UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 28 2024

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

ANGEL SANCHEZ,

Petitioner-Appellant,

v.

TERESA CISNEROS,

Respondent-Appellee.

No. 23-55490

D.C. No.
2:21-cv-07730-SPG-SHK
Central District of California,
Los Angeles

ORDER

Before: FRIEDLAND and MENDOZA, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

THE CENTRAL DISTRICT OF CALIFORNIA

ANGEL SANCHEZ, Petitioner, v. WARDEN TERESA CISNEROS, Warden, Respondent.	Case No. 2:21-cv-07730 SPG (SHK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation ("R&R") is submitted to the Honorable Sherilyn Peace Garnett, 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

On September 27, 2021, Petitioner Angel Sanchez ("Petitioner"), proceeding pro se, filed a Petition for Writ of Habeas Corpus ("Petition"), pursuant to 28 U.S.C. § 2254, challenging his 2019 California state conviction for kidnapping for the purpose of committing rape, assault with intent to commit rape, carrying a concealed dirk or dagger, resisting or obstructing a peace officer, and attempting to dissuade a witness by the threatened use of force or violence. Pending before the

Court is Petitioner's First Amended Petition for Writ of Habeas Corpus ("FAP") raising claims of evidentiary error, instructional error, sentencing error, and ineffective assistance of counsel. Because Petitioner has failed to demonstrate that the California state courts unreasonably denied Grounds Two, Four, and Five, and because Grounds One and Three are not cognizable on federal habeas review, the Magistrate Judge recommends that the District Judge deny Petitioner's request for habeas relief on the merits, in its entirety, and dismiss the action with prejudice.

II. PROCEDURAL HISTORY

In 2019, Petitioner was convicted by a jury in Santa Barbara County of kidnapping for the purpose of committing rape, assault with intent to commit rape, carrying a concealed dirk or dagger, resisting or obstructing a peace officer, and attempting to dissuade a witness by the use or threatened use of force or violence. Electronic Case Filing Number ("ECF No.") 58-2, 2 Clerk's Transcript ("CT") at 348-352.[1] The jury also found true the allegation that Petitioner had been armed with a deadly weapon during the commission of assault with intent to commit rape, id. at 349, and the allegation that he acted maliciously and used or threatened to use force in the commission of the attempt to dissuade a witness, id. at 352. The trial court found true two prior serious felony convictions, one prior prison term, and two priors "strikes" within the meaning of California's Three Strikes Law. ECF No. 58-7, 4 Reporter's Transcript on Appeal ("RT") at 985-986. The trial court stayed the prior prison term and sentenced Petitioner to 32 months in prison plus 75 years to life. ECF No. 58-2, 2 CT at 548-550.

Petitioner appealed to the California Court of Appeal, raising, among others,

[1] The referenced page number for the Clerk's Transcript (three volumes), the Reporter's Transcript (four volumes), and state court filings and opinions lodged by Respondent will be the number assigned in those documents and not the page number associated with the document through the ECF system. With respect to Petitioner's filings, including the Petition and Traverse, which contain supplemental pages and numerous attachments, the referenced page numbers will be those assigned by the Court's ECF system.

claims corresponding to Grounds One, Two, Three, and Four in the FAP. ECF No. 58-8 (Appellant's Opening Brief ("AOB")). The state appellate court rejected the claims and affirmed the judgment in a decision explaining the reasons for the affirmance. ECF No. 30-1, California Court of Appeal Opinion ("Cal. CoA Op."). Petitioner then filed a Petition for Review ("PFR") in the California Supreme Court raising a claim corresponding to Grounds Two and Four of the FAP, which was summarily denied on July 21, 2021. ECF Nos. 30-3 (PFR); 30-4 (Denial of PFR).

On September 27, 2021, Petitioner filed the original Petition in this matter. ECF No. 1. That Petition was ordered dismissed with leave to amend as it identified no claims to be raised and named no Respondent. ECF No. 6 (10/4/21 Amended Order Dismissing Petition For Writ of Habeas Corpus Without Prejudice and With Leave to Amend). On November 19, 2021, the Court issued an Order to Show Cause why the Petition should not be dismissed for Petitioner's failure to file an FAP. ECF No. 8 (11/19/21 Order to Show Cause). Petitioner then purported to file a First Amended Petition on November 29, 2021, which was not on the Court-approved habeas form but rather included a handwritten note from Petitioner along with a copy of his Petition for Review. ECF No. 10. Thereafter, the Court issued an Order requesting that Petitioner verify whether he intended to raise the two grounds for relief alleged in his Petition for Review in his amended petition. ECF No. 12 (12/15/21 Minute Order). On December 23, 2021, Petitioner filed a First Amended Petition for Writ of Habeas Corpus on the Court-approved habeas form raising five grounds for relief. ECF No. 16 (FAP).

On February 22, 2022, the Court issued an Order to Show Cause why the petition should not be dismissed as mixed, as it appeared that Grounds One, Three, and Five were not exhausted. ECF No. 19 (2/22/22 Order to Show Cause). In a Response filed on March 9, 2022, Petitioner advised the Court that he was in the process of filing a habeas petition in the California Supreme Court raising the unexhausted claims and asked for time to do that. ECF No. 20 (Response to

2/22/22 OSC). On April 5, 2022, the Court ordered Respondent to respond to Petitioner's request, which it interpreted as a request for a stay under Rhines v. Weber, 544 U.S. 269, 273 (2005). ECF No. 23 (4/5/22 Minute Order). On June 2, 2022, Respondent filed an Opposition to Petitioner's request for a stay under Rhines. ECF No. 29 (Opposition to Request for a Stay). On August 1, 2022, the Court issued a Report and Recommendation recommending denial of Petitioner's request for a stay under Rhines and dismissal of the FAP unless Petitioner withdrew his unexhausted claims. ECF No. 37 (R&R).

On August 19, 2022, Petitioner filed a copy of the denial of his habeas petition by the California Supreme Court ("CSC"). ECF No. 39 (CSC denial of habeas petition). On August 25, 2022, the Court issued an Order withdrawing the Report and Recommendation issued on August 1, 2022 and ordering Respondent to respond to the FAP. ECF No. 41 (8/25/22 Minute Order). On September 7, 2022, Respondent filed a Motion to Dismiss the FAP on the ground that Petitioner had still failed to exhaust all available state remedies as to Grounds One and Three. ECF No. 43 (Motion to Dismiss). The Court denied Respondent's Motion to Dismiss in an Order issued on September 15, 2022, and ordered Respondent to file an Answer to the FAP. ECF No. 44 (9/15/22 Minute Order). Respondent filed an Answer and a supporting memorandum ("Answer") on November 18, 2022. ECF Nos. 57. Petitioner then filed a Traverse. ECF No. 63.

III. PETITIONER'S CLAIMS

The FAP raises the following five grounds for relief:

1. The trial court abused its discretion in admitting Jane Doe 2's testimony under Cal. Evid. Code §§ 1101 and/or 1108.

2. The trial court's prior acts instruction deprived Petitioner of due process and a fair trial.

3. The $5,000 restitution/parole revocation fine violates due process, equal protection, and the right to be free from excessive fines.

4. Petitioner was denied his right to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments based on the trial court's use of prior acts instructions CALCRIM Nos. 375 and 1191A.

5. Petitioner was denied the effective assistance of counsel in violation of the Sixth Amendment based on counsel's failure to challenge the giving of CALCRIM No. 375.

ECF No. 16, FAP at 5-6.[2]

IV. FACTUAL SUMMARY

Because Petitioner has not rebutted the correctness of the findings of fact made by the California Court of Appeal regarding Petitioner's appeal in state court by clear and convincing evidence, the Court adopts the factual summary set forth in the California Court of Appeal's opinion affirming Petitioner's conviction. Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1). To the extent that an evaluation of Petitioner's individual claims depends on an examination of the trial record, the Court has made an independent evaluation of the record specific to those claims. The "Facts Underlying Charged Sexual Offenses and Prior Uncharged Offense" section of the California Court of Appeal's opinion is set forth and adopted as follows in this R&R:

FACTS UNDERLYING CHARGED SEXUAL OFFENSES AND PRIOR UNCHARGED OFFENSE

> The charged sexual offenses occurred in September 2018 when Jane Doe 1 (Doe 1) was 19 years old. At approximately 11:00 p.m., she was walking to an ATM to get money. [Petitioner], who was riding a bicycle, approached her and started asking her questions. Doe 1 "cussed at him" and "told him to leave [her] alone."
>
> [Petitioner] pedaled his bike so that he was positioned in front of Doe 1, blocking her path. [Petitioner] grabbed her wrist, took her cellphone, and threw it into a parking lot. Doe 1 pushed [Petitioner's]

[2] The Court has presumed that Grounds Two and Four of the FAP raise the same due process claim regarding instructional error. ECF No. 19 at 2 n.2 (2/22/22 Order to Show Cause).

bicycle, "and he fell down with it." Doe 1 tripped and fell. [Petitioner] "pulled [her] up and told [her] that if [she] didn't cooperate, he'd hurt [her]." He said he had a weapon "and lifted up his sweater so [she] could see . . . the tip of a knife or some type of sharp object."

[Petitioner] pushed Doe 1 to the ground and dragged her into the parking lot, away from the streetlights. "[I]t was really hard to see anything." [Petitioner] got down on his knees in front of Doe 1. "He was attempting to grab [her] breasts." While Doe 1 was still on the ground, [Petitioner] pulled her shorts and panties down below her knees. He was positioned between her legs and "was trying to touch [her] vagina." At the same time, he "was unbuckling his belt."

Doe 1 "was just screaming as much as [she] could." [Petitioner] suddenly got up and fled on his bicycle. Doe 1 saw the headlights of a vehicle. The driver had heard her screams. He drove his pickup truck into the parking lot because he assumed 'someone's in trouble over there.'"

Jane Doe 2 (Doe 2) testified to an uncharged rape committed by [Petitioner] in March 2009 when she was 16 years old. Doe 2 went to a friend's house. The friend introduced Doe 2 to her brother, [Petitioner]. While the friend went to a store, Doe 2 remained inside the house with [Petitioner]. Doe 2 was in the living room when [Petitioner] grabbed her from behind. She broke free, but [Petitioner] grabbed her again and pulled her into the bedroom. He pulled down her pants and forcibly had sexual intercourse with her until he ejaculated. Doe 2 fought with him to no avail. Her wrists were bruised.

Doe 2 immediately reported the incident to the police. [Petitioner] was "detained." She went to court but refused to testify against him. Because of her refusal, the case was dismissed. The prosecutor asked Doe 2 why she had decided to testify against [Petitioner] in the present case. Doe 2 responded, "I'm here so I can get justice for myself and for the girl [Doe 1], that it's just not okay what he's doing."

V. STANDARD OF REVIEW

The standards in the Anti-Terrorism and Effective Death Penalty Act of 1996 and 28 U.S.C. § 2254 govern this Court's review of Petitioner's grounds. Because the California Supreme Court summarily denied Grounds Two and Four raised in

the FAP on direct review, this Court reviews the reasoning in the California Court of Appeal's decision denying these claims on appeal. See ECF Nos. 30-4 (Denial of PFR); 30-1 (Cal. CoA Op.); Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018) (holding "that the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "should then presume that the unexplained decision adopted the same reasoning"). As to the remaining claims denied without explanation by the California Supreme Court on collateral review without explanation, the Court is still required to uphold the California Supreme Court's summary denial so long as there is any reasonable basis in the record to support it. Harrington v. Richter, 562 U.S. 86, 102 (2011). (holding that reviewing court "must determine what arguments or theories supported or ... could have supported [] the state court's decision" and "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" existing Supreme Court precedent.).[3]

VI. DISCUSSION

A. Grounds One And Three Are Not Cognizable On Federal Habeas Review.

In Ground One, Petitioner claims that the trial court abused its discretion in admitting Jane Doe 2's testimony under Cal. Evid. Code § 1101 and/or § 1108. ECF No. 16, FAP at 5. He claims that the trial court abused its discretion under Cal. Evid. Code § 352. Id. at 5. In Ground Three, Petitioner contends that the $5,000 restitution/parole revocation fine violates due process, equal protection, and the right to be free from excessive fines. Id. at 6.

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[3] Of course, the Court only reaches the question of whether the AEDPA is satisfied if the claim is cognizable in federal court in the first instance. See Smith v. Phillips, 455 U.S. 209, 221 (1982) ("A federally issued writ of habeas corpus . . . reaches only convictions obtained in violation of some provision of the United States Constitution.").

1. Ground One is not cognizable on federal habeas review.

As the Court indicated in its September 15, 2022 Minute Order, Petitioner appears to be raising in Ground One of his FAP the same claim raised in the California Supreme Court habeas petition – i.e., a claim that was not federalized and which raises only a state law issue.[4] ECF No. 44 (9/15/22 Minute Order) at 2.

Because Petitioner claims that the admission of this evidence violated only state law, he fails to state a claim for federal habeas relief. Federal habeas relief is not available for errors of state law. See Estelle v. McGuire, 502 U.S. 62, 67 (1991) ("federal habeas corpus relief does not lie for errors of state law") (citation and internal quotations omitted); Smith v. Phillips, 455 U.S. 209, 221 (1982); see also Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009).[5]

2. Ground Three is not cognizable on federal habeas review.

The issue of whether the trial court complied with state law in imposing fines and fees during sentencing in a criminal matter does not raise a question of federal law. See generally McGuire, 502 U.S. at 68. A petitioner may seek federal habeas relief from a state court conviction or sentence "only on the ground that he is in

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[4] The exact language of Ground One in the FAP is as follows: "Court abused its discretion admitting Jane Doe 2's testimony under Evid. Code 1101 and/or 1108." ECF No. 16, FAP at 5. In the "supporting FACTS" section, Petitioner states: "the court abused its discretion under Evidence Code section 352 by admitting Jane Doe 2's testimony." Id.

[5] Even if Petitioner had properly federalized this claim, "[h]abeas 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; Walters v. Mass, 45 F.3d 1355, 1357 (9th Cir. 1995). However, "[t]he Supreme Court has made very few rulings regarding the admission of evidence as a violation of due process." Holley, 568 F.3d at 1101. The Ninth Circuit has observed that, "[a]lthough 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). Absent clearly established federal law, the state court's decision could not have violated the AEDPA. See Carey v. Musladin, 549 U.S. 70, 76 (2006) ("Given the lack of holdings from this Court regarding [the claim], it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law." (alterations in original)).

custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (per curiam). Here, the imposition of the fine or fee, which would not impact Petitioner's ability to be released from custody, is, therefore, not cognizable on federal habeas review. See Bailey v. Hill, 599 F.3d 976, 980-981 (9th Cir. 2010) (finding that elimination or alteration of a money judgment does not impact and is not directed at the source of the restraint on petitioner's liberty, such that if the restitution order was modified, the petitioner would still have to serve his custodial sentence; observing the lack of nexus between the claim and unlawful nature of the custody required under § 2254(a)). Consequently, Ground Three does not raise a federal issue and is not cognizable on federal habeas review.

B. Habeas Relief Is Not Warranted With Respect To Petitioner's Instructional Error Claims (Grounds Two and Four).

In Ground Two, Petitioner alleges that the trial court's prior acts instruction deprived him of due process and a fair trial. ECF No. 16, FAP at 5-6. In Ground Four, Petitioner alleges that he was denied his right to due process and a fair trial under the Fifth, Sixth, and Fourteenth Amendments based on the trial court's use of prior acts instructions CALCRIM Nos. 375 and 1191A. Id. at 6. As previously indicated, the Court construes Grounds Two and Four as raising the same claim. Petitioner has not disputed the Court's construction of these claims.

1. Background

Prior to trial, the parties discussed the admissibility of Jane Doe 2's testimony regarding a prior rape that Petitioner committed against her. The Court ultimately ruled that, having considered Cal. Evid. Code § 352, the evidence of the prior rape was admissible under Cal. Evid Code. §§ 1101 and 1108.[6] ECF No. 58-

[6] Cal. Evid. Code § 352 provides: "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."

4, 1 RT at 40-51. While acknowledging the differences in the two offenses, the trial court found that there was similarity between them – in particular, significant, forced movement of both victims. The trial court noted that "not all rapes occur, not all sexual assaults occur with movement of the alleged victim." Id. at 49. The trial court found that there was "sufficient similarity between the two alleged incidents and the motive . . .." Id. at 51. At a later hearing, the trial court ruled that evidence regarding why the rape case was dismissed was admissible and that the parties could ask Jane Doe 2 about the issue. Id. at 74.

Jane Doe 2 testified that ten years prior, in March of 2009, when she was 16 years old, she met her friend Felicia's brother, Angel (Petitioner) at Felicia's place. ECF No. 58-6, 3 RT at 630-631. Jane Doe 2 agreed to watch Felicia's infant daughter while she ran an errand, and Petitioner was at the apartment at the time. Id. at 632-633. Jane Doe 2 had her back to Petitioner and he grabbed her. She asked him what he was doing and broke free. Id. at 633. Petitioner pulled her into a room and "basically stuffed his private part inside of me . . . until he came" while she was telling him to stop. Id. at 633, 636. She told Felicia when she got back, and Jane Doe 2 made a police report. Id. at 636. Jane Doe 2 ultimately decided not to testify and the case was dismissed. Id. at 637-638.

Cal. Evid. Code § 1101 provides: (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

Cal. Evid. Code § 1108(a) provides: (a) In a criminal action in which the defendant is accused of a 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.

The trial court instructed the jury with CALCRIM No. 375 as follows (ECF No. 58-7, 4 RT 841-842):

> The People presented evidence that the Defendant committed an uncharged offense of forcible rape upon Jane Doe Number 2, in violation of Penal Code Section 261(a)(2), which is not charged in this case. 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 offense. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proven by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [π] If the People have not met this burden, you must disregard this evidence entirely. [π] If you decide that the Defendant committed the uncharged offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether the Defendant acted with the intent for Counts 1 and 2 in this case, or the Defendant had a motive to commit the offenses alleged in Counts 1 and 2 in this case. [π] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and the charged offenses. [π] Do not consider this evidence for any other purpose except for the limited purpose of – or as described in CALCRIM 1191A. [π] If you conclude that the Defendant committed the uncharged offense, 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 Count 1 and 2. The People must still prove every charge beyond a reasonable doubt.

The trial court further instructed the jury with CALCRIM No. 1191A as follows (id. at 842-843):

> The People presented evidence that the Defendant committed the crime of forcible rape upon Jane Doe 2, in violation of Penal Code Section 261(a)(2). That was not charged in this case. The crime is defined for you in these instructions. [π] 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 offense. 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. [π] If the People have not met this

> burden of proof, you must disregard this evidence entirely. [π] If you decide that the Defendant committed the uncharged offense, 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 Counts 1 and 2, as charged here. If you conclude that the Defendant committed the uncharged offense, 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 Counts 1 and 2. The People must still prove each charge beyond a reasonable doubt. [π] Do not consider this evidence for any other purpose except for the limited purpose as described in CALCRIM Instruction 375.

2. Applicable Federal Law

Generally, the Supreme Court has held, "instructional errors of state law may not form the basis for federal habeas relief." Gilmore v. Taylor, 508 U.S. 333, 344 (1993) (citing McGuire, 502 U.S. 62). For instructional error to warrant habeas relief, the instruction by itself must have "'so infected the entire trial that the resulting conviction violates due process.'" Middleton v. McNeil, 541 U.S. 433, 437 (2004) (quoting McGuire, 502 U.S. at 72). It is not enough to show that the instruction was merely erroneous; rather, a petitioner must also show that it is reasonably likely that the jury applied the instruction in a way that violates the Constitution. Boyde v. California, 494 U.S. 370, 380 (1990). In making that decision, the erroneous instruction must be considered in the context of the entire trial record and the instructions as a whole. McGuire, 502 U.S. at 72; Cupp v. Naughten, 414 U.S. 141, 147 (1973).

3. California Court of Appeal Opinion

The California Court of Appeal rejected Petitioner's contention that the trial court erroneously instructed the jury with CALCRIM No. 375. It reasoned that the instruction was given pursuant to Cal. Evid. Code § 1101(b) and that despite Petitioner's contention that only identity, and not intent and motive were at issue in the case, intent was an element of the charged sexual offenses, intent became

"disputed" by Petitioner's not guilty plea, and motive was relevant to show intent. ECF No. 30-1, Cal. CoA Op. at 8. It further found that instructing the jury with CALCRIM No. 1191A was not improper, and was authorized by section 1108. Id. at 9.

4. Analysis

As discussed in great detail, the Court recommends that habeas relief be denied on this claim.

First, instructional errors of state law generally may not form the basis for federal habeas relief. Gilmore, 508 U.S. at 344. Here, there was not even an error under state law. The California Court of Appeal found that CALCRIM No. 375 was appropriately given because intent – which was at issue by virtue of Petitioner's not guilty plea – was an element of the charged sexual offenses, and motive was relevant to show intent. ECF No. 30-1, Cal. CoA Op. at 8. It further found that instruction pursuant to CALCRIM No. 1191A was not improper as it was authorized by Cal. Evid. Code § 1108. This Court is bound by and may not revisit the state court's implicit determination that CALCRIM Nos. 375 and 1191A, as provided to the jury, were an accurate reflection of state law, and its express determinations that they were appropriately given. Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam) ("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").

Further, the Court concurs with Respondent that even if the instructions were not applicable, no clearly established Supreme Court law holds that the giving of an instruction that is accurate but inapplicable violates a defendant's constitutional rights. ECF No. 57, Answer at 12-13; See, e.g., Acajabon v. Espinoza, Case No. 1:16-cv-00183-MJS(HC), 2017 WL 5608070, at *13 (E.D. Cal. Nov. 21, 2017) (Petitioner not entitled to habeas relief where the trial court gave accurate but inapplicable instructions because there is no clearly established Supreme Court on

the issue); Prock v. Sherman, Case No. CV 15-1175-PA(SS), 2017 WL 4480738, at *13 (C.D. Cal. Aug. 21, 2017) ("No clearly established federal law 'prohibits a trial court from instructing a jury with a factually inapplicable but accurate statement of state law.") (internal citation and quotations omitted); Fernandez v. Montgomery, 182 F. Supp. 3d 991, 1011 (N.D. Cal. 2016) (same); see also Griffin v. United States, 502 U.S. 46, 59 (1991) ("When ... jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence[.]"). Again, where no clearly established Supreme Court law exists on the issue, it cannot be said that the state court unreasonably applied clearly established federal law. Musladin, 549 U.S. at 77.

The Court further concurs with Respondent that, given that the Supreme Court has never held that the admission of prior bad acts evidence to prove propensity to commit crimes violates a defendant's federal due process rights, McGuire, 502 U.S. at 75 n.5., it follows that an accurate jury instruction on that issue cannot form the basis for federal habeas relief. ECF No. 57, Answer at 14 (citing Santos v. Montgomery, Case No. CV 15-7643-CAS(E), 2016 WL 2605034, at *12 (C.D. Cal. Mar. 31, 2016) (modified version of CALCRIM No. 375 did not violate due process because Supreme Court has not barred use of prior crimes evidence to prove propensity).

In any event, even if the Court were to assume (without deciding) that the giving of these instructions was error, the Court cannot find that Petitioner was prejudiced by that error. Petitioner is only entitled to relief on an instructional error claim if the error "had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); see Hedgpeth v. Pulido, 555 U.S. 57, 61 (2008) ("harmless-error analysis applies to

instructional errors so long as the error at issue does not categorically vitiate all the jury's findings") (internal quotations, emphasis, and citation omitted). Brecht requires more than a "reasonable possibility" that the error was harmful. Davis v. Ayala, 576 U.S. 257, 268 (2015) (citing Brecht, 507 U.S. at 637).

Here, even if the jury had not been instructed with CALCRIM Nos. 375 and 1191A, the jury would still have heard Jane Doe 2's testimony that Petitioner raped her some ten years prior to the charged incident. Her testimony, moreover, was similar to Jane Doe 1's testimony in several ways – they were both teenagers when the assaults occurred and in both cases, Petitioner physically moved the girls in order to commit the sexual assaults. ECF No. 58-4, 1 RT 125, 141-143; ECF No. 58-6, 3 RT at 630, 633. Furthermore, both women were able to identify Petitioner as the attacker. Jane Doe 1 testified that she was only 6 to 10 inches away from Petitioner when he first approached her on his bike, and she "fully [saw] his face." ECF No. 58-4, 1 RT at 130. She identified Petitioner in Court as her attacker. Id. at 138-139. In light of this testimony, the giving of CALCRIM No. 375 and 1191A, even if erroneous as a matter of constitutional law, did not have substantial and injurious effect in determining the jury's verdict.

The Court finds that the state courts' rejection of this claim was neither contrary to nor involved an unreasonable application of clearly established Supreme Court law.

D. Habeas Relief Is Not Warranted With Respect To Petitioner's Ineffective Assistance Of Counsel Claim (Ground Five).

The Court construes Ground Five as the same ineffective assistance of counsel claim alleged in Petitioner's habeas petition filed in the California Supreme Court. ECF No. 30-5 at 7. In that claim, Petitioner alleged that he was denied the effective assistance of counsel in violation of the Sixth Amendment based on counsel's failure to challenge the giving of CALCRIM No. 375. This claim was denied without explanation by the California Supreme Court. ECF No. 39 at 2

(Notice filed by Petitioner 8/10/22, including denial by CSC).

1. Background

At trial, the parties discussed CALCRIM No. 375. The trial court noted that they had had some off-the-record discussions regarding the instruction, along with its companion instruction, CALCRIM No. 1191A. ECF No. 58-6, 3 RT at 591. The trial court recounted that defense counsel had stated that he thought the appropriate instruction would relate to identity. Id. Defense counsel commented that CALCRIM No. 375 has bracketed options, depending on the issues and facts of a particular case where the §1108 [sic] evidence is being proffered.[7] His suggestion off-the-record was to limit the instruction to the following: '"If you decide that the Defendant committed the uncharged offense, you may, but are not required to, consider that evidence for the limited purpose of deciding whether - - 'A, the Defendant was the person who committed the offense alleged in this case.'" Id. at 591-592. The prosecutor argued that the theory should be motive and intent as they argued during motions in limine. Id. at 592. The prosecutor argued that while the acts were similar, they did not rise to the level of sharing distinctive or unusual features to give rise to an inference that the same person committed both acts; they did not, in other words, meet the threshold on the issue of identity, which was much higher than the one required for intent and motive. Id. at 592-593.

The trial court ruled that it would not allow the evidence in to prove identity, but that the prior incident was relevant for intent and motive theory. The trial court rejected defense counsel's argument for instruction on only the (A) bracket relating to identity, and indicated it would instruct with the (B) and (C) brackets relating to intent and motive. Id. at 594. The trial court stated, "It doesn't say – and you can correct me if I'm wrong – anywhere in 375 that, 'You are to presume that the Defendant is the perpetrator in this case.'" Id. 595. The trial court found that there

[7] CALCRIM No. 375 relates to evidence offered under Cal. Evid. Code § 1101.

just was not sufficient evidence from the prior incident for the purposes of identity. Id. at 596.

Defense counsel stated, "I'm not arguing and I won't argue that whoever attacked Jane Doe Number 1 lacked the intent to rape or lacked the motive to commit an assault with intent to commit rape. So neither of those elements are issues in our case. I'm not disputing that the assailant lacked intent or lacked motive. I'm just arguing it was a different person." ECF No. 58-6, 3 RT at 596. The trial court responded that defense counsel was allowed to argue that the instruction did not apply; that "[m]y client didn't do it. It's just irrelevant." Id. at 597. The trial court found that allowing the identity language in the instruction was going to muddle the record and make it appear as if the trial court were allowing the evidence in as an identity theory under § 1101, which it was not. Id.

As to changes to the CALCRIM No. 1191A instruction, the parties clarified that certain language was applicable only to the charged sexual offenses (Counts 1 and 2). ECF No. 58-6, 3 RT at 598. The parties also clarified changes in the last sentence relating to the burden of proof for to each charge. Id. Finally, defense counsel asked to go back to CALCRIM No. 375 because a bracketed portion that stated "Do not conclude from this evidence that the Defendant has a bad character or is disposed to commit crime" was not included. Id. at 598-599. The trial court responded that the "use notes" with the instruction indicated that that bracketed portion was to be given if the evidence was admitted only under § 1101(b) but not if the trial court was also instructing under Evid. Code § 1108. Therefore, the trial court indicated, that bracketed portion would not be included. Id. at 599.

The jury was instructed with CALCRIM No. 375, as indicated in the Court's discussion of Grounds Two and Four, above.

2. Applicable Federal Law

The Sixth Amendment right to counsel guarantees not only assistance, but effective assistance, of counsel. See Strickland v. Washington, 466 U.S. 668

(1984). In order to prevail on a claim of ineffective assistance of counsel, Petitioner must establish two things: (1) counsel's performance fell below an "objective standard of reasonableness" under prevailing professional norms; and (2) the deficient performance prejudiced the defense, i.e., "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687-88, 694. A claim of ineffective assistance must be rejected upon finding either that counsel's performance was reasonable or that the alleged error was not prejudicial. Id. at 697; see also Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the Strickland test obviates the need to consider the other.") (citation omitted).

"The inquiry under Strickland is highly deferential and 'every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" Greenway v. Schriro, 653 F.3d 790, 802 (9th Cir. 2011) (quoting Strickland, 466 U.S. at 689).

3. Analysis

Again, where the state court denies a claim without explanation, the Court "must determine what arguments or theories supported or ... could have supported, the state court's decision" and "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" existing Supreme Court precedent. Richter, 562 U.S. at 102.

Here, the Court finds that the state court's rejection of this claim did not involve an unreasonable application of Strickland. As set forth previously, counsel *did* object to the giving of CALCRIM No. 375 and presented detailed arguments to the trial court as to why the instruction should be given only insofar as it related to identity. The trial court rejected these arguments. The Court has no basis for finding counsel ineffective for failing to object to this instruction when counsel did, in fact, object. Therefore, habeas relief is not warranted on this claim.

VII. RECOMMENDATION

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

DATED: February 28, 2023

HON. SHASHI H. KEWALRAMANI
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file Objections as provided in the Local Rules and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANGEL SANCHEZ,

Petitioner,

v.

WARDEN TERESA CISNEROS,

Respondent.

Case No. 2:21-cv-07730-SPG (SHK)

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition ("FAP"), the relevant records on file, and the Report and Recommendation of the United States Magistrate Judge. Although Petitioner has filed a document labeled "Written Statement of Objections" ("Obj.") and lists six "objections," the six items listed are not actually objections to the Magistrate Judge's findings. Instead, Petitioner simply recites the findings and recommendations of the Magistrate Judge. *See, e.g.*, (ECF No. 68 at 2, Obj. no. 4 ("Ground Three does not raise a federal issue and is not congnizable on federal habeas revew.")).

Notwithstanding, the Court has engaged in *de novo* review of those portions of the Report and Recommendation to which Petitioner references in his list. Having conducted its review, the Court accepts the findings and recommendation of the Magistrate Judge.

IT IS THEREFORE ORDERED that the FAP is DENIED and Judgment is entered dismissing this action with prejudice.

Dated: April 24, 2023

HON. SHERILYN PEACE GARNETT
UNITED STATES DISTRICT JUDGE