APPENDIX C

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH HYUNGSEOP SHIM, **Petitioner,** **v.** **MICHAEL SEXTON, Warden,** **Respondent.**	**NO. CV 17-7743-MWF (KS)** **JUDGMENT**

Pursuant to the Court's Order, IT IS ADJUDGED that this action is dismissed with prejudice.

DATED: August 20, 2018

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH HYUNGSEOP SHIM, **Petitioner,** **v.** **MICHAEL SEXTON, Warden,** **Respondent.**	**NO. CV 17-7743-MWF (KS)** **ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus ("Petition"), all of the records herein, the Report and Recommendation of United States Magistrate Judge ("Report"), and Petitioner's Opposition to the Magistrate Judge's Report and Recommendation ("Objections"). 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 those portions of the Report to which objections have been stated. Having completed its review, the Court accepts the findings and recommendations set forth in the Report.

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Accordingly, IT IS ORDERED that: (1) the Petition is DENIED; and (2) Judgment shall be entered dismissing this action with prejudice.

DATED: August 20, 2018

MICHAEL W. FITZGERALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH HYUNGSEOP SHIM, **Petitioner,** **v.** **MICHAEL SEXTON, Warden,** **Respondent.**	**NO. CV 17-7743-MWF (KS)** **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

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

INTRODUCTION

On October 23, 2017, Petitioner, a California state prisoner represented by counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (the "Petition"). (Dkt. No. 1.) On February 13, 2018, Respondent filed an Answer to the Petition, and on February 14, 2018, lodged with the Court the relevant state

court records. (Dkt. Nos. 10 and 11.) On March 13, 2018, Petitioner's counsel filed a Reply to the Answer. (Dkt. No. 14.) Briefing in this action is now complete, and the matter is under submission to the Court for decision.

PRIOR PROCEEDINGS

On April 1, 2015, a Los Angeles County Superior Court jury convicted Petitioner of three counts of continuous sexual abuse (California Penal Code ("Penal Code") § 288.5(a)) and two counts of lewd acts upon a child (Penal Code § 288(c)(1)). (2 Clerk's Transcript ("CT") 398-402; 6 Reporter's Transcript ("RT") 3303-06.) The jury also found true the allegations that the crimes were committed against more than one victim (Penal Code § 667.61(e)). (*Id*.) On May 21, 2015, Petitioner was sentenced to state prison for 25 years to life. (3 CT 606; 6 RT 3629.)

Petitioner appealed and concurrently filed a habeas petition in the California Court of Appeal. (Lodgment ("Lodg.") Nos. 9, 17.) On February 1, 2017, the California Court of Appeal affirmed the trial court's judgment and denied the habeas petition in a reasoned unpublished opinion. (Lodg. No. 12.) On March 3, 2017, the Court of Appeal made minor modifications to the opinion, but made no change to the judgment and denied Petitioner's request for rehearing.[1] (*See* Petition, Ex. B.) Petitioner then filed Petitions for Review in the California Supreme Court. (Lodg. Nos. 15, 18.) The California Supreme Court's summarily

[1] Respondent did not lodge a copy of the California Court of Appeal's modified opinion or a copy of the California Supreme Court's denial order of the Petition for Review for the direct appeal. However, Petitioner attached these documents as exhibits filed with the Petition at Exhibit B (Order Modifying Opinion of the California Court of Appeal, filed 3/3/17); and Exhibit C (Order of the California Supreme Court dated May 10, 2017). (*See* Dkt. No. 1.) The California Court of Appeal's unpublished decision is also available at *People v. Shim*, No. B264605, 2017 WL 436056 (Cal. Ct. App. Mar. 3, 2017).

denied both Petitions without comment or citation of authority on May 10, 2017. (See Petition, Ex. C.)

SUMMARY OF THE EVIDENCE AT TRIAL

The following factual summary from the California Court of Appeal's modified unpublished decision is provided as background. *See also* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted by the petitioner by clear and convincing evidence).

> [Petitioner] is the father of daughters S.S., born in 1996, J.S., born in 1998, and P.S., born in 2001. [Petitioner] and the girls' mother, V.C., divorced in 2007. Before the divorce, [Petitioner] never touched the girls sexually. However, he did hit the girls. After the divorce, the girls lived with their mother, and had visitation with [Petitioner].

I. Inappropriate Touching

> Between 2008 and 2012, S.S., J.S., and P.S. visited with [Petitioner] at his apartment nearly every weekend. [Petitioner] would pick the girls up on Friday, and return them home to their mother on Sunday evenings. All three girls testified that he touched their breasts during the drive to his apartment. Usually, S.S. sat in the front seat, and therefore, she was touched the most frequently. This touching started when she was 11 or 12, continued until she was 13, and occurred 3 or 4 times a month. When S.S. told [Petitioner] to stop, he told her that he was her father, and her body belonged to him so he was allowed to touch her.

J.S. sometimes sat in the front seat of [Petitioner's] car, and was also touched by [Petitioner]. J.S. testified that [Petitioner] touched her breasts once a month, over a period of 20 months. He touched her both over and under her clothing, starting when she was 11 or 12 years old. He also sometimes touched her breasts in his apartment. When J.S. told [Petitioner] to stop, he acted like it was a "joke" and told her "he could touch [her] whenever he wanted."

P.S. also testified that [Petitioner] touched her breasts in the car.

[Petitioner] also touched the girls' buttocks. S.S. testified that [Petitioner] "grab[bed]" her buttocks three or four times a month between the ages of 11 and 12. This occurred mostly in his apartment, but also in the elevator and hallway.

J.S. testified that [Petitioner] slapped or grabbed her buttocks, starting when she was 11 years old. This happened once or twice a month.

P.S. testified that [Petitioner] would also "squeeze" her buttocks. This happened during every visit over a six-month period. She also saw [Petitioner] touch her sisters' buttocks.

[Petitioner] also touched the girls' vaginas. The touching occurred in the bedroom the girls shared at [Petitioner's] apartment. S.S., J.S., and P.S. each testified similarly, that [Petitioner] would hold them down on the bed, with their legs dangling off of the bed. [Petitioner] would stand at the edge of the bed, and place his foot on their vaginas, and would "shake" or rub his foot on their vaginas. S.S. testified that [Petitioner] did this to her one time, and that she saw [Petitioner] do it to P.S. J.S. testified that [Petitioner] started touching her this

way when she was 11, and that it happened once every three or four months until she turned 13. She saw [Petitioner] do it to her sisters. P.S. testified that [Petitioner] touched her this way more than once. It started when she was 10 or 11. She also saw [Petitioner] do it to both of her sisters.

[Petitioner] also once tongue-kissed S.S. when she was 11 or 12, came into the bathroom when J.S. was showering, and touched P.S.'s vagina with his hand, both over and under her clothing. [Petitioner] also hit the girls when he was angry, and around August 2012, dragged S.S. by her hair.

II. Disclosure

After the hair pulling incident, S.S. refused to see [Petitioner]. S.S. did not tell mother why she no longer wanted to visit with [Petitioner]. Mother noticed she was "upset" and had lost her appetite. Mother was also concerned because J.S. and P.S. appeared angry after visitation with [Petitioner]. Therefore, mother enrolled all three girls in counseling.

When S.S. began counseling, she told her counselor about the hair pulling incident, but did not initially discuss the sexual touching. With S.S.'s permission, the counselor reported the physical abuse to the Los Angeles County Department of Children and Family Services (Department), and when social workers interviewed S.S., she told them about the sexual abuse. After she reported the abuse to the social workers, mother took her to the police to make a report. Mother also contacted the Department and made a report.

S.S. initially told mother that [Petitioner] had only touched her breasts. However, after several months, she told mother more details about the touching.

At the time S.S. first disclosed the sexual abuse to mother, neither J.S. nor P.S. had told mother that [Petitioner] touched them inappropriately.

At first, S.S. only told police that [Petitioner] touched her breasts. She "wasn't ready" to disclose the full extent of the abuse. She was also afraid [Petitioner] would get in trouble. Eventually, she told police about [Petitioner] touching her vagina and tongue-kissing her.

Prior to disclosing the abuse to social workers, S.S. had never discussed it with her sisters or her mother.

In 2012, after S.S. disclosed that [Petitioner] had sexually abused her, mother no longer allowed the girls to visit with [Petitioner]. She sought a temporary restraining order in the family court. The order was granted, and after that [Petitioner] did not see the children.

J.S. was "very angry" after she was first interviewed by social workers and discovered that S.S. had disclosed the abuse. She was upset because she could no longer visit with [Petitioner], and because she had to meet with police and miss school.

When J.S. first spoke with police, she did not tell them what happened because she did not want [Petitioner] to get in trouble. However, she began to feel guilty for being untruthful with the police so she told her counselor the truth. When she later met with the police, she told them what happened.

P.S. did not tell mother about the touching until after S.S. disclosed the abuse. Mother took P.S. to make a report to police. P.S. initially did not share

all the details of the abuse, but eventually told police everything because she felt it was important to be truthful. She did not share everything at first because she was embarrassed. After the abuse was reported to police, P.S. did discuss it with S.S., but not with J.S.

Clinical Psychologist Jayme Jones testified about sexual abuse accommodation syndrome, explaining why abuse often stays a secret and why victims might delay disclosure, disclose in bits and pieces, and even recant their allegations of abuse. He explained that it is also not unusual for a victim to express feelings of affection for an abuser.

III. Investigation

Los Angeles Police Officer Mauricio Moisa was assigned to investigate the allegations in this case. He first interviewed S.S. on August 22, 2012, and the interview was recorded. S.S. initially disclosed that [Petitioner] had touched her breast over and under her clothing while driving in the car, and that [Petitioner] had tongue-kissed her. She appeared very concerned about getting [Petitioner] in trouble, but wanted to protect her sisters, and wanted the touching to stop.

Officer Moisa interviewed J.S. and P.S. the following day. P.S. admitted to seeing [Petitioner] touch S.S.'s breasts. P.S. also admitted to seeing [Petitioner] touch J.S.'s breast in the car, and that [Petitioner] had touched her own breasts in the elevator at his apartment. She did not disclose any other inappropriate touching during this interview.

J.S. appeared upset when Officer Moisa interviewed her, and did not disclose any abuse during the August 23 interview.

The next morning, Officer Moisa received a voicemail from mother indicating that J.S. had disclosed to her that she was not truthful during her interview. On August 24, 2012, Officer Moisa interviewed J.S. She admitted she had not been truthful because she loved [Petitioner] and did not want him to get in trouble. She admitted to seeing [Petitioner] touch both S.S.'s and P.S.'s breasts, and that he had touched her breasts. She did not disclose any additional touching during this interview.

In a later interview of P.S., P.S. offered more details about the abuse, indicating that [Petitioner] had touched her vagina with his hand and massaged her vagina with his foot. When Officer Moisa re-interviewed S.S., she disclosed that [Petitioner] would throw her on the bed and place his foot on her vagina. J.S. also disclosed that [Petitioner] would pin her to the bed and touch her vagina with his foot. No additional touching was disclosed.

IV. Defense Case

Department social worker Mike Oh testified that he investigated a referral for the family in August 2011 based on an incident where [Petitioner's] new wife intentionally stepped on S.S.'s foot. S.S. reported that her mother threatened her and was upset with her every time she visited [Petitioner], and that mother was upset that [Petitioner] was not paying child support. S.S. told Mr. Oh that she would rather live with [Petitioner]. Neither younger sibling disclosed any problems with either parent.

Social worker Steven Song testified that he investigated a referral for the family in the summer of 2012 based on the hair pulling incident. When he interviewed S.S., she only disclosed that [Petitioner] had pulled her hair. Both younger sisters denied any abuse. When mother was interviewed, she did not suspect any abuse of the younger daughters.

During cross-examination, Mr. Song testified that the Department received another referral sometime after July 2012, and S.S. disclosed to Mr. Song that [Petitioner] had touched her "boob." S.S. was worried that [Petitioner] would touch her sisters. P.S. also disclosed that [Petitioner] touched her breasts.

Casey Lee testified that she was co-ministers with [Petitioner] at a church in 2007 and 2008. [Petitioner] left the church and formed his own church in 2010. Lee later joined [Petitioner's] church. Lee's children were very close to [Petitioner's] daughters. Lee never witnessed any abuse or improper touching by [Petitioner].

Tiffany Park (also known as Jung Hee) testified that she married [Petitioner] in 2010. She never saw [Petitioner] throw the girls on the bed, or touch their breasts in the car. The girls' bedroom door was always open.

Clinical and forensic psychologist David Thompson testified. He formerly worked as the interim director of the Walworth County Department of Health and Human Services in Wisconsin. One of his responsibilities was to supervise the child welfare office which was in charge of investigating child abuse. He ensured that social workers were trained to conduct interviews correctly. Generally, child forensic interviews should be recorded so that the

> interview techniques can be properly evaluated because the way the interviewer asks questions can affect responses and the recollections of the child. Questions should initially be broad and open-ended, and not provide the child with any new information so that their answers do not become tainted. Leading questions should be avoided. The questions may become more focused as the interview progresses, related to the responses that the child has already given.
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> Children can report things that did not happen. Also, children are prone to source monitoring error, where they can recall an event, but cannot recall their source of information about the event (e.g., whether they personally had an experience or whether someone told them about an experience). Also, if a child is exposed to negative comments about a person, it can affect the child's statements. Parental coaching can also affect a child's memory. So can tension between the parents, and sibling interactions. Repeated interviews, if the interviews are not done correctly, can reinforce and solidify untrue memories.

(*People v. Shim*, No. B264605, 2017 WL 436056 (Cal. Ct. App. Mar. 3, 2017), Petition, Ex. B at 3-10 [Dkt. No. 1-3].)

PETITIONER'S HABEAS CLAIMS

Petitioner presents the following grounds for habeas relief.

Ground One: "The trial court's comments to the jury that many clerics have committed criminal acts and the fact someone is clergy is not a defense to anything, violated Petitioner's constitutional right to due process and a fair trial." (Petition at 5; Petition Memorandum ("Mem.") at 9-16; Reply at 3-7.)

Ground Two: "The trial court's continual disparaging remarks aimed at defense counsel violated Petitioner's constitutional right to due process and a fair trial and also violated Petitioner's constitutional right to a fair and impartial judge." (Petition at 5-6; Petition Mem. at 16-22; Reply at 7-14.)

Ground Three: "The trial court's denial of a continuance of the trial made on the grounds that counsel needed time to obtain an expert witness violated Petitioner's constitutional right to due process and a fair trial." (Petition at 6; Petition Mem. at 23-28; Reply at 14-17.)

Ground Four: "Petitioner's sentence of 25 years to life was a cruel and unusual sentence in violation of the Eighth Amendment." (Petition at 6; Petition Mem. at 28-31; Reply at 17-20.)

STANDARD OF REVIEW

I. The Antiterrorism and Effective Death Penalty Act

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner whose claim has been "adjudicated on the merits" cannot obtain federal habeas relief unless 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.

For the purposes of Section 2254(d), "clearly established Federal law" refers to the Supreme Court holdings in existence at the time of the state court decision in issue. *Cullen*

v. Pinholster, 563 U.S. 170, 182 (2011); *see also Kernan v. Cuero*, __ U.S. __, 138 S. Ct. 4, 9 (2017) (per curiam) ("circuit precedent does not constitute clearly established federal law . . . [n]or, of course, do state-court decisions, treatises, or law review articles") (internal quotation marks and citations omitted). To constitute clearly established federal law, the Supreme Court precedent must "squarely address[] the issue" in the case before the state court or, at the very least, establish a legal principle that "clearly extends" to the case before the state court." *Wright v. Van Patten*, 552 U.S. 120, 125, 123 (2008); *see also Harrington v. Richter*, 562 U.S. 86, 101 (2011) (it "'is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by'" the Supreme Court) (citation omitted).

A state court decision is "contrary to" clearly established federal law under Section 2254(d)(1) only if there is "a direct and irreconcilable conflict," which occurs when the state court either (1) arrived at a conclusion opposite to the one reached by the Supreme Court on a question of law or (2) confronted a set of facts materially indistinguishable from a relevant Supreme Court decision but reached an opposite result. *Murray v. Schriro*, 745 F.3d 984, 997 (9th Cir. 2014) (citing *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). A state court decision is an "unreasonable application" of clearly established federal law under Section 2254(d)(1) if the state court's application of Supreme Court precedent was "objectively unreasonable, not merely wrong." *White v. Woodall*, __ U.S. __, 134 S. Ct. 1697, 1702 (2014). The petitioner must establish that "there [can] be no 'fairminded disagreement'" that the clearly established rule at issue applies to the facts of the case. *See id.* at 1706-07 (internal citation omitted). Finally, a state court's decision is based on an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d)(2) when the federal court is "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record before the state court." *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir.) (internal quotation marks omitted), *cert. denied*, 135 S. Ct. 710 (2014). So long as "'[r]easonable minds reviewing the

record might disagree,'" the state court's determination of the facts is not unreasonable. *See Brumfield v. Cain*, ___ U.S. ___, 135 S. Ct. 2269, 2277 (2015).

AEDPA thus "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *White v. Wheeler*, __ U.S. __, 136 S. Ct. 456, 460 (2015) (per curiam) (internal quotation marks and citation omitted). Petitioner carries the burden of proof. *See Pinholster*, 563 U.S. at 181.

II. The State Court Decision On Grounds One Through Four Is Entitled To AEDPA Deference.

Petitioner presented his claims in Grounds One to Four to the California Court of Appeal on direct and collateral review. (Lodg. No. 9 at 94-95 [Ground One]; Lodg. No. 9 at 13-32, 71-72 [Ground Two]; Lodg. No. 17 at 24-30 [Ground Three]; Lodg. No. 9 at 121-26 [Ground Four].) The California Court of Appeal denied the claims on the merits in a reasoned decision, affirming the conviction and denying the habeas petition. (Lodg. No. 12.) Petitioner then presented his claims to the California Supreme Court in the Petitions for Review (Lodg. Nos. 15 and 18), which the California Supreme Court denied summarily without comment or citation to authority. Thus, Section 2254(d) applies, and the Court looks through the California Supreme Court's silent denial to the last reasoned decision – the decision of the California Court of Appeal on direct and collateral review – to determine whether the state court's adjudication of Petitioner's claims in Grounds One to Four is objectively unreasonable or contrary to clearly established federal law. *See Johnson v. Williams*, 568 U.S. 289, 297 n.1 (2013) ("Consistent with our decision in *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991), the Ninth Circuit 'look[ed] through' the California Supreme Court's summary denial of [the petitioner's] petition for review and examined the California Court of Appeal's opinion."); *see also*, *e.g.*, *Jones v. Harrington*, 829 F.3d 1128,

1136 (9th Cir. 2016) (looking through California Supreme Court's summary denial of a petition for review to the California Court of Appeal's decision on direct review).

DISCUSSION

I. Petitioner Is Not Entitled To Habeas Relief On His Claims Of Judicial Bias And Misconduct In Grounds One And Two.

In Grounds One and Two, Petitioner claims that his constitutional rights were violated because the trial judge was biased or committed misconduct in several respects. (Petition at 5-6; Petition Mem. at 9-22; Reply at 3-14.)

A. Legal Standard

A criminal defendant has a due process right to a fair and impartial judge, and a fair trial in a fair tribunal. *See In re Murchison*, 349 U.S. 133, 136 (1955); *see also Webb v. Texas*, 409 U.S. 95 (1972). "[W]hen a defendant's right to have his case tried by an impartial judge is compromised, there is structural error that requires automatic reversal." *Greenway v. Schriro*, 653 F.3d 790, 805 (9th Cir. 2011) (noting that judicial-bias claims are not subject to harmless-error analysis).

Where judicial misconduct is alleged, the question on habeas review is whether "the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995). The trial judge's conduct must be considered in the context of the trial as a whole and be "of sufficient gravity to warrant the conclusion that fundamental fairness has been denied" in order to conclude that due process has been violated. *See id.* at 741. "To succeed on a judicial bias claim, . . . the petitioner must 'overcome a presumption of honesty

and integrity in those serving as adjudicators.'" *Larson v. Palmateer*, 515 F.3d 1057, 1067 (9th Cir. 2008) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

"[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Bias or partiality is not shown merely by "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as . . . judges, sometimes display." *See id.* at 555-56. "A judge's ordinary efforts at courtroom administration — even a stern and short-tempered judge's ordinary efforts at courtroom administration — remain immune." *Id*. at 556.

B. Analysis

1. Trial court's comment that being a clergy member is not a defense (Ground One)

In Ground One, Petitioner claims that his rights to due process and a fair trial were violated by the trial judge's "comments to the jury that many clerics have committed criminal acts and the fact someone is clergy is not a defense to anything." (Petition at 5; Petition Mem. at 9-16; Reply at 3-7.)

During voir dire, a prospective juror mentioned references in the Bible to "child-like innocence" and then commented, "I think children are less likely to lie." (4 Augmented ("Aug.") RT 690.) Defense counsel responded, "Now, as long as you brought up the subject of religion, you know Mr. Shim is a pastor?" (*Id*.) The prosecutor objected, to which defense counsel responded, "Oh, okay. Sorry." (*Id*.) The trial court then instructed the jury as follows:

> Ladies and gentlemen, please disregard that. I may have mentioned earlier that we don't usually talk about religion in the criminal courts, and it's really not something to consider at all. If it becomes relevant, then you'll know it. But whether or not a person has a faith discipline or not, whether they're high or low or nowhere in a church structure, has no meaning in the criminal courts at all.
>
> Sorry to say, in my own faith many clerics have not only sinned, but committed criminal acts. So the fact someone is clergy, that's not a defense to anything.

(4 Aug. RT 690.)

Later, outside the presence of the jury, defense counsel attempted to explain to the court why she had referred to Petitioner as a pastor. (4 Aug. RT 713.) Before she could explain, the trial court told her, "That was wrong and don't do it again. I don't care why you did it, it was wrong. It's not in evidence that he's a pastor." (*Id.*)

The California Court of Appeal concluded that the trial court's comment to the jury about clergy members who committed criminal acts was "better left unsaid" but did not amount to judicial bias:

> Setting aside whether the court was correct in limiting voir dire (and we can see potential religious bias as a proper area of inquiry on voir dire, however, [Petitioner] has not claimed error on this basis), in this case the trial court's example was particularly ill-chosen in a case where a clergy member was on trial for sexual abuse.

> In conclusion, the court appears to have been presented with counsel who was intentionally delaying the trial and had sometimes engaged in emotional displays. As trying as this may be, a better practice is for the court's rebukes to be made outside the presence of the jury. At the end of the day, however, we believe these comments fall into the better left unsaid category and do not amount to judicial bias.

(Petition, Ex. B at 29 [Dkt. No. 1-3].)

The California Court of Appeal also rejected Petitioner's related argument that the trial court's remarks about clergy members effectively lowered the prosecutor's burden of proof:

> The jury was correctly told that proof beyond a reasonable doubt is required before [Petitioner] may be convicted. . . . [T]he court's comment that clerics may also commit crimes in no way indicated that [Petitioner] was more culpable because of his status as clergy, or that his status somehow lessened the prosecutor's burden of proof.

(Petition, Ex. B at 40-41 [Dkt. No. 1-3].)

The California Court of Appeal's rejection of this claim was not objectively unreasonable. Even if the trial court's comment that "many clerics" have "committed criminal acts" was a comment "better left unsaid," it did not rise to the level of judicial bias. The trial court made a generic comment about clergy members but did not suggest that all clergy members are criminals, nor did the trial court direct any particular animus toward Petitioner because of his status as a clergy member. *See United States v. Odachyan*, 749 F.3d 798, 802-03 (9th Cir. 2014) (rejecting judicial bias claim premised on a district judge's

allegedly "anti-immigrant" comments where the district judge "did not suggest that all immigrants are criminals at heart regardless of their culpable conduct") (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986) (explaining that a "general frustration with insurance companies" does not establish a constitutionally disqualifying bias)); *United States v. Johnson*, 990 F.2d 1129, 1133 (9th Cir. 1993) ("Referring to a widespread and serious criminal problem as a scourge was not a biased comment, because it carried no implication that the defendant was a criminal."); *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980) (noting that a showing of judicial bias requires "an animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct, unless the attitude is somehow related also to a suspect or invidious motive"). In light of these authorities, the trial court's comment about clergy members, albeit ill-advised, did not reflect such a "high degree of favoritism or antagonism as to make fair judgment impossible." *See Liteky*, 510 U.S. at 555.

Moreover, the trial court's comment did not result in a lowered burden of proof. The jury was correctly instructed about the prosecutor's burden of proof. (2 CT 373; 5 RT 2814-15.) The trial court never suggested that Petitioner's occupation or any other personal characteristic relieved the prosecutor of proving Petitioner's guilt beyond a reasonable doubt. To the contrary, according to the full context of the trial court's remarks, the trial court instructed the jury that a person's religious status should be disregarded and "has no meaning in the criminal courts at all." (4 Aug. RT 690.) The trial court's comments in this context thus fall far short of those in the rare cases where a judge's comments were found to be sufficiently egregious to have prejudiced a criminal defendant's right to a fair trial. *See Maiden v. Bunnell*, 35 F.3d 477, 479, 482-83 (9th Cir. 1994) (rejecting argument that a trial judge's comment, construed as a criticism of jurors who are reluctant to convict, undermined the presumption of innocence given its full context and noting that "[c]ases finding fatally prejudicial judicial bias have uniformly involved much more shocking factual situations than the remark we consider here") (citing *United States v. Allsup*, 566 F.2d 68 (9th Cir.1977)

(judge gave jury the impression that defendant had threatened a witness); *United States v. Pena-Garcia*, 505 F.2d 964 (9th Cir.1974) (judge gave jury the impression he thought defendant was lying under oath); and *United States v. Stephens*, 486 F.2d 915 (9th Cir.1973) (judge gave jury the impression he thought evidence suggested defendant's guilt)).

Finally, in support for his claim, Petitioner cites a California case, *People v. Tatum*, 4 Cal. App. 5th 1125 (2016). (Petition Mem. at 12-13.) In *Tatum*, the California Court of Appeal held that a trial court abused its discretion by denying a criminal defendant's motion for mistrial when the trial court had made "extended remarks" to jurors to the effect that plumbers are "not going to be telling the truth," when the defendant's alibi witness was a plumber. *See* 4 Cal. App. 5th at 1131-32. *Tatum* has no application here because it is a state case involving a state standard (abuse of discretion) for the denial of mistrial motions. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *see also Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (commenting that a state trial court's abuse of discretion under state law does not necessarily show entitlement to federal habeas relief under § 2254). Furthermore, this case did not involve a motion for a mistrial and the "extended remarks" in *Tatum* about plumbers were far more egregious than the trial court's single remark in this case about clergy members. Indeed, in this case, the trial court tempered its remark with the observation that a person's religious status "has no meaning in the criminal courts at all." Accordingly, *Tatum* does not demonstrate that Petitioner is entitled to federal habeas relief for this claim.

2. Trial court's disparaging comments and discourteous conduct toward defense counsel (Ground Two)

In Ground Two, Petitioner claims that he received an unfair trial because of several instances in which the trial judge made disparaging remarks and engaged in "discourteous

conduct" toward defense counsel. (Petition at 5-6; Petition Mem. at 16-22; Reply at 7-14.) Specifically, Petitioner claims that his constitutional rights were violated because the trial court: (a) commented to defense counsel, "I'm concerned whether you are the right lawyer for this case"; (b) "angrily admonished" defense counsel during voir dire for asking prospective jurors about their divorces and custody battles; (c) accused defense counsel "of being wrong, of not paying attention, and wasting the court's time"; (d) accused defense counsel of engaging in a "passive aggressive stunt" by asking unnecessary questions of S.S. simply to cause S.S. to return for a second day of testimony; (e) refused to allow defense counsel to cross-examine the victims' mother about a declaration she had filed in her divorce proceeding with Petitioner; and (f) showed deferential treatment to two of the victims, J.S. and P.S, in several instances. (*Id.*)[2]

a. Commenting whether defense counsel was "the right lawyer for this case"

On February 18, 2015, approximately one month before trial, defense counsel requested additional funds for her memory expert, Dr. Perrotti, as well as a continuance. (2 Aug. RT at Q21.) After a hearing, the trial court denied both requests. (2 Aug. RT at Q24.) The trial court then asked defense counsel for a "date next week you want to come back," apparently for a pretrial conference. (2 Aug. RT at Q27.) Defense counsel asked: "What is this next date for? . . . I'm not ready. . . . I am objecting to the court's ordering me to trial at this point." (*Id.*) The trial court responded: "Counsel, if I have to tell you what a pretrial date is for, I'm concerned about whether you're the right lawyer for this case." (*Id.*)

[2] In the Answer, respondent construes the Petition as further alleging that the trial court demonstrated judicial bias by requiring the parties to use interrogatories during the minors' testimony. (Answer Mem. at 9, 21-22.) This allegation, however, is not raised in the Petition or the Memorandum attached to the Petition, both of which were prepared by Petitioner's federal habeas counsel. The Court therefore finds it not raised in the Petition and does not consider it.

The California Court of Appeal rejected Petitioner's claim that this comment rose to the level of judicial misconduct:

> We can discern nothing inappropriate about the court's comment. The court was simply remarking on counsel's lack of attention, and expressing disapproval for counsel's unwillingness to accept that the case was proceeding to trial.

(Petition, Ex. B at 16 [Dkt. No. 1-3].)

The California appellate court's rejection of this part of Petitioner's claim was not objectively unreasonable. The trial court's remarks to defense counsel about her apparent inattentiveness were not inappropriate given what defense counsel had said immediately before the remarks. As noted, a trial court's expressions of criticism and disapproval toward counsel ordinarily do not support a bias or partiality challenge. *See Liteky*, 510 U.S. at 555.

Moreover, because the trial court's remarks about whether defense counsel was the right lawyer for this case reflected the trial court's opinion from its direct observations of defense counsel during a court proceeding, ., information the trial court had acquired while acting in his judicial capacity, it generally was not subject to attack for partiality. *See Liteky*, 510 U.S. at 555 ("[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion"); *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012) ("Importantly, parties cannot attack a judge's impartiality on the basis of information and beliefs acquired while acting in his or her judicial capacity.") (citation omitted); *see also Sivak v. Hardison*, 658 F.3d 898, 926 (9th Cir. 2011) (rejecting judicial bias claim premised on trial court's suggestion that defense counsel was "over-zealous" and had "fabricated" rumors) (citing *Clemens v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 428

F.3d 1175, 1178 (9th Cir. 2005) (per curiam) ("Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters" do not form the basis of a successful recusal motion)).

Finally, the criticism was, as the California appellate court found, an ordinary admonishment that was insufficiently severe to reflect any deep-seated favoritism or antagonism that would have made fair judgment impossible. *See Liteky*, 510 U.S. at 556 (noting that ordinary admonishments, "whether or not legally supportable," fail to show judicial bias or partiality); *see also Shad v. Dean Witter Reynolds Inc.*, 799 F.2d 525, 532 (9th Cir. 1986) ("Comments by the court which reflect unfavorably on counsel's conduct at trial are not prejudicial unless of a serious nature.") (citation omitted).

b. Admonishment of defense counsel for asking prospective jurors about their divorces and custody battles

i. Background

During voir dire, defense counsel asked the prospective jurors if any of them had been divorced. (3 Aug. RT 345.) When three jurors raised their hands, defense counsel asked them about the length of the marriage, whether children had been involved, whether the divorce was friendly, and the details of any "custody battle." (3 Aug. RT 345-47.) The trial court said the following: "You do realize that this is intensely personal information to start talking about people's relationships, whether they're married or not, or their children. So I think you can ask a general question, but asking people to explain their marriages, their divorces, their children, is really not what we subject jurors to." (3 Aug. RT 347.)

Defense counsel then began asking a prospective juror about her "custody battle." (3 Aug. RT 347-48.) The trial court said, "If I wasn't clear, people's divorces and their

relationships are not properly examined during jury selection in my opinion." (3 Aug. RT 348.) Defense counsel said she would like to approach the bench, but the trial court denied the request and said the following:

> I know you would, but we're not going to spend time on this. To me it's not debatable. If you want to ask someone if they have a preconceived attitude or they have a bias that makes it difficult for them to hear certain types of testimony, that's fine. But people should not be asked to come in and talk about custody disputes. Divorces. Broken hearts. Hard feelings. Whether they've forgiven or not. That's not what jurors came here to do. They came to hear a case.

(3 Aug. RT 348.) A short time later, defense counsel asked if any prospective juror had "been subjected" to a divorce by his or her parents. (3 Aug. RT 349-50.) The trial court said the following:

> The divorce rates in this country are rather significant. So many people have been impacted by divorce. Subjected is a bit of a judgmental term. If people have an attitude about divorce that would prevent them from hearing the evidence in this case in a fair way, that's a fair question. But I don't think the marriages of their parents, their own marriages, or the marriages of their friends are really a proper subject. It's can they be fair in hearing the evidence, and decide based on the evidence.

(3 Aug. RT 350.)

Defense counsel asked a prospective juror, "Is there anything — you know, I've been asking these questions and the judge has been admonishing me. Is there anything —" (3 Aug. RT 350.) The trial court said the following:

> [Defense counsel], when I admonish you, you will know it. Such as referring to me in that way is improper. Do you need some help knowing what you're allowed to ask jurors about? I will give you that help. Whether you call it admonishment or not. But when you tell the jury I'm admonishing you, I don't like it. I think that's inappropriate.

(3 Aug. RT 350-51.) A short time later, defense counsel said she needed to leave the courtroom for a few minutes for "a personal break." (3 Aug. RT 351.) The trial court granted the break. (*Id.*) When she returned from the break and was instructed to continue her voir dire, defense counsel said she was "too upset." (3 Aug. RT 356.)

Later, outside the presence of the jury, defense counsel expressed her concern that the panel had "lost all respect for [her]" based on the court's "harsh" comments, and that the court should direct critical comments to her at sidebar instead of in the presence of the jury. (3 Aug. RT 369, 371, 374.) The trial court explained its view that counsel "seemed to have a level of sensitivity . . . to virtually anything that comes from the bench" and that as an attorney, counsel should "learn to deal with it." (3 Aug. RT 371.) The court also explained that it could not efficiently address every issue that came up at sidebar. (3 Aug. RT 374.)

A short time later, the trial court instructed the prospective jurors to disregard any "clash" between the trial court and the parties. (3 Aug. RT 387.) Specifically, the trial court instructed, "You'll disregard the lawyers and the judge and you'll go back and decide the case based on what the evidence is." (*Id.*) The trial court also instructed, "Don't hold

anything I do against Mr. Shim, or against his lawyers, or against [the prosecutor]." (3 Aug. RT 388.)

ii. Analysis

The California Court of Appeal rejected Petitioner's argument that the trial court's comments to defense counsel outline above constituted judicial misconduct:

> The record makes clear that [Petitioner] persisted with voir dire questioning that the trial court deemed inappropriate, and that counsel then went so far as to improperly accuse the trial court of "admonishing her," when the court was simply directing the scope of voir dire after counsel's repeated violation of the court's orders. (*People v. Williams* (2006) 40 Cal. 4th 287, 307 ["The trial court has considerable discretion in determining the scope of voir dire."]; *People v. Chong* (1999) 76 Cal. App. 4th 232, 243-244 [an attorney may be reprimanded when the attorney fails to maintain a respectful attitude toward the court and ignores the court's directives].)

(Petition, Ex. B at 17 [Dkt. No. 1-3].)

The California Court of Appeal's rejection of this part of Petitioner's claim was not objectively unreasonable. It was well within the trial court's discretion to define the scope of voir dire to exclude what the trial court believed would be unnecessary intrusions into the prospective jurors' personal lives. *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (noting that voir dire need not follow any particular format, and that trial judges have broad discretion to control its scope). Because defense counsel failed to abide by the trial court's rulings in this regard, the trial court's response was warranted, even if it upset defense counsel and led her to request a personal break. *See United States v. Poland*, 659 F.2d 884,

893-94 (9th Cir. 1981) (commenting that defense counsel appeared "too thin-skinned" in response to the trial court's displays of "impatience and irritation," where the record reflected defense counsel's disregard of the trial court's instructions).

Further, any harshness in the trial court's remarks was diluted by the trial court's repeated instructions to the jury to disregard any "clash" and to not use it against either of the parties. (3 Aug. RT 387-88.) On this record, the trial courts remarks do not reflect a deep-seated favoritism or antagonism that would have made fair judgment impossible. Finally, defense counsel was not entitled to hear the trial court's comments to her only at sidebar. *See United States v. Laurins*, 857 F.2d 529, 538 (9th Cir. 1988) ("It is within the court's discretion whether to conduct side-bar discussions."); *United States v. DeLuca*, 692 F.2d 1277, 1283 (9th Cir. 1983) (finding that "the rebuffs of counsels' repeated and unnecessary requests to approach the bench" were "proper exercises of the judge's authority to control his courtroom").

c. Accusation that defense counsel was wrong, not paying attention, and wasting the court's time

During voir dire, the prosecutor commented about the presumption of innocence. (4 Aug. RT 695.) Defense counsel objected that the prosecutor was "preinstructing the jury," but her objection was overruled. (*Id*.) Following these comments, the trial court explained the presumption of innocence and the reasonable doubt standard to the jury. (4 Aug. RT 697.)

Outside of the presence of the prospective jurors, defense counsel expressed that she was "very concerned" about the prosecutor's comments about the presumption of innocence. (4 Aug. RT 709.) The trial court asked whether defense counsel had heard its comments about the presumption of innocence, and defense counsel stated that "I don't think the court,

in my mind, addressed what the instruction actually says." (*Id*.) When the trial court asked what was wrong with its instruction, defense counsel said, "I don't remember, but it wasn't what the jury instruction said." (*Id*.) The trial court expressed its view that defense counsel was "wrong" and that it had correctly instructed the jury. (4 Aug. RT 709-10.) The trial court explained that when the time came, it would instruct the jury with CALCRIM instructions. (4 Aug. RT. 710.) However, defense counsel persisted that the court did not properly instruct the jury, and attempted to describe for the record what had been said. (*Id*.) The trial court expressed its view that it was a "waste of time" for defense counsel to attempt to describe what had occurred in the courtroom when the reporter was making an accurate record of the proceedings. (4 Aug. RT 711-12.)

The California Court of Appeal rejected Petitioner's argument that the trial court's comments constituted disparagement that was so severe that it rose to the level of judicial misconduct:

> These comments arose during an exchange about whether the prosecutor and the court had correctly instructed the jury about the presumption of innocence, where defense counsel labored to describe what had been said by the prosecutor and the court. The court's comments hardly disparaged counsel. Rather, the court was merely explaining that counsel was misrepresenting the record, and that her objections were noted but further discussion on the topic was not an efficient use of time as the reporter's notes accurately recorded what was actually said.

(Petition, Ex. B at 17-18 [Dkt. No. 1-3].)

The California appellate court's rejection of this part of Petitioner's claim was not objectively unreasonable. The trial court's criticism of defense counsel, based on the trial

court's perception that defense counsel was wasting time with an unwarranted discussion of the reasonable doubt standard, was insufficient to rise to the level of judicial bias. The trial court's management of the discussion reflected its ordinary efforts at courtroom administration, no matter how sternly worded. *See Liteky*, 510 U.S. at 556. Nor did the trial court evince impermissible bias by cutting off the discussion and refusing to allow defense counsel additional time to explain her position. *See United States v. Hernandez*, 109 F.3d 1450, 1454 (9th Cir. 1997) (rejecting judicial bias claim where the trial judge's refusal to afford defense counsel additional time to explain his position was merely an ordinary effort at courtroom administration).

d. Accusation that defense counsel was engaging in a "passive aggressive stunt"

i. Background

During defense counsel's cross-examination of S.S., it was almost time to take a recess. (3 RT 1304.) Defense counsel indicated that she had a new subject that she wanted explore, and asked the court whether she should start the new subject. (*Id.*) The court indicated that they would take their recess in 10 minutes, but that counsel should begin her new line of questioning. (*Id.*) When questioning resumed, counsel persisted with the old line of questioning. (3 RT 1305-07.) After several minutes, the court asked "are you not going to the new subject just to show me you can run out the clock?" (3 RT 1307.) Counsel responded, "No. I'd rather just stay on this subject if I could." (*Id.*) The court indicated that it would take its recess, and asked counsel if she would be ready to proceed to the next subject of her inquiry when court reconvened. (*Id.*) Counsel indicated that she would. (*Id.*)

Outside of the presence of the jury, the court asked why counsel had not proceeded to the new subject. (3 RT 1308.) Counsel explained there were only 10 minutes left. (*Id.*)

The court responded, "When I told you I wanted you to use the time we had, you decided to do what I think was a passive aggressive stunt, not go to the new subject, simply stay in the old one, which I think is inconsiderate to the jurors and disrespectful to the court." (*Id*.) Counsel explained that she was "very tired." (*Id*.) The court indicated that she should have asked for a break instead of "game playing" and using delay tactics. (3 RT 1308-09.)

When the proceedings resumed the following day, and the prosecutor and defense counsel raised evidentiary issues for the court to address, the court explained that the jury was waiting and asked both defense counsel and the prosecutor why these issues had not been raised at another time. (3 RT 1504.) "Why are you so wasteful, both of you, with juror time? . . . [¶] . . . If it happens anymore, I'll just tell them why they're waiting and I'll tell them that you've had years to do this, so they can direct their resentment to the correct people." (3 RT 1504-05.)

Later, during Petitioner's continued cross-examination of S.S., defense counsel noticeably paused for some time, seemingly to find or formulate her next question for S.S. (3 RT 1531.) The court asked, "Do you have questions prepared. It seems that you're going through your laptop, spending some time, and then asking questions as you find things. It's not a prohibitive practice, but it's very time consuming. [¶] I would think you can just ask the things you want to know without scrolling through however much you have on that laptop." (*Id*.) Counsel continued her questioning, but had some difficulty formulating a question, repeatedly trying to rephrase it. (3 RT 1532.) The court intervened, "Why don't you back up. Think of one good question. You need to make it clear to her whether you're asking of the time of the telling, the time of the events that she's describing, or something else." (3 RT 1532-33.)

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ii. Analysis

The California Court of Appeal rejected Petitioner's argument that the trial court's comments constituted judicial misconduct:

> [Petitioner] has mischaracterized the record. These comments arose after counsel was dilatory and wasted considerable time during cross-examination, after being warned by the court to use her time effectively. Moreover, both defense counsel and the prosecutor were warned about wasting time. We find no misconduct. It is clear that the court was attempting to manage the proceedings, and to ensure that both attorneys were effectively using their time.

(Petition, Ex. B at 19-20 [Dkt. No. 1-3].)

The California Court of Appeal's rejection of this part of Petitioner's claim was not objectively unreasonable. The trial court's criticisms of defense counsel for wasting time by engaging in repetitive questioning fell within the trial court's prerogative to make ordinary efforts at courtroom administration, even if the criticisms were sternly worded. *See Laurins*, 857 F.2d at 537 ("A trial judge is more than an umpire, and may participate in the examination of witnesses to clarify evidence, confine counsel to evidentiary rulings, ensure the orderly presentation of evidence, and *prevent undue repetition*.") (emphasis added). More specifically, the trial court was entitled to direct defense counsel to use time more efficiently in cross-examining the witness. *See United States v. Eldred*, 588 F.2d 746, 750 (9th Cir. 1978) (rejecting argument that the trial court unfairly belittled defense counsel by asking defense counsel to proceed after repetitive questioning of witnesses).

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The trial court's comment outside the jurors' presence that defense counsel's inefficient use of time was a "passive aggressive stunt" also does not show judicial bias. *See Ortiz v. Stewart*, 149 F.3d 923, 939-40 (9th Cir. 1998) (rejecting judicial bias claim where judge commented that the habeas petitioner was playing a "game" aimed at extending proceedings into the indefinite future), *overruled on other ground as recognized by Apelt v. Ryan*, 878 F.3d 800, 827 (9th Cir. 2017); *Sivak*, 658 F.3d at 925 (same where the judge accused petitioner's counsel of creating a "carnival atmosphere" that was turning the proceedings into a "Roman circus"). Indeed, it was significant that the trial court criticized both parties about wasting time. *See Williams v. Stewart*, 441 F.3d 1030, 1043 (9th Cir. 2006) (per curiam) (rejecting petitioner's claim of judicial bias after finding it significant that the trial judge ordered both parties to remain at counsel table "so that it would not appear that either side was being treated differently").

e. Limitation of defense counsel's cross-examination of the victims' mother about a divorce document

i. Background

Outside the presence of the jury, the attorneys had a discussion with the trial court about the relevance of the divorce proceedings between Petitioner and the victims' mother. (4 RT 2197.) Defense counsel confirmed that she wanted to go through some of the divorce documents with the victims' mother to trigger her recollection of various dates. (*Id.*) The trial court commented that the documents might be used to impeach the witness for bias or to refresh her recollection, but that otherwise the details of the divorce would not be revisited. (4 RT 2197-98.)

During cross-examination, defense counsel asked the victims' mother to look at a two-page legal document, dated January 13, 2011, in which the victims' mother apparently

requested that Petitioner's visitation with the children be stopped until he paid child support. (4 RT 2211-12.) Because it appeared that the document had been prepared by an attorney, the trial court asked, "[Defense counsel], do you intend to hold [the victims' mother] responsible for what her attorney submitted?" (4 RT 2212.) Defense counsel pointed out that the victims' mother had signed the document and should be asked if she had read it. (*Id*.) The trial court responded, "All right. I'm going to exclude use of this because you avoided my question directly. So I'll hang onto this. [¶] Go on to something else." (*Id*.)

ii. Analysis

On direct appeal, Petitioner argued that the trial court's limitation on defense counsel's cross-examination of the victims' mother violated Petitioner's constitutional right of confrontation and evinced judicial bias in favor of the prosecution. (Lodg. No. 9 at 45-46, 70-71.)[3] The California Court of Appeal rejected Petitioner's arguments:

> Concerning the declaration, it appears that counsel was attempting to question mother about a family law document dated January 13, 2011, which was prepared by an attorney, signed by mother, and requested payment of child support arrearages. The court asked whether [Petitioner] intended to hold mother "responsible for what her attorney submitted? Is that where you're going with this?" Counsel indicated that she intended to ask if mother signed it and did not provide any proffer of the relevance of the document. The court "exclude[d] use of this because you avoided my question directly."

[3] Petitioner also argued on appeal that the trial court improperly limited and interfered with defense counsel's cross-examination of the victims' mother in other respects that he does not raise in this Petition. (Lodg. No. 9 at 77-83.)

> [Petitioner] has not attempted to demonstrate any prejudice, and we can discern none. The trial court permitted extensive questioning of mother about the divorce and child custody proceedings, and allowed counsel to question mother about numerous family law documents.

(Petition, Ex. B at 34 [Dkt. No. 1-3].)

The California Court of Appeal's rejection of this claim was not objectively unreasonable. With respect to Petitioner's judicial bias argument, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky*, 510 U.S. at 555 (rejecting judicial bias claim premised in part on the trial judge's "cutting off of testimony"); *see also United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996) (noting that a "judge's views on legal issues may not serve as the basis for motions to disqualify"). Thus, Petitioner's challenge to the merits of the trial court's evidentiary ruling limiting cross-examination of the victims' mother based on the document fails to raise a colorable claim of judicial bias.

To the extent that Petitioner is also arguing that the trial court's ruling violated his constitutional right of confrontation (Petition Mem. at 22), it was not objectively unreasonable or inconsistent with existing Supreme Court precedent for the California Court of Appeal to reject that argument. The Confrontation Clause of the Sixth Amendment "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *See Delaware v. Fensterer*, 474 U.S. 15, 20 (emphasis in original); *Vasquez v. Kirkland*, 572 F.3d 1029, 1038 (9th Cir. 2009). It does not deprive "trial judges . . . [of] wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *See Delaware v. Van Arsdall*, 475 U.S. 673, 679

(1986). The Confrontation Clause is not violated by the exclusion of evidence when "the jury is otherwise in possession of sufficient information upon which to make a discriminating appraisal of the subject matter at issue. When the refused cross-examination relates to impeachment evidence, we look to see whether the jury had sufficient information to appraise the bias and motives of the witness." *See Skinner v. Cardwell*, 564 F.2d 1381, 1388-89 (9th Cir. 1977).

Petitioner contends that "[c]ross-examination on the declaration was very relevant impeachment because the statements in the declaration showed that the divorce proceedings between petitioner and [the victims' mother] were in fact contentious, contrary to what [the victims' mother] was saying on the witness stand." (Petition Mem. at 22.) But as the Court of Appeal noted, the defense was permitted to extensively cross-examine the victims' mother about the contentiousness of the divorce and custody arrangement, with references to other documents. For example, defense counsel was permitted to cross-examine the victims' mother about the precise issue raised in the January 2011 document, *i.e.*, Petitioner's outstanding child support obligation, by questioning the victims' mother about the fact that she went to the city attorney's office to request that Petitioner be ordered to comply with his child support obligation. (4 RT 2206-08.) Defense counsel also cross-examined the victims' mother in detail about her other disputes with Petitioner, including the fact that she had obtained a temporary restraining order against Petitioner for pulling S.S.'s hair, the fact that she and Petitioner had reported each other to the Department of Children and Family Services, the fact that she was angry with Petitioner for not taking an interest in the children's school work, and the fact that she had changed her social worker because he was taking Petitioner's side too often. (4 RT 2215-22, 2225-27; 5 RT 2406-07.) From this evidence, the jury had sufficient information to be aware of the possible bias and motives of the victims' mother, and Petitioner has not shown that the prohibited cross-examination from the January 2011 document would have produced "a significantly different impression of the

witness' credibility." *See Van Arsdall*, 475 U.S. at 679. Thus, the trial court's exclusion of the evidence did not violate the Confrontation Clause.

f. Deferential treatment of the victims

Finally, Petitioner claims that the trial court improperly gave deferential treatment to two of the victims, J.S. and P.S., in several respects, thereby "giving the jury the impression that [the trial court] believed they were telling the truth in their accusations against petitioner." (Petition Mem. at 22.) In support of this claim, Petitioner incorporates the arguments he made on direct appeal. (*Id.*)

On direct appeal, Petitioner argued that the trial court showed deferential treatment toward J.S. by advising her she did not have to point to Petitioner in the court if it made her uncomfortable (2 RT 932), telling the jury it was required to protect J.S. because she was a minor (2 RT 994), and commenting that J.S.'s testimony would not be extended so as to prevent her from going on a preplanned trip (3 RT 1248). (Lodg. No. 9 at 28-30.) Petitioner also argued that the trial court showed deferential treatment toward P.S. by asking her if she was comfortable talking about the allegations (4 RT 1832), telling her she could take all the time she needed to answer questions (4 RT 1849-50), and commenting that she appeared relieved when she finished her testimony (4 RT 1849). (*Id*. at 30-32.)

The California Court of Appeal rejected Petitioner's argument that the trial court gave deferential treatment to J.S. and P.S. that could be construed as vouching or favoritism toward the prosecution:

> [Petitioner] has again mischaracterized the record, and we can discern nothing improper about the court's comments. Evidence Code section 765 provides that "[t]he court shall exercise reasonable control over the

> mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment." (*Id*., subd. (a).) Moreover, this section provides that "[w]ith a witness under the age of 14 . . . the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to ensure that questions are stated in a form which is appropriate to the age or cognitive level of the witness. . . ." (*Id*., subd. (b).) Both J.S. and P.S. were minors at the time of their testimony. P.S. was only 13. A trial court enjoys broad discretion under section 765 to control proceedings and protect witnesses from harassment. (*People v. Spence* (2012) 212 Cal. App. 4th 478, 513-514 (*Spence*).) We can hardly view the court's comments as improper "vouching" or evidence that the court had aligned itself with the prosecution. (*People v. Harris* (2005) 37 Cal. 4th 310, 347.)

(Petition, Ex. B at 23 [Dkt. No. 1-3].)

The California Court of Appeal's rejection of this part of Petitioner's claim was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent. The Supreme Court has recognized that the states have a "compelling" interest in "the protection of minor victims of sex crimes from further trauma and embarrassment." *Maryland v. Craig*, 497 U.S. 836, 852 (1990). And a trial court "has the inherent power to protect witnesses," which 'stems from the 'indisputably . . . broad powers (of the trial judge) to ensure the orderly and expeditious progress of a trial.'" *Wheeler v. United States*, 640 F.2d 1116, 1123 (9th Cir. 1981) (quoting *Bitter v. United States*, 389 U.S. 15, 16 (1976)). "A trial judge's participation oversteps the bounds of propriety and deprives the parties of a

fair trial only when the record discloses actual bias . . . or leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality." *United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001) (citation omitted).

The trial court's comments to the victims and the jurors did not overstep the bounds of propriety so as to amount to vouching or alignment with the prosecution. The comments cited by Petitioner were mild and reasonable in light of the trial court's duty of special care to protect minors J.S. and P.S. from undue harassment or embarrassment. Indeed, the trial court's comments were particularly appropriate in light of the fact that P.S. broke down during cross-examination. (4 RT 1850.) Significantly, nothing about any of the trial court's comments could be construed as imposing any restrictions on defense counsel's cross-examination of J.S. and P.S. Indeed, defense counsel was permitted to cross-examine each victim at length about various topics, and in the case of J.S., the cross-examination went longer than the direct examination. (3 RT 1232-33.) Under these circumstances, Petitioner has not demonstrated that the trial court's comments denied him a fair trial.

II. Petitioner Is Not Entitled To Habeas Relief On His Claim In Ground Three Based On The Denial Of His Continuance Motion.

In Ground Three, Petitioner claims that his right to due process and a fair trial was violated by the trial court's denial his final continuance motion. (Petition at 6; Petition Mem. at 23-28; Reply at 14-17.) As a result, according to Petitioner, he was unable to present the testimony of a memory expert, Dr. Loftus. (Petition Mem. at 27.)

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A. Legal Standard

Trial courts are accorded broad discretion on matters regarding continuances. *See Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). The denial of a continuance constitutes an abuse of discretion when the trial court arbitrarily insists "upon expeditiousness in the face of a justifiable request for a delay." *Morris*, 461 U.S. at 11-12. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." *Ungar*, 376 U.S. at 589; *see also Armant v. Marquez*, 772 F.2d 552, 556 (9th Cir. 1985) (noting that review of a denial of a continuance request "is a case-by-case inquiry; we are bound by no particular mechanical test"). Factors that may be considered include the defendant's diligence, the usefulness of the continuance if granted, the inconvenience that granting the continuance would have caused the court or the government, and the amount of prejudice suffered by the defendant. *See Armant*, 772 F.2d at 556. At a minimum, a habeas petitioner alleging a constitutional violation from the denial of a continuance "must show some prejudice resulting from the court's denial" of the continuance request. *See id.* at 556-57.

B. Factual Background

In its reasoned decision, the California Court of Appeal set out the following background surrounding Petitioner's request for a trial continuance:

> The information was filed in July 2013. [Petitioner] was initially represented by Keith Kim, but [current defense counsel] substituted in as counsel on August 28, 2013. The case was slow to proceed to trial. Proceedings were repeatedly continued, often by stipulation of counsel. Proceedings were further delayed by numerous defense motions, such as a demurrer to the information, motion to dismiss, a motion to compel

discovery, among others. There were also repeated discovery disputes concerning the scope of discovery sought by the defense, such as medical records, therapy records, school records, and diaries of the victims that involved extensive litigation, and further delayed trial. [Petitioner] also made several motions to continue trial, in August 2014, October 2014, and November 2014, asserting that he needed more time to prepare his defense and conduct his investigation. The court either granted these motions, or proceedings were continued by stipulation of the parties.

On May 8, 2014, [Petitioner] made an ex parte motion for appointment of a defense memory expert. The motion sought approval of funds to hire Dr. Geoffrey Loftus as a memory expert, to demonstrate that the victims' memories had been "tainted, decayed, distorted and confused." The motion was denied by the trial court, apparently urging counsel to select an expert from the Los Angeles Superior Court expert appointee list. Therefore, on June 3, 2014, [Petitioner] moved to appoint a panel memory expert, Dr. Michael Perrotti. The trial court granted the motion that same day, authorizing payment of $280 per hour, not to exceed $2,800.

On August 29, 2014, [Petitioner] sought additional funds for his appointed expert. In support of the motion, counsel included a letter from Dr. Perrotti, specifying the work completed to date, and the amount of time needed to continue his work. Dr. Perrotti contemplated reviewing 1,751 pages of documents, such as interviews of the victims, the preliminary hearing transcript, and police reports. He had expended 16 hours to date, and anticipated needing an additional 20 hours to complete his analysis. That same day, the court authorized an additional 10 hours of

work. On September 4, 2014, the court authorized an additional six hours of work.

On January 14, 2015, [Petitioner] sought additional expert funds so that Dr. Perrotti could complete his analysis. An accounting of Dr. Perrotti's time showed he had expended over 26 hours reviewing family law records, court transcripts, and dependency records, among numerous other unspecified "records." This time, he anticipated needing an additional 25 to 30 hours to prepare for trial. The court refused to authorize more funds, expressing concern that the defense expert is "a bottomless pit who's gouging the public." However, the court was willing to allow Dr. Perrotti to come to court to explain his need for additional funds.

On February 3, 2015, [Petitioner] resubmitted his request for additional funds for Dr. Perrotti, this time seeking an additional 50 hours of compensation, anticipating it would take 35 hours just to review all of the discovery in the case. Alternatively, [Petitioner] sought an order appointing Dr. Loftus as his memory expert.

Also on February 3, 2015, [Petitioner] filed an ex parte application urging that [Petitioner] "needed several experts and Dr. Perrotti advised . . . that he qualified as a memory expert, a taint and a CAAS expert." [Petitioner] sought additional funds for Dr. Perrotti, or alternatively, funds to hire another "taint" expert, Dr. Phillip Esplin, at a rate of $350 per hour.

Dr. Perrotti appeared in court on February 18, 2015, to support his request for additional funds. In an in camera proceeding, Dr. Perrotti

explained that counsel had asked him to review over 1,700 pages of discovery, including family law records, and law enforcement interviews. Counsel admitted that she sent the expert all of her discovery, and that she did not define the scope of the work for him. Counsel represented that the expert would testify that the victims were not telling the truth. The court asked the expert what "data" supported this assessment. Dr. Perrotti testified that the victims were asked leading questions by investigators, and that the victims contaminated each other's memories. The court expressed its concern that the expert was invading the province of the jury, reasoning that this was not scientific data, but the facts of the case. Dr. Perrotti expressed that he would testify to memory decay, and the science of effective interviewing. The court was skeptical that an additional 50 hours needed to be expended on this topic, about which Dr. Perrotti testified that he already possessed extensive knowledge. The court denied any additional funds for Dr. Perrotti.

That same day, [Petitioner] also made a motion to continue trial. The motion urged that a continuance was required because Dr. Perrotti had not yet completed his report, as he needed additional funds to complete his assessment of the case. [Petitioner] represented that his family was raising money to pay for an expert, and that he needed more time. The court denied the request for a continuance. Trial was set for February 25, 2015.

On February 20, 2015, [Petitioner] made another motion for a continuance, urging that on February 18, 2015, Dr. Perrotti informed defense counsel that he could not generate any reports or form any opinions because he had not been paid to complete his assessment. Counsel represented that "[b]ecause Dr. Perrotti was selected from the

court approved list, I honestly believed his fees would be considered reasonable" and that counsel had expected that the court would authorize any additional funds requested and justified by the expert. Counsel represented that she needed to find a new expert, and that she could be ready for trial in "30 days if the court gives me time to hire and work with the new expert." Counsel also wanted a continuance so she could attend an MCLE conference from March 5 through March 7. The trial court continued trial until March 12, 2015.

On March 12, 2015, [Petitioner] made another motion to continue trial, urging that he had retained an out-of-state "taint" expert on March 3, 2015, and that the expert needed time to prepare for trial. [Petitioner] expected to be ready for trial on March 25, 2015. The trial court expressed its concern that [Petitioner] had been in custody for two years waiting for the case to go to trial. The court explained that the case would be transferred to the trial department on March 16, 2015, and that counsel could explain why she needed more time to that department. The People announced ready for trial, [Petitioner] was deemed ready for trial, and the court denied the motion. The case was ultimately assigned to the same judge for trial, and [Petitioner] did not again raise the issue of a continuance.

In support of [Petitioner's] habeas petition, Dr. Loftus submitted a declaration averring that "I was available to testify and, if called as a witness, I would have testified in accordance with my November 11, 2015 report." Attached to his declaration was a November 11, 2015 report, indicating that [Petitioner] had asked him to prepare a report in support of his habeas petition, and had forwarded to him "police reports, witness

> statements, witness interviews, counselors' reports, custody evaluation reports, court findings, case correspondence, petitions, and photographs." If called as a memory expert, Dr. Loftus would have testified to general theories of memory, circumstances under which memory fails, the effects of attention, the effects of forgetting, the suggestibility of young children, the consequences of post-event information on memory and witness confidence, and circumstances under which witness confidence cannot be relied upon as an index of reliability and accuracy.
>
> Counsel also submitted a declaration in support of the petition, generally urging that [Petitioner] needed a memory expert to testify about the subjects identified in the Loftus declaration. Counsel averred that after the trial court refused to grant more funds for Dr. Perrotti, she did not have time to hire a new memory expert, and was only able to hire a "taint" expert, who ultimately testified at trial. She averred that she did not have sufficient time to retain Dr. Loftus, and that if she had more time, she would have retained Dr. Loftus in addition to Dr. Thompson who did testify.

(Petition, Ex. B at 53-57 [Dkt. No. 1-3].)

C. State Court Opinion

The California Court of Appeal rejected Petitioner's claim that his constitutional rights were violated by the trial court's denial of his March 12, 2015 request for a continuance:

> We find [Petitioner] has not stated a prima facie claim for relief, and therefore summary denial of the petition is proper. [Petitioner's] only

evidence outside of the appellate record was the declaration and report by Dr. Loftus, averring what he would have testified to had he been retained as an expert, and counsel's declaration that she did not have sufficient time to retain Dr. Loftus. This evidence fails to demonstrate any different outcome at trial.

What's more, the record before us amply reveals no abuse of discretion in denying [Petitioner's] request for additional funds or a continuance. Evidence Code section 730 provides that "[w]hen it appears to the court, . . . that expert evidence is or may be required by the court or by any party to the action, the court . . . may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court."

"[C]ourt-ordered defense services may be required in order to assure a defendant his constitutional right not only to counsel, but to the effective assistance of counsel." (*Corenevsky v. Superior Court* (1984) 36 Cal. 3d 307, 319.) "[I]t is only necessary services to which the indigent defendant is entitled," however, "and the burden is on the defendant to show that the expert's services are necessary to his defense." (*People v. Gaglione* (1994) 26 Cal. App. 4th 1291, 1304.) "The decision on the need for the appointment of an expert lies within the discretion of the trial court and the trial court's decision will not be set aside absent an abuse of that discretion." (*Ibid*.)

> Moreover, the decision to order a continuance is within the sound discretion of the court, and may only be granted for good cause. (§ 1050, subd. (e); *People v. Murphy* (1963) 59 Cal. 2d 818, 825.) However, that discretion may not be exercised in a manner that deprives a defendant of a meaningful opportunity to prepare a defense. (*Murphy*, at p. 825.)
>
> Here, [Petitioner] had retained Dr. Perrotti, who would have testified as a memory and taint expert. It was only because of counsel's mismanagement of Dr. Perrotti's time that he was unable to render an opinion at trial. It was well within the court's discretion to deny counsel's eleventh hour request to retain new experts, and for a continuance of proceedings which had dragged on for nearly two years. Moreover, Dr. Thompson provided competent testimony on many of the proffered areas of expertise about which Dr. Loftus would have testified. Therefore, we can discern no possible prejudice.

(Petition, Ex. B at 58-60 [Dkt. No. 1-3].)

D. Analysis

The California Court of Appeal's determination that a continuance was unwarranted given the circumstances that were before the trial court was not contrary to or an unreasonable application of clearly established Supreme Court precedent, nor was it an unreasonable determination of fact in light of the evidence before the state appellate court. First, counsel's lack of diligence in preparing the first memory expert, Dr. Perrotti, strongly weighed against the reasonableness of counsel's continuance request to prepare a second memory expert. Dr. Perrotti had ample time to prepare for trial because he was appointed by

the trial court in June 2014, several months before the trial in March 2015. The trial court also twice authorized additional funds for Dr. Perrotti to prepare for trial. (Lodg. No. 17, Exhibit D.) But by asking Dr. Perrotti to review voluminous records without defining the scope of the work (Lodg. No. 17, Exhibit L), counsel mismanaged both Dr. Perrotti's time and the funds allocated to him, resulting in his inability to testify at Petitioner's trial. Had counsel been reasonably diligent in managing the resources allocated for Dr. Perrotti, it would have been unnecessary for her to request a continuance so that she could obtain an opinion from a different expert. *See United States v. Lustig*, 555 F.2d 737, 744 (9th Cir. 1977) (holding that a continuance request was properly denied where, among other reasons, the defendant had sufficient time and resources to obtain the counsel of his choice).

Second, a further continuance would have inconvenienced the trial court and the government. As the Court of Appeal found, Petitioner's counsel made the request at the "eleventh hour," almost two years after the information was filed. During that time, the case had been continued several times, often at Petitioner's request. *See United States v Walter-Eze*, 869 F.3d 891, 908 (9th Cir. 2017) (holding that a further continuance request was properly denied where, among other reasons, the case had been continued four times over nearly nine months).

Most significantly, Petitioner has not demonstrated prejudice from the trial court's denial of the continuance request and the resulting inability to present Dr. Loftus's expert testimony. "Where the denial of a continuance prevents the introduction of specific evidence, the prejudice inquiry focuses on the significance of that evidence." *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1142 (9th Cir. 2005) (quoting *United States v. Mejia*, 69 F.3d 309, 317 (9th Cir. 1995)). As the Court of Appeal found, Dr. Thompson provided competent testimony for the defense on many of the proffered areas of expertise about which Dr. Loftus allegedly would have testified. For example, Dr. Loftus's proposed discussions of witness suggestibility and confirmation bias (Lodg. No. 17, Exhibit S) were covered in

detail by Dr. Thompson during his trial testimony (5 RT 2730-36). It, therefore, was not objectively unreasonable for the California Court of Appeal to conclude that Petitioner had not shown prejudice because Dr. Loftus's testimony was not critical to Petitioner's ability to present a defense.

Indeed, although Petitioner now suggests that the continuance was necessary to give *Dr. Loftus* extra time to prepare for trial, the record reflects that Petitioner's defense counsel did not inform the trial court that Dr. Loftus was the reason for her March 12, 2015 continuance request. Instead, defense counsel explained that a continuance was necessary because a different "memory/taint" expert, Dr. Thompson, had just been hired and needed additional time to prepare. (2 RT at G3; Lodg. No. 17, Exhibit P.) Defense counsel never explained to the court that the testimony of both Dr. Loftus and Dr. Thompson was necessary to Petitioner's defense, or that Dr. Loftus was the preferred memory expert. Given that the trial court was never made aware of Dr. Loftus as the reason for the March 12, 2015 continuance request, Petitioner cannot reasonably argue that he was prejudiced by the trial court's failure to grant a continuance on this specific basis. *See Ungar*, 387 U.S. at 589 (noting that whether the denial of a continuance request is reasonable "must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied").

Finally, Petitioner contends that he is entitled to habeas relief because of two Supreme Court cases. (Petition Mem. at 26-27.) First, Petitioner cites *Chandler v. Fretag*, 348 U.S. 3, 10 (1954), where the Supreme Court held that a habeas petitioner's due process rights were violated when he was denied a continuance to hire an attorney on the first day of trial, the same day that he learned for the first time that he was being charged with a "habitual criminal" allegation that carried a mandatory sentence of life without parole. *Chandler* is distinguishable: In contrast to the prisoner in *Chandler*, Petitioner had two years' notice of the charges against him and had ample opportunity and resources to prepare a defense by

hiring a memory expert. The memory expert Petitioner actually hired, Dr. Perotti, had sufficient time and funds to prepare for trial but was unable to do so simply because of defense counsel's mismanagement of his work. Accordingly, *Chandler* does not support Petitioner's claim.

Second, Petitioner cites *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), where the Supreme Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, which involved a defendant who had made a threshold showing of his impaired mental state, also is distinguishable. Petitioner never alleged an impaired mental state as a possible defense. *See Williams v. Ryan*, 623 F.3d 1258, 1269 (9th Cir. 2010) ("Before triggering *Ake*'s due process right to psychiatric assistance, a defendant must 'demonstrate[ ] to the trial judge that his sanity at the time of the offense is to be a significant factor.'") (quoting *Ake*, 470 U.S. at 83). Petitioner's "defense at trial was not insanity or diminished capacity, but that he did not do it." *See Williams*, 623 F.3d at 1269. Without this threshold showing, *Ake* does not apply. *See also Williams*, 441 F.3d at 1048; *Menendez v. Terhune*, 422 F.3d 1012, 1027-28 (9th Cir. 2005); *Gretzler v. Stewart*, 112 F.3d 992, 1001-02 (9th Cir. 1997); *United States v. George*, 85 F.3d 1433, 1438 (9th Cir. 1996); *Williams v. Calderon*, 52 F.3d 1465, 1474 (9th Cir. 1995).

Accordingly, neither of the cases Petitioner relies upon support Petitioner's claim of constitutional error based on the state court's adjudication of his claim arising from the trial court's denial of the motion for continuance.

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III. Petitioner Is Not Entitled To Habeas Relief On His Eighth Amendment Claim In Ground Four.

In Ground Four, Petitioner claims that his sentence of 25 years to life is cruel and unusual punishment in violation of the Eighth Amendment. (Petition at 6; Petition Mem. at 28-31; Reply at 17-20.)

A. Legal Standard

"The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" *Ewing v. California*, 538 U.S. 11, 20 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (conc. op. of Kennedy, J.)). The principle "does not require strict proportionality between crime and sentence," but rather "it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001 (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)). Successful challenges based on gross disproportionality are "exceedingly rare." *See Solem*, 463 U.S. at 289-90.

A reviewing court applies the "gross disproportionality principle" by comparing the gravity of the offense to the harshness of the penalty. *See Ewing*, 538 U.S. at 28; *see also Norris v. Morgan*, 622 F.3d 1276, 1287 (9th Cir. 2010). The comparison can account for, among other things, "the harm caused or threatened to the victim or society, the culpability of the offender, and the absolute magnitude of the crime." *Taylor v. Lewis*, 460 F.3d 1093, 1098 (9th Cir. 2006) (citing *Solem*, 463 U.S. at 292-93).

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B. State Court Opinion

Petitioner was sentenced to 25 years to life under Cal. Penal Code § 667.61 ("One Strike law"), which mandated the sentence because he was convicted of committing continuous sexual abuse of a child against more than one victim and because at least one of the victims was younger than 14 years old. (3 CT 590-92; 6 RT 3619-21, 3624-25, 3629; *see also* Penal Code § 667.61(j)(2).) The California Court of Appeal rejected Petitioner's claim that the sentence constituted cruel and unusual punishment as follows:

> We find no merit in [Petitioner's] contentions. Section 667.61's sentencing scheme has routinely been found to pass constitutional muster under both federal and state standards. (*People v. Estrada* (1997) 57 Cal. App. 4th 1270, 1277–1283 (*Estrada*); *People v. Alvarado, supra*, 87 Cal. App. 4th at pp. 199–201.)
>
> [P]unishment under the one strike law is precisely tailored to fit crimes bearing certain clearly defined characteristics. For the 25–year minimum term to apply, the predicate offense must be a crime of sexual violence and it must be committed under circumstances which increase the risk of injury or death to the victim. . . . Thus . . ., the defendant . . . cannot claim he is the victim of an indiscriminate sentencing scheme which metes out the same punishment for a broadly defined offense regardless of the circumstances surrounding the commission of the offense. [Citation.]" (*Estrada, supra*, 57 Cal. App. 4th at p. 1280, citations & fn. omitted.)
>
> Moreover, [Petitioner's] punishment is not grossly disproportionate to his crimes. [Petitioner] continuously sexually abused his three

> daughters over a period of years, subjecting them to almost weekly violations. [Petitioner's] lack of prior record, though worthy of consideration, does not diminish his culpability. The length of the sentence, when considered in light of the severity of the offenses and [Petitioner] culpability does not give rise to an inference of gross disproportionality.
>
> Moreover, neither the extra- or intra-jurisdictional comparison of punishments provide any additional basis for finding the sentence to be so disproportionate that it "'shocks the conscience.'" (*People v. Dillon* (1983) 34 Cal. 3d 441, 477-478.) [Petitioner] suggests that two or more acts of sexual conduct with a minor under the age of 11 over a period of three months garners a sentence of only 5 years to 25 years in New York (N.Y. Pen. Code, §§ 70.02, subd. (3)(a), 130.75, subd. (1)(a)), that murder in California receives a similar sentence to the one [Petitioner] has received (§ 187), and a defendant receives a lesser sentence for continuous sexual abuse of a child (§ 288.5), forcible rape (§ 264), infliction of corporal injury on a child (§ 273d, subd. (a)), forcible lewd conduct on a child (§ 288, subd. (b), and statutory rape (§ 261.5, subd. (d)) in California. However, "punishing [Petitioner's] conduct as severely as second degree murder is [n]either shocking [n]or outrageous." (*People v. Alvarado*, *supra*, 87 Cal. App. 4th at p. 200; *Estrada*, *supra*, 57 Cal. App. 4th at pp. 1278–1283.) We therefore conclude that [Petitioner's] sentence does not constitute cruel or unusual punishment under either the state or federal Constitutions.

(Petition, Ex. B at 51-52 [Dkt. No. 1-3].)

C. Analysis

The California appellate court's adjudication this claim was not objectively unreasonable or contrary to clearly established Supreme Court precedent, nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence. As an initial matter, Petitioner's sentence of 25 years to life is presumptively valid because it was mandated by Cal. Penal Code § 667.61. *United States v. Mejia-Mesa*, 153 F.3d 925, 930 (9th Cir. 1998) ("A punishment within legislatively mandated guidelines is presumptively valid."). Federal courts should be "reluctan[t] to review legislatively mandated terms of imprisonment." *Windham v. Merkle*, 163 F.3d 1092, 1106 (9th Cir. 1998) (quoting *Hutto v. Davis*, 454 U.S. 370, 374 (1982)). "Generally, as long as the sentence imposed on the defendant does not exceed statutory limits, we will not overturn it on eighth amendment grounds." *United States v. Zavala–Serra*, 853 F.2d 1512, 1518 (9th Cir. 1988). Petitioner's sentence did not exceed the statutory limit, but rather was far less than the maximum possible sentence, which would have been 75 years to life plus 3 years and 8 months had the trial court imposed consecutive terms for each of the five counts of conviction. (3 CT 592.)

Although Petitioner's sentence of 25 years to life is lengthy, an inference of gross disproportionality is not warranted because the circumstances of his offenses rendered them exceptionally grave. First, Petitioner's offenses were continuous and were crimes against people rather than against property. *See Cocio v. Bramlett*, 872 F.2d 889, 892 (9th Cir. 1989) ("The type of harm is measured by whether the crime was violent in nature and whether the offense was directed at a person or at property."); *see also Norris*, 622 F.3d at 1293 (finding it significant that the petitioner "committed an offense against a person rather than property"). Second, Petitioner committed the crimes against defenseless minors, a factor which is considered equivalent to the use of violence. *See United States v. Medina-Villa*, 567 F.3d 507, 515 (9th Cir. 2009) ("[W]e and our sister circuits have [therefore]

consistently held that sexual offenses [by older adults] against younger children constitute crimes of violence.") (internal quotation marks omitted). Well-settled Eighth Amendment jurisprudence makes a clear distinction between non-violent and violent crimes. *See Solem*, 463 U.S. at 292-93 ("[A]s the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence.") Third, Petitioner's offenses are considered to have inflicted significant and lasting harm on the victims. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 508 (9th Cir. 1994) ("The impact of [child molestation] on the lives of [its] victims is extraordinarily severe."); *see also Stogner v. California*, 539 U.S. 607, 651 (2003) ("When a child molester commits his offense, he is well aware the harm will plague the victim for a lifetime.") (diss. op. of Kennedy, J.).

Contrary to Petitioner's argument, an inference of gross disproportionality was not raised because of Petitioner's personal characteristics, such as the facts that he previously worked as a pastor, that witnesses attested to his good character, and that he had no criminal history. (Petition Mem. at 31.) The Eighth Amendment does not require the consideration of mitigating factors in noncapital cases. *See Harmelin*, 501 U.S. at 994-95. In particular, the fact that Petitioner did not have a criminal record did not render his sentence cruel and unusual given the seriousness of his present crimes. *See id*. at 996 (upholding a sentence of life without parole for cocaine possession by a habeas petitioner who had no prior felony convictions).

Finally, Petitioner points out that his sentence of 25 years to life is unconstitutional because it is harsher than sentences for homicide crimes, such as second-degree murder, in California. (Petition Mem. at 31.) If an inference of gross disproportionality is raised, a federal habeas court's next step is to conduct an "intrajurisdictional" and "interjurisdictional" analysis by comparing the imposed sentence "with those imposed for other crimes in California and for the same crime in other states." *See Gonzalez v. Duncan*, 551 F.3d 875, 887 (9th Cir. 2008). But such an analysis is unnecessary if a threshold

inference of gross disproportionality has not been raised. *See Taylor*, 460 F.3d at 1098 n.7 ("[I]ntrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.") (citing *Harmelin*, 501 U.S. at 1004-05). Since this is not a rare case in which an inference of gross disproportionality has been raised, it is unnecessary for the Court to conduct such a comparison.

The California Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of, clearly established Federal law and did not result in an unreasonable determination of fact in light of the evidence presented in the State court proceeding. Accordingly, Petitioner is not entitled to habeas relief on his claim in Ground Four.

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the District Judge issue an Order: (1) accepting the Report and Recommendation; (2) denying the Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: May 22, 2018

Karen L. Stevenson

KAREN L. STEVENSON
UNITED STATES MAGISTRATE JUDGE

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NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.