UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 26 2023

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

JEAN MAX DARBOUZE, Petitioner-Appellant, v. BRIAN KIBLER, Warden, Respondent-Appellee.	No. 22-55298 D.C. No. 2:21-cv-04868-CJC-JDE Central District of California, Los Angeles ORDER

Before: SILVERMAN and FRIEDLAND, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JEAN MAX DARBOUZE, Petitioner, v. BRIAN KIBLER, Warden, Respondent.	Case No. 2:21-cv-04868-CJC (JDE) ORDER DENYING ISSUANCE OF CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides as follows:

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court

of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were '"adequate to deserve encouragement to proceed further."'" Slack v. McDaniel, 529 U.S. 473, 483-84 (2000) (citations omitted).

Here, the Court, having considered the record in this action, finds and concludes that Petitioner has not made the requisite showing with respect to the claims alleged in the operative petition.

Accordingly, a Certificate of Appealability is denied.

Dated: February 15, 2022

CORMAC J. CARNEY
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JEAN MAX DARBOUZE,

Petitioner,

v.

BRIAN KIBLER,

Respondent.

No. 2:21-04868-CJC-JDE

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I.
PROCEEDINGS

On June 14, 2021, Petitioner Jean Max Darbouze ("Petitioner"), proceeding pro se, filed a Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254. Dkt. 1 ("Petition" or "Pet."). On August 5, 2021, Respondent filed an Answer to the Petition, together with a

Memorandum of Points and Authorities ("Ans. Mem."). Dkt. 13. Petitioner filed a Reply on October 12, 2021. Dkt. 20 ("Reply").

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

II.

PROCEDURAL HISTORY

On July 13, 2017, a Los Angeles County Superior Court jury found Petitioner guilty of rape of a minor, child abuse, torture, and two counts of criminal threats. The jury also found true the allegations that Petitioner used a deadly and dangerous weapon in the commission of the offenses of child abuse and torture and Petitioner personally inflicted great bodily injury in the commission of the offense of child abuse. 2 Clerk's Transcript on Appeal ("CT") 274-78. On January 5, 2018, the trial court sentenced Petitioner to a determinate term of 15 years and an indeterminate term of seven years to life, plus one year. 2 CT 342-45.

Petitioner appealed his conviction and sentence to the California Court of Appeal. Respondent's Notice of Lodging ("Lodgment") 6. In an unpublished decision issued on January 23, 2020, the court of appeal modified Petitioner's sentence to stay count two (child abuse) and the related enhancements, reduced the sex offender fine, directed the trial court to correct the abstract of judgment to reflect 140 days of local conduct credit, and affirmed the judgment in all other respects. Lodgment 9. A Petition for Review was denied on April 1, 2020. Lodgments 10-11.

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

The underlying facts are taken from the California Court of Appeal's opinion. Petitioner does not contest the appellate court's summary of the facts

and has not attempted to overcome the presumption of correctness accorded to it. See Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (explaining that state court's factual findings are presumed correct unless petitioner "rebuts that presumption with clear and convincing evidence").

1. Prosecution Evidence

1.1. [Petitioner] Abuses J.D. in New Hampshire

[Petitioner's] daughter J.D. was born in 1997. [Petitioner] and J.D.'s mother divorced when J.D. was two years old. After the divorce, J.D. wasn't allowed to speak with her mother much, and didn't see her more than once a month. During elementary school, J.D. lived with her father in New Hampshire. [Petitioner] had remarried, and in 2005, he had a son, M.D., with his new wife. But that marriage ended the same year.

When J.D. was a toddler, [Petitioner] began to discipline her by grabbing her, punching her, and kicking her. He also hit her with a belt, sometimes making her remove her clothes to increase the pain from the blows. As she got older, [Petitioner] started beating J.D. with whatever objects were close at hand—cable wires, vacuum parts, scissors, pens, and keys.

[Petitioner] first raped J.D. when she was 14 years old, the morning of a class field trip to an amusement park to celebrate the end of the school year. The school bus was scheduled to leave at 8:10 a.m., but around 8:00 a.m., when J.D. asked [Petitioner] for lunch money, he said she couldn't go on the trip because she would be around boys. J.D. told her father that she really wanted to go with her friends and that the bus was leaving, but [Petitioner] responded, "If you want to go, this is what you have to do."

He put $40 on the dresser, made J.D. get on his bed, and told

her to pull her pants down. J.D. climbed onto the bed and pulled down her shorts and underwear as she'd been instructed. [Petitioner] took out his penis, got on top of J.D., and inserted his penis into her vagina. The rape lasted about 10 minutes.

When it was over, J.D. stood up, took the $40 from the dresser, and ran to catch her bus—but the bus was already gone. A neighbor had to drive her to school.

[Petitioner] raped J.D. regularly after that—but he never called it sex. Instead, he said he was "checking" to make sure she was still a virgin. [Petitioner] used "checking" as a form of punishment or as a price J.D. had to pay for something she wanted, like going to the mall. Sometimes, [Petitioner] made J.D. choose her punishment—checking or the belt. [Petitioner] used a condom "here and there." When he didn't wear one, he either ejaculated on the floor or ejaculated inside J.D., then made her take the morning after pill.

In 2011, [Petitioner] married a Haitian woman named Eveline. Two years later, in 2013, the family moved from New Hampshire to Ontario, California to pursue J.D.'s singing career. J.D. and [Petitioner] moved first, and Eveline joined them a few months later.

1.2. The Abuse Continues in California

In Ontario, [Petitioner] decided that instead of attending high school, J.D. would do a self-directed, online homeschooling program while she pursued her singing career. He drove J.D. to Los Angeles every day to go to studios or shows, introduced her to people in the music industry, and started a record label with a cousin and J.D. But [Petitioner] also raped J.D. more frequently in California, and he continued to use beatings and sex as forms of

punishment.

In November 2014, the family moved from Ontario to Woodland Hills, and [Petitioner] got stricter. J.D. was not allowed to go outside or to the pool; when she wasn't studying online, she was supposed to be singing or practicing her choreography. And, instead of sleeping with his wife, [Petitioner] started sleeping in J.D.'s bed.

In December 2014, J.D.'s half-brother M.D. came to Woodland Hills for a two-week visit. He slept in J.D.'s room, at the foot of her bed. Twice during his trip, M.D. awoke to the sound of his father, [Petitioner], having sex with J.D.—events M.D. recounted to the jury in detail. M.D. also testified that he heard J.D. screaming as [Petitioner] beat her and saw [Petitioner] beat E.D., [Petitioner's] son with Eveline. M.D. was afraid of [Petitioner].

Nevertheless, M.D. told J.D. what he had seen. At first she denied that anything had happened, but M.D. persisted, and said they should tell the police. J.D. cried and begged him not to tell anyone. She explained that [Petitioner] was a private investigator and had told her that girls always make up rape stories and nobody ever believes them. It was a warning [Petitioner] had been giving J.D. for years.

1.3. Events of January 22, 2015

The events of January 22, 2015, formed the basis of all the charged counts in this case.

That day, [Petitioner] left the condominium for an appointment with Eveline and E.D. Once they were gone, J.D. went outside and let her friend Drew L. into the complex.

Drew and J.D. went to a basketball court next to the pool,

then went to Drew's car to have sex. Drew used a condom. When they were done, they returned to the basketball court.

Around 2:00 or 3:00 p.m., [Petitioner] approached J.D. from behind, punched her in the face and stomach, and kicked her to the ground. He yelled at her, hit her, punched her, and stomped on her with his boots. The beating left bruises on J.D.—including Timberland boot prints on her legs and body.

[Petitioner] dragged J.D. from the basketball court by her shirt and shoulder. He took her phone, and told her to "get in the house before I kill you." He warned, "I'm about to beat you up. I'm about to kill you. You don't know what I'm about to do to you." J.D. was scared. [Petitioner] had never threatened to kill her before; she thought his threats were serious because he was furious that she was with someone unsupervised—angrier than she'd ever seen him.

Back in the condo, [Petitioner] dragged J.D. to her room, shut the door, and left. J.D. thought he was going to get a gun—but instead, he returned with television cable wires with "a prick on them at the end."

[Petitioner] used the wires to whip J.D. on the back and arms. As he whipped her, he told her, "All boys want from you, especially that one, especially Drew—he's a big singer—of course all he wants from you is sex." He asked, "Is that what you guys did? Is that what you guys did?" Then he said, "I'm going to have you show me. Don't worry. I'm going to have you show me if you did."

J.D. tried to hide under the blankets on her bed, but [Petitioner] ripped the covers off and held her so she could not run. As he whipped her, [Petitioner] threatened, "I'm going to kill you. You're lucky I haven't killed you already." He reminded her that

he had a gun—and said he would shoot her in the head.

J.D was bleeding from the back and both arms. She had bruises on her legs from being kicked on the basketball court. The cables left marks on the bedroom wall and visible scars on J.D.'s arm that still hurt at the time of trial.

[Petitioner] finally stopped whipping J.D. because he had to leave for the eye doctor. He told J.D. to put on a sweatshirt and come with him.

On the drive to the optometrist, [Petitioner] asked J.D. questions about Drew. If he didn't like her answer, he punched her. When they reached the optometrist, J.D. sat in the lobby and cried. The receptionist asked what had happened, but J.D. didn't tell her; she was too scared of [Petitioner].

The beating resumed when they got home. Eveline and her mother tried to intervene, but [Petitioner] told them to get out of the way before he hit them too. J.D. had never seen [Petitioner] threaten them before.

[Petitioner] yelled at J.D. and ordered her to clean and vacuum the whole house. If she missed a spot, he hit her with the vacuum holder. When she finished, he told her to cover the carpet with plastic wrap. He said the plastic would let him hear her footsteps if she tried to leave her room.

Meanwhile, J.D. secreted a duffle bag filled with clothes in a trash bag and stored it near the bushes outside under the guise of throwing away debris. She knew that if she didn't leave that night, [Petitioner] would kill her.

After Eveline and her mother went to bed, [Petitioner] returned to J.D.'s room. He was holding a piece of the vacuum in

his hand and used it to hit J.D. a few times. [Petitioner] said she was going to show him what she wanted to do with boys, and he was going to give her what the boys wanted from her. [Petitioner] ordered J.D. to take off her clothes. Then, he raped her; it was the roughest he had ever been. He forced her to have sex with him in a variety of positions, with and without a condom. After he ejaculated onto the carpet, [Petitioner] said, "You're lucky I didn't kill you tonight." Then he went to bed.

J.D. waited for [Petitioner] to fall asleep, then jumped out the window and ran down the street. She hitchhiked to a friend's neighborhood and knocked on doors until she found the right house.

J.D told her friend that her father had raped her that night—and multiple times over the years. She took off her sweater and pants and showed her friend the bruises on her arms and legs. The injuries looked fresh: They were red, purple, and swollen. A wound on J.D.'s thigh was still bleeding. J.D was hysterical; her body was shaking, and she cried for about 90 minutes.

Meanwhile, J.D.'s mother—who J.D. had called on the way to the friend's house—had notified the UCLA Rape Center, which sent a taxi for J.D. J.D. underwent a sexual assault exam and spoke with a nurse and police officers, who, in turn, testified at trial.

1.4. Investigation

On January 24, 2015, detectives arrived to search the Woodland Hills condo. They collected biological samples from the carpet and wall of J.D.'s bedroom, which were later matched to [Petitioner's] DNA.

The samples collected from the rape kit were generally

inconclusive. The external genital swap was consistent with a mixture of at least two unrelated men. [Petitioner] was the secondary male contributor.[FN 1]

[FN 1] DNA experts for the prosecution and the defense disagreed on this point.

Developmental psychologist Susan Hardie testified for the prosecution as an expert on [child sexual abuse accommodation syndrome ("CSAAS")]. She explained that CSAAS is a model that explains how children who are sexually abused by a powerful adult may accommodate the abuse and delay disclosure or report it inconsistently. It explains why children may not reach out for help.

2. Defense Evidence

[Petitioner] testified that he did not rape J.D. On January 22, 2015, he found J.D.'s clothes on the basketball court—but his daughter wasn't with them. Instead, [Petitioner] found her on the racquetball court having sex with Drew. [Petitioner] admitted that he slapped J.D. in the face and hit her twice with a belt, but denied her remaining allegations.

[Petitioner] explained that after coming back from the optometrist, he told J.D. that he was going to delete her music videos from YouTube. She responded: "You destroyed me. I'm going to destroy you." And indeed, when J.D. left the stand after testifying, she motioned to [Petitioner] with her eye and smiled. She told him, "I destroy you."

[Petitioner's] pastor and several of [Petitioner's] friends and family members also testified on his behalf, as did several experts:

- a forensic nurse testified that J.D's medical reports did not establish nonconsensual penetration with certainty;

- a retired emergency room doctor testified that J.D.'s injuries, though consistent with being whipped with a cord, wires, or belts, were not life-threatening;
- a DNA consultant disagreed with the conclusion that [Petitioner] was the minor contributor to the sample from J.D.'s external genital swab.

Finally, Dr. Mitchell Eisen, a CSAAS expert, testified that CSAAS evidence was not scientific or diagnostic, and it could not be used to distinguish honest people from liars. Adolescents, he explained, "lie for the same motivations, and, roughly, [at] the same rate as any other adult population . . . ."

Lodgment 9 at 3-11.

IV.

PETITIONER'S CLAIMS HEREIN

In the Petition, Petitioner raises the following grounds for relief:

1. The admission of uncharged acts violated Petitioner's due process rights "by allowing admission subject to proof by a preponderance of the evidence." Pet. at 5 (CM/ECF pagination).

2. The admission of uncharged acts violated Petitioner's due process rights and gave a "false aura of credibility to the alleged victim." Pet. at 5-6.

3. The jury instructions on the uncharged acts violated Petitioner's due process rights "by allowing the jury to infer guilt based on propensity, thereby lessening the burden of proof." Pet. at 6.

4. The admission of evidence regarding child sexual abuse accommodation syndrome ("CSAAS") violated Petitioner's due process rights. Pet. at 6.

5. Petitioner's trial counsel provided ineffective assistance by failing to object to the CSAAS evidence. Pet. at 6.

6. The jury instruction on CSAAS evidence permitted the jury to use the evidence to evaluate the believability of the victim's testimony, thereby lessening the burden of proof. Pet. at 8.

Petitioner has not sufficiently stated any other grounds for relief. When he filed the Petition, Petitioner also filed a one-page "Stay and Obeyance Request," citing Rhines v. Weber, 544 U.S. 269 (2005). Dkt. 3 ("Motion for Stay"). On June 21, 2021, the undersigned Magistrate Judge issued a Report and Recommendation, recommending that the Motion for Stay be denied because Petitioner did not meet his burden under Rhines and did not identify any unexhausted claims he intended to pursue in state court. Dkt. 7. Although Petitioner objected to the Report and Recommendation, he still failed to identify any unexhausted claims he sought to pursue. See Dkt. 17.

Thereafter, Petitioner filed a 392-page Reply, attaching numerous documents, including correspondence with his attorneys and an unfiled state habeas petition addressed to the California Court of Appeal,[1] relating to multiple additional grounds for relief. Dkt. 20. To the extent Petitioner is seeking to pursue these new unexhausted claims, the Court declines to consider these claims raised for the first time in his Reply, all of which were known to Petitioner at the time of trial. Cacoperdo v. Demosthenes, 37 F.3d 504, 507-08 (9th Cir. 1994) ("A Traverse is not the proper pleading to raise additional grounds for relief."); see also, e.g., Lopez v. Dexter, 375 F. App'x 724 (9th Cir. 2010) (concluding the district court appropriately rejected petitioner's claim on the basis that it improperly surfaced for the first time in his traverse to the state's answer). Petitioner was expressly cautioned that he may not raise new grounds

[1] A review of the California Court of Appeal's online docket reflects that this habeas petition has not been filed. See California Courts, Appellate Courts Case Information at https://appellatecases.courtinfo.ca.gov.

for relief in his Reply (Dkt. 5 at 2-3). See Fernandez v. Gonzalez, 2009 WL 6543660, at *7 n.19 (C.D. Cal. Sept. 3, 2009) (declining to address unexhausted claim raised for first time in reply where court expressly forewarned petitioner that such grounds would not be considered), report and recommendation adopted by 2010 WL 2232435 (C.D. Cal. June 2, 2010). As such, the Court only considers the six grounds for relief properly raised in the Petition.

V.

STANDARD OF REVIEW

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

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

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

Although a particular state court decision may be "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if it either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable"

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

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

Here, Petitioner raised all six grounds for relief in the California Court of Appeal on direct appeal. The court of appeal rejected these grounds for relief in a reasoned decision on January 23, 2020. Lodgment 9. Thereafter, the California Supreme Court denied Petitioner's Petition for Review without comment or citation to authority. Lodgment 11. In such circumstances, the Court will "look through" the unexplained California Supreme Court decision

to the last reasoned decision as the basis for the state court's judgment, in this case, the court of appeal's decision. See Wilson v. Sellers, 584 U.S. –, 138 S. Ct. 1188, 1192 (2018) ("[T]he federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning."); Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991). However, as to Ground Four, the California Court of Appeal denied relief on procedural grounds and did not reach the merits of this claim. As such, the Court reviews this claim de novo. Cone v. Bell, 556 U.S. 449, 472 (2009) (review is de novo when a state court has not reached the merits of a claim). In reviewing the state court decision, the Court has independently reviewed the relevant portions of the record. Nasby v. McDaniel, 853 F.3d 1049, 1052-53 (9th Cir. 2017).

VI.

DISCUSSION

A. Petitioner's State Law Claims are Not Cognizable

As an initial matter, to the extent Petitioner's claims are based on a violation of state law, such claims are not cognizable on federal habeas review. Federal habeas relief is not available for errors of state law. See 28 U.S.C. § 2254(a); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." McGuire, 502 U.S. at 68; Smith v. Phillips, 455 U.S. 209, 221 (1982) ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution."). "[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam). A federal habeas court is not to "second-guess" a state court's "construction of its own state law

unless 'it appears that its interpretation is an obvious subterfuge to evade consideration of a federal issue.'" Hubbart v. Knapp, 379 F.3d 773, 780 (9th Cir. 2004) (quoting Peltier v. Wright, 15 F.3d 860, 862 (9th Cir. 1994)); see also Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975). No such deception exists here, and Petitioner has not presented any evidence demonstrating otherwise. Accordingly, to the extent Petitioner's claims alleging evidentiary error or instructional error are based on state law, they do not present federal questions and Petitioner is not entitled to habeas relief on those claims. See McGuire, 502 U.S. at 71-72 ("the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief"); Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991) (federal habeas courts "do not review questions of state evidence law").

B. Petitioner is Not Entitled to Habeas Relief on His Claims Challenging the Admission of Uncharged Acts

In Grounds One and Two, Petitioner challenges the trial court's admission of evidence of prior uncharged acts. Pet. at 5-6. Liberally construing Petitioner's allegations, the Court presumes that he is raising the same claims he did on direct appeal. See Reply at 11 (CM/ECF pagination). In particular, Petitioner argued that Cal. Evid. Code Section 1108 and 1109[2] facially violated his due process rights by allowing the admission of prior bad acts that are only subject to proof by a preponderance of the evidence to show he had a propensity to commit the charged offenses, thereby weakening the prosecution's burden of proof. Lodgment 6 at 56-63; Lodgment 10 at 9; Reply

[2] Pursuant to Cal. Evid. Code § 1108, "[i]n a criminal action in which the defendant is accused of sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Similarly, Cal. Evid. Code § 1109 provides for the admission of evidence of prior acts of physical abuse.

at 9. Petitioner acknowledged that California courts have found Sections 1108 and 1109 constitutional, but nevertheless asserted the claim "to preserve it for further review." Lodgment 6 at 56; see also Reply at 9. He further argued that, as applied in his case, evidence of uncharged acts should not have been admitted under Cal. Evid. Code §§ 352, 1108, and 1109 in a manner that allowed the evidence to be used to weaken the burden of proof on the other charges. Lodgment 6 at 64-74; Lodgment 10 at 10-11; Reply at 10.

1. Relevant Factual Background

Over defense objection (1 CT 143-53; 2 Reporter's Transcript on Appeal ["RT"] 30), the trial court admitted evidence of ongoing sexual and physical abuse of the victim, "J.D.," that occurred prior to the incident at issue under Cal. Evid. Code §§ 1108 and 1109. 2 RT 26-30. The trial court found this evidence "highly relevant" and "inextricably intertwined with the current offense" where Petitioner "was, on an ongoing basis, for a couple of years at least . . . engaging in sexual conduct with his daughter, the victim, and also physical abuse, which is, again, also what's charged in this case." 2 RT 26. The trial court found this evidence gave "context to what is charged in this case," gave "a reason why the conduct that's alleged in this case would have occurred," and satisfied the Cal. Evid. Code § 352 analysis. 2 RT 27. The trial court explained that it did not reach this decision "lightly" and understood "the potential prejudice," but found no undue prejudice, explaining that, other than the fact that the victim was younger at the time of the prior abuse, the prior acts were "no worse or no more shocking" than the allegations at issue. 2 RT 29.

At trial, J.D. testified that when she was young, her father, Petitioner, punched, kicked, and/or hit her with a belt to discipline her. 3 RT 963, 974, 977, 1010. Sometimes he would make her take her clothes off so she could feel the beating. 3 RT 974. She described one incident in which he beat and hit her because she had lunch with the pool cleaners, who he felt were "lower class

people." 3 RT 974-75. As a result of that beating, she "had marks all over [her] body, and [Petitioner] made [her] jump in the pool and put clothes on, so when the cops came, the marks would either go down or wouldn't be seen." 3 RT 975.

As she got older, the beatings "grew worse and worse." 3 RT 977. She lived with Petitioner, and he never left her alone, "even with friends." 3 RT 971-73, 976. He would hit her with "whatever he had at the moment," including cable wires, vacuum parts, scissors, pens, and keys. 3 RT 977-78. J.D. testified that she helped him with his business in order to get allowance and when she made a mistake on the invoices, he would punish her. This included "jab[bing]" her with keys on her legs and stabbing her with a pen. 3 RT 977-79, 1001. She also described an incident in which she went to the mall with friends while he waited in the parking lot. When she did not call him as instructed, Petitioner went into the mall, punched her in the face, grabbed her, and dragged her into the car. 3 RT 1006-07. He continued to punch her when they were in the car, telling her she was "trash." 3 RT 1007. The victim's friend, Lanye Jenkins, confirmed seeing Petitioner argue with J.D. at the mall and slap her. 5 RT 1508-09. That evening, following the incident at the mall, Petitioner threw his boots at J.D. and had sexual intercourse with her. 3 RT 1008. J.D. testified that when she was young, she reported the physical abuse to the authorities, "but because the marks were not long enough, they couldn't do anything." 3 RT 983. Thereafter, she did not report the abuse because Petitioner told her he was a private investigator and had connections, and no one would believe her. 3 RT 983-84. He repeated this "many times" and she believed him. 3 RT 984.

The victim also described sexual abuse by Petitioner. J.D. testified that it started when she was fourteen years old. 3 RT 984. The first time Petitioner raped her was the morning of a class field trip. He told her she had to do this if she wanted to go on the field trip. He placed $40 on the dresser, made J.D. get

on the bed, and pull down her pants. He then had sexual intercourse with her. 3 RT 985-91.

After that, Petitioner sexually abused J.D. "many times." 3 RT 991, 997, 999-1003, 1009-10. He referred to having sex with J.D. as "checking" her to make sure she was still a virgin. 3 RT 987, 991, 993. While having sex with J.D., Petitioner made comments about her wanting to be with boys. 3 RT 1008. J.D. testified that he started "checking" her "when he saw [her] growing up and having friends and talking to people." She explained Petitioner "didn't like that." 3 RT 991-92. As she got older, Petitioner became stricter and "checked" her more frequently. 3 RT 1009-10. She described not being allowed to go play outside by herself (3 RT 1010) and Petitioner sleeping in J.D.'s bed with her, purportedly because his wife snored (3 RT 1004, 1009, 1013). Previously, Petitioner had put an alarm on her bedroom door and put her mattress in the living room. 3 RT 994-96

Petitioner used "checking" as punishment, telling her that she "chose this." 3 RT 1006, 1009, 1013. J.D. testified that she was scared of her father and would get in trouble if she disobeyed him. 4 RT 1293. Petitioner also told J.D. that she had to be "checked" in order for her to succeed. 3 RT 1004. J.D. testified that she believed him because she lived with him and "[h]e was the only person who [she] would always be around, so anything he said, [she] just went with it." 3 RT 1004-05.

At times, when she was being reprimanded, Petitioner would require her to choose between "get[ting] the belt" or getting "checked." 3 RT 992-93, 1006. Sometimes she chose being "checked" because "it hurt so much with the belt" and still had marks. 3 RT 993. On occasion, when he did not use a condom, Petitioner would give J.D. the morning after pill. 3 RT 997. J.D. described one incident in which Petitioner had sex with her when her half-brother was visiting and sleeping at the foot of her bed. 3 RT 1075-80. Her half-brother testified that

Petitioner came into J.D.'s room twice while he was staying there. He recalled seeing J.D. lying on the bed with her legs spread and Petitioner standing in between her legs, "thrusting." 4 RT 1326-30. Another time, he witnessed Petitioner and J.D. under the blankets on J.D.'s bed, and felt the bed "rocking back and forth." 4 RT 1334-36. J.D. convinced her brother not to tell anyone because Petitioner was a private investigator and told her girls make up rape stories and people do not believe them. 3 RT 1081.

2. The California Court of Appeal Opinion

The California Court of Appeal rejected Petitioner's claims regarding the admission of uncharged acts, concluding the admission of this evidence did not violate Petitioner's due process rights. Lodgment 9 at 11-16. First, the appellate court found Cal. Evid. Code §§ 1108 and 1109 are constitutional, explaining:

> [Petitioner] contends the trial court violated his right to due process of law when it allowed the jury to consider his uncharged physical abuse of J.D. as evidence that he was likely to commit, and did commit, child abuse and torture (§ 1109) and to use evidence of uncharged sexual abuse of J.D. to find he was likely to commit, and did commit, rape (§ 1108). He acknowledges, however, that the California Supreme Court, in [People v.] Falsetta[(1999)] 21 Cal.4th 903, rejected the argument that section 1108 was unconstitutional, and that the court's reasoning in that case compels the same conclusion for section 1109. (See, e.g., People v. Cabrera (2007) 152 Cal.App.4th 695, 704; People v. Villatoro (2012) 54 Cal.4th 1152, 1162, fn. 4.)
>
> We are bound by the Supreme Court's opinions on these statutes. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450 (Auto Equity Sales).) Accordingly, we conclude sections 1108 and 1109 are constitutional.

Id. at 13-14.

The appellate court further concluded that this evidence was properly admitted under Cal. Evid. Code § 352, finding as follows:

> Under sections 1108 and 1109, prior-acts "evidence is presumed admissible and is to be excluded only if its prejudicial effect substantially outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters. [Citation.] The court's ruling admitting the evidence is reviewed for abuse of discretion. [Citation.]" (People v. Cordova (2015) 62 Cal.4th 104, 132.) A court abuses its discretion with a ruling that falls beyond the bounds of reason, or where the ruling is arbitrary, capricious, or patently absurd. (People v. Fuiava (2012) 53 Cal.4th 622, 663.)
>
> [Petitioner] purports to raise "as-applied" and section 352 challenges to the evidence admitted under sections 1108 and 1109—but offers us little beyond generalized attacks on propensity evidence. For example, [Petitioner] contends his "argument to the jury was undermined by the avalanche of uncharged evidence spanning a period of years and occurring in multiple locations that had to only be proved by a preponderance of the evidence." But [Petitioner] does not address any specific evidence or explain which prior acts should have been excluded and why. Consequently, there is little to distinguish this argument from his facial challenge to sections 1108's and 1109's propensity inferences. Given the all-or-nothing choice [Petitioner] presents us, we conclude the court did not abuse its discretion in admitting evidence of [Petitioner's] past physical and sexual abuse of J.D.
>
> In general, the prior-acts evidence admitted here was similar

> enough to the charged offenses that the uncharged behavior tended to corroborate J.D.'s testimony. The prior acts involved the same victim, the same types of violence, the use of similar objects, and similar surrounding circumstances as the charged beating and rape. (See People v. Hoover (2000) 77 Cal.App.4th 1020, 1029 ["Particularly in view of the fact that the subject evidence involved defendant's history of similar conduct against the same victim, the evidence was not unduly inflammatory."].)
>
> Nor was the prior abuse worse or more shocking than the allegations in this case. For example, both the prior and current crimes involved [Petitioner's] use of physical and sexual violence to punish J.D. for her perceived interest in boys or sex. In 2014, [Petitioner] punched J.D. in the face at the mall, punched her repeatedly during the drive home, threw his boot at her, and told her while raping her that she "just want[ed] to be with boys." In this case, [Petitioner] was charged with brutally beating, whipping, and raping J.D. after he saw her on the basketball court with a teenage boy.
>
> Taken as a whole, the court did not abuse its discretion in admitting the prior acts evidence.

Lodgment 9 at 14-16.

3. Analysis

"Habeas relief is available for wrongly admitted evidence only when the questioned evidence renders the trial so fundamentally unfair as to violate federal due process." Jeffries v. Blodgett, 5 F.3d 1180, 1192 (9th Cir. 1993) (as amended); see also McGuire, 502 U.S. at 67-70. However, "[t]he Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir.

2009). "Although the Court has been clear that a writ should be issued when constitutional errors have rendered the trial fundamentally unfair, it 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." Id. (internal citation omitted). The Supreme Court "has never expressly held that it violates due process to admit other crimes evidence for the purpose of showing conduct in conformity therewith." Alberni v. McDaniel, 458 F.3d 860, 863 (9th Cir. 2006) (citation omitted). Indeed, the Supreme Court has expressly left open the question of "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." McGuire, 502 U.S. at 75 n.5; Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir. 2008). Under the Federal Rules of Evidence, evidence of other sexual assaults is admissible where the defendant is accused of sexual assault. See Fed. R. Evid. 413; see also Fed. R. Evid. 414 (allowing evidence of prior child molestation); United States v. LeMay, 260 F.3d 1018, 1025-27 (9th Cir. 2001) (admission of propensity evidence under Rule 414 does not violate the Due Process Clause). Absent clearly established federal law, the state court's rejection of these claims could not have been an unreasonable application of clearly established Supreme Court law. Holley, 568 F.3d at 1101; see also Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) (holding "it is not 'an unreasonable application of' 'clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court"); Mejia v. Garcia, 534 F.3d 1036, 1046-47 (9th Cir. 2008) (admission of propensity evidence of prior uncharged sexual offenses did not violate clearly established law); Greel v. Martel, 472 F. App'x 503, 504 (9th Cir. 2012) (Ninth Circuit precedent foreclosed claim that admission of evidence of sexual misconduct to show propensity violated due process); Garibay v. Lewis, 323 F. App'x 568, 569 (9th Cir. 2009) (state court's rejection of claim

that introduction of evidence regarding prior acts of sexual misconduct and domestic violence to show propensity violated his due process rights was not contrary to, or an unreasonable application of, clearly established federal law).

Further, even assuming a cognizable due process claim, habeas relief still would not be warranted as the admission of this evidence did not render Petitioner's trial fundamentally unfair. "A habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005). A state trial court's admission of evidence in a criminal trial does not provide a basis for federal habeas relief unless the state court's ruling denied a defendant the benefit of a specific constitutional right, or rendered the trial fundamentally unfair such that it violated the Due Process Clause. See Perry v. New Hampshire, 565 U.S. 228, 237 (2012); see also Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir. 1995) ("The admission of evidence does not provide a basis for habeas relief unless it rendered the trial fundamentally unfair in violation of due process."). "Admission of evidence violates due process '[o]nly if there are no permissible inferences the jury may draw' from it." Boyde, 404 F.3d at 1172 (quoting Jammal, 926 F.2d at 920); see also McGuire, 502 U.S. at 70 (evidence of battered child syndrome did not violate due process rights where evidence was relevant to an issue in the case).

Petitioner was charged with rape, child abuse, and torture based an incident on January 22, 2015, in which Petitioner beat the victim, hit her with cable wires and vacuum parts, and raped her after he found her with a young man at the community center basketball court. 3 RT 1014-44; 4 RT 1270. The uncharged acts evidence corroborated J.D.'s testimony regarding the abuse charged and demonstrated a similar pattern of conduct. J.D. described ongoing physical and sexual abuse over a period of years. The incident on January 22 was similar to the prior abuse. As the court of appeal noted, the prior acts

involved the same victim, the same types of violence, the use of similar objects, and similar surrounding circumstances as charged. As in the prior acts, Petitioner used physical violence, including objects, and sexual abuse to punish Petitioner. The Court agrees with the trial court that the uncharged acts evidence was "highly relevant"; it showed a pattern of conduct, which tended to show that it is more likely that Petitioner physically abused and raped J.D. on the day in question. See, e.g., Morales v. Sexton, 2018 WL 5291914, at *8 (C.D. Cal. Aug. 17, 2018) (evidence that the petitioner engaged in domestic violence in the past gave rise to a permissible inference that he had a propensity to commit domestic violence and thus, was more likely to have committed the charged act of domestic violence), report and recommendation accepted by 2018 WL 5292054 (C.D. Cal. Oct. 22, 2018); Perez v. Lizarraga, 2018 WL 4354426, at *8 (C.D. Cal. July 18, 2018) (rejecting due process challenge to admission of evidence that the petitioner committed uncharged acts of sexual misconduct where the uncharged offenses were probative of petitioner's modus operandi and intent, among other issues), report and recommendation accepted by 2018 WL 4350059 (C.D. Cal. Sept. 10, 2018); Flores v. Figueroa, 2016 WL 8732481, at *8 (C.D. Cal. July 19, 2016) (evidence of the petitioner's prior acts of domestic violence was relevant to prove not only that he acted in a similarly violent manner in the instant case, but also was relevant to the issue of the victim's credibility), report and recommendation accepted by 2016 WL 8738121 (C.D. Cal. Aug. 26, 2016). As the jury could draw reasonable inferences from the uncharged acts evidence, the admission of this evidence did not violate Petitioner's due process rights.

The state court's findings were neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Nor were they based on an unreasonable determination of the facts. Petitioner is not entitled to habeas relief.

C. Petitioner is Not Entitled to Habeas Relief on His Claims Regarding the Admission of CSAAS Evidence

In Ground Four, Petitioner contends that the admission of expert testimony regarding CSAAS violated his due process rights because such evidence was irrelevant and prejudicial and its admission rendered his trial fundamentally unfair. He argues that this evidence "provide[d] the complaining witness with an unwarranted air of credibility by allowing weight to be given to the mere making of claims of abuse." Pet. at 6. Relatedly, in Ground Five, Petitioner argues that trial counsel rendered ineffective assistance by failing to object to this evidence at trial. Id.[3] Again, liberally construed, the Court presumes that Petitioner intends to raise the same claims he asserted on direct appeal. See Reply at 13. Petitioner argued on direct appeal that this evidence was irrelevant, outdated, prejudicial, relied on "junk science," and lightened the prosecution's burden. Lodgment 6 at 86-109; Lodgment 10 at 14-18. According to Petitioner, the CSAAS evidence lacks probative value and relevance because "the behaviors CSAAS described are equally consistent with false accusations as they are with true accusations and can easily be misconstrued as corroboration of a victim's claims." Lodgment 6 at 86-87. Petitioner maintained that CSAAS was not "uniformly accepted" and "the public no longer holds the presumed misconceptions CSAAS purport[ed] to address." Id.

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[3] Respondent contends that Ground Four is procedurally barred because the California Court of Appeal concluded that Petitioner forfeited his right to challenge the trial court's admission of this evidence because he failed to object at trial. Ans. Mem. at 14-16. In the interest of judicial economy, the Court will address Petitioner's claim on the merits rather than consider the procedural default issue. Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) ("Procedural bar issues are not infrequently more complex than the merits issues presented by the appeal, so it may well make sense in some instances to proceed to the merits if the result will be the same.").

at 87, 92. He asserted that expert testimony on the topic was unnecessary to explain the "common-sense" understanding that "abuse happens in secret and people tend to be embarrassed by it and delay reporting" and unnecessary to explain a victim's reasons for recanting because no witness appeared to recant in this case. Id. at 93, 108. Petitioner further argued that the CSAAS evidence did not satisfy the requirements of Kelly/Frye[4] as it was unreliable and violated his due process rights by bolstering the victim's credibility. Id. at 99-106.

1. Relevant Factual Background

Cal. Evid. Code § 801(a) permits an expert to testify about any subject "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Susan Hardie ("Hardie"), a developmental psychologist and nurse, testified for the prosecution regarding how child and adolescent victims respond to sexual abuse as well as "child sexual abuse accommodation" (CSAAS), which is a model that helps to explain how children who are sexually abused might behave and why they may not behave consistent with beliefs and biases adults may have regarding how victims should behave. 5 RT 2206, 2211-12. It explains why children may not cry out for help or act as one might expect. 5 RT 2211-12.

Hardie testified that the model consists of five characteristics, two of which "are sort of the realities of child sexual abuse" and the last three "are dependent upon or they're outcomes of" the first two realities. The first characteristic is that the sexual abuse occurs in secrecy. It occurs when the child

[4] People v. Kelly, 17 Cal. 3d 24 (1976); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The Kelly/Frye rule has been superseded by statute in California as to polygraph evidence in criminal cases. See People v. Wilkinson, 33 Cal. 4th 821, 845 (2004). The Frye test was superseded as to admissibility of scientific evidence in federal courts as stated in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587-89 (1993).

or adolescent is alone with the offender. The child does not understand the meaning of the abuse and depends on the offender for the meaning of what is occurring in the relationship. 5 RT 2212. Hardie testified that this secrecy "drives a wedge of shame between the child and potentially helpful adults." 5 RT 2214. The second characteristic is helplessness. 2 RT 2214. The closer the relationship and the more dependent the child is on the abuser, the less likely they will disclose, the longer the delay in disclosure, and the higher likelihood of retraction. 5 RT 2227; 6 RT 2455. Hardie testified that when the abuser is a family member or parent "this is an overwhelming situation for most" young people; their "sense of helplessness is terrific" and they do not have a sense of how to get out of the situation. 5 RT 2215. The third characteristic is entrapment and accommodation. 5 RT 2214. For adolescents, in particular, they are "more loathe to describe what they consider how stupid they were and how naive they were to think it would stop, and so they will try to somehow accommodate to ongoing abuse." 5 RT 2216. The fourth characteristic is delayed disclosure. 5 RT 2214. For adolescents who are trying to become autonomous and have their own lives, the abuse can become intolerable and eventually lead to disclosure. 5 RT 2217, 2220. Hardie testified that children of abuse often have to overcome feelings of responsibility before they can disclose. 5 RT 2223-24. The final characteristic is retraction. 5 RT 2214. After a disclosure is made, "from the child's perspective, now it takes on a whole life of its own." Hardie explained that a child victim has no control over the reaction of others, and may recant because they are fearful, ashamed, reluctant to go to court, or want to return to a familiar environment. 5 RT 2227-28; 6 RT 2458. Hardie testified that it is common for a victim of child sexual abuse to disclose, possibly retract, and then continue disclosures. See 6 RT 2411-12. She noted that it is not inconsistent with having been abused for the victim to go back to an abusive situation or recant because they are in an unfamiliar environment.

They may fear the loss of being with the family, which they consider security. 5 RT 2222-23.

2. The California Court of Appeal Opinion

The California Court of Appeal considered both of Petitioner's challenges to the CSAAS evidence. The appellate court found Petitioner's evidentiary challenge was forfeited by counsel's failure to object. Lodgment 9 at 17. The court of appeal rejected Petitioner's ineffective assistance of counsel claim on the merits, finding that counsel did not render ineffective assistance by failing to object. First, the California Court of Appeal concluded that the CSAAS testimony was relevant and beyond common experience. It explained:

> [Petitioner] acknowledges the California Supreme Court has held that expert testimony on CSAAS "is admissible to rehabilitate [a victim's] credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. [Citations.]" ([People v.] McAlpin[(1991)] 53 Cal.3d [1289,] 1300-1301.) He contends, however, that the testimony here was irrelevant to address recanting because "[n]o witness in this case appears to have recanted" and inadmissible to address delayed disclosure because "the world has changed" since the CSAAS model was introduced in 1983. We disagree.
>
> As to the first point, [Petitioner] is mistaken. J.D. did, indeed, recant. When she was in Haiti in 2016, J.D. spoke on the phone with a member of the defense team. She told the person that her story wasn't true, and her mother told her to fabricate it.[FN 5] On cross-examination, defense counsel elicited the details of that statement. J.D. told the defense investigator that [Petitioner] was very strict; he wanted her to focus on her music career instead of

her boyfriend. On January 22, 2015, they got into an argument because [Petitioner] did not want her to spend time with her friends; he hit her—but he did not leave any marks. J.D. called her mother, who told her to run away to a friend's house. When J.D. arrived at the friend's house, she spoke to her mother again; her mother said she'd call the UCLA rape center. But, J.D. told the investigator, she had never had sexual contact with her father. In short, J.D. told the investigator her mother had told her to lie to ensure [Petitioner] would go away.

> [FN 5] When she testified at [Petitioner's] trial, J.D. explained that her recantation was false and had been made under duress because [Petitioner's] family had taken her passport.

After eliciting these statements on cross-examination, defense counsel emphasized them during closing argument, arguing they showed J.D. was an untrustworthy liar. As such, [Petitioner] placed recanting at issue, and the prosecution was entitled to introduce CSAAS testimony to explain J.D.'s behavior. (People v. Patino (1994) 26 Cal.App.4th 1737, 1744-1745.)

As to [Petitioner's] second point, we cannot assume, as [Petitioner] suggests, that the average juror is familiar with Law and Order: Special Victims Unit (NBC 1999–present) or that that long-running police procedural has acquainted the average juror with children's reactions to sex crimes. Regardless, even if [Petitioner] is right that expert testimony about CSAAS was unnecessary because the public no longer expects children to report sex abuse immediately, we are bound by the Supreme Court's contrary views on that topic until the court chooses to revisit them.

(See Auto Equity Sales, supra, 57 Cal.2d 450.)

Accordingly, we reject [Petitioner's] claim that his attorney should have objected on relevance or common-knowledge grounds. Id. at 20-21.

Next, the California Court of Appeal rejected Petitioner's contention that his trial counsel should have objected to the CSAAS testimony on the ground that it was "junk science" that did not satisfy the Kelly/Frye rule, concluding, as follows:

> In Kelly, the California Supreme Court adopted the test set out in Frye, supra, 293 F. at p. 1014, which requires a party proffering expert opinion testimony based on a new scientific technique to establish the technique's reliability and acceptance within the relevant scientific community before the testimony will be allowed. (Kelly, supra, 17 Cal.3d at p. 30.)[FN 6] By its terms, the Kelly/Frye rule only applies to new scientific techniques. The question of whether the subject of the testimony satisfies the general acceptance test is reviewed de novo. (Kelly, at p. 39.)
>
> [FN 6] Frye has been superseded in federal courts by the standard adopted by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993) 509 U.S. 579, 589-598, which makes widespread acceptance an important factor—but not a prerequisite—in the admissibility of scientific evidence. (Id. at pp. 588, 594.) Kelly/Frye is still the law in California. (People v. Daveggio and Michaud (2018) 4 Cal.5th 790, 831, fn. 7.
>
> Courts' decisions about whether Kelly/Frye applies to CSAAS testimony have typically depended on whether the testimony is offered as direct evidence of a defendant's guilt or for

another purpose, such as to rehabilitate a victim's credibility when she has recanted her story or delayed reporting. When offered for the former purpose, as a predictive tool, courts have applied Kelly/Frye and excluded the testimony. (See, e.g., People v. Bowker (1988) 203 Cal.App.3d 385, 389-395; In re Sara M. (1987) 194 Cal.App.3d 585, 590-595; In re Christine C. (1987) 191 Cal.App.3d 676, 679.) When offered for the latter purpose, as in this case, however, the Kelly/Frye reliability standard does not apply because the testimony does not concern a new scientific method of proving that molestation has occurred. (See, e.g., People v. Wells (2004) 118 Cal.App.4th 179, 187-190; People v. Gray (1986) 187 Cal.App.3d 213, 218-220.)

Here, because the CSAAS testimony was not offered to prove the charged crimes, Kelly/Frye does not apply, and we reject [Petitioner's] argument that counsel should have objected to the CSAAS testimony on that basis.[FN 7]

[FN 7] [Petitioner] challenges the testimony in its entirety; he does not argue that certain aspects of the testimony in this case crossed the line from descriptive to predictive. (See People v. Julian (2019) 34 Cal.App.5th 878; People v. Wilson (2019) 33 Cal.App.5th 559.)

Lodgment 9 at 22-23.

3. Analysis

i. Evidentiary Error

Petitioner has not demonstrated that the admission of evidence regarding CSAAS violated his due process rights. As explained, the Supreme Court "has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the

writ." See Amaya v. Frauenheim, 823 F. App'x 503, 505 (9th Cir. 2020) (citation omitted). The Ninth Circuit has found that CSAAS testimony is admissible when it concerns "general characteristics of victims and is not used to opine that a specific child is telling the truth." Brodit v. Cambra, 350 F.3d 985, 991 (9th Cir. 2003). This general testimony "assist[s] the trier of fact in understanding the evidence; it [does] not improperly bolster the particular testimony of the child victim." United States v. Antone, 981 F.2d 1059, 1062 (9th Cir. 1992).

In Brodit, the Ninth Circuit rejected the petitioner's due process claim that the CSAAS testimony impaired his ability to present a defense where the jury was expressly instructed that this evidence was not to be construed as proof that the victim's claim was true. 350 F.3d at 991, n.1. Similarly, in this case, the jury was expressly instructed that the CSAAS evidence was "not evidence that the defendant committed any of the crimes charged against him," but rather, may be considered "only in deciding whether or not [J.D.'s] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony." 2 CT 253. The evidence was relevant and permissible for that purpose. See People v. Patino, 26 Cal. App. 4th 1737, 1744-45 (1994).

J.D. testified to years of abuse she suffered before reporting it in January 2015. She further testified that she felt alone after the disclosure, and that sometimes she thinks she would be better off if she stayed with Petitioner. 4 RT 1296, 1313-14. The jury also heard testimony that J.D. recanted, telling a member of the defense team that the abuse did not happen and that her mother told her to lie. 3 RT 1102-03; 4 RT 1283-86. In his defense, Petitioner attempted to portray J.D. as a liar and that the crimes did not occur. He testified in his own defense, denying that he sexual abused J.D. and denying most of the physical abuse. 7 RT 3386-90, 3407, 3413, 3423-25, 3430, 3432; 8 RT 3616,

3619-20, 3622-24. In closing argument, defense counsel attempted to portray J.D. as a liar, arguing that her recant was a "moment[] of clarity" when she was telling the truth. See 8 RT 3980-85. The CSAAS evidence was admissible to explain J.D.'s behavior by introducing Hardie's testimony on issues of delayed disclosure and recantation. Hardie testified that she did not have personal knowledge regarding the allegations of this case and did not know whether J.D. was telling the truth. 6 RT 2432-33. Hardie's testimony was offered for the limited purpose of disabusing the jury of misconceptions it might hold about how a child reacts to molestation, from which the jury could permissibly infer that J.D.'s delayed disclosure and recant did not mean that she lied when she said she was abused. See Patino, 26 Cal. App. 4th at 1744-45 (explaining that expert testimony relating to CSAAS is admissible where the victim's credibility is called into question and "disabusing a jury of misconceptions it might hold about how a child reacts to molestation"). As there were permissible inferences the jury could draw from the CSAAS evidence, Hardie's testimony did not violate Petitioner's due process rights. See People v. Lapenias, 67 Cal. App. 5th 162, 171 (2021) (as modified) ("it is well established in California law CSAAS evidence is relevant for the limited purpose of evaluating the credibility of an alleged child victim of sexual abuse"); Patino, 26 Cal. App. 4th at 1744-45; see also Amaya, 823 F. App'x at 505 (admission of CSAAS evidence did not violate the petitioner's due process rights); Mendez v. Paramo, 2019 WL 8643747, at *6-7 (C.D. Cal. Dec. 31, 2019) (same), findings and recommendations accepted by 2020 WL 2113674 (C.D. Cal. May 4, 2020); Cabrera v. McDowell, 2016 WL 3523844, at *18 (N.D. Cal. June 28, 2016) (same).

ii. Ineffective Assistance of Counsel

Petitioner also is not entitled to habeas relief on his ineffective assistance of counsel claim based on counsel's failure to object to this evidence.

A petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, the petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690. The court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see also Richter, 562 U.S. at 111 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."). If a petitioner does not show one component of the inquiry, a reviewing court need to reach the other component. Strickland, 466 U.S. at 697.

In Richter, the Supreme Court reiterated that the AEDPA requires an additional level of deference to a state-court decision rejecting an ineffective-assistance-of-counsel claim: "The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from

asking whether defense counsel's performance fell below Strickland's standard." 562 U.S. at 101. The Supreme Court further explained (id. at 105 (internal citations omitted)):

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Here, the California Court of Appeal's rejection of Petitioner's ineffective assistance of counsel claim was neither contrary to, nor involved an unreasonable application of, the Strickland standard. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. As the court of appeal explained, expert testimony on CSAAS is admissible to rehabilitate a victim's credibility when the defendant suggests that the child's conduct is inconsistent with her testimony of sexual abuse. Lodgment 9 at 20 (citing People v. McAlpin, 53 Cal. 3d 1289, 1300-01 (1991)). In this case, defense counsel claimed that J.D. lied about the abuse, and highlighted J.D.'s recant, using it to suggest she fabricated the allegations of abuse. Hardie's testimony was relevant to explaining J.D.'s behavior and that delayed disclosure and retraction are not inconsistent with abuse. The Court agrees with the court of appeal that the average juror is not necessarily aware of how a child responds to sexual abuse and CSAAS testimony is "needed to disabuse jurors

of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior." McAlpin, 53 Cal. 3d at 1301 (citation omitted). "[T]he subject of child molestation and more particularly, the sensitivities of the victims, is knowledge sufficiently beyond common experience such that the opinion of an expert would be of assistance to the trier of fact." People v. Gray, 187 Cal. App. 3d 213, 220 (1986) (citation omitted). Thus, any objection on the basis that the evidence was irrelevant would have been denied as futile. Counsel need not make meritless objections. See Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005) (as amended) (failure to raise meritless objection not ineffective); James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994).

Similarly, the Court agrees that trial counsel did not render ineffective assistance by failing to object to the CSAAS evidence on Kelly/Frye grounds. As the appellate court explained, courts have excluded CSAAS evidence under Kelly/Frye where the evidence is being offered as direct evidence of whether the defendant is guilty. See People v. Wells, 118 Cal. App. 4th 179, 188-89 (2004). However, Kelly/Frye does not preclude the use of CSAAS evidence when, as here, it is being offered to rehabilitate the victim's credibility and not to prove the fact of abuse. See People v. Munch, 52 Cal. App. 5th 464, 472-73 (2020); Gray, 187 Cal. App. 3d at 218-20; see also Lapenias, 67 Cal. App. 5th at 173 (finding that expert testimony on CSAAS is not subject to the Kelly rule). As noted, the jury was expressly instructed that this evidence was "not evidence that the defendant committed any of the crimes charged against him." 2 CT 253. Therefore, any objection on this basis would have been overruled and consequently, counsel was not ineffective in failing to assert this meritless objection.

Petitioner is not entitled to habeas relief on his ineffective assistance of counsel claim.

D. Petitioner is Not Entitled to Relief on His Instructional Error Claims

Petitioner also challenges the jury instructions related to the uncharged acts and CSAAS evidence, arguing that the instructions lowered the burden of proof. In Ground Three, Petitioner contends that the jury instructions on uncharged acts reduced the burden of proof to "mere likelihood" (Pet. at 6), and in Ground Six, Petitioner contends that the instruction on the CSAAS evidence permitted the jury to use "the evidence to evaluate the believability of the victim's testimony, thereby lessening the burden of proof." Id. at 8.

Challenges to state jury instructions are generally questions of state law and not cognizable on federal habeas review. See McGuire, 502 U.S. at 71-72. To merit habeas relief based on an instructional error, a petitioner must show "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Id. at 72 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 191 (2009). Instructional errors are considered in the context of the instructions as a whole and the trial record. McGuire, 502 U.S. at 72; Cupp v. Naughten, 414 U.S. 141, 146-47 (1973). To merit relief when an ambiguous instruction is given, there must be a "'reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." Sarausad, 555 U.S. at 190-91 (citation omitted). Habeas relief is warranted only where the error had "substantial and injurious effect or influence in determining the jury's verdict." Clark v. Brown, 450 F.3d 898, 905 (9th Cir. 2006) (as amended) (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)); see also Hedgpeth v. Pulido, 555 U.S. 57, 61-62 (2008) (per curiam).

1. CALCRIM Nos. 852 and 1191

The jury was instructed in accordance with CALCRIM No. 852, as follows:

The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically: physical abuse of Julie D. occurring before January 22, 2015.

Domestic violence means abuse committed against a child of the defendant.

Abuse means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit Child Abuse as charged in Count Two or Torture as charged in Count Three. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Child Abuse as charged

in Count Two or Torture as charged in Count Three. The People must still prove each charge beyond a reasonable doubt.

Do not consider this evidence for any other purpose.

2 CT 250-51. The jury also was instructed pursuant to CALCRIM No. 1191, which provided:

The People presented evidence that the defendant committed crimes of rape that were not charged in this case. This crime is defined for you in these instructions.

You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

If the People have not met this burden of proof, you must disregard this evidence entirely.

If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit Rape as charged in Count One. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Rape as charged in Count One. The People must still prove each charge beyond a reasonable doubt.

Do not consider this evidence for any other purpose.

2 RT 252.

As noted, Petitioner argues that these instructions lowered the prosecution's burden of proof. On direct appeal, the California Court of Appeal rejected Petitioner's challenges, concluding that the language in CALCRIM Nos. 852 and 1191 "properly stated the law." Lodgment 9 at 16. It noted that Petitioner acknowledged "that the California Supreme Court has approved substantially similar instructions," and it was bound by the "Supreme Court's view of this issue." Id.

This determination under state law was not arbitrary or obvious subterfuge. Therefore, this Court is bound by the state court's finding that the instructions accurately stated California law. See Bradshaw, 546 U.S. at 76; Mullaney, 421 U.S. at 691 n.11 ("state courts are the ultimate expositors of state law" and a federal habeas court is bound by the state's interpretation unless "it appears to be an obvious subterfuge to evade consideration of a federal issue" (citation and internal quotation marks omitted)). To the extent Petitioner contends otherwise, he is not entitled to habeas relief.

Moreover, these instructions did not lower the prosecution's burden of proof. Both instructions expressly stated that the uncharged acts were only one factor to consider along with the other evidence and were not alone sufficient to prove that Petitioner was guilty of the charged crimes. CALCRIM Nos. 852 and 1191 also instructed that the prosecution must still prove each charge beyond a reasonable doubt. The jury was separately instructed regarding the reasonable doubt standard, including that the defendant is presumed innocent and the People must prove a defendant is guilty beyond a reasonable doubt. 2 CT 234. The jury is presumed to follow the instructions given, Weeks v. Angelone, 528 U.S. 225, 234 (2000), and Petitioner has not presented any evidence rebutting this presumption. The Court finds there is no reasonable likelihood that the jury applied CALCRIM Nos. 852 and 1191 in a way that

lowered the prosecution's burden of proof. See Mendez, 2019 WL 8643747, at *11 (concluding that there was no reasonable likelihood that the jury misunderstood CALCRIM No. 1191 so as to lessen the prosecution's burden of proof); Hardson v. Madden, 2019 WL 6040441, at *11 (C.D. Cal. Aug. 27, 2019) (concluding that CALCRIM No. 852 did not lower the prosecution's burden of proof), report and recommendation accepted by 2019 WL 6039939 (C.D. Cal. Nov. 12, 2019). Accordingly, the state court's rejection of this instructional error claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief.

2. CALCRIM No. 1193

Petitioner similarly contends that CALCRIM No. 1193[5] lowered the prosecution's burden of proof. Pet. at 8. In accordance with CALCRIM No. 1193, the trial court instructed the jury,

> You have heard testimony from Susan Hardie and Mitchell Eisen regarding child sexual abuse accommodation syndrome.
>
> Their testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him.
>
> You may consider this evidence only in deciding whether or not Julie D's conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony.

[5] Petitioner references CALCRIM No. 1183 on "child sexual abuse accommodation syndrome." Pet. at 8. The jury was instructed regarding the CSAAS evidence under CALCRIM No. 1193 (2 CT 253), which is the instruction Petitioner challenged in state court (Lodgment 6 at 110). The Court presumes that this was typographical error and Petitioner is challenging the CALCRIM No. 1193 instruction.

2 RT 253.

The California Court of Appeal rejected Petitioner's challenge to CALCRIM No. 1193, finding, in pertinent part, as follows:

> As discussed, expert testimony about CSAAS is "not admissible to prove the complaining witness has in fact been sexually abused," but is admissible "to disabuse jurors of commonly held misconceptions of child sexual abuse and the abused child's seemingly self-impeaching behavior. [Citation.]" (People v. Gonzales (2017) 16 Cal.App.5th 494, 503 (Gonzales).) In particular, it "is admissible to rehabilitate [a complaining] witness's credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation." (McAlpin, supra, 53 Cal.3d at p. 1300.)
>
> [Petitioner] contends the last clause of CALCRIM No. 1193 impermissibly allowed the jury to use the CSAAS testimony to determine whether J.D. was telling the truth. Therefore, he argues, the instruction reduced the People's burden of proof and deprived him of the right to a fair trial. The court should instead have used CALJIC No. 10.64, which more precisely explains the ways in which the jury may use this evidence. We independently review whether a challenged jury instruction correctly states the law. (People v. Posey (2004) 32 Cal.4th 193, 218.)
>
> Our colleagues in Division Six rejected a similar argument in Gonzales, a case [Petitioner] fails to address. There, the defendant claimed that "the misleading language of CALCRIM No. 1193 allowed the CSAAS testimony to be used as proof that [the victim] was molested," because it was "impossible to use [that] testimony

> to evaluate the believability of [the victim's] testimony without using it as proof that [the defendant] committed the charged crimes." (Gonzales, supra, 16 Cal.App.5th at p. 503.)
>
> Division Six disagreed, emphasizing that "the instruction must be understood in the context of [the expert's] testimony" that "CSAAS is not a tool to help diagnose whether a child has actually been abused" but instead is meant to explain children's "reactions when they have been abused." (Gonzales, supra, 16 Cal.App.5th at pp. 503-504.) Thus, a reasonable juror could rely on CSAAS testimony to conclude the victim's "behavior [did] not mean she lied when she said she was abused"—thereby "neutraliz[ing] the victim's apparently self-impeaching behavior"—without also relying on that testimony as evidence that the victim was actually molested. (Id. at p. 504.)
>
> [Petitioner] offers us no reason not to follow Gonzales, with whose reasoning we agree. Thus, we conclude that the trial court did not err by giving CALCRIM No. 1193.

Lodgment 9 at 23-25.

The Court concurs with the conclusion of the California Court of Appeal. As explained, CSAAS evidence is "admissible to rehabilitate [the complaining] witness's credibility when the defendant suggests that the child's conduct after the incident is inconsistent with her testimony claiming molestation." People v. Gonzales, 16 Cal. App. 5th 494, 503 (2017). In accordance with California law, the jury was instructed that the CSAAS evidence could be considered "in evaluating the believability of [J.D.'s] testimony." See id. at 503-04; Munch, 52 Cal. App. 5th at 474. The jury was expressly instructed that the CSAAS testimony was "not evidence that the defendant committed any of the crimes charged against him." 2 CT 253. As the Gonzales court noted,

> [a] reasonable juror would understand CALCRIM No. 1193 to mean that the jury can use [the expert's] testimony to conclude that [the victim's] behavior does not mean she lied when she said she was abused. The jury also would understand it cannot use [the expert's] testimony to conclude [the victim] was, in fact, [sexual abused]. The CSAAS evidence simply neutralizes the victim's apparently self-impeaching behavior. Thus, under CALCRIM No. 1193, a juror who believes [the expert's] testimony will find both that [the victim's] apparently self-impeaching behavior does not affect her believability one way or the other, and that the CSAAS evidence does not show she had been [sexually abused].

Gonzales, 16 Cal. App. 5th at 504. The jury was otherwise instructed regarding the presumption of innocence and the reasonable doubt standard. There is no reasonable likelihood that the jury applied CALCRIM No. 1193 in a way that lowered the prosecution's burden of proof. See Griffin v. Martinez, 2021 WL 4100000, at *14 (E.D. Cal. Sept. 9, 2021) (rejecting similar challenge to CALCRIM No. 1193), findings and recommendations adopted by 2021 WL 4460535 (E.D. Cal. Sept. 29, 2021).

The state court's rejection of this instructional error claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Petitioner is not entitled to habeas relief.

E. Petitioner is Not Entitled to an Evidentiary Hearing

Petitioner requests an evidentiary hearing. Reply at 1-2. However, the AEDPA requires federal courts to review state court decisions based on the record before the state court. Pinholster, 563 U.S. at 181-85. Moreover, an evidentiary hearing is not warranted where, as here, "the record refutes the applicant's factual allegations or otherwise precludes habeas relief." Schriro v.

Landrigan, 550 U.S. 465, 474 (2007). "[W]hen issues can be resolved with reference to the state court record, an evidentiary hearing becomes nothing more than a futile exercise." Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998). Petitioner's claims can be resolved by reference to the state court record. Accordingly, Petitioner's request for an evidentiary hearing should be denied.

VII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying Petitioner's request for an evidentiary hearing; and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: November 17, 2021

JOHN D. EARLY
United States Magistrate Judge