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NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIAN KEITH FIGGE, Petitioner-Appellant, v. SCOTT FRAUENHEIM, Warden, Respondent-Appellee.	No. 18-55855 D.C. No. 2:16-cv-07408-DSF-KES MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Submitted May 13, 2020**
Pasadena, California

Before: WARDLAW, COOK,*** and HUNSAKER, Circuit Judges.

Brian Keith Figge appeals the district court's denial of his petition for a writ of habeas corpus following his convictions for child sexual assault under California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Deborah L. Cook, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Penal Code §§ 269, 286, and 288A. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a), and we affirm.[1]

We review the denial of a petition for writ of habeas corpus de novo. *Murray v. Schriro*, 745 F.3d 984, 996 (9th Cir. 2014). Because Figge's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we grant the writ only if the state court's decision was "contrary to, or involved an unreasonable application of clearly, established Federal law, as determined by the Supreme Court," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

1. The California Court of Appeal reasonably determined that the record showed "a demonstrable reality that Juror No. 11 was not willing to engage in the deliberative process," and that Juror No. 11 was therefore properly discharged for failing to deliberate. All four other jurors whom the trial court interviewed agreed that Juror No. 11 had a closed mind and was refusing to deliberate. These jurors described Juror No. 11 as actively resisting the process, including by saying "I don't believe in these scenarios," failing to "acknowledge that there was anything there to talk about," and "not cooperating with the process." Figge argues that some of the jurors' comments are better interpreted as revealing frustration with

[1] We grant Figge's unopposed motion for judicial notice.

Juror No. 11 for being a holdout against conviction, rather than for failing to deliberate. But we give state-court decisions "the benefit of the doubt," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam), and "[c]onsidering these comments, it was not unreasonable for the state appellate court to find" that Juror No. 11 refused to deliberate. *Williams v. Johnson*, 840 F.3d 1006, 1010 (9th Cir. 2016); *see Bell v. Uribe*, 748 F.3d 857, 868 (9th Cir. 2014) (upholding dismissal of a holdout juror who also failed to deliberate). The California Court of Appeal instead reasonably concluded that "Juror No. 11 was at times listening and talking, but he was not engaging in an evaluation of other jurors' opinions and he at times withdrew from the deliberations because he did not want to consider the points raised by other jurors."

Nor was the California Court of Appeal's decision based on a defective fact-finding process. Figge argues that the trial court's decision to interview only Juror No. 11 and the four complaining jurors, but not the remaining seven jurors, rendered the fact-finding process defective under *Milke v. Ryan*, 711 F.3d 998, 1007 (9th Cir. 2013). In *Milke*, however, we held that a trial court's fact-finding process was defective because the prosecution violated an "'inescapable' constitutional obligation" to turn over exculpatory evidence under *Brady* and *Giglio*. *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)). By contrast, Figge points to no such obligation here. Although we have encouraged courts to

take "great pains" to preserve a jury, *Bell*, 748 F.3d at 868, *Perez v. Marshall*, 119 F.3d 1422, 1427 (9th Cir. 1997), the Supreme Court has never adopted such a requirement. *Cf. Williams*, 840 F.3d at 1010 ("Supreme Court case law in the area of juror bias is sparse."). Further, the defective process in *Milke* was not "because of anything petitioner did or failed to do," but rather the result of the prosecution's independent failure to satisfy its discovery obligation. 711 F.3d at 1007. The fact-finding process here was not concealed from Figge; his counsel participated in it, questioned the five jurors who were interviewed, and argued that the four jurors were criticizing Juror No. 11 as a holdout, rather than for failing to deliberate. Figge did not object to the trial court's fact-finding process or ask to interview the remaining seven jurors, and the trial court said nothing to suggest it would have denied such a request. Because Figge's counsel participated fully in the process and had the opportunity to interview the remaining jurors, but did not, we reject his argument that the fact-finding process was defective.

Therefore, the California Court of Appeal's conclusion that the trial court properly excused Juror No. 11 for failing to deliberate was not based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

2. The California Court of Appeal's conclusion that Figge's Confrontation Clause rights were not violated was not contrary to, or an unreasonable application

of, clearly established federal law. No clearly established law holds that a defendant has a Sixth Amendment right to introduce extrinsic evidence for the purpose of impeachment. *See Nevada v. Jackson*, 569 U.S. 505, 512 (2013) ("[T]his Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes."). And the California Court of Appeal reasonably concluded that the jury would not "have received a significantly different impression of [the witness's] credibility had [petitioner's] counsel been permitted to pursue his proposed line of cross-examination." *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).

Figge sought to introduce evidence that Jane Doe 1 had a normal sexual relationship with a previous boyfriend to impeach her statement that "I don't have normal relationships with boyfriends." But the value of this proposed impeachment was low. Jane Doe 1 did not testify that she never had sex with prior boyfriends and, in context, her statement communicated a generalized discomfort with men, rather than a specific inability to have a normal sex life due to the abuse. Moreover, the jury was unmoved by the much stronger impeachment evidence that was offered, including evidence that Jane Doe 1 hated Figge, discrepancies in her testimony about the number of times the sexual assault occurred and Figge's conduct towards her afterwards, and testimony from Jane Doe 1's second boyfriend that she threatened to retaliate against him by making false allegations of

physical abuse against him to the police. Given this evidence, "fairminded jurists could disagree" as to whether the jury would have had a significantly different impression of Jane Doe 1's credibility. *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). As such, § 2254(d)(1) precludes relief. *See id.*

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIAN KEITH FIGGE,

Petitioner,

v.

SCOTT FRAUENHELM, Warden,

Respondent.

Case No. 2:16-cv-07408-DSF-KES

JUDGMENT

Pursuant to the Court's Order Accepting Report and Recommendation of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied.

DATED: 6/6/18

Dale S. Fischer

DALE S. FISCHER
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN KEITH FIGGE,
Petitioner,
v.
SCOTT FRAUENHELM, Warden,
Respondent.

Case No. 2:16-cv-07408-DSF-KES

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Second Amended Petition (Dkt. 10), the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge (Dkt. 43). Further, the Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections (Dkt. 45) have been made. The Court accepts the report, findings, and recommendations of the Magistrate Judge.

IT IS THEREFORE ORDERED that Judgment be entered denying the Petition.

DATED: 6/6/18

Dale S. Fischer

DALE S. FISCHER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIAN FIGGE,

Petitioner,

v.

SCOTT FRAUENHELM, Warden,

Respondent.

Case No. CV-16-07408-DSF (KES)

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE (REDACTED)

This Report and Recommendation ("R&R") is submitted to the Honorable Dale S. Fischer, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

FACTUAL BACKGROUND

Petitioner was convicted of sexual offenses against two minor victims, identified at trial and in this R&R as Jane Doe 1 and Jane Doe 2. The following underlying facts are taken from the unpublished California Court of Appeal decision affirming Petitioner's convictions on direct appeal. Unless rebutted by clear and convincing evidence, these facts may be presumed correct. Tilcock v.

Budge, 538 F.3d 1138, 1141 (9th Cir. 2008); 28 U.S.C. § 2254(e)(1).

The molestation committed by [Petitioner] included three incidents of oral sex involving Jane Doe 1 in 2004, 2005, and 2006, and one incident of sodomy involving Jane Doe 2 in 2010. Jane Doe 1, age 19 at the time of trial, testified that [Petitioner] first molested her when she was about 11 years old and in the sixth grade. He came to her bedroom late at night, sat on the edge of her bed, and said something like, "Oh, I have a favor, can you help me out." [Petitioner] stood up, removed his boxers, and had Jane Doe 1 perform oral sex on him. Jane Doe 1 felt "really terrified" but [Petitioner] kept reiterating "the favor part of it and to not worry," and Jane Doe 1 thought "he must be right" although she did not really understand what was going on. [Petitioner] told her not to say anything and to keep her "mouth shut."

The second and third incidents occurred during the following two years, when Jane Doe 1 was 12 and 13 years old and in the seventh and eighth grade, respectively. The incidents were essentially the same, involving Jane Doe 1 performing oral sex on [Petitioner] late at night in her bedroom. During the second incident, [Petitioner] said things like "You're gonna do this. … You want to do this. … You have to do this." Jane Doe 1 still felt "really scared" but she was "a little bit more coherent to the situation" and knew "it wasn't right." [Petitioner] told her, "Don't tell … don't say anything, keep your mouth shut" and made small threats such as taking her cell phone away. During the third incident, Jane Doe 1 told [Petitioner] she did not want to do this anymore, and [Petitioner] said, "Don't say anything. … No one will know. … You don't want to get in trouble." On a fourth occasion when she was still in eighth grade and [Petitioner] came to her room, Jane Doe 1 told [Petitioner] "I'm not doing this anymore, this isn't gonna happen, this is wrong." [Petitioner] started "backtracking a lot," saying "I'm sorry, I'm sorry, don't say anything, keep your mouth shut, don't tell…" After this, there were no further incidents.

Jane Doe 1 testified she put the molestation "away for a really long time" and did not "revisit it until recently." Jane Doe 1 explained that she did not tell anyone about the molestation when it occurred because [Petitioner] told her not to; she did not want to cause more problems in her family; she was afraid; she thought [Petitioner] would be angry and call her a liar; she thought she could be "strong enough to hold it"; she thought she would get in trouble; and by the time of the last incident she realized [Petitioner] would get in trouble. Jane Doe 1 finally disclosed the molestation in March 2011 during a conversation with her boyfriend (Boyfriend 2) when she was 17 years old and a senior in high school. Jane Doe 1 testified that she never really wanted to "be sexual" with Boyfriend 2 because it made her uncomfortable; he would repeatedly ask her why; and she finally told him what happened with [Petitioner] when she was younger. Boyfriend 2 reported what she said to the police, which upset Jane Doe 1 because at the time she did not want [Petitioner] prosecuted.

Jane Doe 2, age 13 at the time of trial, lived at [Petitioner's] home for about seven weeks when she was 10 years old and in the fifth grade, while her family was relocating and looking for a house to buy. [Petitioner] molested her on one occasion while she was there. She was in the living room watching television and no one else was at home. When [Petitioner] came into the living room and Jane Doe 2 asked if she could finish watching her show, [Petitioner] said no. Apparently because of a dispute over the remote control, [Petitioner] hit Jane Doe 2 on her arm, and she started crying and went upstairs to her room. [Petitioner] went up to her room, pulled her off the bed, removed her pants and underwear, removed his pants, and put his "private part" inside her "butt." [Petitioner] told her if she "told anybody [she] was gonna pay." She did not tell anyone that day because she was scared and thought [Petitioner] would hurt her.

More than one year later, in November 2011, Jane Doe 2 told her mother about the molestation when Jane Doe 2 got suspended from school in the seventh

grade. Jane Doe 2's mother testified that she had previously told Jane Doe 2 that [Petitioner] and his wife were getting divorced and [Petitioner] had moved out of his home because he was "mean to [Jane Doe 1]." While Jane Doe 2 was home on suspension, Jane Doe 2 kept asking her mother to tell her what she meant by [Petitioner] being mean to Jane Doe 1, and when Jane Doe 2's mother did not provide any details, Jane Doe 2 finally said to her mother that [Petitioner] was mean to her and explained that he had "put his pee-pee in [her] butt." Jane Doe 2's mother contacted the police to report what her daughter said. Jane Doe 2 testified that she asked her mother whether [Petitioner] had molested Jane Doe 1 because she wanted to know if what happened to her had happened to someone else.

… For the offenses against Jane Doe 1, [Petitioner] was charged with lewd act, oral copulation, and aggravated sexual assault of a child during three different time periods. For the offense against Jane Doe 2, he was charged with forcible lewd act, sodomy, and aggravated sexual assault of a child in 2010. The information also alleged that he committed the offenses against more than one victim. The jury found [Petitioner] guilty as charged. The trial court sentenced him to four terms of 15 years to life for each of the aggravated sexual offense convictions (for a total of 60 years to life), and stayed the sentences on the remaining counts.

(Lodged Document or "LD" 6 at 1-6.)[1] People v. Figge, No. D066962, 2015 Cal. App. Unpub. LEXIS 2381, at *2-7 (Cal. Ct. App. Apr. 6, 2015).

[1] LDs 1 through 8 have been filed under seal to protect the privacy of the victims. (See Dkt. 17, 18.)

II.

PROCEDURAL HISTORY

A. Direct Appeal.

Petitioner appealed his convictions to the California Court of Appeal in case no. D066962. (LD 3.) He argued, as he does in these federal habeas proceedings, that the trial court erred by (1) excusing Juror No. 11 for "failure to deliberate" when the juror was persisting in a "not guilty" verdict, and (2) excluding proffered impeachment evidence regarding Jane Doe 1.[2] (Id.) The Court of Appeal affirmed his convictions in a written opinion issued on April 6, 2015. (LD 6.) See also Figge, 2015 Cal. App. Unpub. LEXIS 2381.

Petitioner timely filed a petition for review in the California Supreme Court, case no. S226535, raising these same two arguments. (LD 7.) The petition was summarily denied on July 22, 2015. (LD 8.)

B. State Court Habeas Petitions.

Between May and September 2016, Petitioner filed a series of pro se habeas petitions in the California courts claiming that his counsel was ineffective for, in relevant part, failing to obtain the victims' mental health and school records and call legally mandated reporters of sexual abuse, with whom the victims had interacted, at trial. (Dkt. 21-1 through 21-8, LD 9 through LD 16.) This claim was denied in a reasoned opinion issued by the California Court of Appeal on August 12, 2016 (Dkt. 21-6, LD 14) and summarily denied by the California Supreme Court on November 9, 2016 with a citation to People v. Duvall, 9 Cal. 4th 464, 474 (1995) (Dkt. 21-8, LD 16).

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[2] Petitioner also argued that the trial court erred by admitting testimony regarding Child Sexual Abuse Accommodation Syndrome and excluding proffered expert testimony that he lacked the characteristics of a pedophile. (LD 3.) Petitioner does not raise those claims here.

C. Federal Habeas Proceedings.

Petitioner initiated the present federal habeas proceedings on or about October 4, 2016 by filing a "Motion for Appointment of Counsel." (Dkt. 1.) This Court construed the motion as a habeas petition under 28 U.S.C. § 2254 and dismissed it, as well as a first amended petition, with leave to amend. (Dkt. 3, 8, 9.)

Petitioner subsequently filed the operative Second Amended Petition (hereinafter "Petition"). (Dkt. 10.) Respondent answered the Petition on January 26, 2017 (Dkt. 19 ["Answer"]), and Petitioner filed a reply on May 19, 2017 (Dkt. 31 ["Reply"]). After Petitioner requested and was given copies of his trial transcripts (Dkt. 32, 35), the Court allowed him to file a supplemental reply on October 31, 2017 (Dkt. 41 ["Supp. Reply"].)

Petitioner also filed two motions requesting discovery, the first in April 2017 and the second in October 2017. (Dkt. 28, 40.) At the Court's request (Dkt. 29), Respondent filed a response opposing the first motion on May 19, 2017 (Dkt. 30).

III.

CLAIMS AT ISSUE[3]

Ground One: The state trial court violated Petitioner's "rights" by excusing a juror who was persisting in a "not guilty" verdict based on the juror's "failure to deliberate." (Dkt. 10 at 5 ¶ 8(a), at 22-23, 40-49.)

Ground Two: The state trial court erred by excluding evidence proffered to impeach Jane Doe 1. (Dkt. 10 at 5 ¶ 8(b), at 23-24, 49-50; Dkt. 10-1 at 1-7.)

Ground Three: Petitioner's defense counsel was ineffective because counsel

[3] In listing the grounds for relief, the Petition directs the Court to "Attachment A," Petitioner's counseled petition for review in the California Supreme Court (Dkt. 10 at 13-50, Dkt. 10-1 at 1-9), and "Attachment B," a memorandum of law drafted by Petitioner (Dkt. 10-1 at 47-50, Dkt. 10-2 at 1-36). The Court has considered all of the arguments raised in both documents, as well as all other documents in the record.

failed to investigate the victims' medical, mental health, psychiatric, school, and therapist records or call certain mandated reporters of sexual abuse who had interacted with the victims as witnesses at trial. (Dkt. 10 at 6 ¶ 8(c); Dkt. 10-1 at 47-50, Dkt. 10-2 at 1-36.)[4]

IV.

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Petitioner is entitled to habeas relief only if the state court's decision on the merits "(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" or "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Cullen v. Pinholster, 563 U.S. 170, 181 (2011).

The relevant "clearly established Federal law" consists of only Supreme Court holdings (not dicta), applied in the same context that petitioner seeks to apply it to, existing at the time of the relevant state court decision. Premo v. Moore, 562 U.S. 115, 127 (2011). A state court acts "contrary to" clearly established Federal law if it applies a rule contradicting the relevant holdings or reaches a different conclusion on materially indistinguishable facts. Price v. Vincent, 538 U.S. 634, 640 (2003). A state court "unreasonably appli[es]" clearly established federal law if it engages in an "objectively unreasonable" application to the facts of the correct governing legal rule. White v. Woodall, -- U.S. --, 134 S. Ct. 1697, 1705-07 (2014) (rejecting previous construction of section 2254(d) that a state court decision involves an unreasonable application of clearly established Supreme Court law if the state court "unreasonably refuses to extend a legal principle to a new context

[4] When quoting from Petitioner's filings, the Court has amended spelling and grammatical errors where Petitioner's meaning is clear.

where it should apply"). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Harrington v. Richter, 562 U.S. 86, 103 (2011). "[T]his standard is 'difficult to meet,'" Metrish v. Lancaster, -- U.S. --, 133 S. Ct. 1781, 1786 (2013), as even a "strong case for relief does not mean the state court's contrary conclusion was unreasonable," Richter, 562 U.S. at 102.

The same standard of objective unreasonableness applies where the petitioner is challenging the state court's factual findings under 28 U.S.C. § 2254(d)(2). Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding."); Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004). In Taylor, the Ninth Circuit observed that a challenge under section 2254(d)(2) "may be based on the claim that the finding is unsupported by sufficient evidence ... that the process employed by the state court is defective ... or that no finding was made by the state court at all." Id. at 999 (citations omitted).

V.

DISCUSSION

A. Ground One: The Trial Court's Excusal of a Holdout Juror for Failure to Deliberate.

1. Denial of Ground One by the California Court of Appeal.

Petitioner argues that the trial court "violated my rights when it excused juror #11 who was persisting that I was not guilty." (Dkt. 10 at 5 ¶ 8(a).) Petitioner raised this claim on direct appeal (LD 3 at 30-40 [opening brief]; LD 5 at 3-6 [reply brief]) and the California Court of Appeal denied relief in a reasoned opinion (LD 6 at 6-13). Petitioner later raised the same claim in a petition for review to the California Supreme Court (LD 7 at 22-29), which summarily denied the petition without any reasoning or citation to authority (LD 8). Thus, for purposes of

applying the AEDPA standard of review, the relevant opinion is that of the California Court of Appeal. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991) (instructing federal courts to apply "a presumption which gives [unexplained orders] *no* effect-which simply 'looks through' them to the last reasoned decision"); Edwards v. Lamarque, 475 F.3d 1121, 1126 (9th Cir. 2007) ("We must apply AEDPA's standards to the state court's 'last reasoned decision' on the claim[.]"). The California Court of Appeal denied relief on this claim as follows:

I. Excusal of Juror

[Petitioner] argues the trial court's decision to excuse a juror for failing to deliberate is unsupported by the record.

A. Background

After about one and one-half days of deliberation, several jurors reported that Juror No. 11 was refusing to deliberate. The court convened a hearing and separately questioned four jurors, and then separately questioned Juror No. 11.

Juror No. 4 told the court that Juror No. 11 was being "very close minded [sic] and … he doesn't even want to talk about the whole scenario of what's going on here." Juror No. 4 explained that the jurors had discussed the case at length and Juror No. 11 had listened and heard what other jurors were saying, but he had "his mind made up" from the beginning of deliberations and has not changed his mind; he does not "want to even go there"; he does not "want to infer or look at anything"; and he said he did not "believe in these scenarios" and "in these kind of things." Juror No. 4 felt Juror No. 11 was failing to deliberate soon after the beginning of deliberations, explaining the jurors were trying to be fair and do their "jobs" and "go over everything," but Juror No. 11 did not "want to acknowledge that there was anything to talk about," and it appeared he had his mind made up and it did not matter what the other jurors were going to say.

Juror No. 8 told the court that she felt Juror No. 11 was failing to deliberate from the very beginning when they first "sat down," and it appeared from the

discussions that Juror No. 11 "made up his mind before [they] ever entered the jury room." She explained that they started discussing the case, and Juror No. 11 said, "I just don't see any of it. … I can't put this together. It just does not make sense to me." Juror No. 8 elaborated that one of the jurors was very skilled at explaining everything from all angles and was trying to discuss the case from every angle, but it was very frustrating because they were not making progress. She stated Juror No. 11 was providing "no feedback," explaining "It's like you're staring at me and I'm gonna keep talking and you're not gonna say anything."

Juror No. 7 said she felt Juror No. 11 was being "very closed minded"; he made his decision "from the very, very beginning"; and he was not making a good faith effort to deliberate. For example, he would say "that's it. That's what I believe." In response, Juror No. 7 told Juror No. 11 that they were "here today to continue to talk about this and this is all part of the process" and this "is a very serious matter," but it seemed he was not cooperating with the process. Juror No. 7 stated that Juror No. 11 had complained that the other jurors were "badgering" him, but when jurors tried to listen and also interject at appropriate times, Juror No. 7 would say "he is just gonna shut down."

Juror No. 2 told the court that Juror No. 11 had a closed mind starting in the first hour of deliberations; he had his opinion "right away"; and he was not making an effort to deliberate. She stated that although he was listening and at times he was participating, it was also hard to tell if he was listening "because he is so shut down on what we're talking about" and "his opinion is so strong." She explained, "[H]e thinks it's good deliberating because we're all talking. But he's not changing his mind in any way. And we've had three or four readbacks and nothing's changing." When the court noted there was nothing wrong with having an opinion and not changing his mind as long as he listens and discusses with everyone, Juror No. 2 agreed there was nothing wrong, but reiterated her view that Juror No. 11 has been "closed-minded from the beginning." She stated that when

Juror No. 11 engages in discussions, he repeats the "same thing over and over again"; they were not getting anywhere with the deliberations; and it was clear Juror No. 11 was at a point that he was not going to change his mind.

After hearing from these four jurors, Juror No. 11 was questioned. Juror No. 11 told the court he did not make up his mind from the very first hour of deliberations; he did not fail to deliberate or keep an open mind; and, to the contrary, he was the first juror who turned the deliberations "into a discussion." He stated that at the outset of deliberations another juror said "my mind's made up, he's … guilty … as hell." In response, Juror No. 11 told him "no" and they needed to discuss this; he started with count 1 but the other jurors "were all over the place"; and they had a discussion but the other jurors "didn't like that [his] opinion was different." He said one of the jurors "got up and swore" at him; another juror was "badgering" him by asking him the "same things over and over" and "making statements to [him] over and over without having [him] saying anything"; he was trying to enter into a discussion but it was impossible; and he was "respecting everyone's opinions but they just didn't like [his] opinion."

After hearing counsel's arguments, with the prosecutor arguing to excuse Juror No. 11 and defense counsel arguing in opposition, the court decided to excuse him. The court found that Juror Nos. 8, 7, 2, and 4 were more credible than Juror No. 11, and Juror No. 11 appeared "to be trying to hide something." The court reasoned that the four jurors essentially indicated that although Juror No. 11 might be listening and hearing, he "just does not seem to get involved in the process"; he entered into the deliberation process closed-minded and did not keep an open mind; and he had not made a good faith effort to deliberate.

B. Analysis

To protect a defendant's right to the individual votes of an unbiased jury, great caution is required when deciding to excuse a sitting juror. (People v. Allen and Johnson (2011) 53 Cal.4th 60, 71, 133 Cal. Rptr. 3d 548, 264 P.3d 336 (People

v. Allen).) When reviewing a trial court's decision to discharge a juror, we do not reweigh the evidence; however, we apply a standard that requires a somewhat stronger showing than is typical for abuse of discretion review, and we engage in a more comprehensive and less deferential review than simply determining whether any substantial evidence supports the court's decision. (Ibid.) The basis for a juror's discharge must appear on the record as a demonstrable reality, and we evaluate whether the trial court's conclusion is manifestly supported by evidence on which the court actually relied. (Ibid.)

A trial court may dismiss a juror if it finds the juror is unable to perform his or her duties, including the duty to deliberate. (People v. Cleveland (2001) 25 Cal.4th 466, 474, 485, 106 Cal. Rptr. 2d 313, 21 P.3d 1225.) "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury." (Id. at p. 485, italics added.) However, the "circumstance that a juror does not deliberate well or relies upon faulty logic or analysis [or]… disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts … does not constitute a refusal to deliberate … A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." (Ibid.)

Regarding the requirement that a juror keep an open mind, the courts recognize the "reality that a juror may hold an opinion at the outset of deliberations is … reflective of human nature. … We cannot reasonably expect a juror to enter deliberations as a tabula rasa, only allowed to form ideas as

conversations continue. What we can, and do, require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination." (People v. Allen, supra, 53 Cal.4th at p. 75, italics added.) Thus, a juror's mere failure to change his or her opinion does not show a failure to deliberate under circumstances where the juror was participating in the deliberative process. (See id. at pp. 74-75.)

When evaluating the court's ruling, we defer to its assessment that the four jurors credibly described Juror No. 11's conduct, and that Juror No. 11's description of what occurred was not credible. (People v. Merriman (2014) 60 Cal.4th 1, 101, 177 Cal. Rptr. 3d 1, 332 P.3d 1187.) A trial "'judge who observes and speaks with a juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record.'" (Ibid.)

The four jurors indicated to the court that although Juror No. 11 was speaking and listening during the discussions, he had made up his mind from the outset of the deliberations and was not willing to consider other points of view. Juror No. 4 told the court that Juror No. 11 had a closed mind and his mind was made up from the beginning; it did not matter what other jurors were going to say; he told the other jurors he did not "believe in these scenarios"; he did not want to "infer or look at anything"; and he did not want to acknowledge that there was anything to talk about. Juror No. 8 told the court that Juror No. 11 had made his mind up before he entered the jury room; at the outset of their discussions he said he did not "see any of it" and it did not make sense; and he would provide no feedback during their discussions. Juror No. 7 told the court that Juror No. 11 had made his decision from the beginning; he had a closed mind; and when other jurors interjected comments he indicated he was just going to "shut down." Juror No. 2 told the court that Juror No. 11 had his opinion and a closed mind from the first

hour of deliberations, and because of his strong opinion he was "shut down" during the discussions.

As described by these jurors, during the deliberations Juror No. 11 was at times listening and talking, but he was not engaging in an evaluation of other jurors' opinions and he at times withdrew from the deliberations because he did not want to consider the points raised by other jurors. Their descriptions reflect that he was not deliberating in a meaningful manner because he had already decided the case in his mind and he was not willing to give other jurors an opportunity to change his views. The jurors consistently stated that Juror No. 11 engaged in this intransigent approach from the beginning of the deliberations, which reflects this is not a situation where a juror has deliberated with an open mind for a reasonable period and is now simply communicating that he or she has made a final decision.

The record shows as a demonstrable reality that Juror No. 11 was not willing to engage in the deliberative process, which requires that he enter deliberations with an open mind and not become entrenched in any particular decision until he has in good faith considered the views expressed by the other jurors. Although Juror No. 11 clearly had the right to adhere to his position after good faith deliberations, the four jurors that the court interviewed showed that Juror No. 11 was adamantly maintaining his opinion without giving other jurors' opinions any consideration. This was in violation of his duty to consider other jurors' points of view before making a final decision. (People v. Cleveland, supra, 25 Cal.4th at p. 485; People v. Allen, supra, 53 Cal.4th at p. 75.)

We are not persuaded by defendant's claim that the jurors' statements that Juror No. 11 was not deliberating were conclusory and often made in response to leading questions, and any facts the jurors did provide showed Juror No. 11 was deliberating. Although the jurors were at times asked leading questions, they also spoke in a nonconclusory manner and provided details to explain how Juror No. 11 was not willing to engage in meaningful discussions (e.g., he shut down; he said he

did not believe in these scenarios; he refused to acknowledge there was anything to talk about). Further, the record shows that although Juror No. 11 was talking and listening, he was not deliberating in a meaningful manner; that is, maintaining an open mind and taking the views of other jurors into account before reaching a final conclusion.

Based on the showing that Juror No. 11 was unwilling to engage in the deliberative process, the court did not err by discharging him.

(LD 6 at 6-13.). See also Figge, 2015 Cal. App. Unpub. LEXIS 2381, at *7-17.

2. Petitioner is Not Entitled to Federal Habeas Relief Based on the Claim that the Discharge of Juror No. 11 Violated State Law.

Petitioner argues that the trial court "violated my rights when it excused juror #11 who was persisting that I was not guilty." (Dkt. 10 at 5 ¶ 8(a).) Petitioner refers the Court to Attachment A, i.e., his counseled petition for review in the California Supreme Court. (Id. at 22-23, 40-49; see also LD 7 at 22-29.)

Juror No. 11 was discharged under Cal. Pen. Code section 1089, which allows a California trial court to discharge a juror and substitute an alternative if, inter alia, upon "good cause shown to the court [the juror] is found to be unable to perform his or her duty…." In People v. Barnwell, 41 Cal. 4th 1039 (2007), the California Supreme Court held that, to be properly discharged under section 1089, "a juror's disqualification must appear on the record as a demonstrable reality," rejecting the more lenient "substantial evidence" test. Id. at 1052 (citations omitted). In the state courts, Petitioner argued that the trial court's decision to discharge Juror No. 11 did not meet the Barnwell test. (LD 3 at 3, 30-40 [appellate brief in California Court of Appeal]; Dkt. 10 at 42 [petition for review, arguing that the California Supreme Court "should accept review in this case to maintain the vitality of the 'demonstrable reality' standard"].)

To the extent Petitioner is contending that the trial judge improperly discharged Juror No. 11 as a matter of state law, such a contention is not cognizable

in federal habeas proceedings. Federal habeas relief is available only for violations of a petitioner's federal constitutional rights. See Estelle v. McGuire, 502 U.S. 62, 67 (1991) ("We have stated many times that 'federal habeas corpus relief does not lie for errors of state law.'"). This Court is bound by the holding of the California Court of Appeal that the discharge of Juror No. 11 did not violate state law. Bradshaw v. Richey, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.").

3. The Discharge of Juror 11 Did Not Violate Clearly Established Federal Law.

Petitioner does not expressly state that the discharge of Juror No. 11 violated his federal constitutional rights; he simply states that this violated "my rights." (Dkt. 10 at 5 ¶ 8(a).) Many courts have noted, however, that the discharge of a juror under Cal. Pen. Code section 1089 implicates a criminal defendant's Sixth Amendment right to a fair trial by a panel of impartial, indifferent jurors, and that a claim alleging a violation of section 1089 "overlaps with" or is "intertwined with" a Sixth Amendment claim. See, e.g., Bell v. Uribe, 748 F.3d 857, 864 (9th Cir. 2014) (noting "the overlapping nature of the petitioners' Sixth Amendment and § 1089 claims"); Ming Lu v. Perez, No. 14-7057-ODW (JPR), 2016 WL 1658606 at *8, 2016 U.S. Dist. LEXIS 56233 at *22 (C.D. Cal. Feb. 12, 2016), R&R adopted sub nom. Lu v. Perez, 2016 WL 1664641, 2016 U.S. Dist. LEXIS 56203 (C.D. Cal. Apr. 25, 2016) ("a criminal defendant's rights under the Sixth Amendment are intertwined with his rights under section 1089"). Given this, and the Court's duty to liberally construe Petitioner's pro se pleadings, the Court construes the Petition as alleging that Petitioner's Sixth Amendment rights were violated.[5]

[5] It is arguable whether Petitioner indicated the federal nature of this claim in the state courts, so as to properly exhaust it. See generally Baldwin v. Reese, 541 U.S. 27, 32 (2004). The case on which Petitioner principally relied in the state

The gravamen of Petitioner's argument is that Juror No. 11 was improperly dismissed for "persisting in his not guilty verdict" and "refus[ing] to vote with the majority." (Dkt. 10 at 40; LD 7 at 20.) In United States v. Symington, 195 F.3d 1080 (1999), the Ninth Circuit held that "a court may not dismiss a juror during deliberations if the request for discharge stems from doubts the juror harbors about the sufficiency of the evidence" because "[t]o remove a juror because he is unpersuaded by the Government's case is to deny the defendant his right to a unanimous verdict." Id. at 1085 (citations omitted). However, federal courts "may not rely on circuit precedent when adjudicating" habeas petitions governed by AEDPA. Williams v. Johnson, 840 F.3d 1006, 1009 (9th Cir. 2016). AEDPA states that federal habeas relief is appropriate only where the state court's decision was "contrary to, or involved an unreasonable application of clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added). There is no Supreme Court precedent "imposing (or even hinting at) the Symington rule." Williams, 840 F.3d at 1009 (rejecting claim that "there [was] a reasonable probability that [a juror] was excused because of his views as to guilt or innocence"); see also Victorian v. Singh, 584 F. App'x 742, 743 (9th Cir. 2014) ("Victorian has cited no United States Supreme Court case

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court, Barnwell, notes that discharging a juror under Cal. Pen. Code § 1089 implicates a criminal defendant's constitutional rights, see Barnwell, 41 Cal. 4th at 1051-52, and Petitioner quoted this language in his petition for review. (Dkt. 10 at 41; LD 7 at 21.) Cf. Johnson v. Williams, 568 U.S. 289, 305 (2013) (where habeas petitioner argued in state court that discharge of a juror under section 1089 violated both state law and the Sixth Amendment, but the California Supreme Court explicitly addressed only the state law claim, the Supreme Court concluded that the California court had implicitly addressed the merits of the federal claim as well). Respondent does not assert that Petitioner failed to exhaust this claim (see Answer at 14-17) and this Court exercises its discretion to consider the claim on the merits. See Day v. McDonough, 547 U.S. 198, 199 (2006) ("courts have "discretion to consider a state prisoner's failure to exhaust …before invoking federal habeas jurisdiction despite the State's failure to interpose the exhaustion defense….").

holding that dismissal of a juror, holdout or otherwise, is unconstitutional.").

Additionally, to the extent Petitioner is arguing that the California courts' finding that Juror No. 11 was excused for his failure to deliberate—rather than for persisting in his "not guilty" verdict—was an unreasonable determination of the facts, see 28 U.S.C. § 2254(d)(2), the Court disagrees. Some of the jurors' statements did indicate that they were frustrated with Juror No. 11 simply because he was the lone "holdout" juror. Yet Juror Nos. 4, 7, and 8 also opined that Juror No. 11 appeared to have made up his mind before he entered the jury room and refused to engage in meaningful discussions with the other jurors. (2 RT 554, 556-59, 572-74.) These opinions were backed up by specific descriptions of Juror No. 11's behavior. For example, Juror No. 8 stated that there was "no feedback" from Juror No. 11 during discussions (2 RT 558-59), and Juror No. 4 complained that Juror No. 11 did not "want to infer or look at anything" (2 RT 551) when the other jurors were discussing the evidence. Juror No. 4 also reported that Juror No. 11 said, "I don't believe in these scenarios" and "I don't believe in these kinds of things" (2 RT 552-53), comments that tended to indicate Juror No. 11 had a preconceived notion about the case that was unrelated to the evidence presented. Because there was testimony indicating a failure to deliberate, this Court cannot say that the California Court of Appeal's decision was an unreasonable interpretation of the evidence.

In sum, Petitioner is not entitled to relief on Ground 1 because he has not shown that the dismissal of Juror No. 11 was contrary to Supreme Court precedent or an unreasonable interpretation of the evidence presented in the trial court.

B. Ground Two: Exclusion of Evidence Proffered to Impeach Jane Doe 1.[6]

[redacted]

[6] The portion of the California Court of Appeal opinion discussing this evidence was sealed to protect the privacy of Jane Doe 1 and Boyfriend 1, who

[redacted]

were minors when the events in question occurred. Accordingly, this Court has also sealed this portion of the R&R.

[redacted]

[redacted] Thus, Petitioner is not entitled to federal habeas relief on Ground Two.

C. Ground Three: Ineffective Assistance of Counsel Claim.

Petitioner alleges that he received ineffective assistance of counsel ("IAC") at trial because defense counsel "fail[ed] to investigate complaining witnesses [sic] medical, mental health, psychiatric, school, and therapist records" and did "not call[] these mandated reporters [i.e., medical providers and school staff] to the stand." (Dkt. 10-2 at 4; see also id. at 35-36 [sworn declaration by Petitioner describing what he believes the victims' records would show].)[13]

[redacted]

[13] The memorandum of law attached to the Petition also asserts that defense counsel (1) chose not to call an expert witness that the defense had retained prior to trial, after the trial court limited the scope of the expert's testimony, and (2) was not diligent or prepared because he "relied solely on the prosecution's burden of proof," "waived … opening arguments," and called only "one of the prosecutor's" witnesses, i.e., Jane Doe 1's Boyfriend 2. (Dkt. 10-2 at 6-7.) Petitioner appears to have intended these allegations as background context, rather than separate claims of IAC. In his exhaustion petitions in the state courts, he listed the grounds for

1. Legal Standard for IAC Claims.

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

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see also Richter, 131 S. Ct. at 791 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently."). A court deciding an ineffective assistance of counsel claim need not address both components of the inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

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relief only as IAC "for failing to investigate complaining witnesses' medical, mental health, psychiatric, school and therapist records" and "not calling these mandated reporters to the stand." (Dkt. 21-3, LD 11 at 3; Dkt. 21-5, LD 13 at 4; Dkt. 21-7, LD 15 at 3.)

In Richter, the Supreme Court reiterated that AEDPA requires an additional level of deference to a state court decision rejecting an IAC claim. "The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard." Richter, 562 U.S. at 101.

2. Denial of Ground Three by the California Courts and Appropriate Standard of Review in Considering This Habeas Claim.

Petitioner raised this IAC claim in a series of pro se habeas petitions filed in the California courts between May and September 2016.

First, on May 5, 2016, he filed a "Motion for Appointment of Counsel" in the Riverside County Superior Court, which that court construed as a petition for writ of habeas corpus. (Dkt. 21-1, LD 9.) Petitioner raised three claims of IAC: (1) failure to investigate "medical, mental health, psychiatric, school and therapist records" that would have "undercut the credibility of complaining witnesses"; (2) failure to impeach witnesses with prior inconsistent statements they had made to police; and (3) failure to prepare adequately to cross-examine "key prosecution witnesses." (Id. at 3-4.) For the second and third claims, Petitioner did not identify the witnesses in question or the grounds on which Petitioner's counsel should have impeached them; however, Petitioner appears to have been referring to the victims. On May 16, 2016, the Superior Court summarily denied the petition for failure to state a prima facie case and failure to establish prejudice. (Dkt. 21-2, LD 10.)

On June 10, 2016, Petitioner filed a habeas petition in the Riverside County Superior Court. (Dkt. 21-3, LD 11.) The only claim raised in this petition was IAC based on defense counsel's "fail[ure] to investigate complaining witnesses' medical, mental health, psychiatric, school, and therapist records" and failure to "call[] these mandated reporters to the stand." (Id. at 3.) He attached a memorandum of law that is materially similar to the one submitted with his present federal habeas petition (id. at 14-50), as well as the same sworn declaration

describing what he believed the records in question would show (id. at 52-53). The Superior Court summarily denied the petition, this time as successive and for failure to establish prejudice. (Dkt. 21-4, LD 12.)

On July 19, 2016, Petitioner filed essentially the same petition in the California Court of Appeal, case no. D070761. (Dkt. 21-5, LD 13.) On August 12, 2016, the Court of Appeal issued a reasoned opinion:

[Petitioner] now collaterally attacks the judgment on the ground his trial counsel provided constitutionally ineffective assistance by failing to present certain information allegedly contained in the victims' health care and school records. In a declaration that does not disclose any basis for personal knowledge and appears to be based on hearsay, [Petitioner] states that during trial his counsel knew that: (1) one victim [Jane Doe 1] admitted to using "Ecstasy" and antipsychotic drugs, had reported during many annual physical examinations for cheerleading that she had never been sexually abused, and was skipping school and lying about it as her grades suffered; and (2) the other victim [Jane Doe 2] was a high-risk adoptee, had diminished capacity, was mentally ill, had a propensity to lie and fabricate stories for her benefit, was under the constant care of therapists and other health care professionals for years, had shown a very strong pattern of behavioral problems and trust issues, was taking psychotropic and antipsychotic drugs, and had been kicked out of school again. [Petitioner] complains counsel performed deficiently by not presenting the above-described evidence to impeach the victims' credibility; and, had counsel done so, "it would have 'put the whole case i[n] such a different light as to undermine confidence in the verdict.'" He claims his confinement is unlawful and seeks a writ vacating the judgment and ordering a new trial.

[Petitioner] is not entitled to habeas corpus relief. His petition, filed more than three years after he was sentenced to prison without any explanation for the delay, is barred as untimely. (In re Reno (2012) 55 Cal. 4th 428, 459; In re Swain (1949) 34 Cal. 2d 300, 302.)

[¶] Even if it were not time-barred, the petition would be denied because [Petitioner] has not sustained his "heavy burden" to state a prima facie claim for relief by alleging "fully and with particularity the facts on which relief is sought" and submitting "copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (People v. Duvall (1995) 9 Cal. 4th 464, 474.) To state a claim for ineffective assistance of counsel based on failure to present evidence at trial, "'[t]he petitioner must demonstrate that counsel knew or should have known that further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover.'" (In re Clark (1993) 5 Cal. 4th 750, 766.) The petitioner also must show prejudice from the failure to present the evidence, i.e., "a reasonable probability that a more favorable outcome would have resulted had the evidence been presented." (Ibid.)

[¶] [Petitioner] has not established the nature and relevance of the evidence he faults counsel for not discovering and presenting at trial. He has not presented copies of any of the victims' health care or school records, and his own declaration describing the content of those records is inadequate because he has no personal knowledge of those matters, only hearsay knowledge. (Evid. Code, §§ 702, 1200.) [Petitioner] has not presented a declaration from counsel concerning his (counsel's) knowledge of the victims' health care and school records or the reasons for not presenting them at trial. This court must presume counsel had valid tactical reasons for not presenting the records (e.g., they contained information harmful to the defense or their presentation would have made the victims look more vulnerable) unless the contrary is affirmatively shown. (Strickland v. Washington (1984) 466 U.S. 668, 689; People v. Ray (1996) 13 Cal. 4th 313, 349.)

[¶] Finally, [Petitioner] has not shown prejudice. His failure to provide the reporter's transcript of the cross-examination of the victims makes it impossible to determine whether additional cross-examination based on the alleged content of the

victims' medical and school records would have created "a reasonable probability that a more favorable outcome would have resulted." (In re Clark, supra, at p. 766.)

(Dkt. 21-6, LD 14.) The California Supreme Court later summarily denied relief on the same claim with a citation to People v. Duvall, 9 Cal. 4th 464, 474 (1995). (Dkt. 21-7, LD 15 [petition], Dkt. 21-8, LD 16 [order].)[14]

Respondent argues that the state courts adjudicated this claim on the merits, meaning this Court should review that adjudication under the deferential standard set forth in § 2254(d). (See Dkt. 30 at 6 [opposition to motion for discovery, arguing that the denial was "on the basis of a pleading deficiency that is the functional equivalent of a merits determination; a claim that fails to state [a] prima facie case for relief is, by definition, meritless"]; Answer at 22 [arguing that the California courts reasonably applied Strickland].) Respondent relies on Robinson v. Cate, No. 10-1541, 2013 WL 4517716, 2013 U.S. Dist. LEXIS 119048 (S.D. Cal. Aug. 21, 2013), which explained:

> The law governing the proper treatment of such a denial is not particularly clear. In the post-AEDPA era, the Ninth Circuit has treated a denial under Duvall for failure to adequately plead a claim as pointing to a failure to exhaust. See Sanchez v. Scribner, 428 Fed. App'x 742, 742-743 (9th Cir. 2011). This appears consistent with Cullen v. Pinholster, [563 U.S. 170] (2011), which emphasizes federal courts' role in reviewing a petitioner's claims as they were presented to state

[14] Because the California Supreme Court's order cites only Duvall, and not any authority discussing timeliness, the California Supreme Court implicitly overruled the court of appeal's untimeliness ruling. See Curiel v. Miller, 830 F.3d 864, 871 (9th Cir. 2016); McCarthy v. Frauenheim, No. 16-06820, 2017 WL 5972696 at *2, 2017 U.S. Dist. LEXIS 198209 at *3-4 (N.D. Cal. Dec. 1, 2017). Thus, Petitioner's IAC claim is not procedurally barred on this ground.

> courts. In other words, a state prisoner must give state courts a full and fair opportunity to review his federal claims before he presents them to a federal court, see O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999), and a federal court should not treat a state court decision as unreasonable on the basis of allegations never pleaded or evidence it never had the chance to review. But after Pinholster, the Ninth Circuit has reviewed denials under Duvall for failure to plead a prima facie case under the reasonableness standard of § 2254(d)(1). See Cannedy v. Adams, 706 F.3d 1148, 1161 (9th Cir. 2013) [amended on denial of reh'g, 733 F.3d 794 (9th Cir. 2013)].

Robinson, 2013 WL 4517716 at *2, 2013 U.S. Dist. LEXIS 119048 at *4-5 (parallel citations omitted).

This case appears to be distinguishable from Cannedy, however, because here Petitioner did not provide the state courts with a copy of the relevant portions of the trial record. Because of this, the California Court of Appeal noted that it was unable to analyze the prejudice prong of the Strickland test. (Dkt. 21-6, LD 14.) Compare Cannedy, 706 F.3d at 1160 ("In evaluating Petitioner's claim, the state courts had to determine whether the *allegations* contained in the petition, ***viewed in the context of the trial record***, established a prima facie case of ineffective assistance of counsel.") (bolded emphasis added). Cf. Millan v. Marshal, 677 F. Supp. 2d 1217, 1220 (C.D. Cal. 2009) ("Since Petitioner did not attach a copy of the [parole] Board's decision to his habeas corpus petition, the Supreme Court's citation to Duvall stands for the proposition that the petition was incomplete and an amended petition should be filed; thus, the Supreme Court did not consider the merits of petitioner's claim."). Under similar circumstances, other courts have found that the state court's decision was not adjudication on the merits and considered the petitioner's claims de novo. See, e.g., Brown v. Valenzuela, No. 12-5321-DDP-MAN, 2014 WL 1343285 at *3, 2014 U.S. Dist. LEXIS 47186 at *8

(C.D. Cal. Jan. 31, 2014) (finding that "the Duvall citation reflects the imposition of a procedural bar, rather than a merits decision" and finding claims failed de novo review), R&R adopted, 2014 WL 1343290, 2014 U.S. Dist. LEXIS 47184 (C.D. Cal. Apr. 4, 2014); Pule v. Hedgpeth, No. 09-1118-AHM-AGR, 2011 WL 6056921 at *4, 2011 U.S. Dist. LEXIS 139594 at *11 (C.D. Cal. Oct. 11, 2011) ("Neither the Swain nor the Duvall citation constitutes a ruling on the merits. … If … the California Supreme Court finds a petitioner has not alleged facts with sufficient particularity, it does not reach the issue of whether the petitioner has stated a prima facie case. … Under these circumstances, this court will review Ground Three de novo."), R&R adopted, 2011 WL 6056910, 2011 U.S. Dist. LEXIS 139587 (C.D. Cal. Dec. 1, 2011). This Court need not resolve this issue because, even under a de novo standard of review and upon consideration of the full trial record, Petitioner is not entitled to relief on this claim.

3. Analysis.

As discussed in more detail below, Petitioner has submitted an affidavit alleging that Jane Does 1 and 2 had various mental health and behavior problems that his counsel should have used to impeach their credibility. In his memorandum of law (rather than his affidavit), Petitioner alleges that his trial counsel "was in the possession of the knowledge" of these facts but decided "not to seek [the victims' medical or school] records or call these mandated reporters [i.e., the victims' health care providers and/or school staff] to the stand." (Dkt. 10-2 at 8-9.) Petitioner argues that counsel "did not have a tactical reason for not proffering this key evidence to the trial court or the jury," and that he was prejudiced because the trial was a credibility contest and the lack of this evidence "bolstered and skewed the jury's assessment of [the victims'] credibility…." (Id. at 9-10.) As discussed below, Petitioner's factual allegations are largely cumulative with evidence already introduced at trial, likely inadmissible, or not specific enough for the Court to find IAC.

a. Jane Doe 1.

Petitioner has submitted an affidavit alleging that Jane Doe 1: (1) "self-admitted to the use of ecstasy," (2) "was taking anti-psychotic drugs" and "other prescribed medications," (3) for "many years" told health care providers conducting annual physicals that she had never been sexually abused, and (4) "was skipping school and lying about it." (Dkt. 10-2 at 35.)

The evidence described in (1) and (3) was introduced at trial. Jane Doe 1 testified that she had taken ecstasy in high school and explained that she had admitted this to the investigating officers, even though it was illegal, because "people make mistakes" and "if they are going to ask me a question, I'm going to tell the truth." (1 RT 71.) Additionally, testimony by health care providers that Jane Doe 1 did not tell them about the abuse "for many years" would have been cumulative with Jane Doe 1's own admission that she did not tell anyone about the abuse until she told Boyfriend 2 during her senior year of high school. (1 RT 48-49, 54-55, 63, 66-67.)

There are strategic reasons why counsel might not have wanted to introduce the remaining evidence. First, depending on when the anti-psychotic medications were prescribed and when Jane Doe 1 began skipping school—Petitioner's affidavit does not specify—the jury might have interpreted this behavior as resulting from the abuse. Jane Doe 1 testified that she did better in the first two years of high school than the last two and that, after the abuse was reported and she was removed from her parents' home, "my grades dropped really bad because I just wasn't focusing and I had a few absences." (1 RT 34, 68-69.) She also testified that, after the abuse was reported, "I was upset because … now all of a sudden people wanted to know why I was -- why my grades had dropped or why I acted that way." (1 RT 70.) Second, the fact that Jane Doe 1 was receiving mental health treatment might have made her appear more sympathetic while also not significantly undermining her credibility.

Moreover, although "the mental illness or emotional instability of a witness can be relevant on the issue of credibility, and a witness may be cross-examined on that subject, if such illness affects the witness's ability to perceive, recall or describe the events in question[,] … psychiatric material is generally undiscoverable prior to trial" under California's psychotherapist-patient privilege. People v. Gurule, 28 Cal. 4th 557, 592-93 (2002); see also People v. Hammon, 15 Cal. 4th 1117, 1119 (1997) ("[T]he trial court was not required, at the pretrial stage of the proceedings, to review or grant discovery of privileged information in the hands of third party psychotherapy providers. We reject defendant's claim that pretrial access to such information was necessary to vindicate his federal constitutional rights to confront and cross-examine the complaining witness at trial or to receive a fair trial."). Thus, to the extent Petitioner is faulting his counsel for not seeking Jane Doe 1's psychiatric records during pretrial discovery, this was not IAC because counsel has no obligation to pursue an approach that is without legal support. See generally Sexton v. Cozner, 679 F.3d 1150, 1157 (9th Cir. 2012) ("clearly we cannot hold counsel ineffective for failing to raise a claim that is meritless").[15]

b. Jane Doe 2.

Petitioner's affidavit alleges that Jane Doe 2 (1) "was adopted with a status

[15] Jane Doe 1 was 19 years old at the time of trial (1 RT 34), but even if she was still a minor when pre-trial discovery was being conducted, it is extremely unlikely that a California court would have allowed Petitioner, her father, to waive any psychotherapist-patient privilege on her behalf. See Cal. Evid. Code § 1013(b) (guardian of the patient is the holder of the privilege); People v. Superior Court, 43 Cal. 4th 737, 753 (2008) (noting that "[p]arental conflicts of interest may in some instances disqualify parents from waiving or asserting privileges on behalf of their minor children" and finding that father who tried to waive the psychotherapist-patient privilege on behalf of his minor daughter had "a manifest conflict of interest" because the father's brother was charged with sexually abusing the daughter).

of high risk," (2) "had diminished capacity and was mentally ill," (3) "had shown many times the propensity to lies and fabricate stories to her benefit," (4) "was under the constant care of therapists and healthcare professionals for years," (5) "had shown a very strong pattern of behavior problems and trust issues," (6) "was taking psychotropic, anti-psychotic drugs," and (7) had "been kicked out of school again." (Dkt. 10-2 at 35-36.)

Much of this evidence was introduced at trial. Jane Doe 2's mother testified that Jane Doe 2 was adopted, was enrolled in a treatment program for attention deficit hyperactivity disorder ("ADHD") at the University of California Los Angeles ("UCLA"), and was in "special classes" at school. (1 RT 237-38, 244.) In April 2010, while Jane Doe 2's family was staying at Petitioner's home, her mother discovered that she was pulling out her hair and ingesting it, and doctors at UCLA diagnosed her with trichotillomania. (1 RT 241-44, 255-56.) Around the same time, Jane Doe 2 began getting in trouble at school and was suspended twice. (1 RT 247-48.) She also began compulsively "checking the locks on the house." (1 RT 245-46.) Her doctor prescribed anti-psychotic medication for anxiety and opined that "the move had somehow become very tragic for [Jane Doe 2] and … she just wasn't adjusting well with a new school and a new ballet studio and a new neighborhood and new, new, new." (1 RT 245-47.) It was established that Jane Doe 2 did not tell the doctor treating her trichotillomania that she had been abused and indeed did not report the abuse to anyone until she told her mother in November of 2011. (1 RT 239-40, 244-45, 248-52, 261-62.)

Petitioner's remaining allegations—that Jane Doe 2 had diminished capacity, had shown the propensity to lie, and had a pattern of behavioral problems—are simply too vague to support a claim of IAC. Without knowing the nature of the incidents Petitioner wanted his counsel to introduce regarding Jane Doe 2's propensity to lie or behavioral problems, this Court cannot assess whether counsel's acts were "outside the wide range of professionally competent assistance."

Strickland, 466 U.S. at 690. Regarding Jane Doe 2's "diminished capacity," Jane Doe 2's mother testified that she was in some "special classes" at school (1 RT 238) and the jury was able to observe Jane Doe 2's demeanor during trial. As the trial court observed at sidebar, when overruling the defense's objection to the prosecutor using leading questions, "Just so the record is clear, because it obviously won't come across in the transcript, there were points during her testimony where we had silence for four or five minutes after questions were asked." (1 RT 233.) Defense counsel agreed that "obviously, she was having an incredible time testifying." (1 RT 234.)

In sum, Petitioner's allegations fail to demonstrate that his trial counsel's failure to impeach Jane Does 1 and 2 with the evidence described amounted to constitutionally deficient performance under Strickland.

D. Motions Requesting Discovery.

1. Legal Standard for Discovery in Habeas Cases.

It is well settled that a habeas petitioner "is not entitled to discovery as a matter of ordinary course." Smith v. Mahoney, 611 F.3d 978, 996 (9th Cir. 2010) (quoting Bracy v. Gramley, 520 U.S. 899, 904 (1997)). "A judge may, for good cause, authorize a party [in a habeas case] to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Rule 6(a), Rules Governing § 2254 Cases. "Good cause exists 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is … entitled to relief.'" Smith, 611 F.3d at 996 (quoting Bracy, 520 U.S. at 904).

Additionally, "[a]lthough state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." Cullen v. Pinholster, 563 U.S. 170, 186 (2011). Where a state court has denied a habeas petitioner's claim on the merits, and the petitioner is therefore seeking review under § 2254(d), Pinholster held that review

by the federal court "is limited to the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181 (considering review under § 2254(d)(1)); see also Gulbrandson v. Ryan, 738 F.3d 976, 993 n.6 (9th Cir. 2013), cert. denied, 134 S. Ct. 2323 (2014) (noting that the same limitation applies to review under § 2254(d)(2), due to that section's express statutory language).

Pinholster left open whether and when a district court can hold an evidentiary hearing under § 2254(e)(2), which applies when the state court did not reach the merits of the underlying claim. See Pinholster, 563 U.S. at 186, 203 n.20 (noting that "not all federal habeas claims by state prisoners fall within the scope of § 2254(d), which applies only to claims 'adjudicated on the merits in State court proceedings'" and that "[w]e need not decide … whether a district court may ever choose to hold an evidentiary hearing before it determines that § 2254(d) has been satisfied."). However, § 2254(e)(2) states that a district court "shall not hold an evidentiary hearing on the claim unless the applicant shows" the following:

> (A) the claim relies on--
>
> > (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

In Gonzalez v. Wong, 667 F.3d 965 (9th Cir. 2011), cert. denied, 133 S.Ct. 155 (2012), the Ninth Circuit found that new evidence, obtained by the petitioner after his state habeas petitions were denied, stated potentially meritorious claims for

federal habeas relief under Brady v. Maryland, 373 U.S. 83 (1963) and for ineffective assistance of counsel. Id. at 980, 972 n.2. The Ninth Circuit held that Pinholster prevented the federal courts from considering this new evidence in the first instance, but ordered the District Court to stay the federal proceedings while the petitioner returned to state court to present the new evidence. Id. at 979. The court analogized the stay-and-abeyance process utilized for unexhausted claims under Rhines v. Weber, 544 U.S. 269 (2005). Gonzalez, 667 F.3d at 980; see also Coddington v. Martel, No. 01-1290, 2013 WL 5486801 at *5 n.2, 2013 U.S. Dist. LEXIS 142160 at *14-15 n.2 (E.D. Cal. Sept. 30, 2013) ("Some district courts have read Gonzalez to mean that a district court could authorize discovery or hold a hearing and then stay the federal proceedings to allow a petitioner to return to state court.").

2. Petitioner's Request to Conduct Written Discovery Regarding Jane Doe 2's School and Mental Health Records, in Support of His IAC Claim.

Petitioner's first motion for discovery seeks "testimony and admissions" from "therapists and doctors … involved in the treatment of [Jane Doe 2] since her adoption in individual and family therapy treatment sessions," which Petitioner claims will show that the criminal charges were "fabricated" by Jane Doe 2. (Dkt. 28 at 2.) Petitioner argues that this evidence will support his IAC claim by showing that "trial counsel was in error by not fully investigating and calling the following witnesses critical to the defense…." (Id. at 1.) Petitioner submits proposed interrogatories and requests for production to the unnamed therapists and doctors. (Id. at 3-4.) The discovery requests state that they are "addressed and/or in connection with the treatment sessions that occurred between 2000 to 2010 involving Jane Doe 2 and her family members." (Id. at 3.) The interrogatories ask, for example, when the provider started treating Jane Doe 2, why treatment was sought, whether the provider saw any evidence of physical or sexual abuse, and

whether the provider is a mandated reporter of abuse under California law. (Id. at 4.)

The Court finds that, even assuming Petitioner could propound such discovery under Pinholster, Petitioner has not demonstrated good cause for doing so under Rule 6. Petitioner has not given the Court "reason to believe that [he] may, if the facts are fully developed, be able to demonstrate that he is … entitled to relief." Smith, 611 F.3d at 996 (quoting Bracy, 520 U.S. at 904). As discussed above, much of the evidence sought is cumulative of evidence already introduced at trial. See, e.g., Tennison v. Henry, 203 F.R.D. 435, 444 (N.D. Cal. 2001) (finding no good cause to permit habeas petitioner to depose assistant district attorney because, inter alia, "the discovery would be cumulative"). To the extent the evidence sought by Petitioner might reveal that Jane Doe 2 had been receiving mental health treatment before the alleged abuse (since Petitioner seeks treatment records dating back to 2000), this was already implied from the testimony that she had been enrolled in an ADHD study and that she was in "special classes" at school. Petitioner does not specifically explain what other conditions, treatment, or behavior he expects to find or how such evidence would undermine Jane Doe 2's allegation of abuse. Accordingly, Petitioner he has not demonstrated good cause for propounding this discovery.

3. Petitioner's Request for an Evidentiary Hearing on the IAC Claim.

To the extent Petitioner requests an evidentiary hearing to develop facts supporting his IAC claim, rather than written discovery (see Dkt. 10-2 at 15 [Petition, asking the court to "conduct an evidentiary hearing to answer the factual questions necessary to determine the merits of Petitioner's claim"]),[16] Petitioner has

[16] The Court interprets this request as relating to the IAC claim in Ground Three because Grounds One and Two contend that the state trial court erred and thus rely solely on the trial record.

not met the standard set forth in § 2254(e)(2). Petitioner does not rely on a new, retroactive rule of constitutional law. See 28 U.S.C. § 2254(e)(2)(A)(i). He has not demonstrated that the factual predicate for these claims could not have been previously discovered through the exercise of due diligence; he has been aware of the evidence since the time of trial, when he alleges that he told his trial counsel about it. See 28 U.S.C. § 2254(e)(2)(A)(ii). Moreover, for the reasons explained above regarding Ground Three, Petitioner has not shown that the facts underlying the claim would be sufficient to establish, by clear and convincing evidence, that no reasonable factfinder would have found Petitioner guilty of the underlying offense. See 28 U.S.C. § 2254(e)(2)(B).

4. Petitioner's Request for an fMRI Scan.

Petitioner's second motion for discovery seeks discovery "on the claim that trial counsel was in error by not fully investigating and seeking a[n] fMRI [functional magnetic resonance imaging] scan" of Petitioner, which Petitioner contends will "establish[] [his] factual innocence …." (Dkt. 40 at 1.) He explains, "An fMRI can identify or exonerate people based upon measuring brainwave responses to crime related photos or words displayed on a computer screen" and "detects scientifically if that information is stored in the brain or not." (Id. at 2.) He asserts that Federal Rule of Evidence 702 "secure[s] [him the] right to an FMRI scan" and that fMRI scans have "been ruled admissible in the U.S. Courts." (Id.) He "requests this Court to grant him a hearing, or written notification of such decision in allowing said Petitioner to pursue in the production of scientific evidence that is his legal right to procure [sic]." (Id. at 3.)

The underlying Petition does not actually assert an IAC claim based on counsel's failure to pursue an fMRI scan. See Rule 2(c)(2) of the Rules Governing § 2254 Cases (providing that a habeas petition must "specify all the grounds for relief available to the petitioner"). Even if Petitioner has properly raised this claim, he has not cited any case holding that an fMRI scan introduced for purposes of lie

detection is admissible under Rule 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and this Court has not found any case so holding. There does not appear to be any case from the Ninth Circuit or the California state courts addressing this issue, and at least one federal court has found such evidence inadmissible under Rule 702. See United States. v. Semarau, 693 F.3d 510, 521-23 (6th Cir. 2012); see also Archie Alexander, M.D., J.D., LL.M., *Functional Magnetic Resonance Imaging Lie Detection: Is A "Brainstorm" Heading Toward the "Gatekeeper"?*, 7 Hous. J. Health L. & Pol'y 1, 46-56 (2006) (arguing that fMRI lie detector tests are likely inadmissible under Daubert or Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)). In light of this, Petitioner has not shown "that [he] may, if the facts are fully developed, be able to demonstrate that he is … entitled to relief'" on this IAC claim. Smith, 611 F.3d at 996 (quoting Bracy, 520 U.S. at 904). Given that the admissibility of fMRI lie detection evidence is, at best, highly questionable, it would not have been IAC to fail to pursue such a test. Cf. De-Luis-Conti v. Evans, 2008 WL 3166958 at *10, 2008 U.S. Dist. LEXIS 63159 at *28-29 (N.D. Cal. Aug. 5, 2008), aff'd, 510 F. App'x 680 (9th Cir. 2013) (denying IAC claim based on counsel's failure to have the victims submit to a polygraph test because "lie detector results are … inadmissible under California Evidence Code § 351.1(a) unless parties stipulate to the admission of such evidence"). Accordingly, Petitioner has not demonstrated good cause for pursuing this discovery.

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VI.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying Petitioner's motions for discovery (Dkt. 28, 40); and (3) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: March 30, 2018

Karen E. Scott

KAREN E. SCOTT
United States Magistrate Judge

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to timely file Objections as provided in the Federal Rules of Civil Procedure and the instructions attached to this Report. This Report and any Objections will be reviewed by the District Judge whose initials appear in the case docket number.

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIAN KEITH FIGGE, Petitioner, **v.** **SCOTT FRAUENHELM, Warden,** Respondent.	Case No. CV 16-07408-DSF (KES) **NOTICE OF UNDER SEAL LODGMENT IN 28 U.S.C. § 2254 HABEAS CORPUS CASE** Judge: The Honorable Karen E. Scott

Respondent requests that the following documents be lodged **UNDER SEAL** pursuant to Order of the Court dated January 25, 2017:

1. Clerk's Transcript: two volumes.

2. Reporter's Transcript: three volumes.

3. Un-Redacted Appellant's Opening Brief filed in California Court of Appeal case number D066962.

4. Un-Redacted Respondent's Brief filed in California Court of Appeal case number D066962.

5. Un-Redacted Appellant's Reply Brief filed in California Court of Appeal case number D066962.

6. Un-Redacted Opinion filed in California Court of Appeal case number D066962.

7. Un-Redacted Petition for Review filed in California Supreme Court case number S226535.

8. Order denying Petition for Review in California Supreme Court case number S226535.

Because these lodged documents are copies, Respondent does not request that they be returned and the Court may dispose of them as it sees fit. Additionally, in order to reduce paper, all lodgments are copied on two sides.

Dated: January 26, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
HEATHER CRAWFORD
Deputy Attorney General

/s/ Vincent P. LaPietra
VINCENT P. LAPIETRA
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF SERVICE

Case Name: **Figge v. Frauenhelm** No. **CV 16-07408-DSF (KES)**

I hereby certify that on January 26, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

NOTICE OF UNDER SEAL LODGMENT IN 28 U.S.C. § 2254 HABEAS CORPUS CASE

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On January 26, 2017, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Brian Keith Figge
#AP2797
Pleasant Valley State Prison
P.O. Box 8500
Coalinga, CA 93210

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 26, 2017, at San Diego, California.

B. Romero	***/s/ B. Romero***
Declarant	Signature

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIAN KEITH FIGGE,

Petitioner,

v.

SCOTT FRAUENHELM, Warden,

Respondent.

Case No. CV 16-07408-DSF (KES)

~~[PROPOSED]~~ ORDER GRANTING RESPONDENT LEAVE TO FILE LODGMENTS UNDER SEAL

Good cause having been shown, Respondent's Application for Leave to File Lodgments Under Seal is granted. The appellate record is to be lodged UNDER SEAL.

Dated: January 25, 2017

Karen E. Scott

The Honorable Karen E. Scott

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIAN KEITH FIGGE, Petitioner, **v.** **SCOTT FRAUENHELM, Warden,** Respondent.	CV 16-07408-DSF (KES) **APPLICATION FOR LEAVE TO FILE LODGMENTS UNDER SEAL** Judge: The Honorable Karen E. Scott

Pursuant to Local Rule 79-5.2.2(a), Respondent respectfully requests this Court grant leave to file lodgments under seal. This application is based on the reasons set forth in the attached declaration of Vincent P. LaPietra.

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Dated: January 24, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
HEATHER CRAWFORD
Deputy Attorney General

/s/ Vincent P. LaPietra
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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIAN KEITH FIGGE, Petitioner, **v.** **SCOTT FRAUENHELM, Warden,** Respondent.	CV 16-07408-DSF (KES) **DECLARATION OF VINCENT P. LAPIETRA** Judge: The Honorable Karen E. Scott

I, Vincent P. LAPIETRA, declare:

1. I am the deputy attorney general assigned to respond to the Petition for Writ of Habeas Corpus filed in the above captioned case.

2. Pursuant to Rule 5 of the Rules Governing Section 2254 Cases, Respondent must lodge with the Court relevant portions of the transcript, as well as the briefs and opinions filed on appeal.

3. In this case, the transcripts, appellate briefs, California Court of Appeal opinion, and Petition for Review were all filed under seal because they contain

information about child molest victims. Un-redacted copies are not available to the public.

4. I have drafted the responsive pleading in a manner that obviates the need to file Respondent's Answer under seal.

5. Attached to the Petition are copies of documents that were filed under seal in state courts and that should not be available to the public.

6. For these reasons, I respectfully request this Court issue an order permitting Respondent to file the appellate record under seal.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, on this 24th day of January, 2017, at San Diego, California.

Dated: January 24, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
HEATHER CRAWFORD
Deputy Attorney General

/s/ Vincent P. LaPietra
VINCENT P. LAPIETRA
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF SERVICE

Case Name: **Figge v. Frauenhelm** No. **CV 16-07408-DSF (KES)**

I hereby certify that on January 24, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPLICATION FOR LEAVE TO FILE LODGMENTS UNDER SEAL; DECLARATION OF VINCENT P. LAPIETRA AND [PROPOSED] ORDER GRANTING RESPONDENT LEAVE TO FILE LODGMENTS UNDER SEAL

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On January 24, 2017, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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P.O. Box 8500
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 24, 2017, at San Diego, California.

B. Romero	***/s/ B. Romero***
Declarant	Signature

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