APPENDIX-A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 15 2023

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

JOSE MANUEL GALAN, Petitioner-Appellant, v. KATHLEEN ALLISON, Secretary, Respondent-Appellee.	No. 22-55836 D.C. No. 8:21-cv-02019-CAS-JDE Central District of California, Santa Ana ORDER

Before: R. NELSON and COLLINS, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) 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-B

O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE MANUEL GALAN,

Petitioner,

v.

KATHLEEN ALLISON,

Respondent.

Case No. 8:21-cv-02019-CAS (JDE)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the records and files herein, including the Petition (Dkt. 1, "Petition"), Respondent's Answer to the Petition (Dkt. 8) and supporting records, Petitioner's Reply (Dkt. 15) and supporting Memorandum (Dkt. 15), the Report and Recommendation of the United States Magistrate Judge (Dkt. 17, "Report"), and Petitioner's Objections to the Report (Dkt. 20, "Objection"). Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a *de novo* review of the matters to which objections have been stated. Petitioner's assertions and arguments have been reviewed carefully. The Court, however, concludes that nothing set forth in the Objection or otherwise in the record for this case affects, alters, or calls into

question the findings and analysis set forth in the Report. Therefore, the Court concurs with and accepts the findings and recommendations of the Magistrate Judge.

Petitioner's Objection raises two grounds: (1) that the admission of expert testimony regarding Child Sexual Abuse Accommodation Syndrome ("CSAAS") violated his due process rights and (2) that the trial court violated the Ex Post Facto Clause of the U.S. Constitution by providing a jury instruction based on the current version of Cal. Penal Code § 288.2, rather than the version in effect at the time the acts occurred. Objection at 10-12. The Court finds and concludes that all of Petitioner's objections are without merit.

First, Petitioner argues that the admission of expert testimony regarding CSAAS violated his due process rights because such evidence (1) improperly supplanted the jury's decision on whether the victim's testimony was credible and (2) has not received general acceptance in the scientific community. Id. at 11-12. The Court addresses each of these arguments in turn.

With respect to Petitioner's claim that the CSAAS testimony supplanted the jury's decision on whether the victim's testimony was credible, the Court, like the Magistrate Judge, finds that "the court of appeal reasonably rejected Petitioner's assertion that [the expert's] testimony improperly bolstered [the victim's] testimony and was likely used improperly by the jury as evidence that [she] was abused because her behavior was consistent with that abuse." Report at 23. The Ninth Circuit has held that CSAAS testimony is admissible when it addresses "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). Here, the CSAAS testimony was relevant because Petitioner suggested that the victim's behavior indicated that she was lying about being abused, and the jury could infer from the CSAAS testimony that her behavior did not mean that she was lying.

Report at 24. The jury was instructed that the testimony was offered for the limited purpose of deciding whether the victim's conduct was inconsistent with the conduct of someone who had been abused. Id. at 23. And the expert testified that she did not have personal knowledge regarding the details of this case or whether the victim was telling the truth. Id. at 24.

Because the expert's "testimony discussed the circumstances in which child sexual abuse victim's reactions may not be inconsistent with abuse but left the question of whether [the victim] was abused for the jury to decide," Petition at 71, it "assisted the trier of fact in understanding the evidence; it did not improperly bolster the particular testimony of the child victim." United States v. Antone, 981 F.2d 1059, 1062 (9th Cir. 1992). Accordingly, the Court finds that the court of appeal reasonably determined the CSAAS evidence was admissible.

With respect to Petitioner's claim that the admission of CSAAS testimony violated his due process rights because CSAAS evidence has not received general acceptance in the scientific community, the Court finds that the admission of the CSAAS testimony was not objectively unreasonable. Petitioner asserts that CSAAS testimony is subject to the Kelly-Frye rule for admissibility of scientific evidence and is inadmissible under the rule because CSAAS "has not gained general acceptance in the scientific community." Report at 19. Contrary to Petitioner's argument, California courts have consistently held that the Kelly-Frye rule does not apply to CSAAS evidence admitted to rehabilitate a victim's credibility through discussion of victim behavior generally. See People v. Gray, 187 Cal. App. 3d 213, 217-20 (1986); People v. Harlan, 222 Cal. App. 3d 429, 448-49 (1990). Because the CSAAS testimony was not offered to prove the fact of abuse but, rather, to rehabilitate the victim's credibility, it was not subject to the Kelly-Frye rule. See People v. Munch, 52 Cal. App. 5th 464, 472-73 (2020) (finding that CSAAS testimony was not subject to Kelly-Frye where it "was not

being used as scientific proof that a child had, in fact, been abused."). Therefore, the court of appeal's rejection of Petitioner's Kelly-Frye claim was not objectively unreasonable.

Petitioner's second ground for objection to the Report is that the trial court violated the Ex Post Facto Clause of the U.S. Constitution by providing a jury instruction based on the current version of Cal. Penal Code § 288.2, rather than the version in effect at the time Petitioner allegedly committed the crime, and, in doing so, violated Petitioner's due process rights because the current version of the statute is broader than the former version. Report at 26.

The Court, like the Magistrate Judge, finds that any error the trial court made in instructing the jury on Cal. Penal Code § 288.2 was harmless and therefore is not a ground for habeas relief. See Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (holding that "harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type"). The version of the statute that was in effect at the time that Petitioner allegedly violated it required one to act "with the intent or for the purpose of seducing a minor." Cal. Penal Code § 288.2 (2012), amended by § 288.2 (Stats., 2013 ch. 77 § 2). The court of appeal determined that the evidence established that Petitioner "was grooming [the victim] with the intention of enticing her to engage in sexual intercourse and other sexual acts with him and showing her pornography was part of that process." Report at 35. Accordingly, the evidence was sufficient to show that Petitioner seduced the victim, as required by the version of the statute in effect when the acts allegedly occurred. Id. The Court finds that the court of appeal's interpretation of the evidence was not objectively unreasonable because the evidence suggested that Petitioner made comments to the victim indicating that he desired to have sexual intercourse with her, including while showing her pornography, and engaged in sexual acts with the victim. Id. Thus, the court of

appeal reasonably determined that the trial court's instructional error was harmless, and the Court concludes that the error did not violate Petitioner's constitutional rights.

Having completed its review, the Court accepts the findings and recommendations set forth in the Report. In accordance with the foregoing, the Court **DENIES** the Petition, and concludes that Judgment should be entered **DISMISSING** this action **WITH PREJUDICE.**

Dated: August 17, 2022

Christina A. Snyder

CHRISTINA A. SNYDER
United States District Judge

Jose Manuel Galan CDCBF3487
Valley State Prison
P.O. Box 96
Chowchilla, CA 93610

MIME-Version:1.0 From:cacd_ecfmail@cacd.uscourts.gov To:noreply@ao.uscourts.gov Message-Id:<34430527@cacd.uscourts.gov>Subject:Activity in Case 8:21-cv-02019-CAS-JDE Jose Manuel Galan v. Kathleen Allison R&R - Accepting Report and Recommendations Content-Type: text/html

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** There is no charge for viewing opinions.**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing
The following transaction was entered on 8/18/2022 at 9:10 AM PDT and filed on 8/17/2022

Case Name:	Jose Manuel Galan v. Kathleen Allison
Case Number:	8:21-cv-02019-CAS-JDE
Filer:	
Document Number:	24

Docket Text:
ORDER ACCEPTING REPORT AND RECOMMENDATIONS by Judge Christina A. Snyder for Report and Recommendation [17]. The Court DENIES the Petition, and concludes that Judgment should be entered DISMISSING this action WITH PREJUDICE. (see document for further details) (hr)

8:21-cv-02019-CAS-JDE Notice has been electronically mailed to:
Lise S Jacobson angel.breault@doj.ca.gov, walter.hernandez@doj.ca.gov, docketingsdawt@doj.ca.gov, lise.jacobson@doj.ca.gov, daniel.rogers@doj.ca.gov, lindsey.leon@doj.ca.gov
8:21-cv-02019-CAS-JDE Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :
Jose Manuel Galan
CDC BF3487
Valley State Prison
P.O. Box 96
Chowchilla CA 93610

APPENDIX-C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JOSE MANUEL GALAN, Petitioner, v. KATHLEEN ALLISON, Respondent.	No. 8:21-cv-02019-CAS-JDE REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Christina A. Snyder, 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 December 6, 2021, Jose Manuel Galan ("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 February 25, 2022, Respondent filed an Answer to the Petition. Dkt. 8. Petitioner filed a Reply on April 11, 2022. Dkt. 14, 15. The matter is now ready for decision.

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

II.

PROCEDURAL HISTORY

On December 3, 2015, Petitioner's first trial on charges of distributing pornography to a minor, attempting a lewd act upon a child under 14, committing a lewd act upon a child under 14, sexual penetration or oral copulation of a child 10 or younger, and using a minor for distribution of obscene matter resulted in a mistrial. 1 Clerk's Transcript on Appeal ("CT") 208-211, 263; 1 Reporter's Transcript on Appeal ("RT") 4, 9. Upon retrial, on November 9, 2017, an Orange County Superior Court jury found Petitioner guilty of attempted lewd act upon a child under 14, two counts of committing a lewd act upon a child under 14, simple battery, attempted sexual penetration of a child 10 or younger, exhibiting pornography to a minor, and oral copulation of a child 10 or younger. 2 CT 400-11; 6 RT 1980-85, 1996. On January 12, 2018, the trial court sentenced Petitioner to 29 years, 8 months to life in state prison. 2 CT 450-53; 6 RT 1998-99.

Petitioner appealed his conviction and sentence to the California Court of Appeal. 2 CT 454. On June 15, 2020, the court of appeal affirmed the judgment in all respects except that Petitioner did not need to pay a $75 administrative fee in connection with the collection of a DNA sample ordered by the trial court. Pet. at 60-82 (CM/ECF pagination). A Petition for Review by the California Supreme Court was denied on September 9, 2020. Id. at 85.

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

The underlying facts are taken from the California Court of Appeal's opinion. Petitioner does not contest the appellate court's summary of the facts and has not attempted to overcome the presumption of correctness accorded to

it. See Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008) (explaining that state court's factual findings are presumed correct unless petitioner "rebuts that presumption with clear and convincing evidence").

A. The Prosecution Case

For several months, [Petitioner] rented a room in the house where Jane Doe lived with her mother. Even after he moved out, [Petitioner] remained a close friend of the family and visited nearly every day.

When Jane was seven or eight years old, [Petitioner] began telling her that he loved her and called her "my love." He also made remarks about them having children together. He would blow Jane kisses, and using a code he developed, he would communicate that he loved her by blinking his eyes a certain number of times. [Petitioner] told Jane he could buy her many things if she fell in love with him. When Jane was eight years old, [Petitioner] hugged her a couple of times in a way that made her feel uncomfortable. One time in the supermarket, [Petitioner] hugged her so tight that it hurt.

[Petitioner] had an iPod Touch that he let Jane use. He also gave her an iPod Touch for her ninth or tenth birthday. They would communicate through the notes application on [Petitioner's] iPod by writing notes to each other in Spanish. At trial, Jane identified several partial notes recovered from [Petitioner's] iPod as messages she wrote to [Petitioner] and one note from [Petitioner] to her, telling her that he loved her.

Jane also used [Petitioner's] iPod to record videos of herself dancing naked. Four videos of Jane, shot sequentially, were found on [Petitioner's] iPod. Jane initially reported in her Child Abuse

Service Team (CAST) interview that [Petitioner] threatened to harm her if she did not make the videos, but at trial, she testified [Petitioner] bribed her with cookies and food to get her to take naked pictures and videos.

Some of Jane's family members noticed concerning behavior by [Petitioner] toward Jane. Jane's cousin C.C. saw Jane sitting on [Petitioner's] lap and [Petitioner] kiss her on the cheek. Jane's nephew A.V., who was three years older than her, once found [Petitioner] and Jane alone in the garage. When he came into the garage, they appeared "super nervous." The incident was so odd that A.V. told his mother, Jane's sister, about it.

Beginning when Jane was in the third grade and continuing through the fifth grade, there were multiple incidents during which [Petitioner] touched or tried to touch Jane in a sexual manner. [footnote omitted]. Jane did not tell her mother about these incidents when they occurred because [Petitioner] threatened to harm her and her family if she told anyone and she was scared.

When Jane was in the fourth grade, [Petitioner] tried to kiss her. (Count 2.) In a separate incident, Jane was sitting on the couch in the living room while her mother took a shower. [Petitioner] covered Jane's mouth with one hand and tried to touch her "downstairs area" over her clothes with his other hand. (Count 4.) He was interrupted and fell backwards when Jane's mother came out of the bathroom.

One day Jane was raking leaves in the backyard when [Petitioner] offered to help. Jane went inside the house while [Petitioner] continued raking. Once he finished, he told her to come back outside. She went out to see if [Petitioner] had swept

behind a mattress that a tenant had left against a wall. [Petitioner] grabbed her, put his hand over her mouth, and tried to touch her breast. (Count 3.) Jane kicked him and ran back into the house where her mother was. Jane's mother asked why she was running, but Jane did not tell her mother what had happened.

Another incident occurred while Jane was in the fourth grade. Jane was standing by the dining room table watching television while [Petitioner] washed the dishes. [Petitioner] walked up behind Jane and put his hand down the front of her pants. The first time his hand was on the outside of her underwear. (Count 5.) The second time, [Petitioner] put his hand inside her underwear and touched her vaginal area causing her pain and bleeding. (Count 6.)

Using his iPod, [Petitioner] showed Jane an adult video with a naked lady lying on a bed. (Count 7.) Jane, her cousin C.C., and her nephew A.V., found pornography in the search history of the iPod. They did not open the Web sites but looked at the titles, which included child pornography. They also found pornography on Jane's laptop when they were playing a game on the laptop, and hit the back button several times. [Petitioner] had been using the laptop just before them.

The last incident occurred when Jane was 10 years old and watching cartoons on the television in the garage. Tired and thinking she was alone in the garage, Jane began stretching by arching her back up and off the couch. [Petitioner] appeared suddenly, pulled down her shorts and underwear, and licked her vaginal area. (Count 8.) Jane kicked [Petitioner], pulled up her shorts, and went inside the house. Jane's mother sent her to her

room because her mother had friends over from work. Jane's mother did not see [Petitioner] arrive that day but saw him after Jane came in from the garage.

A few days later, Jane disclosed to her mother that [Petitioner] had been molesting her. Her disclosure came as her mother was talking to her about her falling grades at school and her impertinent behavior at school and home. Jane had been getting into trouble repeatedly because she would "sass" her mother and her mother's efforts at punishing her by taking away her laptop and iPod had been ineffective.

Jane's mother did not immediately call the police because she wanted to watch [Petitioner] and see what he was doing. She called the police about a month later, after seeing suspicious behavior by [Petitioner]. When Jane first spoke to the police, she only told them about a few incidents. She then wrote a list of all the things she could remember [Petitioner] had done and gave it to the interviewer during her CAST interview. The recording of her CAST interview was played for the jury.

B. [Petitioner's] Testimony

[Petitioner] testified in his own defense and denied all of Jane's accusations. When [Petitioner] told Jane's mother to punish Jane for misbehaving, Jane got mad and yelled at him. [Petitioner's] iPod previously belonged to his friend David Rodriguez. [Petitioner] would let Jane, C.C., and A.V. use his iPod, as well as Rodriguez. Rodriguez had pornography on the iPod but [Petitioner] did not show it to Jane. Nor did he show Jane pornography on her laptop. Jane showed him pornography on her laptop and on his iPod, while acting "happy and sexy" and

telling him that she wanted him to marry her mother so they could have a son. [Petitioner] told Jane's mother to check Jane's laptop but did not tell her why.

Jane showed [Petitioner] how to use the notes application on his iPod. [Petitioner] only used the application to make notes related to his work and did not use it to pass notes with Jane. One day when [Petitioner] was visiting, he left his iPod on the charger while he stepped outside. Shortly after he came back inside, Jane came out of the bathroom with his iPod and showed him three or four videos she had filmed on his iPod of herself naked. [Petitioner] took the iPod from Jane and tried to erase the videos but was unable to because it was locked.

Pet. at 62-66 (footnote omitted).

IV.

PETITIONER'S CLAIMS HEREIN

In the Petition, Petitioner raises the following grounds for relief (Pet. at 5-6, 24):

1. The admission of evidence of child sexual abuse accommodation syndrome ("CSAAS") violated Petitioner's due process rights; and

2. The trial court erroneously provided jury instructions on the current version of Cal. Pen. Code § 288.2 in violation of the Ex Post Facto Clause.

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); see also Shinn v. Martinez Ramirez, 596 U.S. – , – (2022) (slip opinion) (finding a writ of habeas corpus may issue only on the ground that the prisoner is in custody in violation of the Constitution or laws or treaties of the United States). 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 if it 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).

A federal court shall not grant habeas relief as to a claim that has been adjudicated on the merits in state court "'unless' the state court's decision was

(1) 'contrary to' or an 'unreasonable application of' clearly established federal law, as determined by decisions of [the Supreme] Court, or (2) based on an 'unreasonable determination of the facts' presented in the state court proceeding." Brown v. Davenport, 596 U.S. –, 142 S. Ct. 1510, 1520 (2022) (slip opinion) (quoting 28 U.S.C. § 2254(d) (emphasis added)). An "unreasonable application" of Supreme Court law must be "objectively unreasonable, not merely wrong; even clear error will not suffice." White v. Woodall, 572 U.S. 415, 419 (2014) (internal quotation marks and citation omitted). "To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Metrish v. Lancaster, 569 U.S. 351, 358 (2013) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)). Moreover, as the Supreme Court held in Cullen v. Pinholster, 563 U.S. 170, 181, 185 n.7 (2011), review of state court decisions under § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits.

Here, Petitioner raised both 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 June 15, 2020. Pet. at 60-82. Thereafter, the California Supreme Court denied Petitioner's Petition for Review without comment or citation to authority. Id. at 85. In such circumstances, the Court will "look through" the unexplained California Supreme Court decision to the last reasoned decision as the basis for the state court's judgment, in this case, the court of appeal's decision. See Wilson v. Sellers, 584 U.S. –, 138 S. Ct. 1188, 1192 (2018) ("[T]he federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning."); Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991). In

reviewing the state court decision, the Court has independently reviewed the relevant portions of the record. Nasby v. McDaniel, 853 F.3d 1049, 1052-53 (9th Cir. 2017).

VI.

DISCUSSION

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

In Ground One, Petitioner contends that the admission of expert testimony regarding CSAAS violated his due process rights because such evidence (1) improperly bolstered the testimony of the complaining child and was likely used improperly by the jury as evidence that a child was abused because the child's behavior is consistent with abuse, and (2) has not received general acceptance in the scientific community. As to Petitioner's first argument, Petitioner contends CSAAS testimony improperly encourages the jury to believe that abused children may exhibit a wide range of behaviors as being consistent with abuse, thus undermining the Petitioner's ability to discredit the inconsistencies in the accusing child's testimony. Pet. at 31-34. Petitioner further claims "[i]t is nearly impossible for the jury to consider CSAAS for a limited purpose of determining a child's behavior is not inconsistent with abuse while not improperly using it to conclude the child's behavior is consistent with abuse and therefore abuse was likely to have occurred." Id. at 36. As to Petitioner's second argument, Petitioner asserts the trial court violated his due process rights by admitting CSAAS evidence when such evidence has not gained general acceptance in the scientific community as required under the Kelley-Frye[1] rule. Id. at 40-44.

---

[1] 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

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." Jody Ward, Ph.D., a clinical and forensic psychologist with a doctorate in clinical psychology, testified for the prosecution regarding how child and adolescent victims respond to sexual abuse as well as CSAAS, which is a model that helps to explain how children who are sexually abused within an ongoing relationship might behave and why they may not behave consistent with beliefs and biases adults may have regarding how victims should behave. 5 RT 1610-11, 1619-24. The syndrome explains why children who are abused within an ongoing relationship, like by a family member or close family friend, often do not report the abuse right away as one would expect. 5 RT 1623-24.

Dr. Ward testified that there are five components to CSAAS: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, unconvincing disclosure; and (5) retraction or recantation. 5 RT 1624. She stated that while the first two components, secrecy and helplessness, are apparent in all cases of sexual abuse, the other three components may or may not be present depending on the circumstances. 5 RT 1624-25. As to the secrecy component, Dr. Ward testified that the abuser may provide a "gentle reminder" to the child to keep the abuse secret, or the child may know to keep the abuse secret for "many years" "[j]ust by virtue of the fact that it occurs in secret, and because there is something that feels bad or wrong or shameful about the sexual activity . . . ." 5 RT 1625. Dr. Ward then testified that helplessness is also apparent in every sexual assault case involving children "because of the power

---

(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).

differential that is . . . inherent between children and adults," and because "children are completely reliant upon the adults around them for everything . . . ." 5 RT 1626.

As to the entrapment and accommodation component, Dr. Ward testified that due to the secrecy and helplessness apparent in all cases of child sexual abuse, "the perpetrator of sexual abuse can go back to that child for more and more sexual abuse over a period of time." 5 RT 1628. She explained that because the child does not "have the avenues at [his or her] disposal to get out of that situation," the child becomes "entrapped" and must "learn to accommodate [the abuse] in some way." Id. Such a scenario could involve a child acquiescing and "go[ing] along with" the abuse, which "may look like from the outside the child is a willing participant" in the abuse. Id.

As to the delayed and unconvincing disclosure component, Dr. Ward stated that "when a child or even an adult makes a disclosure of sexual abuse, that disclosure can be tentative or hesitant. . . . [C]hildren may test the waters and see if an adult or someone is open to hearing a disclosure of sexual abuse. If that person picks up on the signals that the child is giving . . . [the child] will reveal more and more sexual abuse over a period of time." 5 RT 1631. Dr. Ward further opined that it is "completely common" for a victim of sexual abuse to disclose details of the abuse over time and give more complete details over time as the child becomes more comfortable sharing details of the abuse. 5 RT 1632. Thus, Dr. Ward stated that the details of a child's experience of sexual abuse do not "come out all at once" during the child's very first disclosure. 5 RT 1634. As to the retraction and recantation component, Dr. Ward testified that while this component occurs the least often of the five components, "it does occur on occasion." Id. Dr. Ward opined a child may recant stories of his or her abuse because "once a child has made a disclosure of sexual abuse, that child's life is completely turned upside down," and these

internal and external pressures "may come to bear on the child and the child may recant the allegation" of abuse. 5 RT 1635.

Dr. Ward further opined that "children respond to sexual abuse in as many different ways as there are children," and thus CSAAS "is helpful in understanding the dynamics that are going on, why children react the way that they do, rather than trying to identify the particular behaviors that children exhibit." 5 RT 1636. Dr. Ward testified that a child may claim he or she was physically threatened to participate in the abuse when in fact the perpetrator did not make any physical threats to the child because the child may feel shame about the abuse and cannot otherwise explain why he or she did not report the abuse. 5 RT 1637-38. Dr. Ward also testified that a common coping strategy for children who are sexually abused within an ongoing relationship is to actively forget the sexual abuse, which in turn interferes with the child's ability to remember and recount the abuse. 5 RT 1643.

2. The California Court of Appeal Opinion

The California Court of Appeal rejected both of Petitioner's challenges to the CSAAS evidence. The court first determined that the CSAAS evidence was relevant for the following reasons.

> [Petitioner] contends the CSAAS testimony was irrelevant and should have been excluded because the prosecutor failed to show that it contradicted "any common misconceptions about child behavior in response to abuse." We conclude the court did not abuse its "wide discretion" in finding the CSAAS testimony relevant and admissible. (See People v. McAlpin (1991) 53 Cal. 3d 1289, 1303 ["'the trial court is vested with wide discretion in determining relevance' under the Evidence Code"].)
>
> Expert testimony on CSAAS "is not admissible to prove that the complaining witness has in fact been sexually abused." (People

v. McAlpin, supra, 53 Cal. 3d at p. 1300.) But "it is admissible to rehabilitate such witness's credibility when the [Petitioner] suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation." (Ibid.) "'Such expert 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.'" (Id. at p. 1301 [discussing CSAAS testimony when addressing the admissibility of expert testimony on the behavior of parents of sexually abused children].) In a number of cases, expert testimony on CSAAS has been upheld as admissible when offered for the limited purpose of rehabilitating a child victim's credibility, dispelling common misconceptions regarding the behavior of abuse victims, and/or showing the child's conduct was not inconsistent with sexual abuse. (People v. Perez (2010) 182 Cal. App. 4th 231, 245; In re S.C. (2006) 138 Cal. App. 4th 396, 418; People v. Patino (1994) 26 Cal. App. 4th 1737, 1744-1745; People v. Housley (1992) 6 Cal. App. 4th 947, 955-956; People v. Gray (1986) 187 Cal. App. 3d 213, 217-220.)

While CSAAS "evidence must be tailored to address the specific myth or misconception suggested by the evidence" (People v. Wells (2004) 118 Cal. App. 4th 179, 188), the prosecution is not required "to expressly state on the record the evidence which is inconsistent with the finding of molestation." (People v. Patino, supra, 26 Cal. App. 4th at p. 1744.) "It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation." (Id. at pp. 1744-

1745.) CSAAS testimony may be admitted in the prosecution's case-in-chief when the victim's testimony raises an "obvious question . . . in the minds of the jurors," such as "why the molestation was not immediately reported if it had really occurred" or "why [the victim] went back to [the Petitioner's] home a second time after the first molestation." (Id. at p. 1745.) Thus, CSAAS evidence "is pertinent and admissible if an issue has been raised as to the victim's credibility." (Ibid.)

Here, the court did not abuse its discretion by admitting Dr. Ward's expert testimony regarding CSAAS. The court correctly waited until after Jane's testimony to determine if the CSAAS evidence was relevant to the issue of Jane's credibility. The court then made a reasoned judgment that its relevance was based on the defense's questioning of Jane, specifically her delayed reporting. During cross-examination, the defense repeatedly highlighted Jane's failure to tell her mother about [Petitioner's] misconduct that spanned over two school years. The defense also attacked Jane's credibility by questioning her as to why she continued to be alone with [Petitioner] after the abuse began. The defense used this evidence to argue that Jane's claims of sexual abuse were fabricated. Through cross-examination and argument, the defense asserted that Jane's delayed disclosure and her behavior around [Petitioner] after the alleged abuse began were inconsistent with her claims of sexual abuse.

Jane's behavior of not immediately reporting the abuse to her mother and not avoiding [Petitioner] after the abuse began would have raised questions in the jurors' minds as to the veracity of her claims of abuse. Dr. Ward's expert testimony concerning

> CSAAS was relevant to dispel misconceptions the jurors might have held as to how child sex abuse victims behave as it countered misconceptions that a child subjected to sexual abuse by a close family friend would consistently avoid the abuser and immediately report the abuse. As the issues of delayed disclosure and accommodation were prominent in the defense's cross-examination of Jane, expert testimony concerning CSAAS had the potential to rehabilitate Jane's credibility.

Pet. at 68-72. The state appellate court also rejected Petitioner's contention that the CSAAS testimony was not relevant because it would mislead the jury and because it was "common knowledge" that children do not report abuse.

> Contrary to [Petitioner's] assertion, Dr. Ward's testimony on CSAAS did not undercut the jury's "critical function" of evaluating Jane's credibility. It remained solely within the jury's province to consider issues of witness credibility (CALCRIM No. 226) and evaluate Jane's and [Petitioner's] conflicting testimony (CALCRIM No. 302) in determining whether [Petitioner] committed the charged offenses. Dr. Ward did not opine as to whether Jane was credible. In her testimony, Dr. Ward explained she was not expressing an opinion as to whether [Petitioner] was guilty or innocent and was not diagnosing anyone. She clearly explained that CSAAS could not be used to determine whether or not a child is telling the truth. The jurors would not have viewed Dr. Ward's testimony as supplanting their job of determining whether Jane was credible regarding the various allegations of abuse. Dr. Ward's testimony discussed the circumstances in which a child sexual abuse victim's reactions may not be inconsistent with abuse but left the question of whether Jane was abused for the jury to decide.

[Petitioner] asserts the testimony should have been excluded as irrelevant because it is now "common knowledge that children do not report [abuse] immediately." We disagree that delayed reporting by a child sexual abuse victim is a matter of "common knowledge." Nevertheless, "'the admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission." (People v. McAlpin, supra, 53 Cal. 3d at p. 1299.) Expert testimony is admissible "'whenever it would "assist" the jury.'" (Id. at p. 1300.) Here, Dr. Ward's expert testimony on CSAAS was admissible as it aided the jury in assessing Jane's credibility. (Evid. Code, § 801, subd. (a).)

Moreover, the court instructed with CALCRIM No. 1193, admonishing the jury concerning its consideration of the CSAAS testimony. (See People v. Patino, supra, 26 Cal. App. 4th at p. 1745 [court "handled the matter carefully and correctly" by giving similar admonishment immediately after CSAAS testimony].) It instructed the jurors that the "testimony about child sexual abuse accommodation syndrome is not evidence that the [Petitioner] committed any of the crimes charged against him" and that they "may consider this evidence only in deciding whether or not [Jane's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony." The jury is presumed to have followed this instruction. (People v. Avila (2006) 38 Cal. 4th 491, 574.)

[Petitioner] contends otherwise, asserting the jury would not have been able to perform the "level of mental gymnastics" required to consider the CSAAS testimony "to refute behavior as

inconsistent with sexual abuse without simultaneously considering it as circumstantial evidence that sexual abuse actually occurred." In support of this assertion, [Petitioner] cites portions of the prosecutor's closing and rebuttal arguments where she compared Jane's behavior to Dr. Ward's testimony on CSAAS. [Petitioner] contends the prosecutor had difficulty in her closing argument in limiting the use of the CSAAS evidence to its permissible purpose and argues if the prosecutor was unable to do so then it would have been impossible for the jurors to follow the limiting instruction. We disagree. In her closing argument, the prosecutor began her discussion of the CSAAS evidence by properly telling the jurors the limited purpose of this evidence, even repeating the words of CALCRIM No. 1193. The prosecutor used the CSAAS evidence to address issues with Jane's credibility—her delayed and limited initial disclosure, her inability to recall details of the abuse, and appearing comfortable with [Petitioner] after the abuse began. At the end of her closing argument, the prosecutor urged the jurors to consider Dr. Ward's testimony on CSAAS only for its intended purpose. Moreover, to the extent the prosecutor's comments on the use of Dr. Ward's CSAAS testimony were inconsistent with CALCRIM No. 1193, the jury was instructed to follow the court's instruction. (CALCRIM No. 200.) We conclude the court did not abuse its discretion by admitting the expert testimony on CSAAS.

Having concluded the court made a reasoned judgment that the CSAAS expert testimony was relevant and admissible, we find no violation of [Petitioner's] constitutional right to due process. (See People v. Patino, supra, 26 Cal. App. 4th at p. 1747 ["introduction of CSAAS testimony does not by itself deny

appellant due process"]; see Estelle v. McGuire (1991) 502 U.S. 62, 70 [admission of relevant evidence of battered child syndrome did not violate the [Petitioner's] due process rights].)

Pet. at 70-72.

Second, the court determined that Petitioner had forfeited his contention that the expert testimony on CSAAS should have been excluded under Kelly-Frye, and further found that regardless of forfeiture, the evidence was not subject to the Kelly-Frye test.

> [Petitioner] next asserts the CSAAS expert testimony should have been excluded because it does not meet the Kelly formulation for admissibility of scientific evidence. Under Kelly, "evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test. The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community." (People v. Bolden (2002) 29 Cal. 4th 515, 544.) Focusing on this first prong, [Petitioner] contends the CSAAS evidence should have been excluded "because it has not gained general acceptance in the scientific community."
>
> [Petitioner], however, failed to present this argument in the trial court. Below, [Petitioner] neither objected on the ground that the CSAAS evidence was inadmissible under Kelly nor did he request a hearing on the issue. Nevertheless, [Petitioner] contends the issue is preserved for review and is a "purely legal" question subject to our independent review. We disagree. Whether a scientific theory is generally accepted in the scientific community is a mixed question of law and fact and an appellate court reviews ""'the trial court's determination with deference to any and all

supportable findings of 'historical' fact or credibility, and then decide[s] as a matter of law, based on those assumptions, whether there has been general acceptance.'"" (People v. Stevey (2012) 209 Cal. App. 4th 1400, 1410.) Here, there are no factual findings before us to consider and determine whether CSAAS is generally accepted in the scientific community because the issue was not raised below.

[Petitioner] acknowledges a number of California Court of Appeal decisions have upheld the admissibility of CSAAS testimony, as he cites People v. Bowker (1988) 203 Cal. App. 3d 385, People v. Housley, supra, 6 Cal. App. 4th 947, and People v. Wells, supra, 118 Cal. App. 4th 179. But he contends these cases were wrongly decided and advocates for a change in the law. Citing three professional publications, [Petitioner] asserts the "scientific validity" of CSAAS evidence "is subject to ongoing considerable debate amongst psychology publications." We have no reason to doubt [Petitioner], but to the extent there is a "considerable debate" concerning the "scientific validity" of CSAAS evidence, the matter needed to be raised in the trial court where evidence of this debate could be presented.

[Petitioner] also cites cases in other states that have excluded CSAAS testimony. [footnote omitted]. He relies heavily on State v. J.L.G., supra, 190 A.3d 442, a case in which the New Jersey Supreme Court considered the admissibility of CSAAS testimony. There, the New Jersey Supreme Court had "remanded to the trial court for a hearing 'to determine whether CSAAS evidence meets the reliability standard of [the New Jersey Rules of Evidence] 702, in light of recent scientific evidence.'" (Id. at p. 449.) During the

remand hearing, four experts testified and submitted reports and "multiple published scientific articles" were introduced among dozens of exhibits. (Ibid.) The New Jersey Supreme Court relied "heavily on the record developed at the hearing" to conclude that there is "continued scientific support for only" the delayed disclosure aspect of CSAAS. (Id. at p. 446.) The court held expert testimony concerning CSAAS was admissible only as to delayed disclosure behaviors and only if the evidence was "beyond the understanding of the average juror." (Ibid.)

There is a stark difference between the situation in State v. J.L.G., supra, 190 A.3d 442 and [Petitioner's] case. Here, we simply have no record to consider to determine whether CSAAS is generally accepted in the scientific community. Because the issue was not raised in the trial court, there was no hearing on the matter and the court made no factual findings for us to review. By failing to raise the issue below, [Petitioner] has forfeited his appellate claim. (Evid. Code, § 353, subd. (a); People v. Demetrulias (2006) 39 Cal. 4th 1, 20-21.)

Regardless, we conclude the Kelly rule does not apply to Dr. Ward's expert testimony on CSAAS. "'Court of Appeal decisions have held that Kelly-Frye . . . precludes an expert from testifying based on the child sexual abuse accommodation syndrome (CSAAS) that a particular victim's report of alleged abuse is credible because the victim manifests certain defined characteristics which are generally exhibited by abused children.'" (People v. Wells, supra, 118 Cal. App. 4th at p. 188.) But where the CSAAS evidence is admitted to rehabilitate a victim's credibility through a discussion of victim behavior as a class and

does not diagnosis or discuss the victim in that case, cases have held CSAAS is not subject to the requirements of the Kelly rule. (People v. Gray, supra, 187 Cal. App. 3d at pp. 217-220; People v. Harlan (1990) 222 Cal. App. 3d 439, 448-449.) In [Petitioner's] case, Dr. Ward's expert testimony on CSAAS did not constitute a new scientific method of proof which purported to provide any "definitive truth" regarding whether Jane had been molested (People v. Stoll (1989) 49 Cal. 3d 1136, 1156) and therefore was not subject to the Kelly rule. (See People v. Jones (2013) 57 Cal.4th 899, 953 ["'absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to Kelly'"].) Accordingly, the court properly admitted the testimony on CSAAS.

Pet. at 72-75 (footnote omitted).

3. Analysis

Federal habeas relief does not lie for errors of state law. Estelle v. McGuire, 502 U.S. 62, 67 (1991). "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). Accordingly, 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.").

Here, the court of appeal reasonably rejected Petitioner's assertion that Dr. Ward's testimony improperly bolstered Jane's testimony and was likely used improperly by the jury as evidence that Jane was abused because her behavior was consistent with abuse. The Ninth Circuit has held 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 trial court instructed the jury that the CSAAS evidence was "not evidence that the [Petitioner] committed any of the crimes charged against him," but rather, may be considered "only in deciding whether or not [Jane's] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony." 6 RT 1963. The court of appeal's finding that the CSAAS evidence was relevant and permissible for that purpose was thus not objectively unreasonable. See Boyde

v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005) ("Admission of evidence violates due process '[o]nly if there are no permissible inferences the jury may draw' from it." (quoting Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991))); Patino, 26 Cal. App. 4th at 1744-45.

Here, Jane testified that Petitioner abused her several times from ages 7 to 10, beginning when Petitioner told her he wanted to start a family with her at age 7 and continuing until Petitioner pulled down her pants and orally copulated her at age 10. 2 RT 443, 460, 576-87. Jane testified that Petitioner repeatedly threatened to harm her if she did not keep the abuse secret, and accordingly she did not tell her mother or the police about her abuse for years. 2 RT 452-57, 607. She testified she finally told her mom "everything" about the abuse a few days after Petitioner had licked her genitals. 2 RT 589. As the court of appeal observed, Petitioner's defense centered on Jane's delayed reporting and credibility. During cross-examination, Petitioner's counsel sought to discredit Jane's testimony of abuse by noting inconsistencies in her testimony and having her admit that she had lied to her mother before. 2 RT 700-02, 723; 3 RT 828, 841-44, 868. Petitioner's counsel also attacked Jane's credibility by questioning why she continued to spend time with Petitioner even after the abuse began. 3 RT 869-72; 4 RT 1025-27. Petitioner testified in his own defense, denying that he had sexually abused Jane. 5 RT 1670-74. In closing argument, defense counsel attempted to portray Jane as a liar who fabricated stories of abuse. 6 RT 1881, 1883, 1893.

Accordingly, as the court of appeal found, because Petitioner highlighted Jane's ongoing relationship with Petitioner and delayed disclosure in his defense, the CSAAS evidence was relevant. Dr. Ward testified that she did not have personal knowledge regarding the allegations of this case and did not know whether Jane was telling the truth. 5 RT 1615-16. Dr. Ward's testimony was offered for a limited purpose from which the jury could permissibly infer

that Jane's delayed disclosure and accommodation 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 for the limited purpose of "disabusing a jury of misconceptions it might hold about how a child reacts to a molestation"). The court of appeal thus reasonably determined the CSAAS evidence was admissible because "Dr. Ward's testimony discussed the circumstances in which child sexual abuse victim's reactions may not be inconsistent with abuse but left the question of whether Jane was abused for the jury to decide." Pet. at 71. As such, the court of appeal's finding that Dr. Ward's testimony did not violate Petitioner's due process rights was not objectively unreasonable. See People v. Lapenias, 67 Cal. App. 5th 162, 171, 174 (2021) (as modified) ("While CSAAS evidence is not relevant to prove the alleged sexual abuse occurred, 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 v. Frauenheim, 823 F. App'x 503, 505-06 (9th Cir. 2020) (finding that admission of CSAAS evidence did not violate the petitioner's due process rights); Mendez v. Paramo, 2019 WL 8643747, at *6 (C.D. Cal. Dec. 31, 2019) (same), report and recommendation adopted, 2020 WL 2113674 (C.D. Cal. May 4, 2020); Dutton v. Davis, 2016 WL 3418365, at *11 (E.D. Cal. June 21, 2016) (finding that the admission of CSAAS testimony did not violate petitioner's due process rights because the evidence was not unreliable and it was relevant to evaluate the credibility of the victim's testimony given that she had delayed in reporting the abuse).

Further, to the extent Petitioner argues his due process rights were violated because the CSAAS evidence was inadmissible under Kelly-Frye, the Court rejects this claim because Kelly-Frye does not preclude the use of

CSAAS evidence when, as here, it is offered to rehabilitate the victim's credibility after efforts by the defense to undermine it rather than to prove the fact of abuse. See People v. Munch, 52 Cal. App. 5th 464, 472-73 (2020); People v. Gray, 187 Cal. App. 3d 213, 218-20 (1986); Lapenias, 67 Cal. App. 5th at 173 (finding that expert testimony on CSAAS is not "scientific evidence" subject to the Kelly rule); see also Caldeira v. Jada, 2013 WL 6284048, at *6-7 (C.D. Cal. Dec. 4, 2013) (finding petitioner's claim that the admission of CSAAS evidence violated the Kelly-Frye rule not cognizable on habeas review because Kelly is a state law case and Frye was not decided on constitutional grounds); cf. Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996) (as modified) (finding that a petitioner may not "transform a state-law issue into a federal one merely by asserting a violation of due process"). The court of appeal's rejection of this claim was thus not objectively unreasonable.

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

B. Petitioner is Not Entitled to Habeas Relief on His Ex Post Facto Violation Claim

In Ground Two, Petitioner asserts the trial court violated the Ex Post Facto Clause of the U.S. Constitution by providing a jury instruction on count 7 based on the current version of Cal. Penal Code § 288.2 rather than the version in effect at the time the acts occurred. Pet. at 45. Petitioner further contends that because the current version of the statute is broader than the version in effect in 2012, the instructional error violated Petitioner's due process rights. Id. at 46.

/ / /

1. Relevant Factual Background

In count 7, the state charged Petitioner with knowingly and unlawfully distributing pornography to a minor in violation of Cal. Penal Code § 288.2 for events that occurred on or about and between August 7, 2012 and December 10, 2012. 1 CT 210. The Court instructed the jury on count 7 as follows (6 RT 1957):

> To prove the [Petitioner] is guilty of [violating § 288.2], the People must prove that:
>
> One, the [Petitioner] exhibited or offered to exhibit, or distributed harmful material to another person by any means;
>
> Two, when the [Petitioner] acted, he knew the character of the material;
>
> Three, when the [Petitioner] acted, he knew or should have known, or believed that the other person was a minor;
>
> Four, when the [Petitioner] acted, he intended to arouse, appeal to, or gratify the lust, passions or sexual desires of himself or the other person;
>
> And five, when the [Petitioner] acted he intended to engage in sexual intercourse, sodomy, oral copulation with the other person, or to have . . . either person touch an intimate body part of the other person.

These instructions reflect language present in the current version of § 288.2, which became effective on January 1, 2014. See Cal. Penal Code § 288.2. However, the version of the statute effective between June 27, 2012 to December 31, 2013 employs different language. The prior version of the statute states (emphasis added):

> Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of

> a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, live or recorded telephone messages, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state prison or in a county jail.

Cal. Penal Code § 288.2 (2012), amended by § 288.2 (Stats., 2013 ch. 77 § 2). Petitioner thus argues the trial court erred in instructing the jury on the current version of the statute rather than the version in place at the time the incidents relating to the charge occurred. Specifically, the current version of the statute replaced the phrase "intent or for the purpose of seducing a minor" with "the intent or for the purposes of engaging in sexual intercourse, sodomy, or oral copulation with the other person, or with the intent that either person touch an intimate body part of the other." Pet. at 49 (citing Cal. Penal Code § 288.2(a)(1) and Former § 288.2; Stats., 2012, ch. 43 § 16). Petitioner contends the current statute covers more conduct than the version in effect at the time of the alleged crime because the term "seduced" as used in the prior version of the statute has the narrow meaning of "persuading into partnership in sexual intercourse" whereas the current version of the statute enumerates specific conduct that may not qualify as sexual intercourse. Pet. at 50, 52 (quoting People v. Hsu, 82 Cal. App. 4th 976, 992 (2000)). Further, Petitioner contends this instructional error was prejudicial because "[Jane] did not testify to any attempt to engage in intercourse," and thus the evidence presented at trial is not sufficient to demonstrate an intent to "seduce" as required by the version of the statute in effect at the time Jane's allegations occurred. Id. at 54-55.

/ / /

2. The California Court of Appeal Opinion

The court of appeal declined to discuss whether the trial court committed error by instructing the jury using the current version of § 288.2, but found that any error was nonetheless harmless.

First, the court of appeal surveyed the relevant caselaw to determine the definition of the term "seducing" as used in the former version of the statute.

> [Petitioner] contends that the current statutory language "covers more conduct than the version of the statute in effect at the time of [his] alleged crime." In support, he relies on People v. Hsu (2000) 82 Cal. App. 4th 976 (Hsu) and People v. Jensen (2003) 114 Cal. App. 4th 224 (Jensen), both of which discussed the requirement in former section 288.2, subdivision (a)(1), that the defendant intend to seduce a minor. Among the issues considered in Hsu was the defendant's contention that the term "'seducing'" in former section 288.2 was impermissibly vague. (Hsu, at p. 992.) The appellate court noted that "'seduce'" is defined as "'to lead astray'" or "'persuading into partnership in sexual intercourse.'" (Ibid.) The court concluded that in the context of section 288.2, "with its references to gratifying lust, passion, and sexual desire, people of ordinary intelligence [citation] would readily understand 'seducing' as used here to mean the latter . . . ." (Hsu, at p. 992.)
>
> In Jensen, "the intent or for the purpose of seducing a minor" element in former section 288.2 was examined, this time in the context of determining whether the intent to entice a male minor to masturbate himself satisfied the element. (Jensen, supra, 114 Cal. App. 4th at pp. 236-241.) Jensen agreed with Hsu that "the word 'seducing'" as used in former section 288.2 was intended to have the "meaning of 'carry[ing] out the physical

seduction of: entic[ing] to sexual intercourse.' [Citation.] And, in this context, 'sexual intercourse' clearly refers to 'intercourse involving genital contact between individuals' . . . ." (Jensen, at p. 239.) "Thus, the 'seducing' intent element of the offense requires that the perpetrator intend to entice the minor to engage in a sexual act involving physical contact between the perpetrator and the minor." (Id. at pp. 239-240.) The Jensen court concluded "[i]ntending to entice a male minor to masturbate himself does not satisfy this 'seducing' intent element . . . ." (Id. at p. 240.)

At the time of [Petitioner's] offense in 2012, CALCRIM No. 1140, the pattern instruction on the elements of section 288.2, subdivision (a), required the prosecution to prove, among other elements, that "[w]hen the defendant acted, (he/she) intended to seduce the minor . . . ." (Former CALCRIM No. 1140 (2013).) Adopting language from Jensen, former CALCRIM No. 1140, supra, explained that "[t]o seduce a minor means to entice the minor to engage in a sexual act involving physical contact between the seducer and the minor."

Here, however, the jury was instructed with the revised version of CALCRIM No. 1140, based on the current version of section 288.2, subdivision (a). [footnote omitted]. As to the intent element, the jury was instructed: "When the [Petitioner] acted, he intended to engage in sexual intercourse, sodomy, [or] oral copulation with the other person or to have either person touch an intimate body part of the other person."

[Petitioner] contends "'seducing' refers to sexual intercourse through genital contact," and therefore "the former version of section 288.2, subdivision (a) describes an intent more narrow than

the intent set forth in the current version of the statute and reflected in the jury instructions in this case." [Petitioner's] argument that "seducing" refers only to sexual intercourse is undermined by Jensen, supra, 114 Cal. App. 4th 224 and former CALCRIM No. 1140, supra, as they provided "'the seducing' intent element" (Jensen, at pp. 239-240), is satisfied if the perpetrator intends "to entice the minor to engage in a sexual act involving physical contact between the perpetrator and the minor." (Id. at p. 240; CALCRIM No. 1140, supra.) Thus, under former section 288.2, subdivision (a), a defendant could be convicted of violating the statute if the prosecution proved the defendant intended to entice the minor to engage in any various sexual acts involving physical contact between the minor and the perpetrator; the offense was not limited to only proof of intent to entice the minor to engage in sexual intercourse. (See People v. Nakai (2010) 183 Cal. App. 4th 499, 510 [evidence indicated the [Petitioner] intended to entice the victim to engage in either sexual intercourse or oral copulation].) Comparing the former and current versions of section 288.2, it seems the current version is simply more descriptive as it identifies the sexual acts that were encompassed within the term "seducing" in the former version. The current version of the statute requires a defendant intend to engage in "sexual intercourse, sodomy, or oral copulation with the other person" or intend for either him or the minor to "touch an intimate body part of the other" (§ 288.2, subd. (a)(1)), all of which qualify as "sexual act[s] involving physical contact between the perpetrator and the minor" under the former version. (Jensen, at p. 240; see id. at p. 239.)

More troubling, however, is [Petitioner's] second point that "the concept of seduction" of the minor was completely omitted from the current version of section 288.2 and the instruction given the jury. Former section 288.2, subdivision (a), required the [Petitioner] exhibit the pornography to the minor "with the intent or for the purpose of seducing [the] minor." As [Petitioner] notes, the instruction given the jury only required the prosecution prove [Petitioner] "intended to engage in sexual intercourse, sodomy, [or] oral copulation . . . ." (CALCRIM No. 1140) not that the [Petitioner] intended to entice or persuade the minor to participate in these sexual acts. [Petitioner] argues this omission makes the intent element of the former statute "substantively different from the intent" element in the instruction given the jury. The Attorney General does not directly address this issue but argues "all illegal intents under the current statute would have been prohibited under the former version of the statute." Arguably, the intent to entice or persuade a minor to engage in sexual acts with physical contact under former section 288.2, subdivision (a), is the same as the intent to engage in the listed sexual acts in the current statute. Under both versions of the statute, the defendant is punished for exhibiting pornography to a minor with the intention of engaging in sexual acts involving physical contact with a willing minor. We note "[t]he purpose of section 288.2 is to prohibit using obscene material, . . . 'to groom young victims for acts of molestation.'" (People v. Powell (2011) 194 Cal. App. 4th 1268, 1287.) Ultimately, we need not decide if the variations between the current and former statute and jury instructions were material because even assuming the instruction given to the jury improperly

described an element of the offense, any error was harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24; Jensen, supra, 114 Cal. App. 4th at p. 241.)

Pet. at 77-80 (footnote omitted).

Second, the appellate court determined regardless of which version of the statute the trial court used to instruct the jury, the verdict would not have changed because sufficient evidence showed Petitioner had a desire to have sexual intercourse with Jane.

> The evidence established [Petitioner] was grooming Jane with the intention of enticing her to engage in sexual intercourse and other sexual acts with him and showing her pornography was part of that process. His conduct began by telling Jane that he loved her and could buy her things if she fell in love with him. His behavior then progressed to attempting to kiss Jane, touching her intimate parts, and culminated in him orally copulating her in the garage. In her CAST interview, Jane stated that [Petitioner] showed her a pornographic video and told her that one day he would do that to her, then sticking out his tongue. [Petitioner] also made comments to Jane about them having children together, indicating his intent to entice her to engage in sexual intercourse with him. Considering all of [Petitioner's] actions, it is clear that [Petitioner] intended to seduce Jane when he showed her the pornography on his iPod. Indeed, there was no evidence [Petitioner] harbored a different intent when he showed her the pornography. Thus, the record demonstrates beyond a reasonable doubt that the error did not contribute to the verdict on count 7. (People v. Gonzalez (2012) 54 Cal. 4th 643, 663.)

Pet. at 81.

3. Analysis

Petitioner argues the trial court violated the Ex Post Facto Clause by instructing the jury using the current version of § 288.2 rather than the more narrow version of the statute in effect at the time Petitioner allegedly committed the crime. The Constitution prohibits states from enacting ex post facto laws. U.S. Const. art. I, § 10, cl. 1. The Ex Post Facto Clause prohibits a state from passing any law that: (1) makes an act done before the passing of the law, which was innocent when done, criminal; (2) aggravates a crime or makes it greater than it was when it was committed; (3) changes the punishment and inflicts a greater punishment for the crime than the punishment authorized by law when the crime was committed; or (4) alters the legal rules of evidence and requires less or different testimony to convict the defendant than was required at the time the crime was committed. Calder v. Bull, 3 U.S. 386, 390-91 (1798); see Stogner v. California, 539 U.S. 607, 611 (2003).

A jury instruction that effects a judicial change in the applicable law violates the prohibition against ex post facto laws. Sanders v. Schriro, 2009 WL 2870057, at *15 (D. Ariz. Sept. 2, 2009), aff'd sub nom. Sanders v. Ryan, 533 F. App'x 706 (9th Cir. 2013). On habeas review, a claim that a trial court violated the Ex Post Facto Clause by instructing the jury on a version of a statute not in effect at the time the petitioner allegedly committed the crime is a "trial type error" subject to harmless-error review under Brecht v. Abrahamson, 507 U.S. 619 (1993). Murtishaw v. Woodford, 255 F.3d 926, 973 (9th Cir. 2001); Rodabaugh v. Sullivan, 2018 WL 4443312, at *10 (C.D. Cal. Feb. 28, 2018), report and recommendation adopted, 2018 WL 3129796 (C.D. Cal. June 25, 2018); see also Williams v. Roe, 421 F.3d 883, 888 n.3 (9th Cir. 2005) ("We did, however, apply Brecht harmless error analysis to a jury instruction error resulting from application of the ex post facto statute, identifying jury instruction error as a 'trial-type error that occurred during the

presentation of the case to the jury.'" (quoting Murtishaw, 255 F.3d at 973)). A petitioner is thus not entitled to relief for such an instructional error unless the error had a substantial and injurious effect or influence in determining the jury's verdict. Brecht, 507 U.S. at 638. Further, when a state court finds harmless error, as the court of appeal did here, habeas relief is appropriate only if the state court applied harmless error in an objectively unreasonable manner. Mitchell v. Esparza, 540 U.S. 12, 18 (2003) (per curiam).

Here, as noted, the state appellate court denied Petitioner's ex post facto claim on direct appeal, finding that any error the trial court made in instructing the jury using the current version of § 288.2 was harmless. Specifically, the court determined that the instructional error did not contribute to the verdict on count 7 because even if the trial court had instructed the jury on the version of the statute in effect at the time the crimes allegedly occurred, "[t]he evidence established [Petitioner] was grooming Jane with the intention of enticing her to engage in sexual intercourse and other sexual acts with him and showing her pornography was part of that process." Pet. at 81. The court of appeal thus reasoned there was sufficient evidence that Petitioner showed Jane the pornography in an attempt to "seduce" her, as required by the former version of the statute. The court of appeal's interpretation of the evidence is not objectively unreasonable considering that Jane testified she began to feel uncomfortable around Petitioner when she was 7-years old after he told her he wanted to have a family with her. 2 RT 436, 438. As the court noted, such a statement logically implies that Petitioner wanted to have sexual intercourse with Jane. Then, when Jane was 9-years old, Petitioner showed her pornography on his iPod and told her, "One of these days I'll do that to you." 3 CT 476-78; 2 RT 469-73. A year later, Petitioner orally copulated Jane in the garage. 2 RT 576-87. In light of this evidence showing Petitioner's desire to have sexual intercourse with Jane, and his showing of pornography to Jane to

further this goal, the court of appeal reasonably determined that the trial court's instructional error was harmless. The trial court's instructional error thus did not violate Ex Post Facto Clause or Petitioner's due process rights.

Accordingly, the court of appeal's decision did not conflict with the reasoning or holdings of Supreme Court precedent and did not apply harmless error review in an objectively unreasonable manner. Mitchell, 540 U.S. at 17-18; Inthavong v. Lamarque, 420 F.3d 1055, 1058-59 (9th Cir. 2005). Nor was it based on an unreasonable determination of the facts in light of the evidence presented. Petitioner is thus not entitled to relief on this claim.

VII.

RECOMMENDATION

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

Dated: June 21, 2022

JOHN D. EARLY
United States Magistrate Judge

Jose Manuel Galan CDCBF3487
Valley State Prison
P.O. Box 96
Chowchilla, CA 93610

MIME-Version:1.0 From:cacd_ecfmail@cacd.uscourts.gov To:noreply@ao.uscourts.gov Message-Id:<34109545@cacd.uscourts.gov>Subject:Activity in Case 8:21-cv-02019-CAS-JDE Jose Manuel Galan v. Kathleen Allison Report and Recommendation (Issued) Content-Type: text/html

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing
The following transaction was entered on 6/21/2022 at 11:47 AM PDT and filed on 6/21/2022

Case Name:	Jose Manuel Galan v. Kathleen Allison
Case Number:	8:21-cv-02019-CAS-JDE
Filer:	
Document Number:	17

Docket Text:
REPORT AND RECOMMENDATION issued by Magistrate Judge John D. Early. IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice. Re Petition for Writ of Habeas Corpus (2254)[1] (mba)

8:21-cv-02019-CAS-JDE Notice has been electronically mailed to:
Lise S Jacobson walter.hernandez@doj.ca.gov, docketingsdawt@doj.ca.gov, lise.jacobson@doj.ca.gov, daniel.rogers@doj.ca.gov, lindsey.schiller@doj.ca.gov
8:21-cv-02019-CAS-JDE Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :
Jose Manuel Galan
CDC BF3487
Valley State Prison
P.O. Box 96
Chowchilla CA 93610

APPENDIX-D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JOSE MANUEL GALAN, Petitioner, v. KATHLEEN ALLISON, Respondent.	Case No. 8:21-cv-02019-CAS (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: August 17, 2022

Christina A. Snyder

CHRISTINA A. SNYDER
United States District Judge

Jose Manuel Galan CDCBF3487
Valley State Prison
P.O. Box 96
Chowchilla, CA 93610

MIME-Version:1.0 From:cacd_ecfmail@cacd.uscourts.gov To:noreply@ao.uscourts.gov Message-Id:<34430578@cacd.uscourts.gov>Subject:Activity in Case 8:21-cv-02019-CAS-JDE Jose Manuel Galan v. Kathleen Allison Order on Petition for Certificate of Appealability Content-Type: text/html

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing
The following transaction was entered on 8/18/2022 at 9:14 AM PDT and filed on 8/17/2022

Case Name: Jose Manuel Galan v. Kathleen Allison

Case Number: 8:21-cv-02019-CAS-JDE

Filer:

WARNING: CASE CLOSED on 08/17/2022

Document Number: 26

Docket Text:
ORDER DENYING ISSUANCE OF CERTIFICATE OF APPEALABILITY by Judge Christina A. Snyder re Petition for Writ of Habeas Corpus (2254)[1]. (see document for details) (hr)

8:21-cv-02019-CAS-JDE Notice has been electronically mailed to:
Lise S Jacobson angel.breault@doj.ca.gov, walter.hernandez@doj.ca.gov, docketingsdawt@doj.ca.gov, lise.jacobson@doj.ca.gov, daniel.rogers@doj.ca.gov, lindsey.leon@doj.ca.gov
8:21-cv-02019-CAS-JDE Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :
Jose Manuel Galan
CDC BF3487
Valley State Prison
P.O. Box 96
Chowchilla CA 93610

APPENDIX-E

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JOSE MANUEL GALAN, Petitioner, v. KATHLEEN ALLISON, Respondent.	Case No. 8:21-cv-02019-CAS (JDE) JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of the United States Magistrate Judge,

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

Dated: August 17, 2022

Christina A. Snyder

CHRISTINA A. SNYDER
United States District Judge

Judgment

Case: 8:21cv02019 Doc: 25

Jose Manuel Galan CDCBF3487
Valley State Prison
P.O. Box 96
Chowchilla, CA 93610

APPENDIX-F

Court of Appeal, Fourth Appellate District, Division Three - No. G055889

S263536

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOSE MANUEL GALAN, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX-G

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE MANUEL GALAN, Defendant and Appellant.	G055889 (Super. Ct. No. 12CF3565) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed with directions.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

After his first trial ended in a mistrial because the jury was unable to agree on a verdict, the jury in his second trial convicted defendant Jose Manuel Galan of attempted lewd act on a child under the age of 14 years (Pen. Code, §§ 664, subd. (a), 288, subd. (a); count 2);[1] two counts of committing a lewd act on a child under the age of 14 years (§ 288, subd. (a); counts 3 & 4); misdemeanor simple battery (§ 242; lesser included to count 5); attempted sexual penetration of a child 10 years old or younger (§§ 664, subd. (a), 288.7, subd. (b); lesser included to count 6); exhibiting pornography to a minor (§ 288.2, subd. (a); count 7); and oral copulation of a child 10 years old or younger (§ 288.7, subd. (b); count 8).[2] At sentencing, the court imposed an indeterminate term of 15 years to life on count 8. The court also imposed a determinate term totaling 14 years 8 months, comprised of the upper term of nine years on count 6; a consecutive one-year term (one-third the three-year midterm) on count 2; consecutive two-year terms (one-third the midterm of six years) on counts 3 and 4; and a consecutive eight-month term (one-third the two-year midterm) on count 7. The misdemeanor sentence on count 5 was stayed.

On appeal, in two separate arguments, defendant contends the court erroneously admitted expert testimony on child sexual abuse accommodation syndrome (CSAAS) and that these errors warrant the reversal of his convictions. First, defendant asserts the court should have ruled the expert's testimony on CSAAS was irrelevant and inadmissible "[b]ecause the prosecutor failed to show that CSAAS testimony contradicted any common misconceptions about child behavior in response to abuse."

---

[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] The jury found defendant not guilty of exhibiting pornography to a minor (§ 288.2, subd. (a); count 1) and inducing a minor to perform prohibited acts (§ 311.4, subd. (c); count 9). As to counts 5 and 6, defendant was found not guilty of the charges of oral copulation or sexual penetration with a child 10 years old or younger (§ 288.7, subd. (b)) but convicted of lesser included offenses.

He contends the admission of this evidence violated his right to due process and a fair trial. Second, he contends the expert's testimony on CSAAS should have been excluded because "CSAAS is not generally accepted as reliable by the scientific community" and therefore "does not meet the *Kelly-Frye*[3] test for admissibility of scientific evidence." We reject both contentions and conclude the court properly admitted the testimony on CSAAS.

Defendant also raises a claim of instructional error as the instruction given for the offense of exhibiting pornography to a minor (§ 288.2, subd. (a)) was based on a version of the statute enacted after his offense. We conclude any error by the court was harmless. Last, we agree with the parties that the sentencing minute order must be corrected to accurately reflect the judgment by striking a $75 administrative fee related to the collection of a local DNA sample.

FACTS

For several months, defendant rented a room in the house where Jane Doe lived with her mother. Even after he moved out, defendant remained a close friend of the family and visited nearly every day.

When Jane was seven or eight years old, defendant began telling her that he loved her and called her "my love." He also made remarks about them having children together. He would blow Jane kisses, and using a code he developed, he would communicate that he loved her by blinking his eyes a certain number of times. Defendant

---

3 *People v. Kelly* (1976) 17 Cal.3d 24, 30; *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013, 1014, abrogated by statute as explained in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 587.

In *People v. Leahy* (1994) 8 Cal.4th 587, our Supreme Court explained that the "*Kelly/Frye* formulation" is "now more accurately" called the "*Kelly* formulation." (*Leahy*, at p. 591.) Accordingly, we will refer to it as such or the *Kelly* rule.

told Jane he could buy her many things if she fell in love with him. When Jane was eight years old, defendant hugged her a couple of times in a way that made her feel uncomfortable. One time in the supermarket, defendant hugged her so tight that it hurt.

Defendant had an iPod Touch that he let Jane use. He also gave her an iPod Touch for her ninth or tenth birthday. They would communicate through the notes application on defendant's iPod by writing notes to each other in Spanish. At trial, Jane identified several partial notes recovered from defendant's iPod as messages she wrote to defendant and one note from defendant to her, telling her that he loved her.

Jane also used defendant's iPod to record videos of herself dancing naked. Four videos of Jane, shot sequentially, were found on defendant's iPod. Jane initially reported in her Child Abuse Service Team (CAST) interview that defendant threatened to harm her if she did not make the videos, but at trial, she testified defendant bribed her with cookies and food to get her to take naked pictures and videos.

Some of Jane's family members noticed concerning behavior by defendant toward Jane. Jane's cousin C.C. saw Jane sitting on defendant's lap and defendant kiss her on the cheek. Jane's nephew A.V., who was three years older than her, once found defendant and Jane alone in the garage. When he came into the garage, they appeared "super nervous." The incident was so odd that A.V. told his mother, Jane's sister, about it.

Beginning when Jane was in the third grade and continuing through the fifth grade, there were multiple incidents during which defendant touched or tried to touch Jane in a sexual manner.[4] Jane did not tell her mother about these incidents when they occurred because defendant threatened to harm her and her family if she told anyone and she was scared.

---

[4] In her closing argument, the prosecutor identified which incident was the factual basis for each charge.

When Jane was in the fourth grade, defendant tried to kiss her. (Count 2.) In a separate incident, Jane was sitting on the couch in the living room while her mother took a shower. Defendant covered Jane's mouth with one hand and tried to touch her "downstairs area" over her clothes with his other hand. (Count 4.) He was interrupted and fell backwards when Jane's mother came out of the bathroom.

One day Jane was raking leaves in the backyard when defendant offered to help. Jane went inside the house while defendant continued raking. Once he finished, he told her to come back outside. She went out to see if defendant had swept behind a mattress that a tenant had left against a wall. Defendant grabbed her, put his hand over her mouth, and tried to touch her breast. (Count 3.) Jane kicked him and ran back into the house where her mother was. Jane's mother asked why she was running, but Jane did not tell her mother what had happened.

Another incident occurred while Jane was in the fourth grade. Jane was standing by the dining room table watching television while defendant washed the dishes. Defendant walked up behind Jane and put his hand down the front of her pants. The first time his hand was on the outside of her underwear. (Count 5.) The second time, defendant put his hand inside her underwear and touched her vaginal area causing her pain and bleeding. (Count 6.)

Using his iPod, defendant showed Jane an adult video with a naked lady lying on a bed. (Count 7.) Jane, her cousin C.C., and her nephew A.V., found pornography in the search history of the iPod. They did not open the Web sites but looked at the titles, which included child pornography. They also found pornography on Jane's laptop when they were playing a game on the laptop, and hit the back button several times. Defendant had been using the laptop just before them.

The last incident occurred when Jane was 10 years old and watching cartoons on the television in the garage. Tired and thinking she was alone in the garage, Jane began stretching by arching her back up and off the couch. Defendant appeared

suddenly, pulled down her shorts and underwear, and licked her vaginal area. (Count 8.) Jane kicked defendant, pulled up her shorts, and went inside the house. Jane's mother sent her to her room because her mother had friends over from work. Jane's mother did not see defendant arrive that day but saw him after Jane came in from the garage.

A few days later, Jane disclosed to her mother that defendant had been molesting her. Her disclosure came as her mother was talking to her about her falling grades at school and her impertinent behavior at school and home. Jane had been getting into trouble repeatedly because she would "sass" her mother and her mother's efforts at punishing her by taking away her laptop and iPod had been ineffective.

Jane's mother did not immediately call the police because she wanted to watch defendant and see what he was doing. She called the police about a month later, after seeing suspicious behavior by defendant. When Jane first spoke to the police, she only told them about a few incidents. She then wrote a list of all the things she could remember defendant had done and gave it to the interviewer during her CAST interview. The recording of her CAST interview was played for the jury.

Defendant's Testimony

Defendant testified in his own defense and denied all of Jane's accusations. When defendant told Jane's mother to punish Jane for misbehaving, Jane got mad and yelled at him.

Defendant's iPod previously belonged to his friend David Rodriguez. Defendant would let Jane, C.C., and A.V. use his iPod, as well as Rodriguez. Rodriguez had pornography on the iPod but defendant did not show it to Jane. Nor did he show Jane pornography on her laptop. Jane showed him pornography on her laptop and on his iPod, while acting "happy and sexy" and telling him that she wanted him to marry her mother so they could have a son. Defendant told Jane's mother to check Jane's laptop but did not tell her why.

Jane showed defendant how to use the notes application on his iPod. Defendant only used the application to make notes related to his work and did not use it to pass notes with Jane. One day when defendant was visiting, he left his iPod on the charger while he stepped outside. Shortly after he came back inside, Jane came out of the bathroom with his iPod and showed him three or four videos she had filmed on his iPod of herself naked. Defendant took the iPod from Jane and tried to erase the videos but was unable to because it was locked.

DISCUSSION

ADMISSIBILITY OF CSAAS EVIDENCE

Defendant contends the court prejudicially erred by admitting expert testimony on CSAAS because it was "not relevant to prove any common misconceptions in this case." He asserts the admission of this irrelevant evidence rendered his trial unfair, thus violating his right to due process. Next, he contends the CSAAS testimony should have been excluded because "CSAAS is not generally accepted as reliable by the scientific community as correctly describing the behavior of sexually abused children . . . ." We reject both contentions.

Prior to trial, the prosecution moved for the admission of expert testimony on CSAAS and "'grooming.'" The prosecution argued testimony regarding CSAAS was needed to address common misconceptions about how a child might react to abuse and was relevant here because Jane delayed in her disclosure of the abuse and continued to spend time with defendant after the abuse began. Defendant objected to the evidence on the ground it would not assist the jury and would violate his right to due process. The court deferred its ruling until after Jane testified and then after her testimony, ruled the evidence was admissible and "relevant based on the reporting history . . . ."

Dr. Ward, a clinical and forensic psychologist, testified that CSAAS was developed by a doctor in 1983 based on his treatment of sexual abuse victims and describes a pattern of behaviors exhibited by sexually abused children. CSAAS was developed as a therapeutic tool to help treat sexually abused children. Dr. Ward explained CSAAS is not a diagnostic tool and cannot be used to diagnose whether or not sexual abuse has occurred. While it is helpful in understanding a child's behavior in response to sexual abuse by a family member or friend, it is not possible to look at a child's behavior and determine whether or not sexual abuse occurred.

Dr. Ward explained children molested by a family member or close family friend respond differently than children molested by a stranger as children abused by someone they know do not tend to report the abuse right away, and when they do report the abuse, they may not be believed. Dr. Ward described the five categories of CSAAS: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, unconvincing disclosure; and (5) retraction or recantation. Secrecy and helplessness are present in all cases in which a child is molested by a family member or family friend because the abuse occurs in secret and children are helpless given the power differential between children and adults. Whether the other categories are present—entrapment and accommodation, delayed disclosure, and retraction or recantation—depends on the situation. Entrapment and accommodation concern a child's inability to get out of the abusive situation; the result is that the child becomes entrapped and has to learn to accommodate the abuse. A child may acquiesce or go along with the sexual abuse because the child believes he or she has to put up with this negative aspect of the relationship with the abuser to receive the positive benefits of the relationship. Children are able to compartmentalize the abuse and put on a happy face to appear as if nothing bad is happening.

Delayed and unconvincing disclosure is the most widely researched aspect of CSAAS. It explains a child may provide a tentative or hesitant disclosure to see how it

is received. Whether the child reveals more depends on the person's reaction. If the listener is receptive, the child becomes more comfortable and reveals more details. Retraction and recantation occur less often. After a disclosure, a child's life may be turned upside down, and internal and external pressures may cause the child to recant the allegations or claim not to remember.

Children feel a lot of shame about being sexually abused and will claim that they were forced or threatened because they cannot explain why they did not report it initially. After failing to report the first incident, a child may feel guilty for being involved and may justify the failure to report by saying he or she was threatened. Most children actively try to forget the abuse as a way to cope, which may interfere with their ability to recall details later.

Before testifying, Dr. Ward had not reviewed any materials concerning the case and did not know the charges, the victim's name, age, or gender.

The CSAAS evidence was relevant and admissible.

Defendant contends the CSAAS testimony was irrelevant and should have been excluded because the prosecutor failed to show that it contradicted "any common misconceptions about child behavior in response to abuse." We conclude the court did not abuse its "wide discretion" in finding the CSAAS testimony relevant and admissible. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1303 ["'the trial court is vested with wide discretion in determining relevance' under the Evidence Code"].)

Expert testimony on CSAAS "is not admissible to prove that the complaining witness has in fact been sexually abused." (*People v. McAlpin, supra*, 53 Cal.3d at p. 1300.) But "it is admissible to rehabilitate such 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." (*Ibid.*) "'Such expert 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.'" (*Id.* at p. 1301 [discussing CSAAS testimony when addressing the admissibility of expert testimony on the behavior of parents of sexually abused children].) In a number of cases, expert testimony on CSAAS has been upheld as admissible when offered for the limited purpose of rehabilitating a child victim's credibility, dispelling common misconceptions regarding the behavior of abuse victims, and/or showing the child's conduct was not inconsistent with sexual abuse. (*People v. Perez* (2010) 182 Cal.App.4th 231, 245; *In re S.C.* (2006) 138 Cal.App.4th 396, 418; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745; *People v. Housley* (1992) 6 Cal.App.4th 947, 955-956; *People v. Gray* (1986) 187 Cal.App.3d 213, 217-220.)

While CSAAS "evidence must be tailored to address the specific myth or misconception suggested by the evidence" (*People v. Wells* (2004) 118 Cal.App.4th 179, 188), the prosecution is not required "to expressly state on the record the evidence which is inconsistent with the finding of molestation." (*People v. Patino, supra*, 26 Cal.App.4th at p. 1744.) "It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting a molestation." (*Id.* at pp. 1744-1745.) CSAAS testimony may be admitted in the prosecution's case-in-chief when the victim's testimony raises an "obvious question . . . in the minds of the jurors," such as "why the molestation was not immediately reported if it had really occurred" or "why [the victim] went back to [the defendant's] home a second time after the first molestation." (*Id.* at p. 1745.) Thus, CSAAS evidence "is pertinent and admissible if an issue has been raised as to the victim's credibility." (*Ibid.*)

Here, the court did not abuse its discretion by admitting Dr. Ward's expert testimony regarding CSAAS. The court correctly waited until after Jane's testimony to determine if the CSAAS evidence was relevant to the issue of Jane's credibility. The court then made a reasoned judgment that its relevance was based on the defense's

questioning of Jane, specifically her delayed reporting. During cross-examination, the defense repeatedly highlighted Jane's failure to tell her mother about defendant's misconduct that spanned over two school years. The defense also attacked Jane's credibility by questioning her as to why she continued to be alone with defendant after the abuse began. The defense used this evidence to argue that Jane's claims of sexual abuse were fabricated. Through cross-examination and argument, the defense asserted that Jane's delayed disclosure and her behavior around defendant after the alleged abuse began were inconsistent with her claims of sexual abuse.

Jane's behavior of not immediately reporting the abuse to her mother and not avoiding defendant after the abuse began would have raised questions in the jurors' minds as to the veracity of her claims of abuse. Dr. Ward's expert testimony concerning CSAAS was relevant to dispel misconceptions the jurors might have held as to how child sex abuse victims behave as it countered misconceptions that a child subjected to sexual abuse by a close family friend would consistently avoid the abuser and immediately report the abuse. As the issues of delayed disclosure and accommodation were prominent in the defense's cross-examination of Jane, expert testimony concerning CSAAS had the potential to rehabilitate Jane's credibility.

Contrary to defendant's assertion, Dr. Ward's testimony on CSAAS did not undercut the jury's "critical function" of evaluating Jane's credibility. It remained solely within the jury's province to consider issues of witness credibility (CALCRIM No. 226) and evaluate Jane's and defendant's conflicting testimony (CALCRIM No. 302) in determining whether defendant committed the charged offenses. Dr. Ward did not opine as to whether Jane was credible. In her testimony, Dr. Ward explained she was not expressing an opinion as to whether defendant was guilty or innocent and was not diagnosing anyone. She clearly explained that CSAAS could not be used to determine whether or not a child is telling the truth. The jurors would not have viewed Dr. Ward's testimony as supplanting their job of determining whether Jane was credible regarding

the various allegations of abuse. Dr. Ward's testimony discussed the circumstances in which a child sexual abuse victim's reactions may not be inconsistent with abuse but left the question of whether Jane was abused for the jury to decide.

Defendant asserts the testimony should have been excluded as irrelevant because it is now "common knowledge that children do not report [abuse] immediately." We disagree that delayed reporting by a child sexual abuse victim is a matter of "common knowledge." Nevertheless, "'the admissibility of expert opinion is a question of degree. The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission.'" (*People v. McAlpin, supra*, 53 Cal.3d at p. 1299.) Expert testimony is admissible "'whenever it would "assist" the jury.'" (*Id.* at p. 1300.) Here, Dr. Ward's expert testimony on CSAAS was admissible as it aided the jury in assessing Jane's credibility. (Evid. Code, § 801, subd. (a).)

Moreover, the court instructed with CALCRIM No. 1193, admonishing the jury concerning its consideration of the CSAAS testimony. (See *People v. Patino, supra*, 26 Cal.App.4th at p. 1745 [court "handled the matter carefully and correctly" by giving similar admonishment immediately after CSAAS testimony].) It instructed the jurors that the "testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him" and that they "may consider this evidence only in deciding whether or not [Jane Doe]'s conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony." The jury is presumed to have followed this instruction. (*People v. Avila* (2006) 38 Cal.4th 491, 574.)

Defendant contends otherwise, asserting the jury would not have been able to perform the "level of mental gymnastics" required to consider the CSAAS testimony "to refute behavior as inconsistent with sexual abuse without simultaneously considering it as circumstantial evidence that sexual abuse actually occurred." In support of this assertion, defendant cites portions of the prosecutor's closing and rebuttal arguments

where she compared Jane's behavior to Dr. Ward's testimony on CSAAS. Defendant contends the prosecutor had difficulty in her closing argument in limiting the use of the CSAAS evidence to its permissible purpose and argues if the prosecutor was unable to do so then it would have been impossible for the jurors to follow the limiting instruction. We disagree. In her closing argument, the prosecutor began her discussion of the CSAAS evidence by properly telling the jurors the limited purpose of this evidence, even repeating the words of CALCRIM No. 1193. The prosecutor used the CSAAS evidence to address issues with Jane's credibility—her delayed and limited initial disclosure, her inability to recall details of the abuse, and appearing comfortable with defendant after the abuse began. At the end of her closing argument, the prosecutor urged the jurors to consider Dr. Ward's testimony on CSAAS only for its intended purpose. Moreover, to the extent the prosecutor's comments on the use of Dr. Ward's CSAAS testimony were inconsistent with CALCRIM No. 1193, the jury was instructed to follow the court's instruction. (CALCRIM No. 200.) We conclude the court did not abuse its discretion by admitting the expert testimony on CSAAS.

Having concluded the court made a reasoned judgment that the CSAAS expert testimony was relevant and admissible, we find no violation of defendant's constitutional right to due process. (See *People v. Patino, supra*, 26 Cal.App.4th at p. 1747 ["introduction of CSAAS testimony does not by itself deny appellant due process"]; see *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [admission of relevant evidence of battered child syndrome did not violate the defendant's due process rights].)

Defendant forfeited his contention that the expert testimony on CSAAS should have been excluded under Kelly.

Defendant next asserts the CSAAS expert testimony should have been excluded because it does not meet the *Kelly* formulation for admissibility of scientific evidence. Under *Kelly*, "evidence obtained through a new scientific technique may be

admitted only after its reliability has been established under a three-pronged test. The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community." (*People v. Bolden* (2002) 29 Cal.4th 515, 544.) Focusing on this first prong, defendant contends the CSAAS evidence should have been excluded "because it has not gained general acceptance in the scientific community."

Defendant, however, failed to present this argument in the trial court. Below, defendant neither objected on the ground that the CSAAS evidence was inadmissible under *Kelly* nor did he request a hearing on the issue. Nevertheless, defendant contends the issue is preserved for review and is a "purely legal" question subject to our independent review. We disagree. Whether a scientific theory is generally accepted in the scientific community is a mixed question of law and fact and an appellate court reviews "'"the trial court's determination with deference to any and all supportable findings of 'historical' fact or credibility, and then decide[s] as a matter of law, based on those assumptions, whether there has been general acceptance."'" (*People v. Stevey* (2012) 209 Cal.App.4th 1400, 1410.) Here, there are no factual findings before us to consider and determine whether CSAAS is generally accepted in the scientific community because the issue was not raised below.

Defendant acknowledges a number of California Court of Appeal decisions have upheld the admissibility of CSAAS testimony, as he cites *People v. Bowker* (1988) 203 Cal.App.3d 385, *People v. Housley, supra*, 6 Cal.App.4th 947, and *People v. Wells, supra*, 118 Cal.App.4th 179. But he contends these cases were wrongly decided and advocates for a change in the law. Citing three professional publications, defendant asserts the "scientific validity" of CSAAS evidence "is subject to ongoing considerable debate amongst psychology publications." We have no reason to doubt defendant, but to the extent there is a "considerable debate" concerning the "scientific validity" of CSAAS evidence, the matter needed to be raised in the trial court where evidence of this debate could be presented.

Defendant also cites cases in other states that have excluded CSAAS testimony.[5] He relies heavily on *State v. J.L.G., supra*, 190 A.3d 442, a case in which the New Jersey Supreme Court considered the admissibility of CSAAS testimony. There, the New Jersey Supreme Court had "remanded to the trial court for a hearing 'to determine whether CSAAS evidence meets the reliability standard of [the New Jersey Rules of Evidence] 702, in light of recent scientific evidence.'" (*Id.* at p. 449.) During the remand hearing, four experts testified and submitted reports and "multiple published scientific articles" were introduced among dozens of exhibits. (*Ibid.*) The New Jersey Supreme Court relied "heavily on the record developed at the hearing" to conclude that there is "continued scientific support for only" the delayed disclosure aspect of CSAAS. (*Id.* at p. 446.) The court held expert testimony concerning CSAAS was admissible only as to delayed disclosure behaviors and only if the evidence was "beyond the understanding of the average juror." (*Ibid.*)

There is a stark difference between the situation in *State v. J.L.G., supra*, 190 A.3d 442 and defendant's case. Here, we simply have no record to consider to determine whether CSAAS is generally accepted in the scientific community. Because the issue was not raised in the trial court, there was no hearing on the matter and the court made no factual findings for us to review. By failing to raise the issue below, defendant has forfeited his appellate claim. (Evid. Code, § 353, subd. (a); *People v. Demetrulias* (2006) 39 Cal.4th 1, 20-21.)

---

5 Defendant cites *State v. J.L.G.* (N.J. 2018) 234 N.J. 265 [190 A.3d 442]; *Sanderson v. Commonwealth* (KY 2009) 291 S.W.3d 610, 613; *Com. v. Dunkle* (Penn. 1992) 529 PA 168, 173-177 [602 A.2d 830, 832-834]; *State v. Ballard* (Tenn. 1993) 855 S.W.2d 557, 561-562; and *State v. Maule* (Wash.App. 1983) 35 Wash.App. 287, 295-296 [667 P.2d 96, 100].

Regardless, we conclude the *Kelly* rule does not apply to Dr. Ward's expert testimony on CSAAS. "'Court of Appeal decisions have held that *Kelly-Frye* . . . precludes an expert from testifying based on the child sexual abuse accommodation syndrome (CSAAS) that a particular victim's report of alleged abuse is credible because the victim manifests certain defined characteristics which are generally exhibited by abused children.'" (*People v. Wells, supra*, 118 Cal.App.4th at p. 188.) But where the CSAAS evidence is admitted to rehabilitate a victim's credibility through a discussion of victim behavior as a class and does not diagnosis or discuss the victim in that case, cases have held CSAAS is not subject to the requirements of the *Kelly* rule. (*People v. Gray, supra*, 187 Cal.App.3d at pp. 217-220; *People v. Harlan* (1990) 222 Cal.App.3d 439, 448-449.) In defendant's case, Dr. Ward's expert testimony on CSAAS did not constitute a new scientific method of proof which purported to provide any "definitive truth" regarding whether Jane had been molested (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156) and therefore was not subject to the *Kelly* rule. (See *People v. Jones* (2013) 57 Cal.4th 899, 953 ["'absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly*'"].) Accordingly, the court properly admitted the testimony on CSAAS.

INSTRUCTIONAL ERROR ON COUNT 7

Defendant contends his conviction on count 7 for exhibiting pornography to a minor (§ 288.2, subd. (a)) must be reversed because the court's instruction was based on the current version of the statute, which was enacted after his offense. He asserts this error violated the ex post facto clauses of the state and federal constitutions and his right to due process because the new version of section 288.2 and its corresponding jury instruction cover "a broader range of behaviors than the version in effect at the time of the alleged crime." We conclude any error by the court in failing to instruct the jury with

the former version of CALCRIM No. 1140, which was based on former section 288.2, subdivision (a), was harmless.

Whether the instruction given the jury correctly stated the law at the time of defendant's offense is assessed under a de novo standard of review. (*People v. Posey* (2004) 32 Cal.4th 193, 218 ["de novo standard of review is applicable in assessing whether instructions correctly state the law"].)

At the time of defendant's offense,[6] section 288.2, subdivision (a)(1) read: "Every person who, with knowledge that a person is a minor, . . . knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, . . . any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment . . . ." (Stats. 2012, ch. 43, § 16 [effective June 27, 2012 to Dec. 31, 2013].) Section 288.2 was repealed and reenacted as amended, effective January 1, 2014. (Stats. 2013, ch. 777, §§ 1-2.) Among other changes, the current version omits the phrase "seducing a minor" and defendant's argument focuses on this change to the intent element. Now, rather than providing that the offense be committed "with the intent to or for the purpose of seducing a minor" (former § 288.2, subd. (a)(1)), the current version of the statute states the offense must be committed "with the intent or for the purposes of engaging in sexual intercourse, sodomy, or oral copulation with the other person, or with the intent that either person touch an intimate body part of the other." (§ 288.2, subd. (a)(1)).[7]

---

6 In count 7, defendant was charged with exhibiting pornography to a minor on or about and between August 7, 2012 and December 10, 2012.

7 The current version of section 288.2, subdivision (a) reads: "(1) Every person who knows, should have known, or believes that another person is a minor, and who knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or

Defendant contends that the current statutory language "covers more conduct than the version of the statute in effect at the time of [his] alleged crime." In support, he relies on *People v. Hsu* (2000) 82 Cal.App.4th 976 (*Hsu*) and *People v. Jensen* (2003) 114 Cal.App.4th 224 (*Jensen*), both of which discussed the requirement in former section 288.2, subdivision (a)(1), that the defendant intend to seduce a minor. Among the issues considered in *Hsu* was the defendant's contention that the term "'seducing'" in former section 288.2 was impermissibly vague. (*Hsu*, at p. 992.) The appellate court noted that "'seduce'" is defined as "'to lead astray'" or "'persuading into partnership in sexual intercourse.'" (*Ibid.*) The court concluded that in the context of section 288.2, "with its references to gratifying lust, passion, and sexual desire, people of ordinary intelligence [citation] would readily understand 'seducing' as used here to mean the latter . . . ." (*Hsu*, at p. 992.)

---

exhibit by any means, including by physical delivery, telephone, electronic communication, or in person, any harmful matter that depicts a minor or minors engaging in sexual conduct, to the other person with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of the minor, and with the intent or for the purposes of engaging in sexual intercourse, sodomy, or oral copulation with the other person, or with the intent that either person touch an intimate body part of the other, is guilty of a misdemeanor, punishable by imprisonment in a county jail not exceeding one year, or is guilty of a felony, punishable by imprisonment . . . . [¶] (2) If the matter used by the person is harmful matter but does not include a depiction or depictions of a minor or minors engaged in sexual conduct, the offense is punishable by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for 16 months, or two or three years. [¶] (3) For purposes of this subdivision, the offense described in paragraph (2) shall include all of the elements described in paragraph (1), except as to the element modified in paragraph (2)." The current version also states "an intimate body part includes the sexual organ, anus, groin, or buttocks of any person, or the breasts of a female." (§ 288.2, subd. (d).)

In *Jensen*, "the intent or for the purpose of seducing a minor" element in former section 288.2 was examined, this time in the context of determining whether the intent to entice a male minor to masturbate himself satisfied the element. (*Jensen, supra*, 114 Cal.App.4th at pp. 236-241.) *Jensen* agreed with *Hsu* that "the word 'seducing'" as used in former section 288.2 was intended to have the "meaning of 'carry[ing] out the physical seduction of: entic[ing] to sexual intercourse.' [Citation.] And, in this context, 'sexual intercourse' clearly refers to 'intercourse involving genital contact between individuals' . . . ." (*Jensen*, at p. 239.) "Thus, the 'seducing' intent element of the offense requires that the perpetrator intend to entice the minor to engage in a sexual act involving physical contact between the perpetrator and the minor." (*Id.* at pp. 239-240.) The *Jensen* court concluded "[i]ntending to entice a male minor to masturbate himself does not satisfy this 'seducing' intent element . . . ." (*Id.* at p. 240.)

At the time of defendant's offense in 2012, CALCRIM No. 1140, the pattern instruction on the elements of section 288.2, subdivision (a), required the prosecution to prove, among other elements, that "[w]hen the defendant acted, (he/she) intended to seduce the minor . . . ." (Former CALCRIM No. 1140 (2013).) Adopting language from *Jensen*, former CALCRIM No. 1140, *supra*, explained that "[t]o *seduce a minor* means to entice the minor to engage in a sexual act involving physical contact between the seducer and the minor."

Here, however, the jury was instructed with the revised version of CALCRIM No. 1140, based on the current version of section 288.2, subdivision (a).[8] As to the intent element, the jury was instructed: "When the defendant acted, he intended to engage in sexual intercourse, sodomy, [or] oral copulation with the other person or to have either person touch an intimate body part of the other person."

---

[8] When discussing the proposed jury instructions, neither the court nor the parties recognized that CALCRIM No. 1140 had been revised based on changes in the statute occurring after defendant's offense.

Defendant contends "'seducing' refers to sexual intercourse through genital contact," and therefore "the former version of section 288.2, subdivision (a) describes an intent more narrow than the intent set forth in the current version of the statute and reflected in the jury instructions in this case." Defendant's argument that "seducing" refers only to sexual intercourse is undermined by *Jensen*, *supra*, 114 Cal.App.4th 224 and former CALCRIM No. 1140, *supra*, as they provided "'the seducing' intent element" (*Jensen*, at pp. 239-240), is satisfied if the perpetrator intends "to entice the minor to engage in a sexual act involving physical contact between the perpetrator and the minor." (*Id.* at p. 240; CALCRIM No. 1140, *supra*.) Thus, under former section 288.2, subdivision (a), a defendant could be convicted of violating the statute if the prosecution proved the defendant intended to entice the minor to engage in any various sexual acts involving physical contact between the minor and the perpetrator; the offense was not limited to only proof of intent to entice the minor to engage in sexual intercourse. (See *People v. Nakai* (2010) 183 Cal.App.4th 499, 510 [evidence indicated the defendant intended to entice the victim to engage in either sexual intercourse or oral copulation].) Comparing the former and current versions of section 288.2, it seems the current version is simply more descriptive as it identifies the sexual acts that were encompassed within the term "seducing" in the former version. The current version of the statute requires a defendant intend to engage in "sexual intercourse, sodomy, or oral copulation with the other person" or intend for either him or the minor to "touch an intimate body part of the other" (§ 288.2, subd. (a)(1)), all of which qualify as "sexual act[s] involving physical contact between the perpetrator and the minor" under the former version. (*Jensen*, at p. 240; see *id.* at p. 239.)

More troubling, however, is defendant's second point that "the concept of *seduction*" of the minor was completely omitted from the current version of section 288.2 and the instruction given the jury. Former section 288.2, subdivision (a), required the defendant exhibit the pornography to the minor "with the intent or for the purpose of seducing [the] minor." As defendant notes, the instruction given the jury only required the prosecution prove defendant "intended to engage in sexual intercourse, sodomy, [or] oral copulation . . . ." (CALCRIM No. 1140) not that the defendant intended to entice or persuade the minor to participate in these sexual acts. Defendant argues this omission makes the intent element of the former statute "substantively different from the intent" element in the instruction given the jury. The Attorney General does not directly address this issue but argues "all illegal intents under the current statute would have been prohibited under the former version of the statute." Arguably, the intent to entice or persuade a minor to engage in sexual acts with physical contact under former section 288.2, subdivision (a), is the same as the intent to engage in the listed sexual acts in the current statute. Under both versions of the statute, the defendant is punished for exhibiting pornography to a minor with the intention of engaging in sexual acts involving physical contact with a *willing* minor. We note "[t]he purpose of section 288.2 is to prohibit using obscene material. . . . 'to groom young victims for acts of molestation.'" (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1287.) Ultimately, we need not decide if the variations between the current and former statute and jury instructions were material because even assuming the instruction given to the jury improperly described an element of the offense, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Jensen, supra*, 114 Cal.App.4th at p. 241.)

The evidence established defendant was grooming Jane with the intention of enticing her to engage in sexual intercourse and other sexual acts with him and showing her pornography was part of that process. His conduct began by telling Jane that he loved her and could buy her things if she fell in love with him. His behavior then progressed to attempting to kiss Jane, touching her intimate parts, and culminated in him orally copulating her in the garage. In her CAST interview, Jane stated that defendant showed her a pornographic video and told her that one day he would do that to her, then sticking out his tongue. Defendant also made comments to Jane about them having children together, indicating his intent to entice her to engage in sexual intercourse with him. Considering all of defendant's actions, it is clear that defendant intended to seduce Jane when he showed her the pornography on his iPod. Indeed, there was no evidence defendant harbored a different intent when he showed her the pornography. Thus, the record demonstrates beyond a reasonable doubt that the error did not contribute to the verdict on count 7. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 663.)

CLERICAL ERROR

At sentencing, the court ordered "defendant to provide a DNA sample pursuant to [sections] 296 and 296.1" and did not impose any fee in connection with this collection of the DNA sample. The minute order for defendant's sentencing, however, states that defendant was ordered to provide a "local DNA sample" to the Orange County District Attorney and pay a $75 administrative fee to the Orange County District Attorney's Office. We agree with the parties that the minute order for defendant's sentencing must be corrected because it does not accurately reflect the court's oral pronouncement of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) We direct the court to strike this portion of its minute order so that it accurately reflects the court's oral pronouncement of judgment.

APPENDIX-H

FELONY ABSTRACT OF JUDGMENT - DETERMINATE

CR-290

(NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: **Orange**		FILED SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE CENTRAL JUSTICE CENTER APR 04 2018 DAVID H YAMASAKI, Clerk of the Court BY: D. HAGAN DEPUTY
PEOPLE OF THE STATE OF CALIFORNIA vs DEFENDANT: **Galan, Jose Manuel** DOB: **04-08-1967** AKA: CII NO.: **A33249413** BOOKING NO.: ☐ NOT PRESENT	**12CF3565** -A -B -C -D	
FELONY ABSTRACT OF JUDGEMENT ☑ **PRISON COMMITMENT** ☐ **COUNTY JAIL COMMITMENT** ☒ AMENDED ABSTRACT		
DATE OF HEARING **01/12/2018**	DEPT.NO. **C43**	JUDGE **Michael J. Cassidy**
CLERK **Andrea Madison**	REPORTER **Jennifer Harpster**	PROBATION NO. OR PROBATION OFFICER ☐ IMMEDIATE SENTENCING
COUNSEL FOR PEOPLE **Kristin R. Bracic**		COUNSEL FOR DEFENDANT **Raymond L. Jones, Public Defender** ☒ APPOINTED

1. Defendant was convicted of the commission of the following felonies:

☐ Additional counts are listed on attachment

0 (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME CMMTD	DATE OF CONVICTION (MO/DATE/YEAR)	CONVICTED BY: JURY	CONVICTED BY: COURT	CONVICTED BY: PLEA	TERM (L,M,U)	CONCURRENT	1/3 CONSECUTIVE	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE (refer to Item 5)	654 STAY	SERIOUS FELONY	VIOLENT FELONY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: YRS	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: MOS.
2A	PC	664(a)-PC288(a)	Attempt lewd act upon child under 1	11	11/09/2017	X			M		X				X		01	00
3A	PC	288(a)	Lewd or lascivious act with minor, u	11	11/09/2017	X			M		X				X	X	02	00
4A	PC	288(a)	Lewd or lascivious act with minor, u	11	11/09/2017	X			M		X				X	X	02	00
6A	PC	664(a)-PC288.7(b)	Attempt lewd act upon child under 1	11	11/09/2017	X			U						X		09	00
7A	PC	288.2(a)	Exhibition of lewd material to minor	12	11/09/2017	X			M		X						00	08

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

COUNT	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL	

3. ENHANCEMENTS charged and found to be true for PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL	

4. Defendant sentenced ☐ to county jail per PC 1170(h)(1) or (2)

☑ to prison per 1170(a), 1170.1(a) or 1170(h)(3) due to ☑ current or prior serious or violent felony ☑ PC 290 or ☐ PC 186.11 enhancement

☐ per PC 667(b)-(i) or PC 1170.12 (strike prior)

☐ per PC 1170(a)(3). Preconfinement credits equal or exceed time imposed. ☐ Defendant ordered to report to local parole or probation office.

5. INCOMPLETE SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

6.	TOTAL TIME ON ATTACHED PAGES:	00	00
7.	☒ Additional indeterminate term (see CR-292).		
8.	TOTAL TIME:	14	08

Attachments may be used but must be referred to in this document.

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: Galan, Jose Manuel			
12CF3565 -A	-B	-C	-D

9 FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. Restitution Fine(s):

Case A: $ 200.00 per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ 200.00 per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case B: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case C: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case D: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

b. Restitution per PC 1202.4(f):

Case A: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund
Case B: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund
Case C: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund
Case D: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund

☐ * Victim name(s), if known, and amount breakdown in item 13, below. ☐ * Victim name(s), in probation officer's report.

c. Fine(s):

Case A: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case B: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case C: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case D: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. Court Operations Assessment: $ 40.00 per PC 1465.8. e. Conviction Assessment: $ 30.00 per GC 70373. f. Other: $ _____ per (specify): _____

10. TESTING: ☐ Compliance with PC 296 verified ☑ AIDS per PC 1202.1 ☑ other *(specify)* **DNA PC 296**

11. REGISTRATION REQUIREMENT: ☒ per *(specify code section)*: Penal Code 290

12. ☐ MANDATORY SUPERVISION: Execution of a portion of the defendant's sentence is suspended and deemed a period of mandatory supervision under Penal Code section 1170(h)(5)(B) as follows *(specify total sentence, portion suspended, and amount to be served forthwith)*:
Total: Suspended: Served forthwith:

13. Other orders (specify): **Please see Indeterminate Sentence.**

14. IMMEDIATE SENTENCING: ☐ Probation to prepare and submit a post-sentence report to CDCR per PC 1203c
Defendant's race/national origin: Hispanic

15. EXECUTION OF SENTENCE IMPOSED
a. ☑ at initial sentencing hearing.
b. ☐ at resentencing per decision on appeal.
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment. (PC 1170(d).)
e. ☒ other *(specify)*: Chambers Work

16. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT	
A	2138	1859	279	☐ 2933 ☒ 2933.1 ☐ 4019
B				☐ 2933 ☐ 2933.1 ☐ 4019
C				☐ 2933 ☐ 2933.1 ☐ 4019
D				☐ 2933 ☐ 2933.1 ☐ 4019

Date Sentence Pronounced	Time Served in State Institution
01/12/2018	☐ DMH ☐ CDC ☐ CRC

17. The defendant is remanded to the custody of the sheriff ☑ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☑ the reception center designated by the director of the California Department of Corrections and Rehabilitation.
☐ county jail ☐ other (specify):

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	DATE
D. HAGAN	APR 04, 2018

SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE

FELONY ABSTRACT OF JUDGMENT - DETERMINATE

(NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED)

CR-290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: **Orange**

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
JAN 17 2018
DAVID H. YAMASAKI, Clerk of the Court
BY: D. HAGAN, DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA vs
DEFENDANT: **Galan, Jose Manuel** DOB: **04-08-1967**
AKA:
CII NO.: **A33249413**
BOOKING NO.: **2738567**
☐ NOT PRESENT

12CF3565 -A
-B
-C
-D

FELONY ABSTRACT OF JUDGEMENT
☑ **PRISON COMMITMENT** ☐ **COUNTY JAIL COMMITMENT** ☐ AMENDED ABSTRACT

DATE OF HEARING: **01/12/2018**
DEPT.NO.: **C43**
JUDGE: **Michael J. Cassidy**
CLERK: **Andrea Madison**
REPORTER: **Jennifer Harpster**
PROBATION NO. OR PROBATION OFFICER ☐ IMMEDIATE SENTENCING
COUNSEL FOR PEOPLE: **Kristin R. Bracic**
COUNSEL FOR DEFENDANT: **Raymond L. Jones, Public Defender** ☒ APPOINTED

1. Defendant was convicted of the commission of the following felonies:
☐ Additional counts are listed on attachment
0 (number of pages attached)

COUNT	CODE	SECTION NO.	CRIME	YEAR CRIME CMMTD	DATE OF CONVICTION (MO/DATE/YEAR)	CONVICTED BY: JURY	COURT	PLEA	TERM (L,M,U)	CONCURRENT	1/3 CONSECUTIVE	CONSECUTIVE: FULL TERM	INCOMPLETE SENTENCE (refer to item 5)	654 STAY	SERIOUS FELONY	VIOLENT FELONY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: YRS	MOS.
2A	PC	664(a)-PC288(a)	Attempt lewd act upon child under 1	11	11/09/2017	X			M		X				X		01	00
3A	PC	288(a)	Lewd or lascivious act with minor, u	11	11/09/2017	X			M		X				X	X	02	00
4A	PC	288(a)	Lewd or lascivious act with minor, u	11	11/09/2017	X			M		X				X	X	02	00
6A	PC	664(a)-288(a)	Attempt lewd act upon child under 1	11	11/09/2017	X			U						X		09	00
7A	PC	288.2(a)	Exhibition of lewd material to minor	12	11/09/2017	X			M		X						00	08

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

COUNT	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL	

3. ENHANCEMENTS charged and found to be true for PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL	

4. Defendant sentenced ☐ to county jail per PC 1170(h)(1) or (2)
☑ to prison per 1170(a), 1170.1(a) or 1170(h)(3) due to ☑ current or prior serious or violent felony ☑ PC 290 or ☐ PC 186.11 enhancement
☐ per PC 667(b)-(i) or PC 1170.12 (strike prior)
☐ per PC 1170(a)(3). Preconfinement credits equal or exceed time imposed. ☐ Defendant ordered to report to local parole or probation office.

5. INCOMPLETE SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

6. TOTAL TIME ON ATTACHED PAGES: **00** **00**
7. ☒ Additional indeterminate term (see CR-292).
8. TOTAL TIME: **14** **08**

Attachments may be used but must be referred to in this document.

Form Adopted for Mandatory Use
Judicial Council of California
CR-290 [Rev. July 1, 2012]

FELONY ABSTRACT OF JUDGMENT - DETERMINATE

Penal Code,
§ 1213, 1213.5

PEOPLE OF THE STATE OF CALIFORNIA vs.
DEFENDANT: **Galan, Jose Manuel**

12CF3565 -A	-B	-C	-D

9 FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. Restitution Fine(s):

Case A: $ 200.00 per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ 200.00 per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case B: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case C: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

Case D: $ _____ per PC 1202.4(b) (forthwith per PC 2085.5 if prison commitment); $ _____ per PC 1202.45 suspended unless parole is revoked.
$ _____ per PC 1202.44 is now due, probation having been revoked.

b. Restitution per PC 1202.4(f):

Case A: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund
Case B: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund
Case C: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund
Case D: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund

☐ * Victim name(s), if known, and amount breakdown in item 13, below. ☐ * Victim name(s), in probation officer's report.

c. Fine(s):

Case A: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case B: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case C: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

Case D: $ _____ per PC 1202.5 $ _____ per VC 23550 or _____ days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $ _____ Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. Court Operations Assessment: $ 40.00 per PC 1465.8. e. Conviction Assessment: $ 30.00 per GC 70373. f. Other: $ _____ per (specify): _____

10. TESTING: ☐ Compliance with PC 296 verified ☑ AIDS per PC 1202.1 ☑ other *(specify)* **DNA PC 296**

11. REGISTRATION REQUIREMENT: ☒ per *(specify code section)*: Penal Code 290

12. ☐ MANDATORY SUPERVISION: Execution of a portion of the defendant's sentence is suspended and deemed a period of mandatory supervision under Penal Code section 1170(h)(5)(B) as follows *(specify total sentence, portion suspended, and amount to be served forthwith)*:
Total: Suspended: Served forthwith:

13. Other orders (specify): **Please see Indeterminate Sentence.**

14. IMMEDIATE SENTENCING: ☐ Probation to prepare and submit a post-sentence report to CDCR per PC 1203c
Defendant's race/national origin: **Hispanic**

15. EXECUTION OF SENTENCE IMPOSED
a. ☑ at initial sentencing hearing.
b. ☐ at resentencing per decision on appeal.
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment. (PC 1170(d).)
e. ☐ other *(specify)*:

16. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT	
A	2138	1859	279	☐ 2933 ☒ 2933.1 ☐ 4019
B				☐ 2933 ☐ 2933.1 ☐ 4019
C				☐ 2933 ☐ 2933.1 ☐ 4019
D				☐ 2933 ☐ 2933.1 ☐ 4019

Date Sentence Pronounced: **01/12/2018**
Time Served in State Institution: ☐ DMH ☐ CDC ☐ CRC

17. The defendant is remanded to the custody of the sheriff ☑ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☑ the reception center designated by the director of the California Department of Corrections and Rehabilitation.
☐ county jail ☐ other (specify):

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE: D. HAGAN DATE: JAN 16, 2018

SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE

CERTIFIED ABSTRACT OF JUDGMENT - DETERMINATE

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - INDETERMINATE

(NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-292 ATTACHED)

CR-292

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
JAN 17 2018
DAVID H. YAMASAKI, Clerk of the Court
BY: D. HAGAN DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF: Orange			
PEOPLE OF THE STATE OF CALIFORNIA vs DEFENDANT: Galan, Jose Manuel	DOB: 04-08-67	12CF3565 -A	
AKA		-B	
CII# A33249413 BOOKING# 2738567	☐ NOT PRESENT	-C	
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGEMENT	☐ AMENDED ☐ ABSTRACT	-D	
DATE OF HEARING: 01-12-18	DEPT.NO.: C43	JUDGE: Michael J. Cassidy	
CLERK: Andrea Madison	REPORTER: Jennifer Harpster	PROBATION NO. OR PROBATION OFFICER	☐ IMMEDIATE SENTENCING
COUNSEL FOR PEOPLE: Kristin R. Bracic		COUNSEL FOR DEFENDANT: Raymond L. Jones, Public Defender	☒ APPTD

1. Defendant was convicted of the commission of the following felonies:

☐ Additional counts are listed on attachment

0 (number of pages attached)

CNT.	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO/DATE/YEAR)	CONVICTED BY: JURY	CONVICTED BY: COURT	CONVICTED BY: PLEA	CONCURRENT	CONSECUTIVE	654 STAY
8A	PC	288.7(b)	Oral copulation or sexual penetration with child 10	12	11/09/17	X					

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

COUNT	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL	

3. ENHANCEMENTS charged and found to be true for PRIOR CONVICTIONS OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed, "S" for stayed, or "PS" for punishment struck. DO NOT LIST ENHANCEMENTS FULLY STRICKEN by the court.

ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	ENHANCEMENT	TIME IMPOSED, "S," or "PS"	TOTAL	

Defendant was sentenced to State Prison for an INDETERMINATE TERM as follows:

4. ☐ LIFE WITHOUT POSSIBILITY OF PAROLE on counts _____

5. ☐ LIFE WITH POSSIBILITY OF PAROLE on counts _____

6. a. ☑ 15 years to Life on counts 8 c. ☐ years to Life on counts _____
   b. ☐ 25 years to Life on counts _____ d. ☐ years to Life on counts _____
   PLUS enhancement time shown above.

7. ☒ Additional determinate term (see CR-290).

8. ☐ Defendant was sentenced pursuant to ☐ PC 667(b)-(i) or PC 1170.12 ☐, PC 667.61 ☐ PC 667.7 ☐ other (specify):

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for indeterminate sentences. Attachments may be used but must be referred to in this document.

Form Adopted for Mandatory Use
Judicial Council of California
CR-292 [Rev. January 1, 2012]

Penal Code,
§ 1213,
1213.5

PEOPLE OF THE STATE OF CALIFORNIA vs.
DEFENDANT: **Galan, Jose Manuel**

12CF3565 -A	-B	-C	-D

9 FINANCIAL OBLIGATIONS (plus any applicable penalty assessments):

a. Restitution Fine(s):

Case A: $ 200.00 per PC 1202.4(b) forthwith per PC 2085.5; $ 200.00 per PC 1202.45 suspended unless parole is revoked.
$ 0.00 per PC 1202.44 is now due, probation having been revoked.

Case B: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45 suspended unless parole is revoked.
$ 0.00 per PC 1202.44 is now due, probation having been revoked.

Case C: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45 suspended unless parole is revoked.
$ 0.00 per PC 1202.44 is now due, probation having been revoked.

Case D: $ _____ per PC 1202.4(b) forthwith per PC 2085.5; $ _____ per PC 1202.45 suspended unless parole is revoked.
$ 0.00 per PC 1202.44 is now due, probation having been revoked.

b. Restitution per PC 1202.4(f):

Case A: $ 600.00 ☐ Amount to be determined to ☐ Victim(s)* ☒ Restitution Fund
Case B: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund
Case C: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund
Case D: $ _____ ☐ Amount to be determined to ☐ Victim(s)* ☐ Restitution Fund

☐ Victim name(s), if known, and amount breakdown in item 12, below. ☐ * Victim name(s), in probation officer's report.

c. Fine(s):

Case A: $ _____ per PC 1202.5 $ 0.00 per VC 23550 or 0 days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense
Case B: $ _____ per PC 1202.5 $ 0.00 per VC 23550 or 0 days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense
Case C: $ _____ per PC 1202.5 $ 0.00 per VC 23550 or 0 days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense
Case D: $ _____ per PC 1202.5 $ 0.00 per VC 23550 or 0 days ☐ county jail ☐ prison in lieu of fine ☐ concurrent ☐ consecutive
☐ includes: ☐ $50 Lab Fee per HS 11372.5(a) ☐ _____ Drug Program Fee per HS 11372.7(a) for each qualifying offense

d. Court Security Fee: $ 40.00 per PC 1465.8. **e. Criminal Conviction Assessment:** $ 30.00 per GC 70373.

10. TESTING: a. ☐ Compliance with PC 296 verified b. ☑ AIDS per PC 1202.1 c. ☑ other *(specify)* **DNA PC 296**

11. REGISTRATION REQUIREMENT: ☒ per *(specify code section)*: Penal Code 290

12. Other orders (specify): **Total term to be served in State Prison is 29 Year(s) 8 Months to life. Defendant is to serve the determinate sentence of** 14 years 8 months first, followed by the Indeterminate Sentence of 15 years to life. Court orders all fees payable through the Dept. of Corrections. Defendant to complete Testing - Acquired Immune Deficiency Syndrome (AIDS) as directed by Dept. of Corrections as to count(s) 2, 3, 4, 5, 6, 7, 8. Pay restitution to the Victim Compensation & Government Board in the amount of $600.00.

13. IMMEDIATE SENTENCING: ☐ Probation to prepare and submit a post-sentence report to CDCR per PC 1203c
Defendant's race/national origin: **Hispanic**

14. EXECUTION OF SENTENCE IMPOSED
a. ☑ at initial sentencing hearing.
b. ☐ at resentencing per decision on appeal.
c. ☐ after revocation of probation
d. ☐ at resentencing per recall of commitment. (PC 1170(d).)
e. ☐ other *(specify)*:

15. CREDIT FOR TIME SERVED

CASE	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
A			☐ 2933 ☐ 2933.1 ☐ 4019
B			☐ 2933 ☐ 2933.1 ☐ 4019
C			☐ 2933 ☐ 2933.1 ☐ 4019
D			☐ 2933 ☐ 2933.1 ☐ 4019

Date Sentence Pronounced	Time Served in State Institution
01/12/2018	☐ DMH ☐ CDC ☐ CRC

16. The defendant is remanded to the custody of the sheriff ☑ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.
To be delivered to ☑ the reception center designated by the director of the California Department of Corrections and Rehabilitation.
☐ other *(specify)*:

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE		DATE
D. HAGAN		JAN 16, 2018

SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE