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FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL J. HULTMAN,

Petitioner-Appellant,

v.

DANIEL PARAMO, Warden,

Respondent-Appellee.

No. 20-55792

D.C. No. 5:18-cv-01439-CJC-LAL
Central District of California,
Riverside

ORDER

Before: WARDLAW and BADE, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 9) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

FILED

JUL 22 2021

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL J. HULTMAN, Petitioner-Appellant, v. DANIEL PARAMO, Warden, Respondent-Appellee.	No. 20-55792 D.C. No. 5:18-cv-01439-CJC-LAL Central District of California, Riverside ORDER

Before: CANBY and TALLMAN, Circuit Judges.

Appellant's motion to file an oversized request for certificate of appealability (Docket Entry No. 5) is granted.

The request for a certificate of appealability (Docket Entry Nos. 2 & 3) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL J. HULTMAN, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. EDCV 18-1439-CJC (LAL) **ORDER DENYING CERTIFICATE OF APPEALABILITY**

For the reasons stated in the Report and Recommendation, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right.[1] Thus, the Court declines to issue a certificate of appealability.

DATED: March 30, 2020

HONORABLE CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

[1] See 28 U.S.C. § 2253; Fed. R. App. P. 22(b); Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL J. HULTMAN, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. EDCV 18-1439-CJC (LAL) **JUDGMENT**

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

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

DATED: March 30, 2020

HONORABLE CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL J. HULTMAN, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. EDCV 18-1439-CJC (LAL) **ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, the Magistrate Judge's Report and Recommendation, Petitioner's Objections and the remaining record, and has made a *de novo* determination.

Petitioner's Objections lack merit for the reasons stated in the Report and Recommendation.

Accordingly, IT IS ORDERED THAT:

1. The Report and Recommendation is approved and accepted;

2. Judgment be entered denying the First Amended Petition and dismissing this action with prejudice; and

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3. The Clerk serve copies of this Order on the parties.

DATED: March 30, 2020

HONORABLE CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

App F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL J. HULTMAN, Petitioner, v. DANIEL PARAMO, Warden, Respondent.	Case No. EDCV 18-1439-CJC (LAL) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Cormac J. Carney, United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On July 6, 2018, Paul J. Hultman ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254, followed by a First Amended Petition ("FAP") on October 9, 2018. On November 19, 2018, Respondent filed a Motion to Dismiss the First Amended Petition. On February 26, 2019, the previously assigned magistrate judge issued a Report and Recommendation that all but one of Petitioner's claims be dismissed. On May 13, 2019, the Court accepted the Report and Recommendation and ordered the FAP

proceed on the single viable claim. On June 6, 2019, Respondent filed an Answer addressing Petitioner's single remaining claim. On July 10, 2019, Petitioner filed a Reply to the Answer. Thus, this matter is ready for decision.

II.

PROCEDURAL HISTORY

On April 17, 2014, Petitioner was convicted after a jury trial in the San Bernardino County Superior Court of one count of continuous sexual abuse,[1] two counts of committing a lewd act on a child under the age of 14,[2] and one count of committing a lewd act on a child under the age of 14 or 15 when the defendant is at least ten years older than the victim.[3] The jury also found true allegations that Petitioner committed his offenses against more than one person.[4] (Volume 2 Clerk's Transcript ("CT") at 214-15, 217-18, 220-22, 237-38.) On November 21, 2014, the trial court sentenced Petitioner to a state prison term of 45 years to life. (2 CT at 310-14.)

Petitioner appealed his convictions to the California Court of Appeal. (Lodgments 1-3.) On March 15, 2016, the California Court of Appeal affirmed the judgment. (Lodgment 4.)

Petitioner then filed a petition for review in the California Supreme Court. (Lodgment 5.) On May 18, 2016, the California Supreme Court denied review. (Lodgment 6.)

Petitioner next filed a habeas corpus petition in the San Bernardino County Superior Court. (Lodgments 7, 7a, 8.) On January 2, 2018, the superior court denied the petition. (Lodgment 9.)

Next, Petitioner filed a habeas corpus petition in the California Court of Appeal. (Lodgments 10, 10a.) On March 14, 2018, the appellate court denied the petition. (Lodgment 11.)

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[1] Cal. Penal Code § 288.5(a).
[2] Cal. Veh. Code § 288(a).
[3] Cal. Veh. Code § 288(c)(1).
[4] Cal. Veh. Code § 667.61(b)(e)(4).

Finally, Petitioner filed a habeas corpus petition in the California Supreme Court. (Lodgments 12, 12a.) On August 29, 2018, the California Supreme Court denied relief. (Lodgment 13.)

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

This Court has independently reviewed the state court record. Based on this review, this Court adopts the factual discussion of the California Court of Appeal's opinion in this case as a fair and accurate summary of the evidence presented at trial:[5]

> At trial, the jury heard evidence that Eric G. and his wife moved into the defendant's neighborhood in January 2009. Eric's daughter, Shyann, and son, Dylan, had friends who lived on the same street as Hultman. Hultman befriended Shyann and Dylan. He repaired their bicycles and paid them for doing yard work. He bought toys and food for them, and took them to the pool and the store.
>
> Eric was uncomfortable about Hultman's relationship with his children, and became more concerned after Hultman gave Shyann a cell phone. In approximately February 2013, Eric told Hultman to stay away from his children. He instructed his children not to go to Hultman's house. Eric testified that Shyann was acting "funny." She was withdrawn and secretive. In June, his son Dylan told him that he and Shyann were still seeing Hultman and that Hultman had given Shyann another cell phone and told her to hide it. Hultman was meeting them in a park. Dylan also told Eric that he and Shyann had watched pornography with Hultman. In June, Shyann told Eric's girlfriend, Michelle, that Hultman had said, "let me show you how to suck my dick," and that he would whisper "oh, beautiful[,] good girl" as she engaged in the act. Eric and Michelle

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[5] "Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary . . ." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing 28 U.S.C. § 2254(e)(1)). Thus, Ninth Circuit cases have presumed correct the factual summary set forth in an opinion of the state appellate court under 28 U.S.C. §2254(e)(1). See, e.g., Moses v. Payne, 555 F.3d 742, 746 n.1 (9th Cir. 2009) (citations omitted).

went to Hultman's home to confront him. When Hultman fled, they contacted the police.

At the time of the trial, Shyann was 13 years old. Shyann testified that she did not remember what happened the first time she performed oral sex on Hultman. After reviewing her initial statement to the police, Shyann said that Hultman asked her to go to his room. He pushed her by her shoulder and said that he had been doing kind things for her and buying her things, and that she had to do something nice for him. He undid the button on his pajama pants. His penis was hard. Shyann said that Kylie and Chelsea had told her that he had made them suck his penis. Shyann performed oral sex on Hultman for about 30 minutes. He gave her $20. Shyann estimated that during the next year and a half, she performed oral sex on Hultman 10 times or fewer. He gave her $20 each time.

Shyann testified that on one occasion, she and Kylie were in Hultman's kitchen when they heard a funny noise coming from the guest bedroom. They peeked through a crack in the doorway and saw Chelsea and Hultman having sex on the bed. Hultman stopped when he realized that Shyann and Kylie were present. He told them not to say anything and gave them each some money. On another occasion, Shyann walked in on Hultman while he was performing oral sex on Kylie and Chelsea.

Hultman gave Shyann an iPhone 4S, but Hultman took it back to the store. He gave her another cell phone shortly before the summer of 2013. Hultman occasionally showed her pornography. Shyann said that the women "kind of looked like [] teenager[s] but kind of looked like [] adult[s]," while the men appeared to be in their 20's and 30's.

Dylan testified that he usually stayed in the living room watching television or using the computer, or was outside watering the roses when Hultman and Shyann were alone in another room. Hultman would take Shyann into a

bedroom almost every time they went to his house. Hultman gave Dylan toys and candy and paid him $5 or $10 to water the roses.

At trial, Kylie initially denied having had any sexual contact with Hultman. Kylie acknowledged that her sister, Chelsea, had told her that she had performed oral sex on Hultman and that he had paid her $20. During her testimony, Kylie became visibly upset and started to cry. After a recess, Kylie testified that she had told Shyann that Hultman had made her suck his penis. Kylie said that she performed oral sex on Hultman once. She was 13 years old at the time. On another occasion, Hultman tried to take her pants off. She told him no, but he took them off anyway and performed oral sex on her for 20 minutes. He paid her $20. Hultman tried to convince her to have sex with him. He said to her, "The other girls get fucked, so why don't you get fucked, too."

Kylie testified that she and Shyann were in the kitchen when they heard noises coming from the back bedroom. The bedroom door was partially open. Kylie and Shyann saw Hultman and Chelsea having sex. Chelsea later told Kylie, "Don't tell mom what happened."

Chelsea testified that she met Hultman when she was walking her dogs. He was a cool person. Hultman paid her $10 to $20 to clean his house. She went to his home on Mondays, Tuesdays and Thursdays. Chelsea denied having had any sexual contact with Hultman. Chelsea said, "[Michelle] put us up to all of this, just to let you know." Chelsea maintained that Hultman had done nothing wrong.

The prosecution played Chelsea's initial interview with a police detective, in which she had stated that she had performed oral sex on Hultman approximately three times. Chelsea also said that she had had sex with Hultman and that he had not forced her to have sex with him. On one occasion, they were having sex when Shyann and Kylie walked into the room.

Detective Frey testified that he was assigned to the Crimes Against Children Detail with the Sheriff. Frey was completing his master's degree in counseling. He expected to graduate in May 2014. He had training and experience in child abuse cases and was familiar with CSAAS. It was presented as part of the forensic children interview training that he had received, and as part of his advanced officer training at the Rady Chadwick Center in 2012 and in 2013. Frey had attended conferences in which academics had discussed CSAAS, and was familiar with scholarly works about CSAAS. He had not applied CSAAS on a clinical level. His training was academic. Prior to this case, Frey had never testified about CSAAS.

Defense counsel objected to Frey testifying as an expert on CSAAS on the ground that he was not qualified to provide expert testimony on the subject. The trial court overruled the objection.

Frey testified that CSAAS is a combination of patterns that have been observed in sexually abused children. One pattern is a delayed, contradictory and unconvincing disclosure of sexual abuse. Another pattern is a complete retraction of the initial disclosure. There are five characteristics of CSAAS: secrecy, helplessness, delayed disclosure, entrapment and accommodation, and retraction. Frey acknowledged that CSAAS is not a diagnostic tool and does not help a professional to determine whether someone has in fact been molested.

Sheriff's detectives testified about seizing and examining the computer equipment found in Hultman's house. They acknowledged that they did not find anything related to child pornography. They found photographs of the victims on the same hard drive that contained pornographic anime. None of the photographs of the victims was provocative or abnormal.

The defense called Veronica Thomas, Ph.D., as its CSAAS expert. She testified that as a therapeutic approach, CSAAS can apply to some people who have been molested by someone they know. CSAAS has no relevance to a

criminal investigation or to determine whether sexual molestation did or did not happen. Dr. Thomas explained that a person who has been sexually assaulted by a stranger is more likely to discuss the abuse than someone who has been sexually assaulted by a family member or friend.

Hultman testified that he met Shyann and Dylan after Thanksgiving in 2009 when they were going door to door begging for food. They showed up at his home the next day with a broken bicycle, which he fixed. Hultman said that the children looked like refugees. Their clothing was filthy. According to Hultman, Dylan and Shyann "adopted" him. He began buying clothing for them. Hultman said that the children's parents did not provide for them and that they lived in squalor and were neglected. Hultman considered calling child protective services. Instead, he spoke to Eric and Michelle about the conditions in the home. Michelle disliked him. According to Hultman, Eric and Michelle had substance abuse problems.

Hultman said that he liked having the children at his house. They were fun and silly and pulled him out of his depression. He maintained that he had not sexually abused anyone. He denied watching pornographic anime or viewing pornography. Hultman acknowledged that he had photographed the children at a park on June 8, 2013, and that he had uploaded those photographs from his camera to one of his computers.

(Lodgment 4 at 6-11 (footnote omitted).)

IV.

PETITIONER'S CLAIMS

Petitioner raises the following claim for habeas corpus relief: Petitioner's rights to due process and a fair trial were violated when the jury viewed the entire contents of Petitioner's cell phone during deliberations despite that fact that only limited portions of the cell phone's contents were admitted as evidence.

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V.

STANDARD OF REVIEW

A. 28 U.S.C. § 2254

The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be. As the United States Supreme Court stated in Harrington v. Richter,[6] while the AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings[,]" habeas relief may be granted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with United States Supreme Court precedent. Further, a state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.[7]

B. Sources of "Clearly Established Federal Law"

According to Williams v. Taylor,[8] the law that controls federal habeas review of state court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." To determine what, if any,

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6 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).
7 28 U.S.C. § 2254(e)(1).
8 529 U.S. 362, 412, 120 S. Ct. 1495, 146, L. Ed. 2d 389 (2000).

"clearly established" United States Supreme Court law exists, a federal habeas court also may examine decisions other than those of the United States Supreme Court.[9] Ninth Circuit cases "may be persuasive."[10] A state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, if no Supreme Court decision has provided a clear holding relating to the legal issue the habeas petitioner raised in state court.[11]

Although a particular state court decision may be both "contrary to" and an "unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings under Williams.

A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts.[12] If a state court decision denying a claim is "contrary to" controlling Supreme Court precedent, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)."[13] However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them."[14]

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'"[15] Accordingly, this Court may reject a state court decision that correctly identified the applicable federal rule but unreasonably applied the rule to the facts of a particular case.[16] However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that

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9 LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).
10 Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).
11 Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S. Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators' courtroom conduct, the state court's decision could not have been contrary to or an unreasonable application of clearly established federal law).
12 Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06).
13 Williams, 529 U.S. at 406.
14 Early, 537 U.S. at 8.
15 Id. at 11 (citing 28 U.S.C. § 2254(d)).
16 See Williams, 529 U.S. at 406-10, 413.

the state court's application of Supreme Court law was "objectively unreasonable" under Woodford v. Visciotti.[17] An "unreasonable application" is different from merely an incorrect one.[18]

Where, as here, the California Supreme Court denied the claims without comment, the state high court's "silent" denial is considered to be "on the merits" and to rest on the last reasoned decision on the claims.[19] In this case, this Court looks to the grounds the California Court of Appeal stated in its decision on habeas review.[20]

VI.

DISCUSSION

A. Background

Petitioner argues his rights to due process and a fair trial were violated by juror misconduct. Specifically, Petitioner argues the jurors engaged in misconduct during deliberations by reviewing all the contents of Petitioner's cell phone, although only the screensaver photo and an officer's notes about text messages found on the phone had been admitted as evidence at trial.[21] (FAP at 16-17.)[22]

B. State Court Opinion

The California Court of Appeal denied Petitioner's claim on habeas review, explaining "[t]he jury did not engage in misconduct by examining the contents of [Petitioner]'s cell phone" because "the phone was admitted into evidence without restriction." (Lodgment 11 at 3.)

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[17] 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

[18] Williams, 529 U.S. at 409-10.

[19] See Ylst v. Nunnemaker, 501 U.S. 797, 803-06, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991); Wilson v. Sellers, ___ U.S. ___, 138 S. Ct. 1188, 200 L. Ed. 2d 530 (2018).

[20] See Ylst, 501 U.S. at 803-06; Cannedy v. Adams, 706 F.3d 1148, 1156-59 (9th Cir. 2013) (holding that "look through" practice continues to apply on AEDPA review of California Supreme Court summary denials of habeas petition).

[21] Respondent argues Petitioner's claim is procedurally defaulted in light of the state courts' denial of the claim as untimely and pursuant to In re Dixon, 41 Cal.2d 756, 759 (1953). (Answer at 6-10.) In the interest of judicial economy, this Court will address petitioner's claim on the merits rather than perform the procedural default analysis. See Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002) (courts "are empowered to, and in some cases should, reach the merits of habeas petitions if they are, on their face and without regard to any facts that could be developed below, clearly not meritorious despite an asserted procedural bar").

[22] This Court refers to the pages of the FAP assigned by the electronic docketing system.

C. Legal Standard

A criminal defendant has a Sixth Amendment right to be tried by impartial jurors.[23] A jury must decide a case solely on the evidence before them.[24] Juror misconduct occurs when a juror introduces into the jury's deliberations extrinsic facts that were not admitted in evidence.[25]

D. Analysis

The record does not support Petitioner's claim that the jury committed misconduct by reviewing the contents of his cell phone. Regardless of what the parties' intentions might have been as to what portions of the cell phone's contents were to be admitted and used at trial,[26] the trial court admitted the cell phone in its entirety. (1 CT at 155; 2 CT at 242; 3 RT at 775.) The jury did not commit any misdeed by considering evidence the trial court admitted.[27]

Accordingly, this Court finds that the California courts' rejection of Petitioner's claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Habeas relief is not warranted.

VII.

RECOMMENDATION

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

DATED: February 6, 2020

HONORABLE LOUISE A. LA MOTHE
United States Magistrate Judge

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[23] Irwin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).
[24] Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).
[25] Thompson v. Borg, 74 F.3d 1571, 1574 (9th Cir. 1996).
[26] Petitioner cites to the parties' discussion of what evidence from the cell phone would be used. (FAP at 16; Volume 2 Reporter's Transcript ("RT") at 496-98.)
[27] For the same reason, there is no merit to Petitioner's suggestion "that the prosecutor had the cell phone sur[r]eptitiously smuggled in [to the jury room] by the court bailiff." (FAP at 16.) Again, the trial court admitted the cell phone into evidence. (1 CT at 155; 2 CT at 242; 3 RT at 775.)

APP F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

PAUL J. HULTMAN,

Petitioner,

v.

DANIEL PARAMO, Warden,

Respondent.

No. ED CV 18-1439-CJC (PLA)

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

On February 26, 2019, the United States Magistrate Judge issued a Report and Recommendation ("R&R"), recommending that respondent's Motion to Dismiss should be granted in part and that, of the six grounds for relief raised by petitioner in the First Amended Petition ("FAP"), Ground Five should be dismissed as not cognizable, and Grounds Two, Three, Four, and Six should be dismissed with prejudice because the claims were not filed within the one-year statute of limitations period, as set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Pub. L. No. 104-132, 110 Stat. 1214 (1996); 28 U.S.C. § 2244(d)(1). On April 29, 2019, petitioner filed Objections to the R&R, and on May 9, 2019, he submitted "Errata" to the Objections, consisting of a declaration from his sister.

In the Objections, petitioner argues, inter alia, that Grounds Two, Three, Four and Six are not time barred, and expands upon many of the same arguments he raised in his Opposition to

the Motion to Dismiss regarding statutory and equitable tolling. The Court has reviewed the Objections, in particular petitioner's arguments that the California Court of Appeal incorrectly denied his state petition as untimely, and that equitable tolling is warranted due not only to his appellate counsel's misconduct and erroneous advice, but also because there were significant delays involving his investigator in completing various witness interviews, and petitioner relied on evidence that was not discovered until his investigator's final witness interviews concluded in June 2017. The Court finds that petitioner's arguments are adequately addressed in the R&R.

To the extent, however, that petitioner has attached new exhibits to his Objections in support of his claim for equitable tolling based on his appellate counsel's alleged misconduct, the Court has reviewed the exhibits and concludes that no change to the Magistrate Judge's recommendation is warranted. The exhibits, which are purported copies of emails exchanged between petitioner's brother and petitioner's appellate counsel during the time of petitioner's post-conviction proceedings, do not reflect any attorney misconduct that prevented petitioner from timely filing his federal petition. In particular, there is no indication that appellate counsel ever unequivocally agreed to prepare and file a state habeas petition, or gave erroneous advice regarding habeas practice and procedure that contributed to the untimely filing of petitioner's federal petition. Rather, it appears that appellate counsel provided repeated explanations regarding how the direct appeal was limited to issues based on the evidence raised at trial, but nevertheless encouraged petitioner to continue his own post-conviction investigation with the goal of developing evidence that could form the basis for habeas relief.

For example, in an email dated April 30, 2015, appellate counsel stated: "As I have told you, the trial is over. However many pieces of evidence we think the jury ought to have considered differently, we are stuck with the way the jury did resolve them." (ECF No. 27 at 59). Appellate counsel explained that "legal issues not raised in an appeal cannot be raised in a later appeal. . . . However, if evidence were to be developed that a defendant is not guilty, then that could be raised by way of a writ of habeas corpus." (ECF No. 27 at 59). One month later, in an email dated May 30, 2015, appellate counsel informed petitioner's brother that federal habeas corpus petitions have a one-year deadline that starts to run when the state appeal is final, and at

that time, they were "a long way from the appeal being final." (Id. at 61). Appellate counsel also stated that there "is no limit on the state writ other than 'reasonableness' or 'due diligence,'" and that he "just sent [petitioner] a letter . . . explain[ing] the timelines for the federal and state writs of habeas corpus." (Id.).

In an email dated June 18, 2015, appellate counsel stated that, in his opinion, "there aren't any grounds for filing a [habeas] writ," and cautioned that "the writ is not a way to re-litigate the issue of reasonable doubt or to bring up issues that are also raised on appeal," and that "you only get one bite at the apple, so if you file prematurely you might preclude yourself from filing again if or when you develop better information." (ECF No. 27 at 63). In that same email, appellate counsel suggested that petitioner should continue to use his investigator "if [petitioner] can" to "[s]ee what [the investigator] comes up with," and that appellate counsel would "evaluate any information . . . and consult with the staff lawyer about it so we have two sets of eyes on it." (Id.). Appellate counsel advised petitioner's brother to not "worry about time limits," as "[w]e are a long way from the appeal being final. In other words, don't sit on your hands but don't fret unduly over the time constraints." (Id.).

In a subsequent email dated June 24, 2015, appellate counsel stated "If I were you (and assuming I could afford it), I would have [the investigator] interview or re-interview all the civilian witnesses . . . . Since this would be pretty much a fishing expedition for us, [I] cannot seek funds for it. But there's no reason you can't fish to your heart's content." (ECF No. 27 at 66). Regarding the investigator, appellate counsel advised: "Your only real chance to prove the allegations are false is to have the [investigator] re-investigate the case and talk to everybody again and hope you are able to come up with something. You can't . . . talk to this person now and somebody else later. If you do all you can now and it doesn't work out, at least you know you've exhausted every avenue." (Id.). Later, in an email dated October 8, 2015, appellate counsel stated that, in light of the recantations of the victims that took place at trial, providing the state court with evidence that two of the victims again recanted in a post-trial interview, while one victim remained consistent with her accusations, "would be . . . retrying the issue of credibility and we can't do that either on appeal or by way of a writ." (Id. at 69). In an email dated April 14, 2017, appellate counsel

explained that if evidence that supported a habeas petition "came to light," he would have to contact his employer and get permission to proceed because his employer would have to ask the Court of Appeal to appoint, and pay, him for that purpose, and that his "appointment is completed at this point."[1] (Id. at 70).

As shown from the above excerpts, appellate counsel unequivocally stated that, in his opinion, there were no grounds for seeking habeas relief, but nevertheless encouraged petitioner to continue his investigation. To the extent it could be inferred that appellate counsel impliedly indicated that he would help prepare a habeas petition, such an implied message was clearly contingent on new evidence being discovered by petitioner's investigator that appellate counsel, upon review, deemed to be an appropriate basis for a habeas claim. Appellate counsel made clear, however, that based on petitioner's investigation, he did not believe there were any grounds for a habeas petition. In short, there is no indication from the email exhibits attached to the Objections that appellate counsel agreed to file a state habeas petition, but then failed to do so, or otherwise engaged in any misconduct, let alone egregious misconduct that warrants the application of equitable tolling. Moreover, although appellate counsel may have expressed his opinion that petitioner's proposed habeas arguments were too weak to pursue, counsel's opinion in no way prevented petitioner from pursuing habeas relief.[2]

The Court finds it significant that the email exhibits attached to the Objections show that in May 2015 -- more than two years before the federal limitations period expired on August 16, 2017 (and before statutory tolling was applied which ultimately extended the deadline to January 8, 2018) -- appellate counsel explained in an email (and also in a letter to petitioner) that, after the state appeal concluded, petitioner would have one year to file a federal petition. (ECF No. 27 at 61). Thus, long before petitioner's direct appeal concluded, he was on notice regarding the AEDPA

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[1] Petitioner does not provide copies of any emails from appellate counsel between October 8, 2015, and April 14, 2017.

[2] Moreover, as pointed out in the R&R, it appears that appellate counsel's representation of petitioner ended after the California Court of Appeal denied the direct appeal, as appellate counsel did not even file the petition for review; rather, petitioner in pro per prepared and filed the petition for review in the California Supreme Court on April 14, 2016. (See R&R at 13).

time constraints. Based on the foregoing -- and even assuming *arguendo* that petitioner was justified in waiting until June 2017 to prepare his habeas claims, when the last round of his investigator's witness interviews concluded[3] -- nothing prevented petitioner from filing a timely, protective federal petition. In other words, considering the timeline of petitioner's state filings, had petitioner exercised reasonable diligence, he could have filed a protective petition in this Court before the limitations period expired.

As set forth in the R&R, petitioner's petition for review was denied by the California Supreme Court on May 18, 2016. Direct review of petitioner's conviction therefore concluded on August 16, 2016, after which he had one year to timely seek federal habeas relief. Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999). Although petitioner had previously been informed by his appellate counsel of the one-year deadline, he nevertheless did not file his first state petition in the superior court until August 10, 2017 -- just six days before the AEDPA period expired. That petition, which was denied on the merits on January 2, 2018, triggered statutory tolling and, as a result, extended the limitations deadline to January 8, 2018. (See R&R at 8-10). On February 25, 2018, petitioner filed his next petition in the California Court of Appeal, which was denied as untimely on March 14, 2018. (Lodgment Nos. 10, 11). Petitioner's last state petition, filed in the California Supreme Court, was denied on August 29, 2018, without comment. (Lodgment Nos. 12, 13). As explained in the R&R, because the state court of appeal denied the petition filed in that court as untimely, no tolling applied for any time after the superior court petition was denied on January 2, 2018.[4] The one-year limitations period expired just days later, on January 8, 2018.

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[3] As stated in the R&R, the Court agrees that petitioner's protracted investigation during which his investigator interviewed witnesses in September 2014, August 2015, and June 2017, reflects a lack of diligence and, furthermore, does not amount to an extraordinary circumstance that prevented petitioner from timely seeking habeas relief. (See R&R at 15). The declaration from petitioner's sister (ECF No. 29) does not change this conclusion.

[4] When assessing the timeliness of a state petition, federal courts look to "the last reasoned state court decision," and, in doing so, "should review the last decision in isolation and not in combination with decisions by other state courts." Curiel v. Miller, 830 F.3d 864, 869-70 (9th Cir. 2016) (internal quotations and citation omitted). "When at least one state court has rendered a reasoned decision, but the last state court to reject a prisoner's claim issues an order 'whose text or accompanying opinion does not disclose the reason for the judgment, [federal courts] 'look

(See R&R at 10-11). However, given that petitioner was aware that he had only one year to file his federal petition after his appeal concluded, at the time he filed his superior court petition in August 2017 (or, for that matter, any time before the one-year period expired on January 8, 2018), he could have filed a protective federal petition to stop the limitations period from expiring while he exhausted his claims in state court.[5]

Following a careful review of the relevant filings, and for the reasons stated above, the Court agrees with the conclusions set forth in the R&R regarding the application of statutory tolling, and that no extraordinary circumstances prevented petitioner from filing a timely federal petition.

Petitioner in his Objections also challenges the Court's dismissal of Ground Five as not cognizable. In Ground Five, petitioner asserts that his right to due process was violated by the denial of his state habeas petition without an evidentiary hearing to obtain evidence to prove his claims. (ECF No. 16 at 50). The Court has reviewed petitioner's arguments regarding Ground Five, and finds that no revision of the Magistrate Judge's recommendation is warranted. See Franzen v. Brinkman, 877 F.2d 26 (9th Cir. 1989) (per curiam) ("[A] petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings."); Gerlaugh v. Stewart, 129 F.3d 1027, 1045 (9th Cir. 1997) (holding that errors committed in state post-conviction proceedings are not cognizable in federal habeas proceedings); Smith v. Lockhart,

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through' the mute decision and presume the higher court agreed with and adopted the reasons given by the lower court." Id. at 870 (citation omitted). Here, because the California Supreme Court issued a silent denial, the Court looks through that unexplained decision and presumes the supreme court agreed with and adopted the timeliness ruling made by the California Court of Appeal. Although petitioner in his Objections challenges the court of appeal's determination that his petition filed in that court was untimely, this Court does not inquire into the correctness of the court of appeal's determination because, as the Supreme Court has held, if a state court clearly rules that a petition is time barred under state law, that is "the end of the matter" and no statutory tolling applies. See Pace v. DiGuglielmo, 544 U.S. 408, 414, 125 S.Ct. 1807, 1812, 161 L.Ed.2d 669 (2005).

[5] A protective petition is a timely federal habeas petition that is stayed while the petitioner exhausts his state court remedies, which suspends the running of the one-year limitations period. See Pace, 544 U.S. at 416 ("A prisoner seeking state postconviction relief might avoid [the] predicament" of trying "to exhaust state remedies . . .only to find out at the end that [the state petition] was never 'properly filed,'" by "filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted.").

882 F.2d 331, 334 (8th Cir. 1989) (petitioner's contention that his motion for post-conviction relief was denied without a hearing and without making written findings is not cognizable in a federal habeas corpus proceeding). Although the federal claims that petitioner presented in his various state habeas petitions may be cognizable on federal habeas review, the manner in which the California courts resolved those claims does not constitute a separate basis for habeas relief.

Lastly, the Court addresses petitioner's arguments regarding the issue of procedural default with respect to the state appellate court's habeas denial based on untimeliness. (ECF No. 27 at 40-44). When a petitioner has defaulted his or her federal claims in state court pursuant to an independent and adequate state procedural rule, "federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Whether a habeas petition is procedurally barred from federal review due to a state procedural rule is a separate determination from whether that same petition was timely filed under AEDPA's statute of limitations. See Holland v. Florida, 560 U.S. 631, 650, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (noting that whereas the doctrine of procedural default asks whether *"federal* courts may excuse a petitioner's failure to comply with a *state court's* procedural rules, notwithstanding the state court's determination that its own rules had been violated[,] [e]quitable tolling, by contrast, asks whether federal courts may excuse a petitioner's failure to comply with *federal* timing rules, an inquiry that does not implicate a state court's interpretation of state law") (emphasis in original); see also Cooper v. Neven, 641 F.3d 322, 328 (9th Cir. 2011) ("whether ... [a federal petitioner's] claims run afoul of AEDPA's statute of limitations is a separate issue" from "the district court's procedural default findings"). Here, it appears that petitioner has improperly conflated the "cause and prejudice" exception to the procedural bar doctrine with the requirement that his federal petition be timely filed under AEDPA's statute of limitations. Petitioner's argument that he has shown cause and prejudice warranting an exception to the procedural bar doctrine is irrelevant to this timeliness determination, and has no bearing on the R&R's findings and conclusions.

As stated supra, petitioner's remaining arguments in the Objections are sufficiently addressed in the R&R.[6]

CONCLUSION

Based on the foregoing and pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, the other records on file herein, the Magistrate Judge's Report and Recommendation, and petitioner's Objections to the Report and Recommendation. The Court has engaged in a de novo review of those portions of the Report and Recommendation to which objections have been made. The Court concurs with and accepts the findings and conclusions of the Magistrate Judge, except as noted below.

ACCORDINGLY, IT IS ORDERED:

1. The Report and Recommendation is accepted, with the exception that on Page 3, Line 17, the R&R incorrectly states that the California Supreme Court set forth the summary of the evidence presented at petitioner's trial, instead of stating that the California Court of Appeal did so.

2. Respondent's Motion to Dismiss is granted in part and denied in part, and Grounds Two, Three, Four, and Six are dismissed with prejudice as time barred, while Ground Five is dismissed as not cognizable.

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[6] On April 29, 2019, petitioner filed an Application for Certificate of Appealability pursuant to 28 U.S.C. § 2253. Because Ground One of the FAP was not dismissed, and therefore judgment in this matter has not been entered, this Order accepting the recommendation of the Magistrate Judge is not a "final order" subject to review by the Ninth Circuit. See 28 U.S.C. § 2253(c)(1)(A) (unless a certificate of appealability is issued, an appeal of "the final order in a habeas proceeding" may not be taken to the court of appeals); see also Fed. R. Civ. P. 54(b) ("When an action presents more than one claim for relief[,] . . . any order or other decision . . . that adjudicates fewer than all the claims . . . does not end the action as to any of the claims . . . and may be revised at any time before the entry of a judgment adjudicating all the claims[.]"). Accordingly, the Court **denies** petitioner's Application as premature.

3. Respondent shall file an Answer and Return to the remaining ground for relief, i.e., Ground One, no later than 30 days from the date of this Order.

4. The clerk shall serve this Order on all counsel or parties of record.

DATED: May 13, 2019

HONORABLE CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

App E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

PAUL J. HULTMAN,

Petitioner,

v.

DANIEL PARAMO, Warden,

Respondents.

No. ED CV 18-1439-CJC (PLA)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE RE: RESPONDENT'S MOTION TO DISMISS

This Report and Recommendation is submitted to the Honorable Cormac J. Carney, 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. For the reasons discussed below, the Magistrate Judge recommends that respondent's Motion to Dismiss be granted in part and denied in part.

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I

SUMMARY OF PROCEEDINGS

On April 17, 2014, a San Bernardino County Superior Court jury convicted petitioner of one count of continuous sexual abuse of a child (Cal. Penal Code § 288.5(a)), two counts of committing a lewd act upon a child under fourteen (Cal. Penal Code § 288(a)), and one count of committing lewd or lascivious acts upon a child of fourteen or fifteen years of age (Cal. Penal Code § 288(c)). The jury also found true the allegation that petitioner was convicted of committing sexual offenses against more than one victim (Cal. Penal Code §§ 667.61(b), (e)(4)). The trial court sentenced petitioner to a prison term of forty-eight years to life. (ECF No. 16 at 4; Lodgment No. 4 at 2).

Petitioner filed a direct appeal. (Lodgment No. 1). On March 15, 2016, the California Court of Appeal affirmed the judgment. (Lodgment No. 4). Petitioner filed a petition for review in the California Supreme Court, which was denied on May 18, 2016. (Lodgment Nos. 5, 6).

On August 10, 2017, petitioner constructively filed a habeas petition in the Los Angeles County Superior Court.[1] (Lodgment No. 7). On September 28, 2017, petitioner filed an amended habeas petition. (Lodgment No. 8). On January 2, 2018, the superior court issued a reasoned decision denying the petition on the merits.[2] (Lodgment No. 9). On February 25, 2018, petitioner constructively filed a petition in the California Court of Appeal. (Lodgment No. 10). On March 14, 2018, the California Court of Appeal denied the petition as untimely and because certain claims could have been raised on appeal. The appellate court also determined that, even assuming the petition was not procedurally barred, the claims failed on their merits as well. (Lodgment No. 11). Petitioner next constructively filed a petition in the California Supreme Court on April 30, 2018.

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[1] Under the "mailbox rule," a court will deem a petition constructively filed on the date the prisoner gives prison authorities the petition to mail to court. See Huizar v. Carey, 273 F.3d 1220, 1223 (9th Cir. 2001) (a prisoner's federal or state habeas petition is deemed "filed at the time [he] deliver[s] it to the prison authorities for forwarding to the court clerk") (internal quotations and citation omitted).

[2] In the superior court's denial, the court also noted that the petition raised issues that could have been raised on appeal, but were not. (Lodgment No. 9 at 6).

(Lodgment No. 12). That petition was denied on August 29, 2018, without comment. (Lodgment No. 13).

On July 2, 2018, while petitioner's petition in the California Supreme Court was pending, petitioner constructively filed his Petition in this Court. The Petition contained both exhausted and unexhausted claims. (ECF No. 1). On July 11, 2018, the Court granted petitioner's motion for a stay while petitioner was pursuing exhaustion of his unexhausted claims in the California Supreme Court. (ECF Nos. 3, 5). On September 27, 2018, the Court lifted the stay after receiving notice from petitioner that the California Supreme Court denied his habeas petition and exhaustion was completed. (ECF No. 11). On October 9, 2018, petitioner filed the operative First Amended Petition ("FAP").[3] (ECF No. 16). On November 19, 2018, respondent filed a Motion to Dismiss, arguing that the FAP is untimely. (ECF No. 18). On December 17, 2018, petitioner filed an Opposition to the Motion. (ECF No. 20).

The Motion is deemed submitted and is ready for a decision.

II

SUMMARY OF FACTS

The California Supreme Court, in its denial of petitioner's direct appeal, set forth the following summary of the evidence presented at petitioner's trial:

> At trial, the jury heard evidence that Eric G. and his wife [FN] moved into [petitioner's] neighborhood in January 2009. Eric's daughter, Shyann, and son, Dylan, had friends who lived on the same street as [petitioner]. [Petitioner] befriended Shyann and Dylan. He repaired their bicycles and paid them for doing yard work. He bought toys and food for them, and took them to the pool and the store.
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> > [FN] Eric's wife, who was Shyann and Dylan's stepmother, died in November 2012.
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> Eric was uncomfortable about [petitioner's] relationship with his children, and became more concerned after [petitioner] gave Shyann a cell phone. In approximately February 2013, Eric told [petitioner] to stay away from his children. He instructed his children not to go to

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[3] The six grounds for relief asserted in the FAP were also asserted in the original Petition. (See ECF Nos. 1, 16).

[petitioner's] house. Eric testified that Shyann was acting "funny." She was withdrawn and secretive. In June, his son Dylan told him that he and Shyann were still seeing [petitioner] and that [petitioner] had given Shyann another cell phone and told her to hide it. [Petitioner] was meeting them in a park. Dylan also told Eric that he and Shyann had watched pornography with [petitioner]. In June, Shyann told Eric's girlfriend, Michelle, that [petitioner] had said, "let me show you how to suck my dick," and that he would whisper "oh, beautiful[,] good girl" as she engaged in the act. Eric and Michelle went to [petitioner's] home to confront him. When [petitioner] fled, they contacted the police.

At the time of the trial, Shyann was 13 years old. Shyann testified that she did not remember what happened the first time she performed oral sex on [petitioner]. After reviewing her initial statement to the police, Shyann said that [petitioner] asked her to go to his room. He pushed her by her shoulder and said that he had been doing kind things for her and buying her things, and that she had to do something nice for him. He undid the button on his pajama pants. His penis was hard. Shyann said that Kylie and Chelsea[, her friends who lived in the neighborhood,] had told her that [petitioner] had made them suck his penis. Shyann performed oral sex on [petitioner] for about 30 minutes. He gave her $20. Shyann estimated that during the next year and a half, she performed oral sex on [petitioner] 10 times or fewer. He gave her $20 each time.

Shyann testified that on one occasion, she and Kylie were in [petitioner's] kitchen when they heard a funny noise coming from the guest bedroom. They peeked through a crack in the doorway and saw Chelsea and [petitioner] having sex on the bed. [Petitioner] stopped when he realized that Shyann and Kylie were present. He told them not to say anything and gave them each some money. On another occasion, Shyann walked in on [petitioner] while he was performing oral sex on Kylie and Chelsea.

[Petitioner] gave Shyann an iPhone 4S, but [petitioner] took it back to the store. He gave her another cell phone shortly before the summer of 2013. [Petitioner] occasionally showed her pornography. Shyann said that the women "kind of looked like [ ] teenager[s] but kind of looked like [ ] adult[s]," while the men appeared to be in their 20's and 30's.

Dylan testified that he usually stayed in the living room watching television or using the computer, or was outside watering the roses when [petitioner] and Shyann were alone in another room. [Petitioner] would take Shyann into a bedroom almost every time they went to his house. [Petitioner] gave Dylan toys and candy and paid him $5 or $10 to water the roses.

At trial, Kylie initially denied having had any sexual contact with [petitioner]. Kylie acknowledged that her sister, Chelsea, had told her that she had performed oral sex on [petitioner] and that he had paid her $20. During her testimony, Kylie became visibly upset and started to cry. After a recess, Kylie testified that she had told Shyann that [petitioner] had made her suck his penis. Kylie said that she

performed oral sex on [petitioner] once. She was 13 years old at the time. On another occasion, [petitioner] tried to take her pants off. She told him no, but he took them off anyway and performed oral sex on her for 20 minutes. He paid her $20. [Petitioner] tried to convince her to have sex with him. He said to her, "The other girls get fucked, so why don't you get fucked, too."

Kylie testified that she and Shyann were in the kitchen when they heard noises coming from the back bedroom. The bedroom door was partially open. Kylie and Shyann saw [petitioner] and Chelsea having sex. Chelsea later told Kylie, "Don't tell mom what happened."

Chelsea testified that she met [petitioner] when she was walking her dogs. He was a cool person. [Petitioner] paid her $10 to $20 to clean his house. She went to his home on Mondays, Tuesdays and Thursdays. Chelsea denied having had any sexual contact with [petitioner]. Chelsea said, "[Michelle] put us up to all of this, just to let you know." Chelsea maintained that [petitioner] had done nothing wrong.

The prosecution played Chelsea's initial interview with a police detective, in which she had stated that she had performed oral sex on [petitioner] approximately three times. Chelsea also said that she had had sex with [petitioner] and that he had not forced her to have sex with him. On one occasion, they were having sex when Shyann and Kylie walked into the room.

Detective Frey testified that he was assigned to the Crimes Against Children Detail with the Sheriff. Frey was completing his master's degree in counseling. He expected to graduate in May 2014. He had training and experience in child abuse cases and was familiar with [a pattern known as Child Sexual Abuse Accommodation Syndrome ("CSAAS"), i.e., the tendency for child sexual abuse victims to delay disclosure or recant their initial disclosures]. It was presented as part of the forensic children interview training that he had received, and as part of his advanced officer training at the Rady Chadwick Center in 2012 and in 2013. Frey had attended conferences in which academics had discussed CSAAS, and was familiar with scholarly works about CSAAS. He had not applied CSAAS on a clinical level. His training was academic. Prior to this case, Frey had never testified about CSAAS.

Defense counsel objected to Frey testifying as an expert on CSAAS on the ground that he was not qualified to provide expert testimony on the subject. The trial court overruled the objection.

Frey testified that CSAAS is a combination of patterns that have been observed in sexually abused children. One pattern is a delayed, contradictory and unconvincing disclosure of sexual abuse. Another pattern is a complete retraction of the initial disclosure. There are five characteristics of CSAAS: secrecy, helplessness, delayed disclosure, entrapment and accommodation, and retraction. Frey acknowledged that CSAAS is not a diagnostic tool and does not help a professional to determine whether someone has in fact been molested.

> Sheriff's detectives testified about seizing and examining the computer equipment found in [petitioner's] house. They acknowledged that they did not find anything related to child pornography. They found photographs of the victims on the same hard drive that contained pornographic anime. None of the photographs of the victims was provocative or abnormal.
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> The defense called Veronica Thomas, Ph.D., as its CSAAS expert. She testified that as a therapeutic approach, CSAAS can apply to some people who have been molested by someone they know. CSAAS has no relevance to a criminal investigation or to determine whether sexual molestation did or did not happen. Dr. Thomas explained that a person who has been sexually assaulted by a stranger is more likely to discuss the abuse than someone who has been sexually assaulted by a family member or friend.
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> [Petitioner] testified that he met Shyann and Dylan after Thanksgiving in 2009 when they were going door to door begging for food. They showed up at his home the next day with a broken bicycle, which he fixed. [Petitioner] said that the children looked like refugees. Their clothing was filthy. According to [petitioner], Dylan and Shyann "adopted" him. He began buying clothing for them. [Petitioner] said that the children's parents did not provide for them and that they lived in squalor and were neglected. [Petitioner] considered calling child protective services. Instead, he spoke to Eric and Michelle about the conditions in the home. Michelle disliked him. According to [petitioner], Eric and Michelle had substance abuse problems.
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> [Petitioner] said that he liked having the children at his house. They were fun and silly and pulled him out of his depression. He maintained that he had not sexually abused anyone. He denied watching pornographic anime or viewing pornography. [Petitioner] acknowledged that he had photographed the children at a park on June 8, 2013, and that he had uploaded those photographs from his camera to one of his computers.

(Lodgment No. 4 at 7-12).

III

PETITIONER'S CONTENTIONS

1. The jury committed misconduct by viewing the contents of petitioner's cell phone during deliberations. (ECF No. 16 at 16-17).

2. Petitioner's trial counsel was ineffective. (ECF No. 16 at 19-37).

3. The prosecutor committed misconduct. (ECF No. 16 at 38-44).

4. Cumulative error deprived petitioner of a fair trial. (ECF No. 16 at 45-49).

5. Petitioner was deprived of his right to due process when the state court denied his state habeas petition without an evidentiary hearing. (ECF No. 16 at 50-58).

6. Petitioner's appellate counsel was ineffective. (ECF No. 16 at 59-61).

IV

THE STATUTE OF LIMITATIONS

Respondent argues that petitioner did not file the Petition within the one-year statute of limitations as prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub. L. No. 104-132, 110 Stat. 1214 (1996); 28 U.S.C. § 2244(d)(1). (ECF No. 18-1 at 3-7).

A. THE LIMITATIONS PERIOD

The AEDPA imposes a one-year period of limitation for state prisoners to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1) ("the statute of limitations"). That section provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D).

The Court has reviewed each of petitioner's claims with respect to the calculation of the limitations period. For Ground One, in which petitioner contends that the jury committed misconduct, the evidence supporting this claim consists of copies of two interview summaries

dated April 13, 2017, and June 29, 2017. The summaries, prepared by an investigator, detail two interviews with Juror Paula Townsend, in which she stated that during deliberations the jury viewed the contents of petitioner's cell phone. (See ECF No. 16-1 at 26-31, 36-38). Although petitioner obviously knew or had some awareness about the facts of the juror misconduct claim at some point before these interviews took place, as that prior knowledge was undoubtedly the catalyst for having the investigator contact Juror Townsend, there does not appear to be anything in the record that reflects any specific earlier date when petitioner became aware of these facts. Nor does respondent in the Motion attempt to ascertain when petitioner discovered the factual predicate of this claim.[4] Under these circumstances, and giving petitioner the benefit of the doubt, the Court will presume for purposes of this statute of limitations analysis that petitioner became aware of the facts of the juror misconduct claim on April 13, 2017, the date of the first interview with Juror Townsend. Under § 2244(d)(1)(D), the one-year period expired one year later, on April 13, 2018. Given that the original Petition was not constructively filed in this Court until July 2, 2018, Ground One is time barred unless sufficient statutory and/or equitable tolling applies.

For Grounds Two, Three, Four, and Six of the FAP, it appears that petitioner could have, through the exercise of reasonable diligence, discovered the factual predicate of these claims before direct review concluded, as they are based on events at trial or on events that took place during the appeal process.[5] Accordingly, the Court calculates the statute of limitations for these claims under § 2244(d)(1)(A). The record shows that after the California Supreme Court denied petitioner's petition for review on May 18, 2016, petitioner did not seek review in the United States Supreme Court. For AEDPA purposes, the process of direct review of petitioner's conviction

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[4] Petitioner references a "chance" communication over Facebook between his sister and the juror, during which the jury misconduct claim came to light; however, the date of this Facebook communication is not known. (See ECF No. 20 at 32).

[5] Petitioner's claim of prosecutorial misconduct in Ground Three is premised on post-trial interviews conducted by his investigator with two of the victims, Kylie and Chelsea, and their parents. The interviews took place in September 2014, August 2015, and June 2017. The Court finds that, based on the information provided in the September 2014 and August 2015 interviews, petitioner could have, through the exercise of reasonable diligence, discovered the factual predicate of his prosecutorial misconduct claims by the time direct review concluded. The Court discusses the interviews in more detail in the equitable tolling analysis in Section IV(C). See infra.

concluded on August 16, 2016, when the ninety-day period for filing a petition for certiorari in the Supreme Court expired. Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999). The one-year limitations period for presenting Grounds Two, Three, Four and Six expired one year later, on August 16, 2017. See 28 U.S.C. § 2244(d). Accordingly, absent sufficient statutory or equitable tolling, Grounds Two, Three, Four and Six of the FAP are time barred.

In Ground Five, petitioner challenges the denials of his state habeas petitions. As a rule, "a petition alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings." Franzen v. Brinkman, 877 F.2d 26 (9th Cir. 1989). Accordingly, petitioner's claims in Ground Five are not cognizable on federal habeas review and should be dismissed.

B. STATUTORY TOLLING

The running of the AEDPA is "statutorily tolled" while a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). This provision tolls the statute for the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application.

While a petitioner is pursuing a round of state collateral relief, he is entitled to tolling during the intervals between his state petitions -- that is, from the date of the denial of a petition in one court to the filing date of a subsequent petition in a higher court -- provided the petitions were timely filed under state law. Evans v. Chavis, 546 U.S. 189, 191, 126 S.Ct. 846, 163 L.Ed.2d 684 (2006); Banjo v. Ayers, 614 F.3d 964, 968 (9th Cir. 2010) ("The period between a California lower court's denial of review and the filing of an original petition in a higher court is tolled -- because it is part of a single round of habeas relief -- so long as the filing is timely under California law."). However, "[w]hen a California state court determines that a state prisoner's state habeas petition is untimely under state law, there is no 'properly filed' state petition, and [the state prisoner is] not entitled to statutory tolling under AEDPA." Robinson v. Lewis, 795 F.3d 926, 929 (9th Cir. 2015) (quotation marks and citation omitted); see Pace v. DiGuglielmo, 544 U.S. 408, 414, 417, 125

S.Ct. 1807, 161 L.Ed.2d 669 (2005) (state petition that was not timely filed was not "properly filed" for AEDPA purposes).

Here, for Grounds Two, Three, Four, and Six of the FAP, the limitations period started to run on August 17, 2016, and ran continuously until August 10, 2017, when petitioner constructively filed his first state habeas petition in the superior court. At that point, six days remained in the one-year period. Tolling was in effect while the superior court petition was pending (including while petitioner filed an amended petition), i.e., until January 2, 2018, when the superior court issued its denial. Petitioner then constructively filed a habeas petition in the California Court of Appeal on February 25, 2018. The appellate court issued a denial on March 14, 2018, stating in part:

> [Petitioner] is not entitled to habeas corpus relief. The petition, filed more than three years after he was sentenced and nearly two years after the judgment was affirmed on appeal without an adequate explanation for the delay, is barred as untimely. (In re Sanders (1999) 21 Cal.4th 697, 703; In re Swain (1949) 34 Cal.2d 300, 302.) [Petitioner's] assertions he "acted with all due diligence," his "investigator had difficulty in obtaining the evidence presented," and he "filed as soon as [he] possibly could," are insufficient because the factual and legal bases for the claims now asserted existed either before sentencing or, at the latest, when the appeal was decided. "[T]he filing of untimely claims without any serious attempt at justification is an example of abusive writ practice." (In re Reno (2012) 55 Cal.4th 428, 460.)

(Lodgment No. 11 at 2).

The foregoing statement by the California Court of Appeal is a clear determination that the petition was untimely.[6] The petition therefore was not "properly filed" for tolling purposes. The fact that the court of appeal denied the petition on additional grounds, including on the merits, does not alter this conclusion. See Bonner v. Carey, 425 F.3d 1145, 1148-49 (9th Cir. 2005) ("Neither does the fact that the superior court also denied Bonner's petition on the merits save his petition.

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[6] Petitioner in his Opposition argues that the California Court of Appeal erroneously determined that his petition was untimely. The Supreme Court in Pace held that when a California Court "clearly rule[s]" that a petition is untimely, "'that [is] the end of the matter' for purposes of § 2244(d)(2)." Pace v. DiGuglielmo, 544 U.S. at 414 (citing Carey, 536 U.S. at 225, 226). Here, because the court of appeal unambiguously determined the petition was untimely, this Court does not analyze the correctness of that ruling, as that is "the end of the matter" with respect to statutory tolling.

Because the California courts dismissed Bonner's petition as untimely, his petition was not 'properly filed' under AEDPA. Accordingly, he is not entitled to tolling under § 2244(d)(2).") (internal footnote omitted), amended, 439 F.3d 993 (9th Cir. 2006). If a petition is denied as untimely, "none of the time before or during the court's consideration of that petition is statutorily tolled." See id. Accordingly, no tolling applies after the denial of the superior court habeas petition on January 2, 2018, when only six days of the one-year limitations period remained. Thus, on January 8, 2018, the limitations period expired.[7] Accordingly, by the time petitioner filed his habeas petition in the California Court of Appeal on February 25, 2018, the time for seeking habeas relief in federal court had expired. Moreover, no statutory tolling applies for petitioner's last state petition constructively filed on April 30, 2018, in the California Supreme Court, because it was also filed after the limitations period expired. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("section 2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed"); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001) (state habeas petition filed after the statute of limitations ended "resulted in an absolute time bar"). Absent sufficient equitable tolling, Grounds Two, Three, Four, and Six are time-barred.

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[7] The Court recognizes that while petitioner was waiting to hear from the California Court of Appeal regarding his habeas petition, he was not aware the petition would ultimately be deemed untimely and therefore not trigger the application of statutory tolling for the time period following the superior court's habeas denial for Grounds Two, Three, Four, and Six. The Supreme Court in Pace, however, held that such a result -- "a petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that he was never 'properly filed'" -- did not justify a different rule with respect to tolling. Pace, 544 U.S. at 416. The Supreme Court remarked that a prisoner seeking state post-conviction relief might avoid this predicament "by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." Id. at 416 (citing Rhines v. Weber, 544 U.S. 269, 125 S.Ct. 1528, 1531, 161 L.Ed.2d 440 (2005)); see also Bonner, 425 F.3d at 1149. The Court in Pace noted that a petitioner's "reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." Pace, 544 U.S. at 416. The Court notes that, here, petitioner did in fact file such a "protective petition," given that petitioner filed his original Petition while his habeas petition in the California Supreme Court was pending; however, he did not do so during the limitations period. Petitioner constructively filed the instant Petition on July 2, 2018, several months after the California Court of Appeal denied his petition as untimely, and over five months after the limitations period expired in January 2018 for Grounds Two, Three, Four, and Six.

As for Ground One, in which the limitations period started to run in April 2017, statutory tolling was also in effect from August 10, 2017, through January 2, 2018, while the superior court petition was pending. This amount of tolling -- over four months in total -- is enough to render Ground One timely, as it extended the one-year deadline for Ground One, originally set for April 13, 2018, beyond the constructive filing date of petitioner's original Petition filed in this Court on July 2, 2018.

C. EQUITABLE TOLLING

The Court now considers whether the remaining grounds for relief are subject to equitable tolling. In order to qualify, a petitioner must demonstrate: (1) that he has been pursuing his rights diligently, and (2) that some "extraordinary circumstance" stood in his way that prevented him from timely filing. Holland v. Florida, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (citing Pace, 544 U.S. at 418). The "extraordinary circumstance" requirement "suggests that an external force must cause the untimeliness, rather than . . . merely oversight, miscalculation or negligence on [the petitioner's] part, all of which would preclude the application of equitable tolling." Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th Cir. 2009) (quoting Harris v. Carter, 515 F.3d 1051, 1055 (9th Cir. 2008)) (internal quotation marks omitted). "The petitioner must additionally show that the extraordinary circumstances were the cause of his untimeliness, and that the extraordinary circumstances made it impossible to file a petition on time." Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir. 2009) (internal quotations, brackets, and citations omitted).

Equitable tolling determinations are "highly fact-dependent." Whalem/Hunt v. Early, 233 F.3d 1146, 1148 (9th Cir. 2000) (per curiam); see also Lott v. Mueller, 304 F.3d 918, 923 (9th Cir. 2002) (observing that equitable tolling determinations "turn[ ] on an examination of detailed facts"). A litigant bears a heavy burden to establish that equitable tolling applies, as "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule." Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002). This high bar is necessary to effectuate the "AEPDA's statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." Guillory v. Roe, 329 F.3d 1015, 1018 (9th Cir. 2003) (internal quotations and citation omitted).

Additionally, "[t]he diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" Holland, 560 U.S. at 653 (citations and internal quotation marks omitted). "The purpose of requiring a habeas petitioner to show diligence is to verify that it was the extraordinary circumstance, as opposed to some act of the petitioner's own doing, which caused the failure to timely file." Doe v. Busby, 661 F.3d 1001, 1012-13 (9th Cir. 2011) (citations omitted).

Petitioner asserts that he is entitled to equitable tolling for several reasons. First, petitioner states that a delay occurred because his appellate counsel told him not to file a state habeas petition until after the direct appeal became final, and also did not return petitioner's trial transcripts and other records to petitioner until September 2016. At the same time, petitioner also asserts that his appellate counsel failed to investigate and file a habeas petition. (ECF No. 20 at 4, 8-9). None of these reasons warrants equitable tolling. There is no indication in the record that petitioner's appellate counsel ever agreed to prepare and file a state habeas petition for petitioner after the direct appeal concluded. Indeed, the Court notes that appellate counsel did not even file a petition for review in the California Supreme Court -- petitioner in pro per prepared and filed the petition for review on April 14, 2016. (See Lodgment No. 5 at 2 (petitioner states that he "received notice from his appellate attorney around March 25th that counsel was not going to file a petition for review")). Accordingly, it appears that appellate counsel's representation of petitioner ended before the petition for review was filed. In any event, "there is no constitutional right to counsel on habeas." Bonin v. Vasquez, 999 F.2d 425, 429 (9th Cir. 1993). Thus, to the extent petitioner claims he had the right to have appellate counsel represent him on habeas review, his claim fails.[8] Additionally, petitioner cannot show that the receipt of his trial transcripts and records in September 2016 amounted to an "extraordinary circumstance" that prevented him from timely filing his Petition in this Court given that, for Grounds Two, Three, Four, and Six of the FAP, the limitations period commenced in August 2016 and, with statutory tolling, did not expire until

[8] Nor does appellate counsel's purported advice to delay filing a state habeas petition until after the appeal concluded amount to an "extraordinary circumstance" warranting equitable tolling. At the time the direct appeal concluded, petitioner still had the entire one-year period in which to file his federal petition.

January 2018. Accordingly, as of September 2016 when petitioner received his trial documents, he had ample time before the AEDPA deadline to timely pursue federal habeas relief. To the extent petitioner asserts his ignorance of the law is a basis for equitable tolling, the law is well established that neither limited educational skills nor ignorance of the law constitutes an "extraordinary circumstance" entitling a habeas petitioner to equitable tolling of the limitation period. See Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) (holding that "a pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling" of the AEDPA limitations period); Baker v. Cal. Dep't of Corr., 484 Fed.Appx. 130, 131 (9th Cir. 2012) ("Low literacy levels, lack of legal knowledge, and need for some assistance . . . are not extraordinary circumstances to warrant equitable tolling") (citable pursuant to Ninth Circuit Rule 36-3).

Petitioner also asserts that the investigation he undertook before filing his superior court habeas petition was "hampered by having to locate transient witnesses and re-engaging his investigator who was out of the country and otherwise engaged in other investigations." (ECF No. 20 at 9). In support of his claims, petitioner presents, inter alia, copies of summaries of interviews conducted by his investigator of two of the victims -- sisters Kylie and Chelsea -- and their parents. The interviews are dated September 14, 2014, August 14, 2015, and June 9, 2017. (ECF No. 16-2 at 80-88, 135-46, 160-72). As set forth supra, petitioner was charged with and convicted of sexually abusing Kylie and Chelsea along with a third victim, Shyann. The summaries reflect that Kylie, Chelsea, and their parents stated that petitioner did not commit the charged crimes, and that the sisters falsely accused petitioner because they felt threatened by Shyann's father's girlfriend (Michelle). (See id.).

Petitioner has not demonstrated that his reliance on a private investigator, and delays in the investigation, prevented him from timely filing his Petition. As mentioned above, the investigator interviewed Kylie, Chelsea, and their parents during September 2014 and August 2015, during which Kylie and Chelsea stated that petitioner did not commit the charged crimes, that they were pressured by others to go along with the false accusations, and that Kylie and Chelsea told the prosecutor that petitioner had not harmed them but the prosecutor told them they

could not change their stories. Although the investigator followed up with the family again in June 2017, petitioner does not explain why this last round of interviews was necessary in order to pursue habeas relief for Grounds Two, Three, Four and Six. In other words, from the record it is clear that petitioner could have, at a minimum, relied on the September 2014 and August 2015 interviews to prepare his habeas claims. Moreover, the long delays between interviews reflect a lack of diligence. The Court is not persuaded that the investigator's apparently open-ended investigation constitutes an "extraordinary circumstance" that prevented petitioner from timely filing. "All prisoners who raise fact-based habeas claims must undertake, to some extent, an investigation into . . . the available facts that support their claims." Frize v. Marshall, 2008 WL 4861521, at *6 (C.D. Cal. Oct. 30, 2008). Even if petitioner's investigator was unavailable for large expanses of time, that alone would not have prevented petitioner from using other means -- e.g., a different investigator -- to carry out the interviews in order for him to timely prepare and file his claims. Accordingly, the Court concludes that no equitable tolling is warranted.

To the extent petitioner asserts that his untimely claims should still be considered because he is actually innocent of the crimes, his assertion fails. The Supreme Court has held that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar. . . or. . . [the] expiration of the statute of limitations." McQuiggin v. Perkins, 569 U.S. 383, 386, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013); see Lee v. Lampert, 653 F.3d 929, 932 (9th Cir. 2011) ("[A] credible claim of actual innocence constitutes an equitable exception to AEDPA's limitations period, and a petitioner who makes such a showing may pass through the . . . gateway and have his otherwise time-barred claims heard on the merits."). The Supreme Court has cautioned, however, that "tenable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" Perkins, 569 U.S. at 386 (quoting Schlup v. Delo, 513 U.S. 298, 329, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)); see also House v. Bell, 547 U.S. 518, 522, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (the exception applies in "certain exceptional cases involving a compelling claim of actual innocence").

To prevail on an actual innocence claim, petitioner must "support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." Schlup, 513 U.S. at 324. The recantations of Chelsea and Kylie, as set forth in the investigator interview summaries, along with the other exhibits petitioner provided, are not enough for the Court to conclude that, in light of this evidence, no reasonable juror would have reached a guilty verdict. At trial, Chelsea completely recanted and told the jury that Michelle Eddy (the girlfriend of the father of the third victim, Shyann) "put us up to all of this, just to let you know." (Lodgment No. 9 at 9). Chelsea's prior statements, in which she described being abused, were presented to the jury. On the stand, Kylie denied recollection of the abuse and partially recanted, but then testified that petitioner did abuse her and the other two girls. The third victim, Shyann, testified that petitioner sexually abused her on as many as ten occasions, and that she witnessed petitioner abusing Kylie and Chelsea. Shyann's brother, Dylan, verified aspects of Shyann's testimony, as he testified that, on almost every occasion when Dylan and Shyann went to petitioner's house, petitioner would take Shyann into a bedroom while Dylan was either outside or in the living room. (Id. at 2-3). The jury heard expert testimony about the fact that children sometimes make false accusations of molestation based upon adult encouragement or suggestive interviewing techniques. (Id. at 9). The jury also heard expert testimony on CSAAS, which was described as: "a combination of patterns that have been observed in sexually abused children. One pattern is a delayed, contradictory and unconvincing disclosure of sexual abuse. Another pattern is a complete retraction of the initial disclosure." (Id. at 4). Additionally, the Court notes that, in connection with his habeas claims, petitioner submitted a copy of a post-trial interview summary involving Shyann, in which Shyann stated to the investigator that petitioner sexually abused her, Kylie, and Chelsea. Shyann's interview statements were consistent with her trial testimony. (ECF No. 16-2 at 195-98). On this record, petitioner has not shown that, based on the evidence at trial and the exhibits submitted in support of his federal habeas claims, no reasonable juror would have voted to find him guilty beyond a reasonable doubt.

Based on the above, although Ground One is not time barred, petitioner has not demonstrated any extraordinary circumstance that prevented him from timely filing Grounds Two, Three, Four, and Six. Nor has he demonstrated his factual innocence such that his untimely claims can pass through the actual innocence gateway and be considered on their merits. Accordingly, Grounds Two, Three, Four, and Six should be dismissed with prejudice as barred by the statute of limitations.

V

RECOMMENDATION

It is recommended that the District Judge issue an Order: (1) accepting this Report and Recommendation; (2) granting respondent's Motion to Dismiss in part, and denying the Motion to Dismiss in part; (3) dismissing Ground Five as not cognizable; and (4) dismissing Grounds Two, Three, Four, and Six with prejudice as time barred.

Paul L. Abrams

DATED: February 26, 2019

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE