denial of Petitioner's Sixth Amendment right to counsel.

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62 Bland v. California Dep't of Corrections, 20 F.3d 1469, 1475 (9th Cir.1994), overruled on other grounds by Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000).

63 Bland, 20 F.3d at 1475-76; Hudson v. Rushen, 686 F.2d 826, 829 (9th Cir.1982).

64 King v. Rowland, 977 F.2d 1354, 1357 (9th Cir.1992) (record may demonstrate that extensive inquiry was not necessary).

65 Schell, 218 F.3d at 1024-25.

Habeas relief is not warranted on Claim Five.

VII.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court 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: June 21, 2021

HONORABLE LOUISE A. LA MOTHE
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIE T. SHIPLEY, JR.,

Petitioner,

v.

D. HOLBROOK, Warden, CSP-CVSP,

Respondent.

Case No. LACV 20-2496-JAK (LAL)

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Magistrate Judge's Report and Recommendation, Petitioner's Objections and the remaining record, and has made a *de novo* determination.

Petitioner's Objections lack merit for the reasons stated in the Report and Recommendation.

Accordingly, IT IS ORDERED THAT:

1. The Report and Recommendation is approved and accepted;

2. Judgment be entered denying the Petition and dismissing this action with prejudice; and

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3. The Clerk serve copies of this Order on the parties.

DATED: August 25, 2021

JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIE T. SHIPLEY, JR.,

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v.

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Respondent.

Case No. LACV 20-2496-JAK (LAL)

JUDGMENT

Pursuant to the Order Accepting Report and Recommendation of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: August 25, 2021

JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE