Case: 20-56185, 12/20/2022, ID: 12614564, DktEntry: 44-1, Page 1 of 3

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE EDWARD PEYTON, Petitioner-Appellant, v. THERESA CISNEROS, Warden, Respondent-Appellee.	No. 20-56185 D.C. No. 2:19-cv-09249-VAP-KK MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief District Judge, Presiding

Submitted December 16, 2022**
San Francisco, California

Before: HAWKINS, S.R. THOMAS, and McKEOWN, Circuit Judges.

California state prisoner Lee Edward Peyton appeals pro se from the district court's judgment denying his habeas petition under 28 U.S.C. § 2254. We have

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 2253. We review de novo, *see Rowland v. Chappell*, 876 F.3d 1174, 1180–81 (9th Cir. 2017), and we affirm.[1]

The district court correctly concluded that the state court decision at issue was neither "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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).

Peyton contends that the state court's denial of his requests for self-representation violated his rights under *Faretta v. California*, 422 U.S. 806 (1975), because his requests were knowing and intelligent, unequivocal, and timely. The California Court of Appeal's decision, which did not incorporate the trial court's basis for denying Peyton's *Faretta* requests, is the last reasoned state-court

[1] Peyton's motion to waive oral argument is **GRANTED.**

decision resolving this claim, and therefore the only one we review.[2] *See Barker v. Fleming*, 423 F.3d 1085, 1091–93 (9th Cir. 2005).

After independently reviewing the record, the appellate court concluded, inter alia, that Peyton's purpose in invoking his right to self-representation was to disrupt or delay proceedings. That conclusion was neither contrary to, nor an unreasonable application of, *Faretta*, nor an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d); *Hirschfield v. Payne*, 420 F.3d 922, 926 (9th Cir. 2005) (holding that a requirement imposed by state courts "that the request not be for the purpose of delay" is not contrary to, nor an unreasonable application of, *Faretta*).

AFFIRMED.

[2] The record belies Peyton's assertion that the state appellate court improperly applied harmless error review; instead, it simply relied on a different basis to conclude that no constitutional error had occurred. *See Williams v. Johnson*, 840 F.3d 1006, 1011 (9th Cir. 2016) ("The state appellate court was entitled to make its own factual findings, unconstrained by what the trial court did."). Further, contrary to Peyton's contention, the appellate court's analysis was not improper under *Frantz v. Hazey*, 533 F.3d 724, 737–38 (9th Cir. 2008), or *Van Lynn v. Farmon*, 347 F.3d 735, 741 (9th Cir. 2003). Those cases address whether federal courts can supply alternative reasons from those proffered by a state court when affirming a denial of relief under § 2254(d)(1). They are therefore inapposite.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE EDWARD PEYTON, Petitioner-Appellant, v. THERESA CISNEROS, Warden, Respondent-Appellee.	No. 20-56185 D.C. No. 2:19-cv-09249-VAP-KK Central District of California, Los Angeles ORDER

Before: HAWKINS, S.R. THOMAS, and McKEOWN, Circuit Judges.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LEE EDWARD PEYTON, Petitioner, v. RALPH DIAZ, CDCR - Secretary, Respondent.	Case No. CV 19-9249-VAP (KK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, Chief United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

SUMMARY OF RECOMMENDATION

Petitioner Lee Edward Peyton ("Petitioner") has filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his 2017 state convictions for forcible rape and lewd act on a child. Petitioner asserts claims of denial of his rights to counsel of choice, self-representation, and effective and conflict-free counsel; false evidence; and cumulative error. Because Petitioner's claims fail on their merits, the Court recommends denying the Petition.

II.

PROCEDURAL HISTORY

A. STATE COURT PROCEEDINGS

On May 24, 2017, following a jury trial in the Ventura County Superior Court, Petitioner was convicted of one count of forcible rape in violation of section 261(a)(2) of the California Penal Code and three counts of lewd act on a child in violation of section 288(c)(1) of the California Penal Code. 2 CT at 348-51, 443-45, 449-52, 459-62, 469, 472.[1] In a bifurcated proceeding, the trial court found Petitioner had suffered multiple prior convictions within the meaning of sections 667(a)(1), 667(c)(2), 667(e)(2), 667.5(b), 667.5(c)(3), 1170(h)(3), 1170.12(a)(2), and 1170.12(c)(2) of the California Penal Code. Id. at 453-56, 459-64, 469, 471-72, 474. On June 12, 2017, the

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[1] The Court's citations to Lodged Documents refer to documents lodged in support of Respondent's January 9, 2020 Answer. See ECF Docket No. ("Dkt.") 14. Respondent identifies the documents in Dkt. 14 as follows:

1. California Court of Appeal opinion on direct appeal
2. Volumes 1-3 Clerk's Transcript in Ventura County Superior Court case number 2016004171 ("CT")
3. Volumes 1-6 Reporter's Transcript in Ventura County Superior Court case number 2016004171 ("RT")
4. Appellant's Opening Brief in California Court of Appeal
5. Respondent's Brief in California Court of Appeal
6. Appellant's Reply Brief in California Court of Appeal
7. Petition for Review in California Supreme Court
8. California Supreme Court order denying review
9. Habeas Corpus Petition in California Court of Appeal
10. California Court of Appeal's order denying habeas petition
11. Habeas Corpus Petition in California Supreme Court
12. Respondent's Informal Response to Habeas Corpus Petition
13. Petitioner's Reply to Respondent's Informal Response
14. California Supreme Court's order denying habeas petition
15. Petition for Certiorari in United States Supreme Court
16. United States Supreme Court docket

trial court sentenced Petitioner to a state prison term of 66 years to life.[2] Id. at 455-56, 465-66, 469-74.

Petitioner appealed his convictions to the California Court of Appeal. Lodgs. 4-6. Meanwhile, on October 12, 2017, Petitioner also filed a habeas corpus petition in the California Court of Appeal. Lodg. 9. On August 16, 2018, in separate orders, the California Court of Appeal affirmed the convictions and denied habeas relief. Lodgs. 1, 10.

On September 16, 2018, Petitioner filed a petition for review in the California Supreme Court. Lodg. 7. On October 24, 2018, the California Supreme Court denied review. Lodg. 8.

On March 22, 2019, Petitioner filed a habeas corpus petition in the California Supreme Court. Lodgs. 11-13. On October 9, 2019, the California Supreme Court denied the petition. Lodg. 14.

On October 15, 2019, Petitioner filed a petition for writ of certiorari in the United States Supreme Court. Lodg. 15. On January 13, 2020, the United States Supreme Court denied the petition. Peyton v. California, ___ U.S. ___, 140 S. Ct. 838, 205 L. Ed. 2d 480 (2020).

B. FEDERAL HABEAS PETITION

On October 16, 2019, Petitioner constructively filed[3] the Petition in this Court challenging his 2017 convictions. Dkts. 1-2. On January 9, 2020, Respondent filed an

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[2] While the California Court of Appeal and Respondent refer to a term of 76 years to life, lodg. 1 at 1; dkt. 12 at 16, Petitioner's abstract of judgment reflects a prison term of 66 years to life, 2 CT at 469-74. As reflected in the Reporter's Transcript, at the sentencing hearing, the trial court stated it was imposing consecutive sentences of 38 years to life on Counts Three and Six, for a total aggregate sentence of 76 years to life. 6 RT at 887. The trial court, however, later clarified that Petitioner's sentence on Count Six was to be 28 years to life, for a total aggregate term of 66 years to life. 2 CT at 465-67.

[3] Under the "mailbox rule," when a pro se prisoner gives prison authorities a pleading to mail to court, the court deems the pleading constructively "filed" on the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010).

Answer to the Petition. Dkt. 12. On February 4, 2020, Petitioner constructively filed a Reply. Dkt. 16. This matter thus stands submitted.

III.

SUMMARY OF FACTS

For a summary of the facts, this Court relies on the California Court of Appeal's August 16, 2018 opinion, as those facts pertain to Petitioner's conviction:[4]

> [Petitioner], then 37 years old, moved in with S.R. and his family in late 2015. While living there, [Petitioner] provided drugs and alcohol to S.R.'s 14-year-old daughter, M.R. In early 2016, [Petitioner] began asking M.R. about her sexual activity. He offered to pay her telephone bill in exchange for oral sex. He touched her buttocks and tried to kiss her.
>
> A few nights later, M.R. smoked marijuana and drank alcohol in [Petitioner]'s vehicle. [Petitioner] did not partake. M.R. felt "completely numb" and "really out of it." She was not "seeing straight." [Petitioner] rubbed M.R.'s thigh and reclined her seat. He pulled down her pajama bottoms, digitally penetrated her vagina, and performed oral sex on her. He then pinned her down and raped her. M.R. told [Petitioner] to stop several times, but he did not. He said he would tell her father she had been drinking and smoking marijuana if she told him about the assault.

Lodg. 1 at 2.

IV.

PETITIONER'S CLAIMS FOR RELIEF

Petitioner presents the following claims in the Petition:

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[4] Because this factual summary is drawn from the California Court of Appeal's opinion, "it is afforded a presumption of correctness that may be rebutted only by clear and convincing evidence." Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2008) (citations omitted). To the extent Petitioner alleges the summary is inaccurate, the Court has independently reviewed the trial record and finds the summary accurate.

1. Claim One: Petitioner was deprived of his right to counsel of choice.
2. Claim Two: Petitioner was deprived of his right to self-representation.
3. Claim Three: The prosecution presented "covert perjury" and false evidence.
4. Claim Four: Petitioner was deprived of his right to effective, conflict-free counsel.
5. Claim Five: Cumulative error.

See dkt. 1 at 5-6, 8; dkt. 2 at 11-185.[5]

Respondent contends these claims fail on the merits. Dkt. 12 at 20-61.

V.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless the 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).

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[5] Petitioner suggests Respondent is being "deceptive" by organizing Petitioner's arguments into five claims. Lodg. 16-1 at 6. While Petitioner's form Petition only presents a single claim for relief, i.e. the trial court denied Petitioner's right to counsel of choice, dkt. 1, in his Memorandum of Points and Authorities in Support of the Petition, dkt. 2, Petitioner presents a litany of claims and arguments. Petitioner organizes those contentions under four main headings with an additional section regarding cumulative error. Id. at 2-185. Respondent and this Court have, therefore, addressed the issues using the same organization Petitioner used in his Memorandum of Points and Authorities in Support of the Petition.

"'[C]learly established Federal law' for purposes of § 2254(d)(1) includes only 'the holdings, as opposed to the dicta, of th[e] [United States Supreme] Court's decisions'" in existence at the time of the state court adjudication. White v. Woodall, 572 U.S. 415, 419, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014). However, "circuit court precedent may be 'persuasive' in demonstrating what law is 'clearly established' and whether a state court applied that law unreasonably." Maxwell v. Roe, 628 F.3d 486, 494 (9th Cir. 2010).

Overall, AEDPA presents "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, 571 U.S. 12, 19, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013). The federal statute presents "a difficult to meet . . . and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011) (internal citation and quotation marks omitted). On habeas review, AEDPA places the burden on petitioners to show the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Put another way, a state court determination that a claim lacks merit "precludes federal habeas relief so long as fairminded jurists could disagree" on the correctness of that ruling. Id. at 101. Federal habeas corpus review therefore serves as "a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." Id. at 102-03 (internal citation and quotation marks omitted).

Where the last state court disposition of a claim is a summary denial, this Court must review the last reasoned state court decision addressing the merits of the claim under AEDPA's deferential standard of review. Maxwell, 628 F.3d at 495; see also Berghuis v. Thompkins, 560 U.S. 370, 380, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010); Ylst v. Nunnemaker, 501 U.S. 797, 803-04, 111 S. Ct. 2590, 115 L. Ed. 2d 706

(1991). Here, with respect to Claims Two and Four, the California Court of Appeal's August 16, 2018 opinion on direct review (see lodg. 1) stands as the last reasoned decision with respect to Petitioner's claims.

Where, as here with respect to Claims One, Three, and Five, the state courts supply no reasoned decision on the claim presented for review, this Court must perform an "'independent review of the record' to ascertain whether the state court decision was objectively unreasonable." 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. COUNSEL OF CHOICE

1. Background

In Claim One, Petitioner argues the trial court denied his right to counsel of choice when the court relieved Petitioner's retained counsel and appointed the Public Defender's Office. Dkt. 1 at 5; dkt. 2 at 11-17.

On February 5, 2016, Petitioner made his first court appearance on the instant charges. 1 CT at 8-11. Petitioner was represented at that time by retained counsel Victor Salas. Id. On March 1, 2016, Petitioner again appeared before the trial court represented by Salas. Id. at 19-22. Also present in court was Deputy Public Defender Drevenstedt. Id. at 21. At that time, Petitioner requested the trial court appoint Salas to represent him, but the trial court denied the request. Id.

On March 2, 2016, the trial court relieved Salas as counsel of record and appointed the Public Defender's Office. Id. at 25. Petitioner and Salas were not present at the March 2, 2016 hearing. Id.; dkt. 2-2 at 39. Petitioner was, however, represented by Deputy Public Defender Harmon at the hearing. 1 CT at 25.

At a March 11, 2016 hearing on Petitioner's request to substitute counsel pursuant to People v. Marsden, 2 Cal. 3d 118 (1970), Petitioner was represented by Deputy Public Defender Drevenstedt. Dkt. 4-4 at 61-62. During that hearing,

Drevenstedt offered some insight into the trial court's appointment of the Public Defender's Office to represent Petitioner. Specifically, Drevenstedt explained Petitioner had requested the trial court appoint Salas at the March 1, 2016 hearing. Id. at 64; 1 CT at 21. The trial court was unwilling to appoint Salas without first verifying whether the Public Defender's Office could be appointed to represent Petitioner. Dkt. 4-4 at 64. The Public Defender's Office did not declare a conflict; thus, the trial court relieved Salas as counsel of record and formally appointed the Public Defender's Office on March 2, 2016. Id. at 63-64; 1 CT at 25.

2. Applicable Law

The Sixth Amendment right to counsel encompasses a criminal defendant's right to retain counsel of his choice. Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932) (holding that a criminal defendant must be afforded a "fair opportunity to secure counsel of his own choice"); see also Chandler v. Fretag, 348 U.S. 3, 10, 75 S. Ct. 1, 99 L. Ed. 4 (1954) ("[A] defendant must be given a reasonable opportunity to employ and consult with counsel."). The "essential aim" of the right to counsel, however, "is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) (citations omitted).

Accordingly, the right to retained counsel of choice is not absolute. Id. (noting that "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects"). Notably, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." United States v. Gonzalez-Lopez, 548 U.S. 140, 151, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); see Caplin & Drysdale, Chartered v. U.S., 491 U.S. 617, 624, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989) (finding petitioner could not "defensibly . . . assert that impecunious defendants have a Sixth Amendment right to choose their counsel"); Wheat, 486 U.S. at 159 (holding that under the Sixth Amendment, "a defendant may not insist on

representation by an attorney he cannot afford"). Hence, "those who do not have the means to hire their own lawyers have no cognizable [Sixth Amendment] complaint so long as they are adequately represented by attorneys appointed by the courts." Caplin & Drysdale, 491 U.S. at 624.

3. Analysis

Here, Petitioner required the appointment of counsel at the court's expense. See 2 CT at 21. Accordingly, because Petitioner required the appointment of counsel, he did not have a Sixth Amendment right to counsel of his choosing. Knowles v. Muniz, 228 F. Supp. 3d 1009, 1020 (C.D. Cal. 2017) (finding petitioner did not have a right to counsel of his choice where trial court appointed previously retained counsel, then relieved counsel and appointed a panel attorney because petitioner could not afford to retain his preferred counsel).[6]

Although Petitioner now contends he did not require the appointment of counsel, dkt. 16-1 at 7, the record shows otherwise. Specifically, while Petitioner initially retained Salas, he later requested the trial court appoint Salas to represent him. 1 CT at 21; 4-4 at 64. Petitioner has not presented any evidence, other than his own

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[6] Petitioner's claim also fails to the extent he argues the trial court's removal of Salas and appointment of the Public Defender's Office violated state procedural rules, see dkt. 2 at 16; violated Petitioner's federal constitutional rights to counsel, confrontation, and due process, id. at 13-16; and was the result of judicial bias. Claims of state law error are not cognizable on federal habeas review. Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (noting that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). Also, due process is not violated when the trial court removes retained counsel and appoints alternate counsel where the defendant did not show he could afford to continue paying retained counsel, even when the defendant is not afforded a hearing on the matter. Knowles, 228 F. Supp. 3d at 1020-21. In addition, although Salas was not present at the hearing, Petitioner was not denied his right to counsel, as he was represented by the Public Defender's Office. 2 CT at 25. Moreover, Petitioner's confrontation rights were not at issue during the hearing because no witnesses were called and no witness statements were at issue. See Douglas v. Alabama, 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965) (noting the "primary interest secured by [the Confrontation Clause] is the right of cross-examination"); Kentucky v. Stincer, 482 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). Finally, because Petitioner has not shown the trial court erred, he is unable to establish judicial bias on this basis. See Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (finding bias can "almost never" be demonstrated solely on the basis of a judicial ruling).

unsupported, self-serving assertions offered in hindsight, to rebut this record.[7] Self-serving allegations by a habeas petitioner, without more, are not sufficient to warrant relief. See, e.g., Womack v. Del Papa, 497 F.3d 998, 1004 (9th Cir. 2007) (ineffective assistance of counsel claim denied where, aside from his self-serving statement, which was contrary to other evidence in the record, there was no evidence to support his claim); Dows v. Wood, 211 F.3d 480, 486 (9th Cir. 2000) (noting there was no evidence in the record to support petitioner's ineffective assistance of counsel claim, "other than from [petitioner's] self-serving affidavit").

Hence, the state court's denial of Petitioner's counsel of choice claim was not contrary to or an unreasonable application of clearly established federal law. Habeas relief is, thus, not warranted on Claim One.

B. SELF-REPRESENTATION

1. Background

In Claim Two, Petitioner argues the trial court violated his right to self-representation. Dkt. 1 at 5; dkt. 2 at 22-32, 47-64.[8]

As noted above, on March 11, 2016, Petitioner requested substitution of counsel pursuant to Marsden, 2 Cal. 3d at 118, which the trial court denied. Dkt. 4-4

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[7] To the extent Petitioner intended to rely on Salas's declaration to support his assertion, see dkt. 16-1 at 8, Salas's declaration does not state Petitioner intended (or was financially able) to keep him as retained counsel. Dkt. 2-2 at 39.

[8] To the extent Petitioner also attempts to raise this claim under theories of due process, equal protection, the presumption of innocence, and the right to confrontation, dkt. 16-1 at 15-25, the Court has considered Petitioner's claims and finds they lack merit. Petitioner received the process to which he was entitled, as the trial court held hearings on his Faretta requests. See United States v. Farias, 618 F.3d 1049, 1051-52 (9th Cir. 2010) ("Once a defendant makes an unequivocal request to proceed pro se, the court must hold a hearing - commonly known as a Faretta hearing."). In addition, Petitioner has not shown he was a member of a protected class or that he was intentionally treated differently from others similarly situated, as required for a showing of an equal protection violation. See Lee v. City of L.A., 250 F.3d 668, 686 (9th Cir. 2001) (discussing elements of equal-protection claim in 42 U.S.C. § 1983 civil rights action); see also N. Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008) (noting an equal protection claim brought by "class-of-one" is "premised on unique treatment rather than on a classification"). Finally, the denial of Petitioner's Faretta requests did nothing to curtail the presumption of his innocence or his right to confront witnesses.

at 61-65. On June 15, 2016, Petitioner again sought substitution of counsel. Id. at 67-79. At that time, Petitioner informed the trial court that he would invoke his right to self-representation under Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), if his request was denied. Id. at 78-79. The trial court again denied Petitioner's Marsden motion. Id. at 79. Petitioner asked the court to transfer him back to another department so that he would be able to invoke his Faretta rights, but the court took the matter off the record without responding to Petitioner's request. Id.

On June 21, 2016, Petitioner reminded the trial court he had invoked his Faretta rights. 1 RT at 2. The trial court deferred ruling at that time. Id.

On June 22, 2016, the trial court denied Petitioner's Faretta request. Id. at 5. The trial court based its decision on Petitioner's disruptive and dilatory behavior in prior prosecutions. Id. In addition, the trial court cited authority which upheld denial of Faretta requests based on a defendant's behavior in both prior and current proceedings. Id. (citing People v. Welch, 20 Cal. 4th 701, 731, 734-35 (1999) (noting the defendant's belated request for reappointment of counsel in a prior unrelated case, but affirming the trial court's denial of the Faretta motion based only on the defendant's behavior in the case before it) and People v. Watts, 173 Cal. App. 4th 621, 622, 629-30 (2009) (finding defendant's behavior in multiple prosecutions, which "proceeded simultaneously in the trial court without formal consolidation" was sufficient to support the trial court's denial of his Faretta motion)).

On June 28, 2016, Petitioner filed a written Faretta motion. Id. at 7-9. The trial court deferred ruling on the motion at that time. Id. at 11-12. On July 6, 2016, the trial court again denied Petitioner's request for self-representation because of his "prior misconduct and his prior case." Id. at 23-24.

On January 5, 2017, Petitioner renewed his request for self-representation. Id. at 25. The trial court again denied Petitioner's request, indicating the prior ruling on Petitioner's request would stand. Id.

2. State Court Opinion

The California Court of Appeal denied Petitioner's claim on appeal, explaining it did not have to decide whether the trial court properly denied Petitioner's request to represent himself based on his behavior in prior cases because Petitioner's request was equivocal and, as evidenced by Petitioner's actions in the current prosecution, was made for the purpose of disrupting and delaying the proceedings. Lodg. 1 at 8-10.

3. Applicable Law

The right to counsel has been interpreted to encompass "an independent constitutional right" of the accused to represent himself at trial, and thus waive the right to counsel. Faretta, 422 U.S. at 806. This right, however, is neither automatic nor without qualification. Rather, a defendant's Faretta request must be timely, not for purposes of delay, unequivocal, and knowing and intelligent. United States v. Maness, 566 F.3d 894, 896 (9th Cir. 2009) (per curiam).

Additionally, a criminal defendant who waives his or her right to counsel and seeks to represent himself must be "able and willing to abide by rules of procedure and courtroom protocol." McKaskle v. Wiggins, 465 U.S. 168, 173, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). "The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. [T]rial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The Supreme Court has further recognized the "government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." Martinez v. California, 528 U.S. 152, 162, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000). In deciding whether a defendant should be allowed to represent himself, "[p]retrial activity" is relevant "if it affords a strong indication that the defendants will disrupt the proceedings in the courtroom." United States v. Flewitt, 874 F.2d 669, 674 (9th Cir. 1989).

4. Analysis

Although this Court cannot find, based on the record detailed above, that Petitioner's Faretta request was equivocal,[9] the record supports the findings of the state trial and appellate courts that Petitioner's motion was made for the purpose of disrupting and delaying the proceedings.

a. Prior Conduct

First, Petitioner has not presented any clearly established United States Supreme Court precedent holding that a trial court cannot consider a defendant's past behavior in prior unrelated cases in determining whether the defendant's future conduct will be disruptive to the integrity and efficiency of the trial. While courts are typically confronted with pretrial activity in the case before them,[10] a defendant's conduct in prior cases may be indicative of his likelihood for disruption in a current case.

Here, Petitioner's past behavior was extremely disruptive and his behavior in the current case appeared to be following the same pattern. On appeal from Petitioner's previous conviction, the California Court of Appeal offered insight into the seriousness of Petitioner's disruptive behavior in that case, explaining:

> Had the trial court terminated self-representation and made an adequate record for doing so, we would have upheld it. It seems obvious that

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[9] See, e.g., Adams v. Carroll, 875 F.2d 1441, 1444-45 (9th Cir. 1989) (finding conditional Faretta request was not equivocal where defendant made it clear he wanted to represent himself if new counsel was not appointed and did not waiver from this position).

[10] See, e.g., Zamora v. Virga, No. 2:12-CV-1922-WBS (DAD), 2013 WL 3788423, at *10 (E.D. Cal. July 18, 2013) (Faretta motion properly denied due to defendant's "rude and obstreperous" behavior at pretrial hearings); Ainsworth v. Virga, No. 10-6602, 2012 WL 7984098, at *9 (C.D. Cal. Aug.13, 2012) (finding denial of Faretta claim not objectively unreasonable where petitioner had previously made six Marsden motions and one previous Faretta motion, "which may well have amounted to sufficient disruptive behavior by itself to justify the trial court's denial"); Rodriguez v. Cate, No. 10-8142, 2012 WL 2458114, at *6-8 (C.D. Cal. June 12, 2012) (denying Faretta claim because trial court's finding that petitioner was "playing games" and "committing obstructionist misconduct" by filing numerous Marsden and Faretta motions was not objectively unreasonable).

> appellant was not interested in having a speedy resolution of his case and that he used the right of self-representation to actually prevent the orderly administration of justice. As Faretta itself recognized, "The right of self-representation is not a license to abuse the dignity of the courtroom."

See People v. Peyton, 229 Cal. App. 4th 1063, 1081 (2014) (finding that, by not terminating Petitioner's Faretta rights, the trial court allowed Petitioner "to frustrate the orderly administration of justice" by taking a case charging "three pedestrian felonies" and prolonging the proceedings for three years). In addition, by the time he first invoked his Faretta rights in the current case, Petitioner had already filed two Marsden motions and exhibited behavior, as discussed below, which followed the pattern of his past dilatory conduct. As such, Petitioner's previous pattern of behavior "afforded a strong indication that the defendant will disrupt the [current] proceedings." Flewitt, 874 F.2d at 674.

Ultimately, in the absence of clearly established Supreme Court precedent holding that a trial court is prohibited from considering this past conduct, the Court cannot conclude the state courts' decision to deny Petitioner's Faretta request was contrary to, or an unreasonable application of, Supreme Court authority. Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law.").

b. Current Conduct

Moreover, Petitioner's conduct in the instant case before his Faretta motion indicated he had not reformed his disruptive conduct since his prior case.

First, at the June 21, 2016 hearing, the trial court indicated it would have Petitioner evaluated before ruling on his Faretta motion because the court had "made observations" that caused concern about Petitioner's courtroom behavior. 1 RT at 2.

In addition, Petitioner continued to delay the trial court proceedings and waste judicial resources by filing repetitive and meritless motions and contentions. Petitioner filed repeat Marsden motions that were both denied. Dkt. 4-4 at 61-65, 68-79; 1 RT at 5. At the hearing on his first Marsden motion, Petitioner misrepresented facts regarding his prior federal habeas corpus action in an attempt to allege a conflict of interest between him and the Public Defender's Office. Dkt. 4-4 at 62-63, 65. Specifically, although Petitioner cited a conflict of interest based on a prior grant of federal habeas corpus involving a member of the Public Defender's Office, id. at 62, Petitioner misrepresented the facts of that case to the trial court hearing his Marsden motion.[11] Moreover, as for Petitioner's second Marsden motion, Petitioner presented the trial court with a laundry list[12] of meritless complaints against his trial counsel, which the trial court found did not justify dismissal of counsel. Dkt. 4-4 at 68-79.

Ultimately, because Petitioner continued his well-established pattern of disrupting judicial proceedings and making meritless and time-consuming arguments, the trial court could have reasonably concluded Petitioner's pretrial conduct in the current case "afford[ed] a strong indication that [Petitioner] w[ould] disrupt the proceedings in the courtroom." Flewitt, 874 F.2d at 674. Hence, the state court's denial of Petitioner's Faretta claim was not contrary to or an unreasonable application of clearly established federal law. Habeas relief is, thus, not warranted on Claim Two.

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[11] In fact, habeas relief was granted in that case only as to Petitioner's former counsel's failure to file a notice of appeal. Peyton v. Adams, Case No. CV 05-6928-FMC (AJW), dkt. 102. Petitioner's other claims against his former counsel, including his claim that his trial counsel improperly induced him to plead guilty, were denied as meritless. Peyton, Case No. CV 05-6928-FMC (AJW), dkts. 112, 115, 117.

[12] Specifically, Petitioner complained that his trial counsel failed to communicate, provide discovery, subpoena witnesses, and conduct investigation and testing Petitioner requested; attempted to negotiate a plea agreement despite Petitioner not being interested in plea bargaining; and communicated with Petitioner's counsel on a different case without Petitioner's permission. Dkt. 4-4 at 68-79. As set forth in section D.3.b., the Court also concludes these claims are meritless.

C. FALSE EVIDENCE

1. Background

In Claim Three, Petitioner argues the prosecution presented "covert perjury" and false evidence. Dkt. 1 at 6; dkt. 2 at 65-126.[13]

2. Applicable Law

A conviction violates due process if it is obtained through testimony or evidence the prosecutor knew or should have known was false. Napue v. People of the State of Ill., 360 U.S. 264, 269-70, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). In order to prevail on a Napue claim, a petitioner must demonstrate: (1) the testimony or evidence was "actually false"; (2) the prosecution knew or should have known that the testimony or evidence was actually false; and (3) the false testimony or evidence was "material." Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005) (en banc) (quoting United States v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003)). Inconsistencies caused by failed memory are not sufficient to establish a witness offered false testimony, let alone that the prosecutor knew the testimony to be false. See Zuno-Arce, 44 F.3d at 1423 (observing that discrepancies in evidence "could as easily flow from errors in recollection as from lies"); United States v. Croft, 124 F.3d 1109, 1119 (9th Cir. 1997) (holding that actual falsity was not shown where witnesses merely had "conflicting recollections of events").

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[13] The Court has also considered Petitioner's claim to the extent he argues the prosecution withheld evidence of an interview of the victim. Dkt. 2 at 117-18. While there was some confusion as to whether Petitioner's counsel had received an audio tape of an interview with the victim, 2 RT at 125-26, there was no assertion the defense was not made aware of the interview or a conclusion that the prosecution failed to disclose the audio tape evidence. In addition, Petitioner's arguments that his counsel was ineffective for failing to challenge the DNA evidence and investigate an expert witness, id. at 107, 112, and that Petitioner was denied the opportunity to present expert testimony, id. at 125, are addressed in section D.4.b, below.

3. Analysis

a. The Testimony of the Victim and Olivia

First, Petitioner argues the prosecutor presented "covert perjury" and false evidence by presenting the testimony of the victim and her friend Olivia that was inconsistent with statements those witnesses made before trial. Dkt. 2 at 108-22. The Court has carefully reviewed the trial testimony as well as the pretrial statements of these witnesses. 2 RT at 181-205, 211-46; 3 RT at 254-361; dkt. 2-1 at 136-37, 144-45, 147-97; dkt. 2-2 at 238-39, 241-43. As discussed in detail by Petitioner's counsel at trial, 5 RT at 806-26, 836, there are a variety of examples in which the witnesses were inconsistent with their own statements or with each other. For example, there were inconsistencies in the statements of the victim and Olivia about how much the victim drank on the night of the rape, whether Petitioner drank that night, the type of beer the victim drank with Petitioner on a prior occasion, whether or not the victim sent certain text messages, whether the victim drank Jack Daniels with a Pepsi chaser before the rape, whether the victim smoked a blunt or a joint before the rape, whether the victim was wearing underwear at the time of the rape, whether Petitioner took the victim's pajama pants all the way off or left them around one ankle, whether the victim experienced pain during and after the rape, whether the victim had possession of her cell phone on the night of the rape or her dad had taken the phone away, Olivia's age at the time of relevant events, and whether the rape occurred in front of the victim's house or in Matilija Canyon. See 2 RT at 185, 189, 191-92, 194-96, 197, 199, 202, 205, 229, 242-46; 3 RT at 263, 269, 272, 274, 304-09, 313, 317, 320-22, 331, 333-34, 341, 344-45, 350-52, 355, 358, 396, 404, 408, 414-15; 5 RT at 806-26, 836; dkt. 2-1 at 136, 144, 147-49, 152, 156, 162-65, 170-73, 176-78, 180-81, 185-86, 188, 193-94; dkt. 2-2 at 238, 242.

Petitioner, however, has not shown that any inconsistencies were the result of anything more than changed memory, failed recollection, or alternative perceptions. Importantly, the victim admitted it was difficult to remember everything, as she could

not remember each officer she spoke to about the rape. 3 RT at 352-53. In addition, the sexual assault nurse testified trauma victims might have difficulty remembering details, 4 RT at 521-22, and, specifically, testified the victim here was not able to remember all the details of the crime during her examination, 4 RT at 534.[14]

Ultimately, Petitioner has not shown the prosecutor knew or should have known that any of the pretrial statements or trial testimony of the victim and Olivia were false. A petitioner fails to show a prosecutor presented false evidence simply because she presented testimony of a witness who had given inconsistent statements and left for the jury the decision of determining the witness's credibility. See Lara v. Madden, No. EDCV 17-474-ODW (KS), 2017 WL 7938464, at *16 (C.D. Cal. Dec. 22, 2017) ("The prosecutor's theory of the case rested on his belief that the victims' earlier police interview statements were true, despite the victims' recantations" and presentation of testimony did not amount to Napue violation); Henry v. Ryan, 720 F.3d 1073, 1084 (9th Cir. 2013) (finding petitioner's conclusory assertion that any testimony inconsistent with the truth must be not only inaccurate but also perjured, does not constitute evidence sufficient to establish a Napue claim).

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[14] Petitioner's claim also fails to the extent he alleges error due to the exclusion of impeachment evidence against the victim. Dkt. 2 at 99. As Petitioner's trial counsel conceded, the impeachment evidence Petitioner wanted to introduce likely would have been inadmissible under California's rape shield law and section 352 of the California Evidence Code because its probative value did not outweigh the danger of undue prejudice. See 1 RT at 58-59, 75-77; Cal. Evid. Code §§ 352 ("The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."), 782(a)(4) (evidence of complaining witness's unrelated sexual conduct is not admissible on issue of witness's credibility where the trial court finds under California Evidence Code section 352 the evidence is more prejudicial than probative). Moreover, while Petitioner argues he wanted to impeach the victim with his "personal knowledge" of the victim, dkt. 2 at 99, Petitioner did not testify at trial. Finally, to the extent Petitioner blames his trial counsel for not using this evidence to impeach the victim's testimony directly, his claim still fails. Petitioner's self-serving allegations that he had "personal knowledge" of impeaching information against the victim is not sufficient to support a claim of ineffective assistance of counsel. See, e.g., Womack, 497 F.3d at 1004; Dows, 211 F.3d at 486 .

b. DNA Evidence

Second, Petitioner "contests the truth and scientific validity of the DNA evidence." Dkt. 2 at 112. Petitioner's sperm DNA was recovered from vaginal and anal swabs of the victim. 5 RT at 629, 631, 643-45, 658, 660-63. However, Petitioner offers no proof that this DNA evidence was unreliable or that the prosecutor knew or reasonably should have known the evidence was false.[15] Such conclusory allegations are insufficient to warrant relief. See Cervantes v. Montgomery, No. CV 15-08911-AG (JDE), 2018 WL 3339674, at *19 (C.D. Cal. Apr. 18, 2018) (rejecting Napue claim as conclusory) (citing Jones v. Gomez, 66 F.3d 199, 204-05 (1995)).

c. Sexual Assault Nurse

Finally, Petitioner argues the testimony of Mara Landa, the nurse who conducted the sexual assault exam on the victim, was "fraud upon the jury and the court." Dkt. 2 at 99-108. Petitioner makes four basic arguments, (1) Landa lacked expertise because she was not board-certified to conduct pediatric examinations, (2) Landa's testimony was scientifically inaccurate and based on "junk science," (3) the prosecution did not turn over to the defense video and colposcope photographs taken during Landa's examination of the victim that would have undermined Landa's testimony, and (4) Landa falsely testified she did not collect pubic hair or toxicology samples from the victim. Id.

First, Petitioner fails to establish Landa lacked sufficient expertise to conduct a sexual assault examination on the teenaged victim. At the time of her testimony, Landa had experience conducting examinations on child victims and was simply awaiting the results of her test to gain pediatric certification. 4 RT at 502-03. In addition, Petitioner has not presented any evidence that the body of the teenaged

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[15] Petitioner also argues he was deprived of an opportunity to contest the DNA evidence due to his trial counsel's "objectionable concession of the states [sic] DNA evidence." Dkt. 2 at 112. In the absence of any proof the DNA evidence was unreliable, Petitioner has not shown his trial counsel had any basis upon which to contest the DNA evidence. Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005) (trial counsel not ineffective for failing to raise meritless arguments).

victim was sufficiently different from an adult woman to render meaningless Landa's certification with respect to adult victims. More importantly for purposes of Petitioner's claim, however, Petitioner fails to show this alleged lack of expertise resulted in testimony that was false or that the prosecutor knew was false.

Second, Petitioner argues Landa's testimony was scientifically unreliable and based on "junk science," but offers only his own "expert" assessment of the science to rebut Landa's testimony. Dkt. 2 at 99-108. Petitioner offers no proof, such as a declaration from an expert in the field, that Landa's testimony or scientific findings were unreliable or, more importantly, knowingly false. Such a conclusory claim does not warrant relief. James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) (holding conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief).

Third, Petitioner argues the prosecution did not turn over to the defense video and colposcope photos from Landa's exam on the victim, which, Petitioner argues, would have undermined Landa's testimony. Dkt. 2 at 99-101, 104, 107.[16] Petitioner has not shown such alleged photos and videos prove Landa's testimony was false or that the prosecutor knew or should have known Landa's testimony was false. Although Petitioner's trial counsel showed the photographs to Landa and elicited her admission that she had been mistaken about whether the victim had shaved her pubic hair, 4 RT at 551, the record does not support a finding that Landa's testimony was the result of anything more than her failed memory. Again, inconsistencies resulting from failed memory do not prove a witness testified falsely or that the prosecutor

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[16] To the extent Petitioner intended to raise a claim pursuant to Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), his claim still fails. Petitioner appears to be mistaken that the prosecution failed to turn over photos and video; rather, Petitioner's trial counsel did not turn those items over to Petitioner to possess while in custody, see 4 RT at 498-99. See Jahad v. Hernandez, No. CV 07-3135-DOC (CW), 2011 WL 1195401, at *20 (C.D. Cal. Feb. 28, 2011) ("Petitioner cites no authority, nor is the magistrate judge aware of any, which obligated counsel to share every item of discovery with Petitioner," and "[a]t any rate, Petitioner's claim fails because he does not show how counsel showing him these items would have changed the outcome of his trial.").

knew of the falsity. See Zuno-Arce, 44 F.3d at 1423 (observing that discrepancies in evidence "could as easily flow from errors in recollection as from lies").

Finally, Petitioner has not shown Landa testified falsely when she stated she did not collect pubic hair or toxicology samples from the victim, 4 RT at 516. Although Petitioner argues policy required Landa to collect pubic hair samples, nothing in the record shows Landa, in fact, collected such samples. See dkt. 2-1 at 135-42 (examination report indicates no pubic hair samples were collected). Moreover, although Landa's testimony that she did not collect toxicology samples, 4 RT at 558, was inconsistent with her examination report, which indicates she collected such samples, dkt. 2-1 at 142, Petitioner has not presented any evidence that Landa intentionally lied about this fact or that the prosecutor knew or should have known Landa was lying. See Zuno-Arce, 44 F.3d at 1423.

Hence, the state court's denial of Petitioner's Napue claim was not contrary to or an unreasonable application of clearly established federal law. Habeas relief is, thus, not warranted on Claim Three.

D. CONFLICT OF INTEREST WITH COUNSEL

1. Background

In Claim Four, Petitioner argues he and his trial counsel experienced a conflict of interest which denied Petitioner his right to counsel and to present a defense. Petitioner argues prior litigation between himself and the Public Defender's Office created a conflict of interest. Dkt. 2 at 127. Petitioner also argues numerous incidents of ineffective assistance of counsel amounted to a conflict of interest. Id. at 107, 112, 127-59, 161-75.

2. State Court Opinion

The California Court of Appeal denied Petitioner's claim on direct appeal. As to the allegation of a conflict of interest, the appellate court noted that lawsuits between a defendant and appointed counsel do not necessarily create an actual conflict of interest, particularly where, as here, the specific member of the Public

Defender's Office targeted in those lawsuits was no longer employed at the office. Lodg. 1 at 7-8. As to Petitioner's claims of ineffective assistance of counsel, the California Court of Appeal found no merit to any of Petitioner's assertions of ineffectiveness. Id. at 5-7.

3. Analysis

a. Prior Litigation

i. Applicable Law

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to conflict-free representation. Stenson v. Lambert, 504 F.3d 873, 885 (9th Cir. 2007). An alleged conflict violates the right to conflict-free counsel only if the conflict "adversely affected" trial counsel's performance. Alberni v. McDaniel, 458 F.3d 860, 870 (9th Cir. 2006). In order to establish a violation of the Sixth Amendment, a petitioner must demonstrate: (1) counsel actively represented conflicting interests, and (2) an actual conflict of interest adversely affected counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 348-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). "[A]n actual conflict of interest mean[s] precisely a conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties." Mickens v. Taylor , 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) (emphasis omitted).

ii. Analysis

Petitioner argues an actual conflict of interest existed between himself and the Public Defender's Office because he previously obtained federal habeas corpus relief based on a claim of error by a member of the Public Defender's Office who represented Petitioner in a prior, unrelated case.[17] This prior litigation involving a different public defender does not establish a conflict of interest between Petitioner

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[17] In a prior case in this District Court, Petitioner received habeas corpus relief on a claim that his past trial counsel, who was then employed by the Public Defender's Office, failed to timely file a notice of appeal. Peyton v. Adams, Case No. CV 05-6928-FMC (AJW), dkt. 102.

and the entire Public Defender's Office for all subsequent cases. See Foote v. Del Papa, 492 F.3d 1026, 1029-30 (9th Cir. 2007) (finding no conflict of interest between petitioner and the Public Defender's Office where petitioner filed an earlier habeas corpus petition in an unrelated case alleging ineffective assistance by a member of the Public Defender's Office and that office was later appointed to represent the petitioner on appeal in a subsequent case).

Moreover, regardless of whether a potential conflict existed between Petitioner and all members of the Public Defender's Office, Petitioner's claim fails here. Ultimately, Petitioner has not shown the alleged conflict "adversely affected" trial counsel's performance. For the reasons detailed below, none of Petitioner's allegations of ineffective assistance have merit and Petitioner has not established that any of the alleged acts of ineffectiveness were the result of a conflict stemming from Petitioner's past litigation against the Public Defender's Office.

b. Conflict Due to Ineffective Assistance of Counsel

i. Background

The balance of Petitioner's claim is premised on numerous allegations of ineffective assistance of counsel including: (1) failing to consult with, communicate with, or turn over discovery to Petitioner; (2) failing to investigate forensic evidence, witnesses, experts, Petitioner's juvenile incarceration records, physical evidence such as Petitioner's car and cell phone, a basis for a motion to dismiss pursuant to section 995 of the California Penal Code, and exculpatory alibi and impeachment evidence;[18] (3) insisting on pursuing a plea agreement against Petitioner's wishes; (4) contacting Petitioner's counsel on a separate case without Petitioner's permission; (5) pursuing a

[18] Petitioner further argues in Claim Three that he was denied the opportunity to call an expert witness, dkt. 2 at 125. It is unclear whether his argument is that the trial court denied him the opportunity to call an expert or that he was denied the opportunity as a result of counsel's alleged ineffectiveness. Either way Petitioner's claim fails. The trial court did not deny a defense request to present expert testimony. Further, as discussed below, Petitioner has not shown his trial counsel was ineffective with respect to potential expert witnesses.

consent defense against Petitioner's wishes and failing to request a related jury instruction; (6) failing to understand pertinent case law; (7) denying Petitioner his right to testify; (8) conducting an ineffective cross-examination of witnesses; (9) failing to object to the erroneous admission of propensity evidence; and (10) failing to request a hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) regarding the testimony of the sexual assault nurse.[19]

ii. Applicable Law

Although the Sixth Amendment guarantees criminal defendants the right to the assistance of counsel, it does not guarantee a "meaningful relationship" between a client and his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). A defendant's constitutional rights are impinged only if an irreconcilable conflict exists that prevents the effective assistance of counsel.

Under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), courts impose a two-prong test in determining ineffective assistance of counsel: (1) was counsel's performance deficient, and (2) did prejudice result from the deficient performance. 466 U.S. at 687. To prove deficient performance, a petitioner must show counsel's representation fell below an objective standard of reasonableness. Id. at 687-88. Establishing counsel's deficient performance does not warrant setting aside the judgment, however, if the error had no effect on the judgment. Id. at 691; see also Seidel v. Merkle, 146 F.3d 750, 757 (9th Cir. 1998). A petitioner must also show prejudice, such that there is a reasonable probability that,

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[19] Petitioner also argues his trial counsel was ineffective at his preliminary hearing. Dkt. 2 at 134-43. These arguments do not warrant relief because Petitioner cannot show any of his allegations of error at the preliminary hearing resulted in prejudice to Petitioner at trial, where he was convicted by an independent jury that fairly weighed the evidence against him. See also Davidson v. Davey, No. 2:16-cv-00689-GEB (GGH), 2017 WL 2972516, at *3 (E.D. Cal. July 12, 2017) (nonstructural errors, such as alleged ineffective assistance of counsel, occurring during a preliminary hearing are not actionable because defendant does not have a constitutional right to a preliminary hearing and because a conviction at trial breaks the chain of events resulting from any error at the preliminary hearing) (citing Rose v. Mitchell, 443 U.S. 545, 576, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) (Stewart J., concurring)).

but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

iii. Failure to Consult and Communicate

First, Petitioner argues his trial counsel failed to consult and communicate with Petitioner. Dkt. 2 at 127-30, 165-67.

Petitioner, however, does not show his trial counsel actively failed to consult and communicate with him. In fact, the record reflects counsel's earnest attempts to consult and communicate with Petitioner and that counsel complained consultation and communication was often impossible because Petitioner refused to cooperate. Dkt. 4-4 at 75, 77, 95, 99-102, 139, 180-81. Ultimately, Petitioner has not shown any of counsel's alleged ineffectiveness was the result of a lack of consultation or communication and, to the extent lack of communication could have hampered trial counsel's performance, it was likely the result of Petitioner's refusal to cooperate with counsel, see, e.g., dkt. 4-4 at 99-102, 180-81. Cheung v. California Attorney Gen., No. CV 18-7935-PSG (PLA), 2019 WL 5107100, at *15 (C.D. Cal. Aug. 27, 2019) (criminal defendant had not shown deficiencies on the part of trial counsel so as to warrant a substitution of counsel where the defendant's failure to cooperate was the cause of the breakdown between the defendant and his counsel).

iv. Failure to Turn Over Discovery

Second, Petitioner argues his trial counsel failed to turn over discovery. Dkt. 2 at 127-30, 143, 145, 166. Petitioner's trial counsel made clear there were items of evidence, including graphic and explicit photos and video and CDs that would be deemed contraband in the jail, that he was withholding from Petitioner. Dkt. 4-4 at 96; 4 RT at 498-99. Petitioner fails to show it was unreasonable for counsel to deny this evidence to Petitioner while he was in jail. Ultimately, Petitioner has not shown his trial counsel had a duty to share all discovery with him or that counsel's failure to share certain items of discovery resulted in prejudice at trial. Jahad v. Hernandez, No. CV 07-3135-DOC (CW), 2011 WL 1195401, at *20 (C.D. Cal. Feb. 28, 2011)

("Petitioner cites no authority, nor is the magistrate judge aware of any, which obligated counsel to share every item of discovery with Petitioner," and "[a]t any rate, Petitioner's claim fails because he does not show how counsel showing him these items would have changed the outcome of his trial.").

v. Failure to Investigate

Third, Petitioner argues his trial counsel failed to investigate forensic evidence, witnesses, experts, Petitioner's juvenile incarceration records, physical evidence such as Petitioner's car and cell phone, a basis for a 995 motion to dismiss, and exculpatory alibi and impeachment evidence. Dkt. 2 at 127-30, 137, 143-45, 147-53, 155-56, 159, 166-67, 172-73. Petitioner, however, has not shown that trial counsel would have discovered any evidence beneficial to the defense had he conducted additional investigation. Such speculative and conclusory allegations are insufficient to prove ineffective assistance of counsel. See Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001) (speculation as to what expert would have said insufficient to support ineffective assistance of counsel claim); Bragg v. Galaza, 242 F.3d 1082, 1088-89 (9th Cir. 2001) (mere speculation that further investigation might lead to evidence helpful to petitioner was insufficient to demonstrate ineffective assistance of counsel); Ceja v. Stewart, 97 F.3d 1246, 1255 (9th Cir. 1996) (to show prejudice, the petitioner must demonstrate that further investigation would have revealed favorable evidence).

Petitioner faults his trial counsel for failing to investigate the fact that Petitioner was in juvenile hall at the time prior bad acts witness S.H. alleged Petitioner assaulted her. Dkt. 2 at 130; dkt. 2-2 at 200-01. Petitioner's counsel was aware of evidence that Petitioner may have been incarcerated at the time S.H. was alleged to have been assaulted by Petitioner. 1 RT at 53. Yet, Petitioner still has not produced that evidence of his incarceration or shown with certainty that he was incarcerated during the entire time S.H. was fourteen years old, the age at which Petitioner allegedly

assaulted her. Dkt. 4-4 at 233-34.[20] Accordingly, Petitioner has not presented anything other than his personal assurances that counsel could have impeached S.H. with evidence of his incarceration. This is insufficient to warrant relief. See, e.g., Womack, 497 F.3d at 1004; Dows, 211 F.3d at 486.

In addition, to the extent Petitioner argues his counsel should have investigated evidence showing Petitioner had sex with other women in his car, dkt. 2 at 129, trial counsel was aware of the DNA evidence in this regard and, at trial, elicited testimony that DNA from other individuals had been found on the seat of Petitioner's car. 5 RT at 663-64. This evidence was only marginally helpful to the defense, however, because the DNA expert testified the DNA could not be attributed to any single individual and could not be associated with a female, rather than a male, contributor. Id. at 664.

Finally, counsel considered Petitioner's proposed alibi witness and found the witness was not credible. Dkt. 4-4 at 204.

vi. Plea Negotiation

Fourth, Petitioner faults his trial counsel for insisting on pursuing a plea agreement against Petitioner's wishes. Dkt. 2 at 128, 137, 147, 156, 166. Trial counsel admitted he had discussed the potential of settling the case with the prosecution, but did so under the belief it was what Petitioner wanted. Dkt. 2-2 at 75. Petitioner, however, has not shown how trial counsel's early attempts to negotiate a plea deal prejudiced Petitioner at trial.

vii. Contacting Counsel

Fifth, Petitioner argues his trial counsel was ineffective for contacting Petitioner's counsel on a separate case without Petitioner's permission. Dkt. 2 at 128, 137. Trial counsel admitted having spoken to the lawyer representing Petitioner on another matter; however, trial counsel disputed the substance of the conversation as

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[20] The record does not contain references to exact dates on which Petitioner allegedly assaulted S.H. See dkt. 4-4 at 232-36; 5 RT at 612-21.

alleged by Petitioner.[21] Dkt. 4-4 at 76. Nevertheless, Petitioner has not shown how this conversation amounted to ineffective representation or prejudiced him at trial.

viii. Consent Defense

Sixth, Petitioner argues his trial counsel pursued a consent defense against Petitioner's wishes and failed to request a related jury instruction. Dkt. 2 at 129-39, 156-58, 162-65.[22] Petitioner's trial counsel, however, did not pursue a consent defense at trial but, instead, challenged the truthfulness of the victim's allegations against Petitioner and the investigation into those allegations. 3 RT at 303-08, 314, 320, 322-23, 331-32, 334-51, 396, 399-404, 408, 412-15, 462, 464-67, 475-76, 535-37, 543-54, 563-68; 5 RT at 806-32, 834-38. Although trial counsel presented a consent theory at the preliminary hearing, see 2 CT at 493-99, 503-08, 519-20, Petitioner cannot show counsel's theory at the preliminary hearing was ineffective assistance of counsel in light of the fact that Petitioner's sperm DNA was recovered from vaginal and anal swabs of the victim. Dkt. 2-2 at 97; 5 RT at 629, 631, 643-45, 658, 660-63. Moreover, Petitioner cannot show any alleged errors at the preliminary hearing resulted in prejudice to Petitioner at trial, where he was convicted by an independent jury that fairly weighed the evidence against him. See Davidson v. Davey, No. 2:16-cv-00689-GEB (GGH), 2017 WL 2972516, at *3 (E.D. Cal. July 12, 2017).

In addition, Petitioner cannot show counsel was ineffective for failing to request a jury instruction on the consent theory. As explained, trial counsel did not present a consent defense at trial. See Gonzalez v. McDowell, No. CV 16-5695-AG (E), 2017 WL 5125753, at *16 (C.D. Cal. Sept. 19, 2017) (counsel not ineffective for failing to request instructions inconsistent with her trial theory).

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[21] Petitioner alleged trial counsel urged his other lawyer not to pursue a contested hearing on his probation violation. Id. at 72.

[22] Petitioner also argues trial counsel erred under the holding of the United States Supreme Court in McCoy v. Louisiana, __ U.S. __, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018) by conceding Petitioner's guilt when he presented a consent defense. Dkt. 2 at 133, 136, 157-58. As explained below, however, trial counsel did not present a consent defense at trial, nor did counsel otherwise concede Petitioner's guilt at trial.

ix. Understanding Case Law

Seventh, Petitioner faults his trial counsel for failing to understand pertinent case law because counsel did not understand consent was not a defense to the charges of sexual penetration, oral copulation, and rape of an intoxicated person, or statutory rape. Dkt. 2 at 156, 158, 164-65. Trial counsel's understanding of the applicability of the consent defense was irrelevant to the issues at trial since, as stated above, trial counsel did not present a consent defense at trial.

Moreover, Petitioner cannot prove prejudice. As stated above, trial counsel did not present a consent defense at trial. Thus, any misunderstanding of the law of consent on the part of trial counsel could not have impacted Petitioner's trial.

x. Right to Testify

In addition, Petitioner argues his trial counsel denied Petitioner his right to testify. Dkt. 2 at 146, 161, 166. Petitioner, however, presents only his own self-serving statements in an attempt to establish his trial counsel prohibited Petitioner from testifying against his wishes. Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991) (defendant's self-serving statement, under oath, that his trial counsel refused to let him testify insufficient, without more, to support his claim of a denial of his right to testify).

xi. Cross-Examination

Ninth, Petitioner faults his trial counsel for conducting an ineffective cross-examination of witnesses. Dkt. 2 at 153-55. To the extent Petitioner argues his trial counsel failed to cross-examine prior bad acts witness S.H., dkt. 2 at 154-55, his claim fails. Petitioner has not established that, on cross-examination, S.H. would have offered any testimony beneficial to the defense. In fact, the record suggests S.H. was an uncooperative witness who sought only to blurt out excluded accusations that Petitioner molested her two-year old daughter. 5 RT at 606-21. Ultimately, Petitioner has shown neither that trial counsel's performance was deficient, nor that Petitioner suffered prejudice, as a result of counsel's failure to cross-examine this uncooperative

and damaging witness. See Brown v. Uttecht, 530 F.3d 1031, 1036 (9th Cir. 2008) (noting courts give "great deference" to "counsel's decisions at trial, such as refraining from cross-examining a particular witness" and counsel is not ineffective where she makes a tactical decision not to cross-examine a witness).

xii. Propensity Evidence

Petitioner next argues his trial counsel failed to object to the erroneous admission of propensity evidence. Dkt. 2 at 155. Petitioner suggests his trial counsel should have objected to the admission of an audio recording of S.H.'s pretrial statements that Petitioner had sexually assaulted her many years prior. Id. Specifically, Petitioner argues the admission of the audio recording as propensity evidence under section 1108 of the California Penal Code violated his federal constitutional rights to due process and a fair trial. The United States Supreme Court has never held the admission of propensity evidence violates due process or a defendant's right to a fair trial. See Rogers v. Giurbino, 619 F. Supp. 2d 1006, 1014-15 (S.D. Cal. 2007) (explaining and highlighting decisions by federal courts upholding the analogous federal rule, Federal Rule of Evidence 413, against due process challenges). Hence, because trial counsel had no basis to object to the propensity evidence on federal due process grounds, Petitioner cannot show ineffective assistance. Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005) (trial counsel not ineffective for failing to raise meritless arguments).

xiii. Kelly/Frye

Finally, Petitioner argues his trial counsel was ineffective for failing to request a hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) regarding the testimony of the sexual assault nurse about the memory of trauma victims. Dkt. 2 at 173-75. Frye, in addition to its state law counterpart, People v. Kelly, 17 Cal. 3d 24 (1976) governs the admissibility of expert testimony regarding a "new scientific technique." Kelly, 17 Cal.3d at 30. The testimony Petitioner challenges here did not relate to a scientific technique, but rather dealt with research of the emotional

reactions and memory of trauma victims, 4 RT at 521-22. See People v. Harlan, 222 Cal. App. 3d 439, 449 (1990) (expert's opinion based on her clinical experience and on her familiarity with professional literature in the area not the type of evidence to which Kelly/Frye applies). Hence, because trial counsel had no basis to request a Frye hearing, Petitioner cannot show ineffective assistance.[23] Juan H., 408 F.3d at 1274.

xiv. Prejudice

Ultimately, Petitioner cannot show any of the alleged ineffective assistance resulted in prejudice at trial in light of the evidence of Petitioner's guilt. While Petitioner denies having sexual relations with the victim, Petitioner's sperm DNA was recovered from vaginal and anal swabs of the victim, 5 RT at 629, 631, 643-45, 658, 660-63, and Petitioner has not presented any evidence calling into question the validity of the DNA evidence. In light of this evidence, Petitioner cannot show the result of the trial would have been different but for trial counsel's alleged acts of ineffectiveness.

Accordingly, Petitioner has failed to show trial counsel operated under an actual conflict that affected counsel's representation or that Petitioner and counsel had an irreconcilable conflict that resulted in ineffective assistance. Hence, the state court's denial of Petitioner's conflict claim was not contrary to or an unreasonable application of clearly established federal law. Habeas relief is, thus, not warranted on Claim Four.

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[23] To the extent Petitioner is arguing counsel was ineffective for failing to object to the testimony of the sexual assault nurse about the memory of trauma victims, see dkt. 2 at 99-108, Petitioner fails to show the trial court did not properly exercise its role as gatekeeper. See Sargon Enterprises, Inc. v. University of Southern California, 55 Cal. 4th 747, 769-772 (2012). The nurse based her opinions on her review of research regarding the memory of trauma victims. 4 RT at 521-22. Hence, because trial counsel had no basis to challenge the admissibility of the nurse's testimony, Petitioner cannot show ineffective assistance.

E. CUMULATIVE ERROR

In Claim Five, Petitioner argues all of the errors alleged accumulated to render his trial fundamentally unfair. Dkt. 2 at 185.

Cumulative error applies where, "although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant." Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002), as amended June 11, 2002) (quoting United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996)) (internal quotation marks omitted). However, where no error lies with each alleged claim taken separately, there also rests no cumulative error. See Mancuso, 292 F.3d at 957 ("Because there is no single constitutional error in this case, there is nothing to accumulate to a level of a constitutional violation.").

Here, the Court finds no constitutional error with respect to any single claim. Accordingly, there is nothing to accumulate. Hence, the state court's denial of Petitioner's cumulative error claim was not contrary to or an unreasonable application of clearly established federal law. Habeas relief is, thus, not warranted on Claim Five.

VII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the Petition; and (3) dismissing this action with prejudice.

Dated:May 22, 2020

HONORABLE KELLY KIYA KATO
United States Magistrate Judge