NO. 18-9285

IN THE
SUPREME COURT OF THE UNITED STATES

DEAN A. SCHWARTZMILLER-PETITIONER

VS.

THE STATE OF CALIFORNIA-RESPONDENT

PETITION FOR REHEARING

Pursuant to Rule 44.2, Rules of the Supreme Court of the United States, Petitioner presents his Petition For Rehearing of the Court's Order entered herein on the 7th day of October, 2019, denying the Writ of Certiorari sought herein.

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HISTORY

"Nothing is more common than for a free people in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disenfranchisement and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disenfranchise any number of citizens at pleasure by general discriptions, it may soon confine all the votes to a small number of partisans and establish an aristocracy, or oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious without hearing or trial, no man can be safe, nor know when he maybe the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery of common sense." 111, (John C. Hamilton), "History of the Republic of the United States" at 34 (quoting Alexander Hamilton).

INTENDED RESULT

170 years later an astute Justice of the United States Supreme Court construed the forefathers' action to endorse and prohibit:

> Those who wrote our constitution well knew the danger inherent in legislative acts which take away the life, liberty or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. (citation omitted). And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charges against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted with the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense and even after conviction no cruel and unusual punishments can be inflicted upon him. (citation omitted). When our constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. United States v. Lovett, 328 U.S. 303 (1946)(emphasis supplied).

REASONS FOR REHEARING THIS CASE

Apparantly this pro per petitioner was not sufficiently specific in pleading his Certiorari petition. Currently the role of politics and partisan divides in the Judiciary, particularly the Federal Courts, have created a monster in its midst that has also included two members of the current Supreme Court both of whom were found guilty by public opinion without due process of law for committing alleged sexual assaults without trial.

What is this anathema of current American Society? Exactly the counter-majoritarianism our Constitution was intended to prohibit. Any allegation of sexual misconduct with another man, woman or child regardless of who, what, when, or why it is made and regardless of ulterior motives, is considered to be true.

The case currently before this Court clearly demonstrates what happens when the Judicial Branch of government abdicates and joins rather than separates itself from the legislative and executive power, see, The Federalists Papers No. 78, Alexander Hamilton.

First, in the late 1980's child sexual abuse arose to the forefront of political fervor in the form of 'Satanic Rituals' sexual abuse cases. Cf. People v. Pitts, (1990) 223 Cal.App.3d 606 (sexual rituals alleged with own children, drinking of urine a "lewd" act.); then see, Pitts v. Kern County, (1998) 17 Cal.4th 340, 346 n.1 (after 10 years in prison and being reversed because of prosecutor misconduct along with State psychologists fabricating evidence.). See, "The Myth of Repressed Memory" at 259 (1994).

This eventually led to Sexually Violent Predator Acts in about 20 or so States (first in Kansas, Washington and California), in the

mid-1990's that further resulted in this Court reducing the Double Jeopardy Clause of the Fifth Amendment of the Constitution to a bad "civil" procedure joke in Kansas v. Hendricks, 527 U.S. 346 (1997); United States v. Comstock, (2010) 2010 WL 1946729 (double imprisonment for the same crime(s) approved because it is for treatment, not punishment, which is still bondage, enternment, or servitude to the United States government.)

In 1995 when California Courts rewrote Penal Code § 288, as argued, it changed the requirement of a lewd or lascivious act into "any touching" of a minor or child, and required no actual specific intent to do so, People v. Martinez, 11 Cal.4th 434 (1995). This was approved sub-silentio by rejecting a Federal Court's correct opinion in accordance with Kolender v. Lawson, 461 U.S. 352, 357-58 n.8 (1983), that was completely ignored by the Ninth Circuit Court of Appeals in Schwartzmiller v. Gardner, 567 F.Supp. 1371 (D.Id. 1983)(Lewd statute void for vagueness on its face), rev'd in part, 752 F.2d 1341, 1346-47 (9th Cir. 1984)(Reversing this finding because Kolender "presented a unique fact situation and was only available when the 'enactment is impermissably vague in all of its applications'".).

It is respectfully submitted that establishing rules of statutory construction by this Court have no force, effect, or meaning to anyone when not enforced by the Federal Courts creating them. This has now created a split requirement--one for the Federal Courts --and one for the State Courts, beginning with Kolender, then in Johnson v. United States, 135 S.Ct. 2552 (2015), and then Sessions v. Dimaya, 584 U.S. 2319 (2018), and then United States v. Davis,

588 U.S. 2319 (2019).

The State of Califonria routinely and daily, rejects the rulings of these cases with impunity to their majority opinions, telling them in its 'subjective' style to "stick-it, our subjective rules are better and they result in a 99% conviction rate". Cf. In re Mendoza, HSC 11731 (August 20, 2019)(San Diego Superior Court), succinctly displays California's contempt for decisions of this Honorable Court. In re Mendoza is attached hereto as Joint Appendix K.

In Mendoza, a 22 year-old youth offender at the time of the alleged offenses was charged and prosecuted upon 13 counts of criminal sexual misconduct with a child pursuant to Penal Codes §§ 288(a) and 288.7(b): Four Counts of section 288.7(b)(non-violent "oral copulation" by placing "his mouth to her genitalia, under clothing -first time", Counts 1 and 3, and also charging in Counts 2 and 4, a violation of Penal Code § 288(a)(non-violent lewd or lascivious conduct by placing "his mouth to her genitalia, under clothing-first time".). What is the difference? Section 288.7(b) requires a sentence of 15 years to life in prison, Section 288(a) requires 3, 6, or 8 years in prison for the identical conduct.

Eventually he was found guilty of all 13 counts of sexual contact alleged, even upon Count 10 upon which no evidence was produced as to the allegation made, and in fact, was denied by the prosecutrix when she was attempted to be rehabilitated.

When Mendoza attacked the constitutionality of the statutes for vagueness and overbreadth, the Superior Court Judge on habeas corpus review responded:

> The rule is well established...that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations. (In re Cregler, supra 56 Cal.2d 308, 313, 14 Cal.Rptr. 289, 363 P.2d 305). If the statute clearly applies to a criminal defendant's conduct, the defendant may not challenge it on grounds of vagueness. (Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed. 2d 439; People v. Green, (1991) 227 Cal.App.3d 692, 696, 278 Cal.Rptr 140).... In re Mendoza at Slip op 4. Joint Appendix K attached.

However, Federal Courts had held similar situations to be contrarywise to the vagueness requirements of the United States Constitution as decided by the Federal Court 35 years before and affirmed in Johnson v. United States, 135 S.Ct. at 2561, where Justice Scalia and 5 other Justices in no uncertain terms declared in reviewing a Federal statute for vagueness:

> It seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all but a tautology: if we hold a statute to be vague, it is vague in all of its applications (and never mind the reality). Id.

Before this, also 35 years before Mendoza, This Court stated:

> No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. The dissent relies heavily on Parker v. Levy, 417 U.S. 733 (1974), but in that case we deliberately applied a less stringent vagueness analysis "because of the factors differentating military society from civilian society." Id. at 756. Kolender at 358 n.8

Then shortly after this Kolender decision, the Federal District Court of Idaho, Senior Judge Ray McNichols found an identical statute to Section 288 attacked here by declaring that the lewd and lascivious statute's plain language is "unconstitutionally vague on its face". Schwartzmiller v. Gardner, 567 F.Supp at 1382.

To obtain the convictions in Mendoza, the State was also allowed to play a video/audio tape recording made by police of the

questioning by them of the alleged victim and her mother along with the recording of their eavesdropping on conversations initiated by them while Mendoza was sitting alongside of the freeway in a dangerous location, where to end the conversation being perpetuated by them with police proding, Mendoza made some admissions against interest just so he could move from the Freeway. When this Video/audio tape was played for the jury who also received transcribed manuscripts to read as the tape played, the alleged victim wasn't even in the courtroom let alone available for cross-examination. It had been admitted without objection from defense counsel pursuant to California Evidence Code § 1360(a)(2), because of the evidence's "indicia of reliability" as determined by a judge.

The State had no real evidence of any guilt from medical, physical or psychological sources that any sexual crimes had been committed on the girl, let alone by Mendoza. This defendant was convicted by evidence that the State was allowed to manufacture and submit four years after the fact the alleged victim had disclosed to her school teacher, her mother, a police officer Strunk, and the eavesdropping cell phone call on the Freeway recorded without warrant by Detective Goldfinger, who was also not present when the video tape played to the jury. Plus the fact, that the State had sought and received in limine, an order to exclude any evidence that Martin Cunningham who was residing in the same residence as Mendoza and his girlfriend had also been named by the prosecutrix as having molested her in a like manner. Cunningham was not prosecuted by the State for anything. The fact that a Sexual Assault Response Team (SART)

examination of the alleged victim had disclosed no trauma to the girl's genitalia was not produced by the State.

Mendoza knew nothing about what was occurring around him at his trial except that he had not committed any of the crimes alleged and therefore thought that he could not possibly be convicted of anything. Every bit of the aforementioned testimonial hearsay statements were entered into evidence against him in violation of this Court's decision in Crawford v. Washington, 541 U.S. 36 (2004), pursuant to Evidence Code § 1360 and the requirement of the indicia of reliability of the evidence being proferred.

Mendoza was recently married, his wife had his child while he was in jail, and he was the new manager of a grocery store department for a large supermarket chain. He was ultimately sentenced to two consecutive 15 year to life sentences in California's unconstitutional prison system, Brown v. Plata, 131 S.Ct. 1910 (2011) aff'd 134 S.Ct. 1 (2013). A first time non-violent sexual crime offender.

To get him there the State of California violated Article 1, Section 10 of the United States Constitution, cf. United States v. Lovett, 326 U.S. 303, 322-23 (1946)(Legislatively punishing Mendoza and Petitioner for violent crimes they did not commit, were not charged, and no jury found guilt upon; the Fourth Amendment requirement of obtaining a warrant to eavesdrop on citizens conversations as required by 18 U.S.C. § 2518, ¶ (7)(i)-(iii) as required by Penal Code § 633.8(a), but nobody cared; a Fifth Amendment Miranda violation that was used against Mendoza to keep him from testiying in his own defense by his own defense counsel; a Sixth Amendment violation

of at least 5 State witnesses' confrontations during his trial, that were stipulated to be admitted by his State appointed counsel without Mendoza knowing what a stipulation even was, contra, People v. Farwell, Cal. Supreme Court No. S5231009 (June 21, 2018), Slip Op. (Defense counsel stipulating to waiver of defendant's constitutional rights without his knowledge is a violation of the Constitution) and, of course, the 14th Amendment's right to both a fair trial and to fair administration of statutes which excludes 'comfort dogs' and victims' "advocates" sitting along side of them while they testify, and also does not allow the prosecution to shop statutes for the life sentences to prison they carry for the same criminal conduct, Minnesota v. Probate Court, 309 U.S. 271, 277 (1940); accord, Johnson v. United States, 135 S.Ct. at 2556-57.

The California Courts used reversed convictions that were unsimilar as propensity evidence pursuant to Evidence Code § 1108, then paid the alleged teenaged victims and families, U-Visas (16 of them) all illegal entrants for the 2 alleged victims to testify on Petitioner.

California Courts allow their bias' and prejudices', as well as their political and ex-prosecutor sentiments of the moment to make its courts an extremely unfair judicial branch or system by affirming sexual offense convictions not proved beyond a reasonable doubt (In re Winship, 397 U.S. 358 (1970)), or proved by even a preponderence of evidence, a result of court activism and fiat principally from People v. Jones, 51 Cal.3d 292 (1990)(generic dates and no circumstances of crime pleaded is okay Notice); People v. Martinez, 11 Cal.4th 434 (1995) (a lewdly committed lewd or lascivious act need not be proved, "any

touching" not even lewdly done will suffice to convict); People v. Lopez, 19 Cal.4th 281 (1998)(incorporating most misdemeanor conduct into § 288(a) statute by fiat and overruling several precedential cases); and, People v. Murphy, 25 Cal.4th 136 (2001)(not necessary to commit an objectively sexual act but subjectively found "touching" will convict). All of which have demeaned the requirements of the Bill of Rights and the Amendments to the United States Constitution; to and beyond, all established limits.

As to California Courts' use of alleged propensity evidence at criminal trials pursuant to Evidence Code § 1108 with unsimilar victims, of unsimilar ages and alleged acts committed, going as far back as 1866, this Supreme Court concluded, which has not been overruled today, that:

> When trying a prisoner for a particular crime, proof that he has a general disposition to commit the crime is never permitted. Thompson v. Bowie, 71 U.S. (4 Wall) 463, 471-72 (1866)(emphasis added).

No court has overruled this opinion in 160 years, but yet California uses propensity evidence of any kind, shape, or form of alleged victims of any age, indiscriminately, in its criminal trials, see e.g., Cal. Evidence Code § 1108 and compare with Fed. Evid. Rule, 414(d), United States v. Larson, 112 F.3d 600, 604 (2nd Cir. 1997).

On top of this, California uses these unproven, or reversed and remanded dismissed charges to reimprison the "non-violent" sexual offender for treatment unavailable while doing the prison term. Not because he/she is a violent predator, but rather, they maybe touched a child anywhere, even incidentally.

This Court had approved this practice in Kansas v. Hendricks, 521 U.S. 364 (1997), and has gone even farther to assure the non-violent sexual offender is punished for the rest of his life for no meaningful reason. See, McCune v. Doe, 536 U.S. 24, 35-36 (2002)(sex offenders recidivism rates are "frightening and high"); Smith v. Doe, 538 U.S. 84 (2003)(registration of non violent sex offenders necessary for branding and shaming but nothing more.); Connecticut Dep't of Safety v. Doe, 538 U.S. 1 (2003)(It is okay to place sex offenders addresses names, and crime committed onto the internet for all to see, vigilantes included.).

All of these prior sex offense decisions are premised upon the psuedo-fact that sex offenders have a "frightening and high" percentage rate, more than all other crimes, for recidivism. Cal. Penal Code § 290.3(a) (1)("(1) Sex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and the protections of the public from reoffending by these offenders is a paramount public interest.").

However, under every scientific study to be conducted since these decisions in the last 20 years, it has been found to be untrue [see, Petition for Certiorari at 16, California's own sex offender management board in a study of about 4,000 prisoners released on parole, only 3.8% of them recidivated with a sexual crime]. In fact, sexual offenders have been shown to have almost the lowest rate of recidivism of all felony crimes, Doe v. Snyder, 834 F.3d 696, 704 (6th Cir. 2016)(sex offenders recidivism rates are not "frightening and high".); See also, State v. Weins, 417 P.3d 787 (Ariz. S.Ct.

2018) (Questioning this Court's decision in McCune.[2/]).

It is all of the above factors in toto and the highly relevant fact that State Courts have been abusing these prior opinions as reshaped by them, to find guilt and punishment where none should exist. Then, punish the alleged offender with ridiculously harsh sentences for de minimus non-violent crimes and conduct, all to show they are tough on sexual crimes, to hell with the United States Constitution that was designed to prohibit such occurances from being committed by any individual State. See, Flecher v. Peck, 6 Cranch 87, 137-138 (1810), where sections of the Constitution were deemed to be viewed as protection against "violent acts (by the government) which might grow out of the feeling of the moment.".

This case presents this Court with several unique and golden oportunities to return the United States justice system back to where the Constitution says it should be without any political hype premised upon untrue facts that are "frightening and High", but that constitionally restructure sexual offense criminal trials such as:

1. Prohibiting joint trials upon non-cummulative events or victims, cf. Panzaveccnia v. Wainwright, 658 F.2d 337 (5th Cir. 1981)(requires a special instruction);

2. Prohibiting propensity evidence use at all sexual offense trials without exception, or at a minimum limit it to similar facts and circumstances and victims, especially in age, cf. United States v. Larson, 112 F. 3d 600, 604 (2nd Cir. 1997);

3. Prohibiting all hearsay evidence use at all sexual offense trials without exception where no physical, psychological or medical evidence of sexual contact exists, cf. Crawford v. Washington, 541 U.S. 36 (2004);

2/ See Mark and Tara Ellman, "Frightening and High": The Supreme Court's crucial mistake about sex crime statistices, 30 Const. Comments, 495, 498-99 (2015).

4. Return the requirement of corroboration at all sexual offense trials without exception for any finding of guilt;

5. Prohibit all 'comfort dogs' and 'victim advocates' from the courtroom at any time during witness' testimony;

6. Appoint only counsels who specialize in the defense of sexual offense cases for defendants, contra, In re Mendoza, supra (Aug. 20, 2019);

7. Void all vague and overbroad statutes purposely written or construed by the courts to allow police, prosecutors, judges or juries to select who they think should be prosecuted thereupon, Kolender v. Lawson, 461 U.S. 351 (1983);

8. Get rid of completely, all registration, neighborhood restrictions and/or GPS tracking devices on all non-violent sex offenders who are not recidivists;

9. Stop all double jeopardy punishments of citizens who have served their terms for non-violent, non-predatory sexual offenses, determining in lieu of prosecution, if the defendant is mentally ill, send them to a hospital not a state prison, nor a prison hospital for the rest of their lives.

The time is ripe for both conservative and moderate jurists to move to alter the following embarrassing facts of the United States:

> By any measure, the United States leads the world in incarceration. In absolute terms, it has more prisoners than any other country, With just 5 percent of the world's population, we have almost a quarter of the world's prisoners. China, with nearly 20 percent if the world's population, has 16 percent of the world's prisoners. Incarceration rates were not always this high in the United States. For the first three-quarters of the twentieth Century, the rate was well under 250 per 100,000. Then, starting around 1980, incarceration rates started rising sharply with the advent of the war on drugs, mandatory minimum sentences and three-strikes laws (of which California leads all). Criminal Law 2.0, 44 Geo.Ann.Rev.Crim.Proc., xvi-xvii (2015)(Hon. A. Kozinski, CJ.).

In the "land of the free", California built 36 huge maximum security prison complexes that actually contained 5 to 7 separate prisons each, built to contain 200 prisoners in each housing unit, all lumped together for fiscal considerations. Each of these individual prisons within prison yards however, grew to 1200 to 1400 prisoners in each unit until even the gymnasiums were teeming with double

or even triple bunked prisoners, Brown v. Plata, 131 S.Ct. 1910 (2011), aff'd, 134 S.Ct. 1 (2013). Many of whom were non-violent not 2-strikes, nor 3-strikes offenders, but 1-strike sexual offenders sentenced to life in prison for de minimus alleged sexual offenses. Page 13 above demonstrates how California has done this, but:

> When the rules of evidence are relaxed in order to permit the successful prosecution of alleged child molestation cases, we have gravely damaged the rights of the accused and invite the repetition, in a new form of the kind of justice associated with the witchcraft trials of seventeenth-century Massachusetts. In those famous and now abhorred proceedings, judges credited the accounts of children that they had been bewitched by the defendants. It was palpable to the judges that the accusers were suffering: They were suffering fits 'beyond the efficacy of any natural distemper in the world'. They would bark like dogs and purr like cats and sometimes shiver because they said cold water had been thrown on them, and sometimes declare they were in a red hot oven; other times they would cry out and tell that they were being beaten by cudgels. See Cotton Mather, Memorable Providences Relating To Possessions (1989), reprinted in narrative of the witchcraft case 1648-1706, 107-108 (George Lincoln Burr Ed. 1992)(detailing the afflictions of the four Goodwin children, aged 5 to 13). The judges had a belief, a theory which explained the palpable phenomena in terms of witchcraft. The judges identified the witch and had her executed. Id. at 106. The anology with the present case is this: "The general characteristics" of children believed to be under the spell of a witch were the principle evidence that witchcraft had taken place. United States v. Bighead, 128 F.3d 1329, 1331-1339 (9th Cir. 1997)(Noonan, J. dissenting).

To end this Petition For Rehearing, in the year of our Lord 2019, I go back to where it all began in the late 1700's and early 1800's, and exactly where it still should be now. The Persecution of the alleged witches is now more than 3 Centuries past, but the persecution of alleged sex offenders is an anathema occurring now:

> ...the fact that sex offenders are so widely feared and disdained by the general public implicates the counter-majoritarian principle embodied in the [Constitution]. As the founders rightly perceived as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under the guise of [criminal]

regulation to punish people without prior notice. Doe v. Snyder, 834 F.3d at 706.

Notice that provides no notice to any defendant, is no notice at all, Penal Code §§ 288(a) and 288.7(b), Schwartzmiller v. Gardner, 567 F.Supp. 1371, 1378 (D.Id. 1983)(voiding one count of lewd or lascivious conduct for lack of notice by statutes or courts.); and see, In re Mendoza, supra, who was charged with 4 counts of Penal Code § 288.7 (b) that reads in pertinent part:

> Any person...who engages in oral copulation...as defined in section 289...is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life. (Emphasis added).

But nowhere from subdivision (a) to (m) does section 289 define "oral copulation". And of course, "any touching" defines no criminal conduct whatsoever.

> In the words of George Wells, "as the mens rea requirement withers when the quantity and complexity of laws increase, the doctrine of ignorantia legis neminem excusat-ignorance of the law does not excuse-becomes problematic. The regulatory state is rendering unrealistic the presumption that a responsible citizen should be presumed to have knowledge of the law. Repealing a thousand vague and overreaching laws and replacing them with laws that are cast narrowly to punish morally reprehensible conduct and give fair notice as to what is criminal may not solve the problem altogether but it would be a good start. Criminal Law 2.0, 44 Geo.L.J.Ann. Rev.Crim.Proc. at xliv (A.Kozinski Cir. J.).

Wherefore, Petitioner respectfully submits that this request for rehearing be granted with the purpose of using this case as a springboard for correcting State's criminal laws as they relate to sexual crimes as noted herein, created over the last 2 decades or so, by political greed and pundits by mixing of judicial, legislative and executive branches of government to maintain it.

DATED this 18th day of November, 2019.

Respectfully submitted,

Dean A. Schwartzmiller

Dean A. Schwartzmiller
Petitioner pro se

Revd 8/26/2019

FILED
SAN DIEGO SUPERIOR COURT

AUG 20 2019

CLERK OF THE SUPERIOR COURT
BY: D. DICCION

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

IN THE MATTER OF THE APPLICATION OF:

ROBERT MENDOZA,

Petitioner.

HSC 11731
SCS 276250

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS; ORDER DENYING MOTION FOR DISCOVERY

AFTER REVIEWING THE PETITION FOR WRIT OF HABEAS CORPUS AND THE COURT FILE IN THE ABOVE REFERENCED MATTER, THE COURT FINDS:

On January 20, 2016 a jury convicted petitioner of two counts of oral copulation with a child 10 years of age or younger (Pen. Code,[1] §.288.7(b); counts 1 and 3), two counts of sexual penetration with a child 10 years of age or younger (§ 288.7(b); counts 5 and 7), and nine counts of lewd acts with a child (§ 288(a); counts 2, 4, 6, & 8–13). The jury found true special allegations petitioner had substantial sexual conduct with a child under the age of 14 (§ 1203.066(a)(8)) with respect to counts 2, 4, 6, 8, 9, and 10.) Petitioner was sentenced to 30 years to life in state prison based upon consecutive terms of 15 years to life for counts 1 and 3. The indeterminate terms of 15 years to life for counts 5 and 7 and the determinate middle terms of six years each for counts 9 through 13 were to be served concurrently with the terms for counts 1 and 3. The court

[1] All unspecified statutory references are to the Penal Code.

stayed the sentences for counts 2, 4, 6, and 8 pursuant to section 654.

Petitioner timely appealed his conviction to the California Court of Appeal, Fourth Appellate District, Division One. (Case No. D070079.) Petitioner argued and the court ruled:

> [T]he prosecutor committed prejudicial error in rebuttal argument by mischaracterizing the evidence regarding the victim's statements and the failure of Mendoza's counsel to object to the prosecutor's statement was ineffective assistance of counsel. Mendoza also contends the abstract of judgment is unclear and should be corrected. We disagree with Mendoza's first contention. However, we remand to the trial court with direction to amend the abstract of judgment to correct any ambiguity and clarify the term imposed for count 9 shall be served concurrently with the consecutive terms imposed for counts 1 and 3 as stated in the oral pronouncement of judgment. In all other respects, we affirm the judgment.

(*People v. Mendoza* (Feb. 28, 2017, D070079) [nonpub. opn.] review den.)

On July 12, 2019 petitioner filed a petition for writ of habeas corpus with this court. Petitioner argues section 288(a) and 288.7 are void for vagueness, overbroad, and unconstitutional as applied. Petitioner argues that trial counsel was ineffective because he did not file a trial brief in support of the defense, did not seek discovery, did not call an expert witness on behalf of defense, failed to attack evidence of controlled phone calls between petitioner and the victim and other prosecution evidence, and failed to raise in the trial court the constitutional issues raised in this petition. Petitioner complains about the fact he is being punished as a violent offender pursuant to section 667.5(c) though his offenses did not involve violence and argues it was ineffective assistance of counsel for appellate counsel not to raise this issue on appeal. Petitioner argues the trial court erred in admitting hearsay testimony and other evidence and committed instructional error which shifted the burden of proof off of the state and onto defendant. Finally, he complains the charges against him were the result of vindictive prosecution because the prosecution pursued charges with the highest penalty provisions.

On July 15, 2019 a second petition for writ of habeas corpus was filed with the

court by petitioner. The second petition is an identical copy of the first petition, but does not include the additional "memorandum in support of petition for habeas corpus" which accompanies the first petition.

On July 18, 2019 petitioner filed a request for ruling on his petition for writ of habeas corpus pursuant to Cal. Rules of Court, rule 4.551(a)(3). Accompanying the request for ruling is a copy of the first petition for writ of habeas corpus.

On August 2, 2019 petitioner filed a brief in support of his petition for writ of habeas corpus. In the brief, petitioner argues the fact the prosecution amended the charges against him by adding four additional counts of section 288.7(b), nine counts of 288(a) and an allegation of substantial sexual conduct (§ 1203.066(a)(8)), was a violation of double jeopardy. He argues kissing the victim on the lips does not support a conviction for section 288(a), lewd and lascivious act. Petitioner argues defense counsel's stipulation to numerous *in limine* requests of the prosecution amounted to an admission by counsel of petitioner's guilt and reiterates arguments made in the first petition that counsel was ineffective. He also argues all testimonial evidence by the victim, her mother, police investigators, and petitioner were inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36. Included with the brief is a motion for discovery. A duplicate of the discovery motion was also filed on June 27, 2019.

On August 15, 2019 petitioner filed another copy of the August 2, 2019 brief in support of the petition, the discovery motion, and the July 12, 2019 petition for writ of habeas corpus.

The petition, all arguments raised in the brief in support of the petition, and the discovery motion are denied.

Request for Ruling on Petition

Cal. Rules of Court, rule 4.551(a)(3)(B) provides that a petitioner may request a ruling if the court fails to rule on a petition within 60 days of its filing. Here, the petition was stamp filed on July 12, 2019. The date a petitioner dates his petition or mails to the

court does not control. The ruling of the court on the petition and all subsequent filings of the petition is timely.

July 12, 2019 Petition

In reviewing a petition for writ of habeas corpus, the court presumes the regularity of proceedings that resulted in a final judgment. (*Ex parte Bell* (1942) 19 Cal.2d 488, 500.) Every petitioner, even one filing in pro per, must set forth a *prima facie* statement of facts that would entitle him to habeas corpus relief. (*In re Bower* (1985) 38 Cal.3d 865, 872; *In re Hochberg* (1970) 2 Cal.3d 870, 875 fn 4.) The petitioner then bears the burden of proving the facts upon which he bases his claim for relief. (*In re Riddle* (1962) 57 Cal.2d 848, 852.) Vague or conclusory allegations do not warrant habeas relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) The petition should include copies of "reasonably available documentary evidence in support of claims . . ." (*Id.*) Petitioner has not met this burden.

Petitioner argues sections 288(a) and 288.7(b) are vague and overbroad.

> "The rule is well established ... that one will not be heard to attack a statute on grounds that are not shown to be applicable to himself and that a court will not consider every conceivable situation which might arise under the language of the statute and will not consider the question of constitutionality with reference to hypothetical situations." (*In re Cregler*, supra, 56 Cal.2d 308, 313, 14 Cal.Rptr. 289, 363 P.2d 305.) If the statute clearly applies to a criminal defendant's conduct, the defendant may not challenge it on grounds of vagueness. (*Parker v. Levy* (1974) 417 U.S. 733, 756, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439; *People v. Green* (1991) 227 Cal.App.3d 692, 696, 278 Cal.Rptr. 140.) However, in some cases, a defendant may make a facial challenge to the statute, if he argues that the statute improperly prohibits a " 'substantial amount of constitutionally protected conduct,' " whether or not its application to his own conduct may be constitutional. (*Kolender v. Lawson* (1983) 461 U.S. 352, 358–359, fn. 8, 103 S.Ct. 1855, 1858–1859, fn. 8, 75 L.Ed.2d 903.)

(*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1095.) Here, both sections 288(a) and 288.7(b) clearly apply to petitioner's conduct with the victim. Therefore, he cannot be heard to complain that the provisions are unconstitutionally vague. Neither statute prohibits a substantial amount of constitutionally protected conduct; both

provisions criminalize sexual conduct with a child under the age of 14 years. Therefore, the statutes are not overbroad. (See *Id.* at 1096; see *Kolender v. Lawson* (1983) 461 U.S. 352, 358-359, fn. 8.)

Petitioner's claims that the trial court erred by admitting hearsay testimony and other evidence are not properly raised in this petition. Rulings of the trial court on the admission or exclusion of evidence or other procedural matters may not be reviewed by way of habeas corpus. (*In re Harris* (1993) 5 Cal.4th 813, 826.)

Petitioner complains that the trial court erred by instructing the jury with CALCRIM 1110 for the section 288(a) offenses because that instruction does not include the elements of lewd, lascivious, or sexual acts. Petitioner's claim is wholly devoid of merit. CALCRIM 1110 is the required instruction for a charge under section 288(a). Petitioner cites no authority to support his contention to the contrary. The instruction includes the element that the touching be committed with "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or the child". (CALCRIM 1110.) This sexual intent element is the lewd, lascivious, sexual component of section 288(a). (See *In re Smith* (1972) 7 Cal.3d 362, 365.)

Petitioner's claim that he is being improperly punished as a violent felon pursuant to section 667.5 and his appellate attorney was ineffective for failing to raise this issue on appeal fails. Section 667.5(c) provides, in part: "[f]or the purpose of this section, 'violent felony' shall mean any of the following: ... (6) Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288." Petitioner's conviction for violating section 288(a) falls squarely within section 667.5(c)(6) defining violent felonies. Therefore, it was not ineffective assistance of appellate counsel to not raise the issue on appeal; to have raised the issue would have been frivolous.

Petitioner's claim of vindictive prosecution fails. Petitioner has not met his threshold burden to show that the prosecution increased the charges against him in response to petitioner's exercise of some pretrial right. (*People v. Puentes* (2010 190 Cal.App.4th 1480, 1484.)

Petitioner argues trial counsel was ineffective because he did not file a trial brief in support of the defense, did not seek discovery, did not call an expert witness on behalf of defense, failed to attack evidence of controlled phone calls between petitioner and the victim, failed to attack other prosecution evidence, and failed to raise all the constitutional issues at trial that are raised by petitioner in this petition.

In order for a convicted defendant to establish that counsel's assistance was so defective as to require reversal of a conviction, the defendant must show: (1) that counsel committed error so serious that his attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that the deficient performance prejudiced the defense. (*Strickland* v. *Washington* (1984) 466 U.S. 668, 687; *People* v. *Ledesma* (1987) 43 Cal.3d 171, 216.)

A reviewing court must apply the first of these prongs "deferentially" since there is a strong presumption that counsel's conduct falls within the "wide range of reasonable professional assistance." (*Strickland, supra,* 466 U.S. at p. 689; *Ledesma, supra,* 43 Cal.3d at p. 216). The second prong of prejudice must be "affirmatively proved." (*Ledesma, supra,* 43 Cal.3d at p. 217.) To prove prejudice, defendants must establish the "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* 466 U.S. at p. 694.)

With regard to claims of ineffective assistance of counsel, petitioner's assertions must be corroborated independently by objective evidence. (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) Petitioner's unsubstantiated, self-serving statements do not provide a sufficient basis upon which to prove his claims. (*Id.* at 945.) Failure to object rarely constitutes ineffective assistance of counsel. (*People v. Huggins* (2006) 38 Cal.4th 175, 206.)

Here, petitioner's unsubstantiated, self-serving statements do not establish that counsel's representation was deficient. Even if petitioner had shown counsel was deficient, he has not established prejudice; he has not shown that counsel's attacks on the evidence, seeking additional discovery, or calling of an expert witness

would have resulted in a more favorable outcome for petitioner. As for the failure to raise the constitutional claims, given that those claims have been rejected by this court as lacking in merit, it was clearly not unreasonable for counsel to not raise the issues in the trial court or on appeal. Petitioner has not established that he suffered ineffective assistance of counsel.

Issues Raised in August 2, 2019 Brief in Support

Petitioner argues that the prosecution violated double jeopardy by charging him with multiple criminal charges for a single act. This contention is without merit. "The double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 15, of the California Constitution provide that a person may not be twice placed 'in jeopardy' for the 'same offense.' 'The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense. [Citations.]' (Citations.)" (*People v. Anderson* (2009) 47 Cal.4th 92, 103–104, as modified (Aug. 26, 2009).) Here, petitioner was not tried twice for the same offense following acquittal or conviction and was not punished multiple times for the same offense.

Petitioner contends his right of confrontation was violated because testimonial hearsay statements made by the victim, the victim's mother, an expert for the prosecution, two police officers, and petitioner were admitted into evidence in violation of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). This argument fails.

In *Crawford* the court found that admission of an out-of-court statement that is "testimonial" and that incriminates a defendant violates the confrontation clause unless the declarant is unavailable and the defendant had an opportunity to cross-examine him or her. The court in *Crawford* stated that "testimony" is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." (*Crawford, supra,* 541 U.S. at 51 [citations omitted].) As the *Crawford* court put it, "[a]n accuser who makes a formal statement to government officers 'bears testimony' in a sense that a person who makes a casual remark to an acquaintance does not." (*Id.*)

Petitioner does not establish that a *Crawford* violation occurred with regard to any of the named witnesses. All the named witnesses testified at the trial with the exception of petitioner, and the police officer who interviewed the victim. *Crawford* does not apply to statements made by the defendant. The officer's questioning of the victim during the interview was not testimonial hearsay under *Crawford*. There was no *Crawford* violation.

Petitioner's argument that kissing the victim on the lips does not support a conviction for section 288(a), lewd and lascivious act is without merit. (See *In re R.C.*, 196 Cal.App.4th 741, 751.)

Petitioner's arguments that the pretext calls conducted by law enforcement with the victim and her mother were unconstitutional are without merit. Section 632 does not apply to police controlled phone calls between a victim or witness of a crime and the alleged perpetrator. Petitioner cites no authority to the contrary.

Petitioner reiterates the claims made in his July 12, 2019 petition regarding ineffective assistance of counsel and also argues that defense counsel's stipulating to certain prosecution *in limine* requests amounted to an admission of petitioner's guilt. Petitioner is mistaken with regard to his *in limine* claim; counsel did not concede or admit that petitioner was guilty of the charged offenses. Counsel simply stipulated to the *admission* of certain evidence. Petitioner has not established that the two are equivalent. Further, even if counsel had not stipulated the trial court had the discretion to admit the evidence anyway. Petitioner has not shown that he suffered any harm as a result of the stipulations. Petitioner's remaining claims of ineffective assistance of counsel were previously addressed in the context of the July 12, 2019 petition, *supra*.

Discovery Motion

Petitioner seeks discovery of various documents pursuant to section 1054.9. Section 1054.9(a) reads:

> In a case involving a conviction of a serious felony or a violent felony resulting in a sentence of 15 years or more, upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment, or

> in preparation to file that writ or motion, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall, except as provided in subdivision (b) or (d), order that the defendant be provided reasonable access to any of the materials described in subdivision (c).

Section 1054.9(c) reads: "For purposes of this section, 'discovery materials' means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial."

Here, petitioner has not shown that he meets the requirements of section 1054.9 subdivisions (a) and (c) such that he is entitled to the relief he seeks. Accordingly, the request for a discovery order pursuant to section 1054.9(a) is denied. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, as modified on denial of reh'g (Jan. 2, 2007).)

Pursuant to the foregoing, the July 12, 2019 petition, the issues raised in the August 2, 2019 brief in support, and the discovery motion are denied.[2]

A copy of this Order shall be served upon petitioner.

IT IS SO ORDERED.

DATE: 8/20/19

Stephanie Sontag

STEPHANIE SONTAG
JUDGE OF THE SUPERIOR COURT

[2] This order applies to all duplicates of the petition, brief in support, and discovery motion.