No.

IN THE SUPREME COURT OF THE UNITED STATES

PETER IVAN MCNEAL,

***Petitioner*,**

v.

DEAN BORDERS, Warden,

***Respondent*.**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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No.

IN THE SUPREME COURT OF THE UNITED STATES

PETER IVAN MCNEAL,

***Petitioner*,**

v.

DEAN BORDERS, Warden,

***Respondent*.**

QUESTIONS PRESENTED

I. Whether the Prosecution Failed to Present Sufficient Evidence to Sustain the Conviction?

II. Whether Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and Present Exculpatory Evidence Linking the M.K. and I.P. Cases?

III. Whether Trial Counsel Rendered Ineffective Assistance by Failing Investigate and to Present a Memory Expert?

IV. Whether Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and to Present an Expert to Explain How I.P.'s Parents Tainted Her Recollections?

V. Whether Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and to Present a Taint Expert for Accuser M.K.?

VI. Whether the Combination of Errors Rendered McNeal's Trial Fundamentally Unfair?

VII. Whether McNeal's 15 Years-to-life Sentence Violates the Eighth Amendment?

VIII. Whether the California Courts' Unreasonable Refusal to Hold an Evidentiary Hearing, Entitles McNeal to an Evidentiary Hearing?

No.

PETER IVAN MCNEAL,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, PETER IVAN MCNEAL, petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's denial of McNeal's Request for a Certificate of Appealability. (Appendix A)

OPINION BELOW

On August 26, 2022, the Ninth Circuit Court of Appeals denied McNeal's request for a certificate of appealability. (Appendix A)

JURISDICTION

The Court has jurisdiction. 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

U.S. Const. Amends. V, VI, XIV; 28 U.S.C.§ 2254.

STATEMENT OF THE CASE

A. State Court Trial Proceedings

The prosecution charged McNeal with one count of oral copulation on a child under 10 years old. Cal. Penal Code § 288.7(b) (1CT61-62) After the first trial ended in a mistrial, on March 18, 2013, a second jury found McNeal guilty. (2CT252, 370; 8RT5102) On December 2, 2014, the trial court sentenced McNeal to the mandatory indeterminate term of 15 years to life in state prison. (2CT431, 483-484, 503) (11RT9309-9325, 9331)

B. Direct Appeal

McNeal appealed to the California Court of Appeal (CCA), and on December 27, 2016 the CCA affirmed the judgment.

McNeal then filed a Petition for Review. On March 29, 2017, the California Supreme Court (CSC) summarily denied his petition.

C. Federal Habeas Proceedings

On, August 13, 2018, McNeal filed a petition for writ of

habeas corpus in the district court. On June 11, 2021, the district court denied McNeal's habeas petition.

On July 7, 2021, McNeal filed an Amended Request for Certificate of Appealability to the Ninth Circuit. On August 26, 2022, the Ninth Circuit Court of Appeals denied McNeal's request for a certificate of appealability. (Appendix A)

STATEMENT OF THE FACTS ELICITED FROM THE CALIFORNIA COURT OF APPEAL OPINION

Facts

In 2009, I.P., her parents Johann and Michaele, and her sister "Echo" were visiting Los Angeles from Massachusetts. They stayed with Michaele's sister and spent Thanksgiving at the home of Michaele's cousin, Jacquire King. I.P. was three years old at the time. King and his wife invited about 20 people for Thanksgiving dinner, including I.P.'s family. Appellant, his then wife, his eight-year-old daughter and his six-year-old son were also guests at the party. During the party, appellant took one of King's sons, his own son and I.P. outside to play catch. Appellant was the only adult who played outside with the children.

That evening, after the party was over, I.P. spontaneously asked her parents, "Why did that man want to put his penis in my mouth?" One of the parents asked I.P. what she had said. I.P. repeated her question. Her parents asked which man did that. I.P. replied, "The man with the ball." Later, Michaele and I.P. took a bath together, as they often did. While they were in the bathtub, Michaele asked I.P. if I.P. wanted to show her what happened. There was a large stainless steel thermos on the bathtub rim. I.P. picked up the thermos, held it to her crotch so that it stuck straight out from her body and told Michaele to, "Say aah, and open your mouth." Then, I.P. put the thermos into Michaele's mouth and moved her hips back and forth. Michaele asked I.P. what she did then. I.P. replied, "I said, Yuck!"

I.P.'s parents debated what they should do to minimize I.P.'s trauma. They eventually decided to do nothing, believing that I.P. would eventually forget the incident. They did not tell the Kings about I.P.'s disclosure.

A few days later, I.P. and her family returned to Massachusetts. I.P. did not mention the sexual assault again for nearly two years. In mid-November 2011, I.P. told her parents that during the Thanksgiving party, she played ball outside with the man who put his penis in her mouth and told her to suck on it. They were in the bathroom at her cousin Braden's house. The bathroom was white and had a big window. The man put his penis in her mouth more than once. After the "second round," the man took a cupcake out of his pocket and gave it to her. After the third time the man put his penis in her mouth, he took her out of the bathroom. I.P. also said it felt like the man punched her while she was in the bathroom with him.

Other Crimes Evidence

On December 11, 2009, 15 days after he sexually assaulted I.P., appellant was doing volunteer work at the charter school his son attended. While he was working outside, he came upon then six-year old M.K. who was playing in the school courtyard, waiting for her mother to finish volunteering. Appellant asked her if she wanted some Skittles. Appellant took the candy out of his pocket, walked down a path away from the school, and beckoned for M.K. to follow. When they reached some bushes, appellant told M.K., "close your eyes and open your mouth." She did as she was asked, thinking he was going to put some Skittles in her mouth. When she opened her eyes again, M.K. saw appellant's erect penis. M.K. went back to the classroom where her mother was working.

M.K. told her mother about the incident before they left the campus that day. Her mother reported the incident to the school's volunteer coordinators, who in turn informed one of the school directors. When the director arrived, the whole group went to the street to a police station, where M.K. made a

statement. Appellant was prosecuted and given a probationary "sentence."

M.K. and I.P. did not know each other; their parents also had never met. One of the guests at the King's Thanksgiving party had children who attended the same school as M.K. and appellant's son. After that Thanksgiving weekend, I.P.'s parents had little contact with the Kings. M.K.'s mother sent an e-mail to the parents of students at M.K.'s school, describing appellant's conduct. There is no evidence I.P.'s parents saw the e-mail or spoke to anyone about M.K.

REASONS TO GRANT CERTIORARI

I. The Prosecution Failed to Present Sufficient Evidence to Sustain the Conviction

The jury convicted McNeal of oral copulation of I.P., a child under 10 years of age, in violation of Cal. Penal Code 288.7. The trial court sentenced McNeal to 15 years to life in state prison.

No physical evidence linked McNeal to any crime against then three year old I.P. The prosecution's case rested on unreliable, conflicting and tainted testimony. Three year old I.P.'s disclosure came two years after the incident. Although her mother, Michaele, testified I.P. initially disclosed the event in 2009 when they arrived home from the Thanksgiving party, Michaele never filed a report. Michaele believed "something had happened," but she "did not know what it was." (3RT 2717, 2724, 2726, 2827-2829; 4RT 3034, 3050)[1]

At trial, I.P. testified that a "man" took out his penis, told her to suck on it and put it in her mouth. He then gave her a cupcake. (4RT 3009-3013, 3032) I.P. testified her cousin Braden

[1]"RT" refers to the Reporter's Transcripts and "CT" refers to the Clerk's Transcripts in McNeal's direct appeal.

peeked in during the incident.[2] (4RT 3040-3043) I.P. testified while someone washed her feet, the man "smooshed his face on the window and made a scary face at [I.P.] or a weird face. I don't know really." (4RT 3013, 3021) I.P. could not identify her assailant at trial, the preliminary hearing, or at another hearing. (5RT 3722)

I.P.'s factually uncorroborated testimony failed to support the conviction. *Jackson v. Virginia,* 443 U.S. 307 (1979).

To find sufficient evidence, the California Court of Appeal (CCA) relies on I.P.'s "fresh complaint" disclosure to prove McNeal committed the incident. (Slip Opn. 6, 10) I.P.'s "fresh complaint" to her parents could only prove that I.P. made a disclosure and the circumstances under which it was made so that the jury could determine if the offense occurred. *People v. Brown*, 8 Cal.4th 746, 749-750 (1994).

Under the "fresh complaint" doctrine, "an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault may be admissible for a *limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances*

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[2]Braden denied that he saw anything. (3RT 2472)

surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." *People v. Brown,* 8 Cal.4th at 749-750. (Italics added)

"Caution . . . is particularly important because, if the details of the victim's extrajudicial complaint are admitted into evidence, even with a proper limiting instruction, a jury may well find it difficult not to view these details as tending to prove the truth of the underlying charge of sexual assault [citation], thereby converting the victim's statement into a hearsay assertion. [Citation]." *People v. Brown*, 8 Cal.4th at 760-63.

By relying on the fresh complaint doctrine to prove McNeal committed the offenses, the CCA unreasonably violated McNeal's rights to due process, a fair trial, and the right to confront and cross-examine witnesses. *Brecht v. Abrahamson,* 507 U.S. 619 (1993); U.S. Const. amends. V, VI, VIII, XIV.

II. Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and Present Exculpatory Evidence Linking the M.K. and I.P. Cases

The prosecution had no substantial evidence to prove the charges against McNeal. (See, Argument I). To close the evidentiary gap, the prosecution relied on an uncharged offense involving M.K. The prosecution spent substantial time developing the M.K. case and used the M.K. case to bolster I.P.'s weak case.

The prosecutor relied heavily on the M.K. case to prove that McNeal committed a crime against I.P. The prosecutor relied on the unlikely probability that two girls from different sides of the country, who did not know each other, would accuse McNeal of similar crimes. (8RT 4934)

Trial counsel rendered ineffective assistance by failing to investigate and find a link between the I.P. and M.K. cases. (2ACT288, 290) Trial counsel overlooked that Lucas Reynolds, an attendee at the King's Thanksgiving party, where the incident allegedly happened, knew about the M.K. incident because he helped McNeal defend against the M.K. case. Photographs, taken

by McNeal's wife, Jill, depict Reynolds on the Charter School campus. In the photos, Reynolds reenacted the alleged "crime" scene at the Charter School. (10RT 8187)

The jury could have easily inferred that the Pauwens learned about the M.K. case from Reynolds. The jury could have inferred that, because the Pauwen's knew about the M.K. case, when I.P. had problems at her school and problems in bathrooms, the Pauwens attributed I.P.'s difficulties to the supposed molestation that occurred two years earlier.

The Pauwen's knowledge that McNeal had been previously accused of a similar offense would have compromised the integrity of the prosecution's case and created a reasonable possibility of a favorable verdict. Trial counsel rendered ineffective assistance by failing to investigate and link the M.K. and I.P. cases. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In finding no error, the CCA unreasonably relied on the findings the trial court made at the motion for new trial. U.S. Const. amends. V, VI, XIV; *People v. Ault*, 33 Cal.4th 1250, 1261 (2004) (When the defendant reasserts on appeal the claims

previously raised in an unsuccessful new trial motion, the appellate court must independently review the record to determine if prejudicial trial error occurred.)

Throughout the CCA's slip opinion, the CCA recites the trial court's findings and concludes, "*Like the trial court, we are not persuaded that the representation appellant received from his counsel at trial fell below an objective standard of reasonableness.* [Citation]." (Slip Opn. 8-9) (Italics added)

The law entitled McNeal to an *independent review* of his case on appeal after a motion for new trial. *People v. Ault*, 33 Cal.4th at 1261. (When defendant reasserts on appeal claims previously raised in an unsuccessful new trial motion, the appellate court must independently review the record to determine if prejudicial trial error occurred.)

Trial counsel rendered ineffective assistance by failing to investigate and present exculpatory evidence. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If trial counsel had investigated the case, he would have found that Reynolds, who attended the King's Thanksgiving party, knew about the M.K. incident.

Trial counsel would have been able to explain that Michaele failed to report the I.P. incident immediately after the Thanksgiving party because the M.K. incident did not happen until after the Thanksgiving party and she did not know about the M.K. incident. After Michaele learned about the M.K. incident, and two years later when she notice behavioral changes in I.P.'s bathroom habits, she believed McNeal molested I.P. See *Strickland,* 466 U.S. at 688, 694.

III. Trial Counsel Rendered Ineffective Assistance by Failing Investigate and to Present a Memory Expert

I.P.'s alleged incidents occurred at age three. I.P.'s disclosures came two years afterwards. Even if I.P. disclosed the incident immediately to her parents, Michaele waited two years to make a police report. After the disclosure, Michaele and her husband Johannes tape recorded their interrogations of I.P. (2ACT126; 10RT8207; 11RT8404-8405,8417)

Recognized scientific data would have shown that neither Michaele nor I.P. could have recalled the incident details and, even if they could have recalled the incident, the memories had become decayed, distorted and confused. Even worse, Michaele

targeted McNeal as the perpetrator. Even if Michaele did not target McNeal as the perpetrator, she could not have recalled the incident details. (2254HCExh. C 22-35)

Trial counsel should have called a memory expert, such as Dr. Geoff Loftus. Dr. Loftus, a memory expert, would have explained the scientific bases of perception and memory so the jury could assess the reliability of the witnesses' memories. Dr. Loftus would have explained the lack of correlation between a confident witness and an accurate witness. Dr. Loftus would have explained how witnesses rehearse reconstructed memories of an alleged incident until the memories become strong and confident inducing. (2ACT240)

Dr. Loftus would have testified how I.P.'s and Michaele's memories would have become confused, decayed, and distorted. A memory expert, such as Dr. Loftus, would have shown how Michaele and Johannes tainted I.P.'s memory. Significantly, Dr. Loftus would have testified that ". . . . *following repeated suggestive post-event information, people are capable of forming memories of entire, fictional, sometimes upsetting childhood events*. [Citations omitted] " (2ACT246) (Italics added.)

The CCA "decline[s] to second-guess this tactical choice by trial counsel." (Slip Opn. 10) *The CCA overlooks that trial counsel never made any tactical decision about a memory expert because trial counsel never consulted a memory expert.* Although trial counsel consulted a psychiatrist, he never made an informed decision about whether to consult a memory expert. (2ACT288, 290)

The CCA finds no reasonable probability that McNeal would have achieved a more favorable verdict if trial counsel presented a memory expert because the jury heard evidence about I.P.'s initial disclosure, about I.P.'s disclosure two years after the incident, and also heard the conversations I.P. had with her parents and the social worker who interviewed I.P. (Slip Opn. 10)

The CCA overlooks that the memory expert would have explained that I.P. believed she had been molested because of the conversations she had with her parents and the social worker who interviewed her.

The CCA also relies on the trial court's comments at the Motion for New Trial. The CCA states that the trial court

commented, "'Everybody knows that . . . the more time passes, the more your memory fades. Everybody knows that three-year-olds don't remember things as well as adults . . . . We don't need memory experts to tell us that.'" (Slip Opn. 9)

Case law holds otherwise; courts have consistently upheld the admissibility of expert testimony on the psychological factors affecting the reliability of memory. *People v. McDonald,* 37 Cal.3d 351 (1984) (dealing with an eyewitness identification expert.) Furthermore, Cal. Evid. Code § 801 permits a party to introduce expert testimony that may assist the trier of fact. See also *In re Nourn,* 145 Cal.App.4th 820, 834 (2006).

Trial counsel's failure to present a memory expert deprived McNeal of the effective assistance of counsel. *Strickland v. Washington,* 466 U.S. at 687.

IV. Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and to Present an Expert to Explain How I.P.'s Parents Tainted Her Recollections

On November 26, 2009, after three year old I.P.'s purported initial disclosure, her parents interrogated her. While naked in a bathtub with Michaele, I.P. demonstrated what happened using a

thermos prop. Two years later, Michaele and Johann interviewed I.P. twice on November 5, 2011, once on November 10, 2011, and once on November 11, 2011.[3] (2254HCExh. D). Social worker, Roann Vecchia, interviewed I.P. on November 11, 2011, and on November 15, 2011. (2254HCExh. E)

An expert, like Dr. David Thompson, would have testified how I.P.'s multiple interviews tainted I.P.'s memory and statement. The repeated interviewing, negative stereotype induction, a tainted identification procedure, inappropriate interviewing techniques, source misattribution errors (source monitoring errors), and interviewer bias adversely impacted I.P.'s memory and statement causing her to mistakenly implicate McNeal. (2254HCExhs. A, B)

Dr. Thompson would have explained how misattribution errors and source monitoring caused I.P. to mistakenly recall where she saw a penis. Because I.P.'s father frequently walked around the house undressed, and I.P. saw his penis daily, I.P. mistakenly recalled where she saw a penis. (2254HCExhs. A;B

[3]Trial counsel also failed to introduce the parents' recorded interviews into evidence.

16-at 8-19)

Trial counsel failed to make a reasonable decision. First, trial counsel failed to contact a taint expert, without which his decision could not have been reasonable. Second, the recordings could not have harmed McNeal. The recordings would have shown Johann and Michaele tainted and corrupted I.P.'s memory and statements so that I.P. would testify she had been molested. Trial counsel's failure to introduce the critical tape recordings deprived McNeal of the effective assistance of trial counsel. *Strickland*, 466 U.S. at 687.

Trial counsel's failure to call a taint expert deprived McNeal of the effective assistance of trial counsel. *Strickland*, 466 U.S. at 687.

V. Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and to Present a Taint Expert for Accuser M.K.

The prosecution relied heavily on the uncharged incident involving M.K. M.K. testified that, on December 11, 2009,[4] while McNeal volunteered to prepare for a festival at his children's

[4]The M.K. incident happened a week *after* November 26, 2009 Thanksgiving party.

school, McNeal allegedly enticed M.K. to follow him by offering her candy. After M.K. followed McNeal down a pathway toward some bushes, McNeal told her to close her eyes and open her mouth. When she opened her eyes, she saw McNeal laying in a "weird" position with his pants down and penis exposed. McNeal said, "Shhhh. Shhhh. It's a secret. Remember" and gave her Skittles. (4RT3080-3081, 3088, 3107, 3116, 3345, 3307-3311,3639–3640 3652-3656,3692)

The prosecution used the uncharged M.K. offense at McNeal's trial to prove McNeal's disposition to molest children. Even though the prosecution had audio recordings of the police and M.K.'s parents interrogating her, trial counsel never investigated nor presented a forensic child interview expert to testify about the fundamental flaws in M.K.'s interrogation that negatively impacted her credibility.

A forensic taint expert, like Dr. David Thompson, would have testified how M.K.'s multiple interviews tainted M.K.'s memory and subsequent testimony. Dr. Thompson would have testified how [M.K.'s] repeated interviews by the police with M.K.'s parents present, exposed M.K. to "leading and suggestive

questions . . . [and] raise grave concerns about the reliability of [M.K.'s] statements and subsequent memories of the alleged encounter" with McNeal. (2254HCExh. G at 39)

Defense counsel inexplicably never introduced M.K.'s audio recorded interviews nor presented a forensic child interview expert to explain how the interviews tainted M.K.'s recollections of any encounter with McNeal. (See 2254HCExh. G) The recordings, as explained by a taint expert, such as Dr. Thompson, would have shown how M.K.'s parents and the police tainted and corrupted M.K.'s memory and statements. Trial counsel's failure to introduce the critical tape recordings deprived McNeal of the effective assistance of trial counsel. *Strickland*, 466 U.S. at 687.

VI. The Combination of Errors Rendered McNeal's Trial Fundamentally Unfair

The individual prejudicial errors mandated relief. "Although no single alleged error may warrant . . . relief, the cumulative effect of errors . . . deprive[d] . . . [McNeal] of the due process right to a fair trial." *Karis v. Calderon*, 283 F.3d 1117, 1132 (9th Cir. 2002); U.S. Const. amends. V, VI, VIII, XIV.

VII. McNeal's 15 Years-to-life Sentence Violates the Eighth Amendment

The jury convicted McNeal of violating Cal. Penal Code § 288.7. Cal. Penal Code § 288.7 mandated a 15 year to life sentence and sentenced McNeal to 15 years to life in state prison. (11RT 9331) The 15 years to life sentence violated the state and federal prohibitions against cruel and unusual punishment. U.S. Const. amend. VIII.

The CCA unreasonably finds no violation of the Constitution's prohibition against cruel and unusual punishment. (Slip Opn. at 17.)

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." A punishment is excessive in violation of the Eighth Amendment if it is "grossly out of proportion to the severity of the crime." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

The cruel and unusual punishment clause of the Eighth Amendment prohibits the imposition of a penalty that is disproportionate to the defendant"s ""personal responsibility and moral guilt."" *Enmund v. Florida,* 458 U.S. 782, 801 (1982); see

also *Solem v. Helm,* 463 U.S. 277 (1983)(life sentence without the possibility of parole for a seventh nonviolent felony unconstitutional under the Eighth Amendment); *Robinson v. California,* 370 U.S. 660 (1962); see also *In re Lynch,* 8 Cal.3d 410, 414 (1972).

McNeal had minimal contacts with the law. At the time of the alleged crime, McNeal had been living a productive, law-abiding, normal life. He had been married and had two children, a son and a daughter. (2CT 441 - 458) Several people wrote letters to support McNeal's request for leniency, including friends, his mother, his ex-wife, his son and his daughter. The letters attested to McNeal's good character. (2CT 453-479) At sentencing, McNeal's friends and relatives testified to his good character. (11RT 9310, 9317-9323)

The CCA unreasonably finds McNeal's sentence of 15 years to life comports with the California and the federal Constitutions. The CCA finds the punishment constitution based on the seriousness of the crime, because McNeal had a prior similar offense, and because McNeal's sentence is proportional to those imposed under California law for other, similar offenses. (Slip

Opn. at 17)

A COA should be granted to determine if the indeterminate 15 years to life sentence for a single criminal act is grossly disproportionate to McNeal's crime and personal circumstances and constitutes unconstitutional cruel and/or unusual punishment. U.S. Const. amend. VIII.

VIII. The California Courts' Unreasonable Refusal to Hold an Evidentiary Hearing, Entitles McNeal to an Evidentiary Hearing

McNeal requested an evidentiary hearing at every level of the state habeas proceedings and again in federal court. The California courts should have held an evidentiary hearing to allow McNeal to call trial counsel as a witness and prove that trial counsel rendered ineffective assistance. See, *Dunn v. Reeves,* 584 U.S. ___ (2021;) No. 20-1084, 2021 U.S. LEXIS 3590, at *22 (July 2, 2021) (The state court held a 2-day evidentiary hearing on the defendant's ineffective assistance of counsel claims); see, e.g., *People v. Pope*, 23 Cal.3d 412, 426 (1979) (An evidentiary hearing allows trial counsel to fully describe "his or her reasons for acting or failing to act in the manner complained of.")

McNeal made a prima facie showing for ineffective

assistance of counsel supported by the record. Assuming the record and other evidence to be true (see *Cullen v. Pinholster*, 563 U.S. 170, 188 (2001)) nothing more was required. See *Nunes v. Mueller,* 350 F.3d at 1052, 1054 (9th Cir. 2003).

No AEDPA deference is due under 2254(d)(2) or (e)(1) where the state has made an "unreasonable" determination of the facts. No deference is due in federal court to the state court's disputed findings of fact. *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) ("Where a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an 'unreasonable determination' of the facts.").

The California courts unreasonably denied McNeal's claims without holding an evidentiary hearing; the district court should have held an evidentiary hearing. See *Pinholster*, 563 U.S. at 183-184 (evidentiary hearing may be proper where § 2254(d) does not preclude habeas relief); *Harrington v. Richter,* 562 U.S. 86 (2011) (where petitioner satisfies § 2254(d), claim may be relitigated in federal court); *Johnson v. Finn*, 665 F.3d 1063, 1069 n.1 (9th Cir. 2011)(where state court decision not entitled to AEDPA

deference, even after *Pinholster* it was still proper for district court to hold evidentiary hearing); see also *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005) (evidentiary "hearing is required if: '(1) [the defendant] has alleged facts that, if proven, would entitle him to habeas relief, and (2) he did not receive a full and fair opportunity to develop those facts'")(quoting *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004)).

CONCLUSION

Mr. McNeal respectfully requests that this Court grant Certiorari.

DATED: November 16, 2022

Respectfully submitted,
FAY ARFA, A LAW CORPORATION

/s Fay Arfa

_____
Fay Arfa, Attorney for Appellant

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 26 2022

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

PETER IVAN MCNEAL, Petitioner-Appellant, v. DEAN BORDERS, Warden, Respondent-Appellee.	No. 21-55618 D.C. No. 2:18-cv-06964-JGB-JPR Central District of California, Los Angeles ORDER

Before: SILVERMAN and M. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 2, 3) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX A

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PETER IVAN McNEAL,
Petitioner,
v.
JAMES HILL, Acting Warden,
Respondent.

Case No. CV 18-6964-JGB (JPR)

J U D G M E N T

Pursuant to the Order Accepting Findings and Recommendations of U.S. Magistrate Judge,

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

DATED: June 11, 2021

JESUS G. BERNAL
U.S. DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PETER IVAN McNEAL, Petitioner, v. JAMES HILL, Acting Warden, Respondent.	Case No. CV 18-6964-JGB (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

The Court has reviewed the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge, which recommends that judgment be entered denying the Petition and dismissing this action with prejudice. See 28 U.S.C. § 636(b)(1). On April 15, 2021, Petitioner filed Objections to the R. & R., in which he largely reiterates the arguments raised in his Petition and Traverse. A few of his contentions warrant discussion, however.[1]

I. Insufficient Evidence

Petitioner argues that in denying his insufficient-evidence

[1] Respondent has not responded to the Objections.

APPENDIX B

claim, the Magistrate Judge "overlook[ed]" that I.P. testified that she did not immediately disclose that Petitioner had assaulted her during the 2009 Thanksgiving party to either her cousin Braden or her mother, Michaele. (Objs. at 4.) But I.P. never said that she didn't promptly tell her mother about the assault. Rather, she observed that although she "probably" told her mother "right away" about the assault, she didn't know for sure. (Lodged Doc. 15, 4 Rep.'s Tr. at 3047.) And the Magistrate Judge noted that although I.P. testified that Braden might have witnessed the assault, he testified that he did not see anything happen to her. (See R. & R. at 7 n.5 (citing Lodged Doc. 15, 3 Rep.'s Tr. at 2465, 2472-73, 4 Rep.'s Tr. at 3025, 3040-43).) Critically, as Petitioner does not dispute, I.P. testified that a male guest at the Thanksgiving party put his penis in her mouth (see Lodged Doc. 15, 4 Rep.'s Tr. at 3008-09), and, as the Magistrate Judge found, other evidence corroborated her account and established that Petitioner was the perpetrator — including but not limited to Michaele's testimony that on the night of the party I.P. asked her why someone matching Petitioner's description had wanted to put his penis in her mouth at the party and that I.P. then demonstrated what he had done to her.[2] (See R. & R. at 14-16.) That evidence was

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[2] Petitioner also appears to argue that I.P.'s statements to Michaele the night of the party were inadmissible hearsay. (See Objs. at 4-6.) But the trial court found that they were admissible as excited utterances (see Lodged Doc. 15, 2 Rep.'s Tr. at 334-35), and Petitioner has never challenged that finding. In any event, for purposes of deciding the sufficiency of the evidence, a habeas court considers all the evidence, properly admitted or not. See McDaniel v. Brown, 558 U.S. 120, 131 (2010).

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constitutionally sufficient to support Petitioner's conviction even though I.P.'s parents didn't immediately report the assault to police. (See Objs. at 5.)

Petitioner also claims that the Magistrate Judge "overlook[ed]" that although his sexual assault of M.K. might have been admissible to show his propensity to commit sex crimes, the prosecution still needed to establish that M.K.'s testimony was truthful. (See id. at 6-7.) But the Magistrate Judge noted that M.K. not only identified Petitioner as her assailant and described what he did to her but that other evidence corroborated her testimony.[3] (See R. & R. at 16 & n. 10.)

At bottom, Petitioner's insufficient-evidence arguments boil down to his insistence that he was convicted "based on the uncorroborated and inconsistent story of a three-year old child" and the unreliable testimony of her mother. (See Objs. at 3; id. at 4-7.) But as the Magistrate Judge found, the arguments Petitioner highlights in his objections were all presented to the jury, which nevertheless credited I.P.'s and her mother's testimony. (See R. & R. at 18.) This Court can't reweigh the evidence or reassess the witnesses' credibility. See Bruce v.

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[3] Petitioner suggests that the evidence concerning M.K.'s assault showed that he was actually just "urinating in the bushes." (Objs. at 30.) But M.K. testified that he exposed his penis to her after "laying down in a weird position" and instructing her to "close [her] eyes and open [her] mouth" (Lodged Doc. 15, 5 Rep.'s Tr. at 3640, 3647-51, 3653-54, 3682), actions inconsistent with his simply urinating. Moreover, any such claim is inconsistent with his arguments that the bushes were only four, not seven, feet tall and that Petitioner would not have done something inappropriate in plain view of other parents. (See id., 6 Rep.'s Tr. at 4286-87, 4289-92, 4297, 8 Rep.'s Tr. at 4910-12.)

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Terhune, 376 F.3d 950, 957-58 (9th Cir. 2004).

II. Ineffective Assistance of Counsel

Petitioner argues that in denying his claims that his trial counsel were ineffective for failing to consult with or present the testimony of a memory or a taint expert to undermine I.P.'s, Michaele's, and M.K.'s testimony, the Magistrate Judge improperly found that the psychiatrist or psychiatrists whom his attorneys did consult were an effective substitute for those experts. (See Objs. at 13-15, 21.) But the Magistrate Judge didn't make any such finding, instead noting that Petitioner failed to meet his burden to show that the psychiatrist or psychiatrists with whom trial counsel consulted, who had expertise in evaluating child-abuse claims (see Lodged Doc. 14, 2 Aug. Clerk's Tr. at 290; see id. at 288), didn't consider some or all of the topics he claims a memory or taint expert would have discussed.[4] (See R. & R. at 37-38, 46.)

Nor did the Magistrate Judge err in relying on Gentry v. Sinclair, 705 F.3d 884, 899-900 (9th Cir. 2012) (as amended Jan. 15, 2013), in denying Petitioner's claims in part because he had failed to provide a declaration from trial counsel explaining their decision not to present expert testimony. (See Objs. at 22.) In Gentry, the petitioner claimed that his trial counsel failed to have him evaluated by a psychologist and as a result didn't present any mitigating evidence of his mental state. 705 F.3d at 897, 899. The state court denied the claim, finding

[4] Indeed, both the memory and the taint expert whose testimony Petitioner claims should have been presented are themselves psychiatrists. (See Pet., Exs. A-G.)

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"insufficient evidence" that trial counsel "neglected the issue" when their declarations, which addressed other aspects of his ineffective-assistance claim, didn't discuss "why no expert testimony was presented," leaving the possibility that "an evaluation was performed that provided no evidence useful to the defense." Id. at 899-900. The Ninth Circuit held that the state court was not unreasonable in finding counsel's performance not deficient, emphasizing that although trial counsel submitted detailed declarations in support of most of petitioner's claims, they "said nothing" about his expert-evidence claim, leaving petitioner, who bore the burden of dispelling the "strong" presumption that counsel's performance was reasonable, with "no evidence to indicate why the failure to present [expert] evidence . . . was unreasonable under the circumstances." Id. at 900.

Here as in Gentry, trial counsel submitted declarations addressing Petitioner's various ineffective-assistance claims. (See Lodged Doc. 14, 2 Aug. Clerk's Tr. at 288-90.) But although counsel mentioned consulting with a psychiatrist with an expertise in child-abuse cases, they apparently weren't asked to elaborate on what information that expert shared and how that shaped their decision not to call a memory or a taint expert during trial. (Id.) As in Gentry, that left open that the psychiatrist or psychiatrists addressed the various memory and taint issues relevant to I.P.'s, Michaele's, and M.K.'s testimony but that counsel found that such testimony wouldn't be "useful to the defense." 705 F.3d at 900; see Womack v. McDaniel, 497 F.3d 998, 1004 (9th Cir. 2007) (rejecting ineffective-assistance claim when petitioner offered no evidence of counsel's allegedly

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deficient performance aside from petitioner's own self-serving statement).[5] Petitioner's argument that he was entitled to an evidentiary hearing in state court to explore these issues (Objs. at 23, 42-43) ignores that it was his burden to produce some evidence that counsel performed deficiently. He does not allege that he requested an evidentiary hearing because he was unable to develop the record as to counsel's decision not to call a memory or a taint expert; indeed, not being granted a state-court evidentiary hearing didn't prevent him from obtaining counsel's explanation for various other issues he had with their performance, and he hasn't explained why this one is any different. Cf. Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir. 2004) ("A federal court may not second-guess a state court's fact-finding process unless, after review of the state-court record, it determines that the state court was not merely wrong, but actually unreasonable."), overruled on other grounds by

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[5] Petitioner argues that under the Magistrate Judge's logic, "trial counsel could avoid being found ineffective by refusing to provide a declaration." (Objs. at 22.) But numerous cases hold that a petitioner can't be faulted and the reasoning of Gentry doesn't apply if he asks counsel to address a particular topic and counsel refuses, see, e.g., Manzano v. Montgomery, No. ED CV 13-02249-RGK (VBK)., 2014 WL 1670079, at *11 (C.D. Cal. Mar. 26, 2014), accepted by 2014 WL 1669974 (C.D. Cal. Apr. 25, 2014), aff'd, 669 F. App'x 864 (9th Cir. 2016), and the Magistrate Judge said nothing to the contrary. This is not such a case. Indeed, although one of Petitioner's trial attorneys eventually told habeas counsel he "no longer wished to talk [to her]" (Pet., Mem. P. & A., Ex. F at 143), that was in response to habeas counsel's questioning on a different topic, and Petitioner does not claim that counsel were ever asked to elaborate on why they didn't call a memory or taint expert.

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Murray v. Schriro, 745 F.3d 984, 999-1000 (9th Cir. 2014).

Beyond that, for the reasons discussed in the R. & R., even without expert testimony Petitioner's counsel were able to expose the weaknesses in I.P.'s, Michaele's, and M.K.'s testimony and suggest to the jury that their testimony was tainted and unreliable. (See R. & R. at 38-41, 46-52.) Accordingly, as the Magistrate Judge also found, any deficient performance didn't prejudice Petitioner. (See id. at 41-48, 51-52.)

Petitioner's objections to the Magistrate Judge's findings in denying his other ineffective-assistance claims are similarly unpersuasive. For instance, he argues that in denying his claim that his attorneys failed to present evidence to corroborate his wife's trial testimony that there weren't any cupcakes at the Thanksgiving party, the Magistrate Judge "overlooked" that the prosecutor repeatedly emphasized I.P.'s testimony that Petitioner had lured her with a cupcake. (See Objs. at 33-34.) But even assuming the prosecutor capitalized on that improbable testimony, the evidence that Petitioner claims counsel failed to use wouldn't have shown that there were no cupcakes at the party, as the Magistrate Judge pointed out. (See R. & R. at 36.) Petitioner also maintains that his attorneys were ineffective for failing to establish that I.P.'s parents knew about the M.K. incident before reporting I.P.'s accusation to the police, insisting that testimony from the new-trial hearing "proved" they had "learned about the M.K. case." (See Objs. at 9-10.) But as the Magistrate Judge explained, that testimony showed only that a guest at the Thanksgiving party later learned about the M.K. incident, and that in fact the hearing testimony established that

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I.P.'s parents did not learn about M.K.'s case until after they had already contacted the police. (See R. & R. at 27-31.) Tellingly, as the Magistrate Judge pointed out (see id. at 29-30), Petitioner never presented any testimony from that guest, who presumably would have testified that he alerted I.P.'s parents to the M.K. assault were that in fact true. Petitioner's arguments on this score are pure speculation.

Having reviewed de novo those portions of the R. & R. to which Petitioner objects, the Court agrees with and accepts the findings and recommendations of the Magistrate Judge. IT THEREFORE IS ORDERED that judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: June 11, 2021

JESUS G. BERNAL
U.S. DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PETER IVAN MCNEAL, Petitioner, v. JAMES HILL, Acting Warden,[1] Respondent.	Case No. CV 18-6964-JGB (JPR) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Jesus G. Bernal, U.S. District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the U.S. District Court for the Central District of California.

PROCEEDINGS

On August 13, 2018, Petitioner, through counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody,

[1] Petitioner is incarcerated at the California Institution for Men in Chino, whose acting warden is James Hill. See Cal. Dep't of Corr. & Rehab. Inmate Locator, https://inmatelocator.cdcr.ca.gov (search for "Peter Ivan" with "McNeal") (last visited Jan. 25, 2021). Hill is therefore substituted in as the proper Respondent. See Fed. R. Civ. P. 25(d); see also R. 2(a), Rs. Governing § 2254 Cases in U.S. Dist. Cts.

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challenging his 2013 conviction for oral copulation of a child under the age of 10. On September 19, 2018, Respondent moved to dismiss the Petition because two of its claims, numbers eight and nine, had not been exhausted in state court. On September 25, 2018, after Petitioner filed notice that he was withdrawing those claims, the Court denied Respondent's motion to dismiss as moot.

On December 26, 2018, Respondent filed an Answer and a Memorandum of Points and Authorities; on January 23, 2019, Petitioner filed a Traverse. On February 20, 2019, with the Court's permission, Respondent filed a Superseding Answer and Memorandum of Points and Authorities; on February 26, Petitioner filed a Superseding Traverse.

For the reasons discussed below, the Court recommends that judgment be entered denying the Petition and dismissing this action with prejudice.

PETITIONER'S REMAINING CLAIMS[2]

I. Petitioner's conviction was not supported by sufficient evidence. (Pet. at 5; id., Mem. P. & A. at 17-19.)

II. Petitioner received ineffective assistance of counsel when his trial attorneys failed to investigate and present exculpatory evidence. (Pet. at 5-6; id., Mem. P. & A. at 20-28, 74-76.)

III. Petitioner received ineffective assistance of counsel when his trial attorneys failed to consult or present a memory expert. (Pet. at 6; id., Mem. P. & A. at 29-39.)

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[2] The Court has renumbered Petitioner's claims and addresses them in an order different from that presented in the Petition, for clarity and other reasons.

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IV. Petitioner received ineffective assistance of counsel when his trial attorneys failed to consult or present an expert to explain how the victim's testimony was "tainted." (Pet. at 6; id., Mem. P. & A. at 40-64.)

V. Petitioner received ineffective assistance of counsel when his trial attorneys failed to consult or present an expert to explain how an uncharged victim's testimony was "tainted." (Pet. at 6; id., Mem. P. & A. at 65-73.)

VI. Petitioner received ineffective assistance of counsel when his trial counsel admitted his guilt during her closing argument. (Pet. at 6a; id., Mem. P. & A. at 76-77.)

VII. The prosecutor committed misconduct during her cross-examination of a defense witness and her closing argument. (Pet. at 6a-6b; id., Mem. P. & A. at 78-82.)

VIII.The cumulative effect of the errors alleged in grounds one through seven denied Petitioner a fair trial. (Pet. at 6b-6c; id., Mem. P. & A. at 90.)

IX. Petitioner's sentence of 15 years to life was cruel and unusual under the Eighth Amendment. (Id., Mem. P. & A. at 91-94.)

BACKGROUND

On March 18, 2013, after his first trial ended in a mistrial (see Lodged Doc. 14, 1 Clerk's Tr. at 134-35), Petitioner was convicted by a Los Angeles County Superior Court jury of oral copulation of a child under 10 years of age (id., 2 Clerk's Tr. at 352, 370). He was sentenced to 15 years to life in state prison. (Id. at 483-84, 503-05.)

Petitioner appealed, raising all but two of the Petition's

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remaining claims. (See Lodged Doc. 16.) He also filed a habeas petition in the state court of appeal, raising some of the same claims as well as the Petition's fourth claim. (See Lodged Doc. 8.) On December 27, 2016, the court of appeal affirmed the judgment and denied his habeas petition on the merits[3] in an order filed that same day. (See Lodged Docs. 2 & 9); People v. McNeal, No. B260489, 2016 WL 7439015, at *7 (Cal. Ct. App. Dec. 27, 2016) (as modified Jan. 9. 2017). He filed petitions for review challenging the denials of his appeal and habeas petition (see Lodged Docs. 5 & 10), which the state supreme court summarily denied on March 29, 2017 (see Lodged Docs. 6 & 11). On October 2, 2017, the U.S. Supreme Court denied his petition for a writ of certiorari. (See Lodged Doc. 7.)

On March 15, 2018, Petitioner filed a habeas petition in the supreme court, raising the Petition's fifth claim. (See Lodged Doc. 12.) On May 23, 2018, the supreme court denied the petition on procedural grounds, as "repetitive." (See Lodged Doc. 13.)

SUMMARY OF THE EVIDENCE

The factual summary in a state appellate-court opinion is entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). See Crittenden v. Chappell, 804 F.3d 998, 1010-11

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[3] The court of appeal simply cited People v. Duvall, 9 Cal. 4th 464, 474-75 (1995), and Strickland v. Washington, 466 U.S. 668, 687-88 (1984) (see Lodged Doc 9); the cited pages of those decisions stand for the proposition that a state appellate court may summarily deny a habeas petition if it doesn't state a prima facie case for relief, Duvall, 9 Cal. 4th at 474-75, and that to state a prima face case of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense, Strickland, 466 U.S. at 687-88.

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(9th Cir. 2015). But see Murray v. Schriro, 745 F.3d 984, 1001 (9th Cir. 2014) (discussing "state of confusion" in circuit's law concerning interplay of § 2254(d)(2) and (e)(1)). Because Petitioner challenges the sufficiency of the evidence supporting his conviction, the Court has independently reviewed the state-court record and finds that the following statement of facts from the court-of-appeal decision on direct appeal fairly and accurately summarizes the evidence. See Nasby v. McDaniel, 853 F.3d 1049, 1054-55 (9th Cir. 2017).

> In 2009, I.P., her parents Johann and Michaele, and her sister "Echo" were visiting Los Angeles from Massachusetts. They stayed with Michaele's sister and spent Thanksgiving at the home of Michaele's cousin, Jacquire King. I.P. was three years old at the time. King and his wife invited about 20 people for Thanksgiving dinner, including I.P.'s family. [Petitioner], his then-wife, his eight-year-old daughter and his six-year-old son were also guests at the party. During the party, [Petitioner] took one of King's sons, his own son and I.P. outside to play catch. [Petitioner] was the only adult who played outside with the children.[4]
>
> That evening, after the party was over, I.P. spontaneously asked her parents, "Why did that man want to put his penis in my mouth?" One of the parents asked I.P. what she had said. I.P. repeated her question. Her

[4] Michaele testified that I.P.'s cousin Matthew, who was 18 at the time, also briefly played catch with the children. (Lodged Doc. 15, 3 Rep.'s Tr. at 2502-03, 2725.)

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parents asked which man did that. I.P. replied, "The man with the ball." Later, Michaele and I.P. took a bath together, as they often did. While they were in the bathtub, Michaele asked I.P. if I.P. wanted to show her what happened. There was a large stainless steel thermos on the bathtub rim. I.P. picked up the thermos, held it to her crotch so that it stuck straight out from her body and told Michaele to, "Say aah, and open your mouth." Then, I.P. put the thermos into Michaele's mouth and moved her hips back and forth. Michaele asked I.P. what she did then. I.P. replied, "I said, Yuck!"

I.P.'s parents debated what they should do to minimize I.P.'s trauma. They eventually decided to do nothing, believing that I.P. would eventually forget the incident. They did not tell the Kings about I.P.'s disclosure.

A few days later, I.P. and her family returned to Massachusetts. I.P. did not mention the sexual assault again for nearly two years. In mid-November 2011, I.P. told her parents that during the Thanksgiving party, she played ball outside with the man who put his penis in her mouth and told her to suck on it. They were in the bathroom at her cousin Braden's house. The bathroom was white and had a big window. The man put his penis in her mouth more than once. After the "second round," the man took a cupcake out of his pocket and gave it to her. After the third time the man put his penis in her mouth,

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he took her out of the bathroom.[5] I.P. also said it felt like the man punched her while she was in the bathroom with him.[6]

Other Crimes Evidence

On December 11, 2009, 15 days after he sexually assaulted I.P., [Petitioner] was doing volunteer work at the charter school his son attended. While he was working outside, he came upon then six-year old M.K. who was playing in the school courtyard, waiting for her mother to finish volunteering. [Petitioner] asked her if she wanted some Skittles. [Petitioner] took the candy out of his pocket, walked down a path away from the school, and beckoned for M.K. to follow. When they reached some bushes, [Petitioner] told M.K., "close your eyes and open your mouth." She did as she was asked, thinking he was going to put some Skittles in her mouth. When she opened her eyes again, M.K. saw [Petitioner's] erect penis. M.K. went back to the classroom where her

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[5] I.P. testified that her cousin Braden, who was eight years old at the time (see Lodged Doc. 15, 3 Rep.'s Tr. at 2465), peeked into the bathroom during the assault (id., 4 Rep.'s Tr. at 3025; see id. at 3040-43). Braden testified, however, that he did not see anything happen to I.P. in the bathroom. (Id., 3 Rep.'s Tr. at 2472-73.)

[6] After her 2011 disclosure, I.P. asked her mother, "but why was [her assailant] on the hike," referring to the hike the family took the day after Thanksgiving with Jacquire and his family. (Lodged Doc. 15, 3 Rep.'s Tr. 2817.) Petitioner was not on the hike. (Id. at 2818; id., 4 Rep.'s Tr. at 3050.) When shown photographs taken during the hike, however, I.P. didn't see her assailant in them. (Id., 3 Rep.'s Tr. at 2827-29; id., 4 Rep.'s Tr. at 3052, 3055.)

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mother was working.

M.K. told her mother about the incident before they left the campus that day. Her mother reported the incident to the school's volunteer coordinators, who in turn informed one of the school directors. When the director arrived, the whole group went to the street to a police station, where M.K. made a statement. [Petitioner] was prosecuted and given a probationary "sentence."[7]

M.K. and I.P. did not know each other; their parents also had never met. One of the guests at the King's [sic] Thanksgiving party had children who attended the same school as M.K. and [Petitioner's] son.[8] After that Thanksgiving weekend, I.P.'s parents had little contact with the Kings. M.K.'s mother sent an e-mail to the parents of students at M.K.'s school, describing [Petitioner's] conduct. There is no evidence I.P.'s

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[7] Petitioner pleaded no contest to engaging in lewd conduct in public and luring or transporting a minor under 14 years old. (See Lodged Doc. 14, 1 Clerk's Tr. at 85, 89-90; Lodged Doc. 15, 2 Rep.'s Tr. at 312, 315.)

[8] It's not clear what evidence, if any, was presented at trial that a guest at the Thanksgiving party had children who attended the same school as M.K. and Petitioner's son, and Petitioner doesn't appear to rely on that alleged "fact." Rather, the connection between M.K. and the party was that party attendee Luke Reynolds visited the school with Petitioner's wife shortly after the incident with M.K. occurred to take photographs of the crime scene. (See Lodged Doc. 15, 3 Rep.'s Tr. at 2481-84, 2492, 10 Rep.'s Tr. at 8108, 8127, 8168-70, 8181-84, 8187-88.)

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parents saw the e-mail or spoke to anyone about M.K. (Lodged Doc. 2 at 2-4.)

STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996:

> 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.

Under AEDPA, the "clearly established Federal law" that controls federal habeas review consists of holdings of Supreme Court cases "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). As the Supreme Court has "repeatedly emphasized, . . . circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" Glebe v. Frost, 574 U.S. 21, 24 (2014) (per curiam) (quoting § 2254(d)(1)). Further, circuit precedent "cannot refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the] Court has not announced." Lopez v. Smith, 574 U.S. 1, 7 (2014)

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(per curiam) (citing Marshall v. Rodgers, 569 U.S. 58, 64, (2013) (per curiam)).

A state-court decision is "contrary to" clearly established federal law if it either applies a rule that contradicts governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (citation omitted). A 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." Id.

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' (emphasis added)." Id. at 11 (quoting § 2254(d)). A state-court decision that correctly identifies the governing legal rule may be rejected if it unreasonably applies the rule to the facts of a particular case. Williams, 529 U.S. at 407-08. To obtain federal habeas relief for such an "unreasonable application," however, a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Id. at 409-10. In other words, habeas relief is warranted only if the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011).

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Here, Petitioner raised grounds one through three and six through nine on direct appeal. (See Lodged Doc. 16.) The state court of appeal denied them in a reasoned decision on the merits. (See Lodged Doc. 2.) The state supreme court then summarily denied his petition for review. (See Lodged Docs. 5 & 6.) Petitioner raised ground four in a habeas petition to the court of appeal. (See Lodged Doc. 8.) The court of appeal denied the claim on the merits. (See Lodged Doc. 9.) The supreme court then summarily denied his petition for review. (See Lodged Docs. 10 & 11.) The Court therefore "looks through" the supreme court's silent denials to the court of appeal's decisions as the bases for the state court's judgment on those claims. See Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). Because the state court adjudicated them on the merits, the Court's review is limited by AEDPA deference. See Richter, 562 U.S. at 100.

Petitioner raised ground five in a habeas petition to the state supreme court. (See Lodged Doc. 12.) The supreme court denied it on procedural grounds. (See Lodged Doc. 13.) The Court therefore reviews that claim de novo. See Chaker v. Crogan, 428 F.3d 1215, 1221 (9th Cir. 2005) (reviewing claims de novo when state court decided them on procedural grounds only and, as here, respondent did not raise procedural-default defense).

DISCUSSION

I. Petitioner's Insufficient-Evidence Claim Does Not Warrant Habeas Relief

Petitioner contends that his conviction was not supported by sufficient evidence because the prosecution's case "rested on

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unreliable, conflicting and tainted testimony." (Pet., Mem. P. & A. at 17; see id. at 18-19; Superseding Traverse at 4-8.)

A. Applicable Law

The Due Process Clause of the 14th Amendment protects a criminal defendant from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). In considering a sufficiency-of-the-evidence claim, a court must determine whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original). California's standard for determining the sufficiency of evidence is identical to the federal standard announced in Jackson. People v. Johnson, 26 Cal. 3d 557, 576 (1980).

A federal habeas court reviews a sufficiency claim with an additional layer of deference, in that relief is not warranted unless the state court's application of Jackson was not just wrong but "objectively unreasonable." Coleman v. Johnson, 566 U.S. 650, 651 (2012) (per curiam) (citation omitted). Thus, a petitioner faces a "high bar" when challenging the sufficiency of the evidence used to obtain a state conviction. Id. And Jackson "makes clear that it is the responsibility of the jury — not the court — to decide what conclusions should be drawn from evidence admitted at trial." Cavazos v. Smith, 565 U.S. 1, 2 (2011) (per curiam). The reviewing court "cannot second-guess the jury's credibility assessments"; such determinations are "generally

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beyond the scope of review." Kyzar v. Ryan, 780 F.3d 940, 943 (9th Cir. 2015) (citation omitted).

The reviewing court "must look to state law for 'the substantive elements of the criminal offense,'" although the "minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." Johnson, 566 U.S. at 655 (citation omitted). In determining whether the evidence was sufficient, a federal court must follow the state courts' interpretation of state law, including in the underlying case. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam); Emery v. Clark, 643 F.3d 1210, 1214 (9th Cir. 2011) (per curiam).

To prove oral copulation with a child 10 years of age or younger, the prosecution must show that "the defendant engaged in an act of oral copulation with the victim," "the victim was 10 years of age or younger," and "the defendant was at least 18 years old." People v. Mendoza, 240 Cal. App. 4th 72, 79-80 (2015) (citing Penal Code § 288.7(b)). Oral copulation is "any contact, however slight, between the mouth of one person and the sexual organ or anus of another person." People v. Dement, 53 Cal. 4th 1, 42 (2011), abrogated on other grounds by People v. Rangel, 62 Cal. 4th 1192, 1216 (2016).

B. Court-of-Appeal Decision

The court of appeal rejected Petitioner's claim that his conviction was not supported by sufficient evidence:

> I.P.'s testimony was not "physically impossible or inherently improbable[.]" She first reported her sexual assault on the day it occurred, described it in detail,

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> and identified [Petitioner] as the perpetrator. Her initial report included nothing that was physically impossible or "'so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt.'" I.P.'s subsequent disclosure, made two years later, was consistent in many respects with her initial report. Specifically, she reported the same type of sexual assault and she continued to identify [Petitioner] as her abuser. A rational trier of fact could have found I.P.'s testimony believable. It constitutes substantial evidence in support of the judgment.

(Lodged Doc. 2 at 6 (citations omitted & some alterations in original).)

C. Analysis

The court of appeal's rejection of Petitioner's sufficiency-of-the-evidence challenge was not objectively unreasonable.

As the court recognized, I.P.'s testimony about the assault and her description of her assailant "constitute[d] substantial evidence in support of the judgment." (Id. at 6.) Under state law, the testimony of a single witness is sufficient to prove a disputed fact and support a conviction unless her testimony is "physically impossible or inherently improbable." People v. Young, 34 Cal. 4th 1149, 1181 (2005). Here, I.P.'s testimony was neither of those things, as the court of appeal found. (Lodged Doc. 2 at 6.) Specifically, I.P., who was six years old at the time of Petitioner's 2013 trial (see Lodged Doc. 15, 4 Rep.'s Tr. at 3004), testified that during the 2009 Thanksgiving party, when

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she was three (id., 3 Rep.'s Tr. at 2480, 4 Rep.'s Tr. at 3014), a male guest took her into a bathroom, removed his penis from his pants, "told [her] to suck on it," and then placed it in her mouth (id., 4 Rep.'s Tr. at 3008-09). The man had curly, short "brownish black" hair and was wearing a "brownish blackish or greenish" hat with "squares on it"; had a "round face" and "dark skin"; was at the party with his son and daughter; and had organized a game of catch with I.P. and the other children, during which he searched for a lost ball with I.P. (Id. at 3010-12, 3014, 3016.)

Although I.P. didn't visually identify Petitioner at trial or any prior hearings (see Pet., Mem. P. & A. at 17-18; Superseding Traverse at 5; see also Lodged Doc. 15, 5 Rep.'s Tr. at 3722), some evidence showed that he wore a hat at some point during the party[9] (Lodged Doc. 15, 3 Rep.'s Tr. at 2491, 2769 (Michaele testifying that she saw Petitioner wearing hat during party), was the only guest at the party with both a son and daughter (id. at 2482, 2485, 2725; id., 6 Rep.'s Tr. at 4344-46), had organized a game of catch with I.P. and the other children (id., 3 Rep.'s Tr. at 2457-58, 2471, 2477, 2501, 2508-09, 4 Rep.'s Tr. at 3306), and had walked around with I.P. looking for a lost ball (id., 3 Rep.'s Tr. at 2514-15). Further, the jury saw photographs taken at the party of all the men in attendance and was therefore able to determine for itself whether he matched

[9] Petitioner wasn't wearing a hat in any of the photographs from the party. (See Lodged Doc. 15, 3 Rep.'s Tr. at 2781-84.) And his wife testified that he hadn't worn a hat at the party. (Id., 6 Rep.'s Tr. at 4357, 7 Rep.'s Tr. at 4503.)

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I.P.'s description of her assailant. (Id. at 2498-99, 2766-69, 2781.)

Moreover, less than three weeks after the 2009 party, while volunteering at his children's school, Petitioner lured six-year-old M.K. to a pathway with the promise of candy and exposed his penis to her after "laying down in a weird position" and instructing her to "close [her] eyes and open [her] mouth."[10] (Id., 5 Rep.'s Tr. at 3640, 3647-51, 3653-54, 3682.) That was compelling admissible evidence of Petitioner's propensity to commit sex crimes against young girls, see Cal. Evid. Code § 1108(a), removing any doubt that I.P. was mistaken. Indeed, the significant similarities between the two crimes, both of which involved Petitioner victimizing young girls he didn't know by using treats to lure them while in proximity to other adults, corroborated I.P.'s account and his identity as her assailant.

Petitioner contends that I.P.'s testimony was "uncorroborated and inconsistent." (Superseding Traverse at 4; see Pet., Mem. P. & A. at 17.) But I.P.'s trial testimony was consistent with what she had previously reported. On the night of the party, she asked her parents why "the man with the ball" had wanted to put his penis in her mouth. (See Lodged Doc. 15, 3 Rep.'s Tr. at 2711-14.) When Michaele asked her later that

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[10] M.K. identified Petitioner at trial as the man who exposed his penis to her. (See Lodged Doc. 15, 5 Rep.'s Tr. at 3642, 3649.) M.K.'s mother testified that on the day of the crime, she had stopped to speak with Petitioner, who was wearing a red beanie, on her way home with M.K. Once they were alone, M.K., who was "very agitated," told her that "the man that [she had been] talking to" — "the man with the red beanie" — had "shown her his penis." (Id. at 3096, 3101-02, 3117-18.)

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evening to demonstrate what had happened, I.P. held a thermos to her vagina to simulate a penis; said, "ah and open your mouth"; and put the thermos into Michaele's mouth, "push[ing] her hips back and forth." (Id. at 2714.) Given I.P.'s physical demonstration of what Petitioner did to her mere hours after the assault, Petitioner's claim that she "never . . . even reported a completed sexual assault" (Superseding Traverse at 5) is not well taken.

When I.P. next mentioned the molestation, two years later, in November 2011, her account was generally consistent with her initial report. She again described her assailant as the person who played ball with her, this time providing more identifying information. (Id. at 2724.) And during her November 10 and 15, 2011, interviews with Roann Vecchia, a forensic interviewer specializing in child sex-abuse cases (id., 5 Rep.'s Tr. at 3910), recordings of which were played for the jury (see id. at 3929-34, 3937-39), I.P. reiterated that during the Thanksgiving party a man with black curly hair and wearing a hat (Lodged Doc. 14, 1 Clerk's Tr. at 219, 222), who had a son and daughter (id. at 227) and had played catch and looked for a lost ball with her (id. at 232-33; see id., 2 Clerk's Tr. 271), had taken her into a bathroom, told her to "suck his penis," and placed his penis in her mouth at least three times (id., 1 Clerk's Tr. at 219; see id. at 222-24, 237, 240).

Petitioner correctly notes that some aspects of I.P.'s testimony were improbable — such as that after the assault Petitioner gave her a cupcake that he removed from his jeans' pocket (see Pet., Mem. P. & A. at 17; Superseding Traverse at 5,

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30); others were strange, including her recollection that during the party, while her mother or aunt was washing her feet, the man who molested her "smooshed his face on the window and made a scary face . . . or a weird face" at her (Lodged Doc. 15, 4 Rep.'s Tr. at 3021; see Superseding Traverse at 5). And both I.P.'s and her mother's testimony had some inconsistencies. But defense counsel thoroughly cross-examined them, impeaching them with prior statements when appropriate. (See, e.g., Lodged Doc. 15, 3 Rep.'s Tr. at 2737-42, 2752, 2776-78, 2797, 4 Rep.'s Tr. at 3017-21, 3045-46, 3039-43.) Likewise, the jury heard that I.P. had never identified Petitioner in court (see id., 5 Rep.'s Tr. at 3722) and that her parents didn't report the assault until two years after her initial disclosure because they initially weren't sure what happened and were concerned about traumatizing her further (id., 3 Rep.'s Tr. at 2713-17). Indeed, defense counsel stressed during her closing argument that I.P.'s parents' delay in reporting the crime showed that they didn't believe her, spotlighting their delay as "the most important piece of evidence in this case." (Id., 8 Rep.'s Tr. at 4906; see id. at 4872-77, 4887, 4919.) Despite all this, the jury apparently credited I.P.'s and her mother's testimony, and this Court may not reweigh the evidence or reassess the witnesses' credibility.[11] See Bruce

[11] Notably, in denying Petitioner's new-trial motion raising this same claim, the trial judge had "no question . . . in [his] mind" that Petitioner was guilty. (Lodged Doc. 15, 11 Rep.'s Tr. at 9027-28.) And although Petitioner's first trial ended in a mistrial after the jury couldn't reach a verdict, 11 jurors were in favor of conviction and the sole juror in favor of acquittal allegedly refused to deliberate, although the judge apparently (continued...)

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v. Terhune, 376 F.3d 950, 957-58 (9th Cir. 2004); Leonard v. Perez, No. 12-cv-02161-JKS., 2015 WL 5255357, at *14-15 (E.D. Cal. Sept. 9, 2015) (rejecting petitioner's argument that evidence of oral copulation of child was improbable because his "arguments simply point[ed] out inconsistencies in the evidence before the jury and attack[ed] the credibility of [victim]").

Petitioner claims that in finding the proof of his guilt legally sufficient, the court of appeal improperly considered I.P.'s 2011 renewed disclosure of the assault, which he contends was admitted into evidence for only a limited purpose under the "fresh complaint" doctrine.[12] (Pet., Mem. P. & A. at 18-19; Superseding Traverse at 6-7.) To be sure, the court of appeal noted that "I.P.'s subsequent disclosure, made two years later, was consistent in many ways with her initial report" in that she recounted "the same type of sexual assault and she continued to identify [Petitioner] as her abuser." (Lodged Doc. 2 at 6.) In her renewed disclosure to her parents in 2011, I.P. said that a "man put his penis in [her] mouth" when she "was at [her] cousin

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[11] (...continued) rejected that claim. (See Lodged Doc. 14, 1 Clerk's Tr. at 128, 132-35.) If anything, the prosecution's case against Petitioner at the second trial was weaker: although the evidence was generally the same, at the second trial but not the first I.P.'s cousin Braden testified, disputing I.P.'s claim that he looked through the bathroom window and saw the crime take place. (See Lodged Doc. 15, 3 Rep.'s Tr. at 2472.)

[12] The fresh-complaint doctrine provides that "proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose — namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others." People v. Brown, 8 Cal. 4th 746, 749-50 (1994).

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Braden's house." (Lodged Doc. 15, 2 Rep.'s Tr. at 370.) Before trial, the court ruled that that statement was inadmissable hearsay and that under the fresh-complaint doctrine, the only aspect of it that was admissible was that I.P. complained "about the same incident that happened at the Thanksgiving Party" but not "specifically what she said about it." (Id. at 2128.)

Consistent with that ruling, I.P.'s mother testified that in November 2011, I.P. brought up "the molestation that she disclosed in 2009," and the jury never heard the specific statement I.P. made. (Id., 3 Rep.'s Tr. at 2722-23.) But the court's fresh-complaint ruling didn't apply to I.P.'s later description of her assailant, which Michaele testified about without objection. (See id. at 2724; see also id., 2 Rep.'s Tr. at 2117 (trial court noting that "fresh complaint [doctrine] has nothing to do with identification").) More importantly, the court expressly admitted for their truth I.P.'s November 2011 statements to Vecchia (see id., 2 Rep.'s Tr. at 368-69), in which she again described the assault and her assailant (see Lodged Doc. 14, 1 Clerk's Tr. at 219, 222-24, 227, 232-33, 237, 240, 2 Clerk's Tr. at 271). Thus, the court of appeal properly discussed I.P.'s November 2011 disclosures, which were consistent with her initial 2009 disclosure, as evidence the jury could have considered in crediting her testimony.

Accordingly, habeas relief is not warranted.

II. Petitioner's Ineffective-Assistance-of-Counsel Claims Do Not Warrant Habeas Relief

In grounds two through six Petitioner contends that his trial attorneys, Robin Yanes and Meline Mkrtichian, were

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constitutionally ineffective for failing to investigate and present exculpatory evidence and for admitting his guilt during closing argument. Specifically, in ground two he argues that his attorneys failed to investigate and present evidence that (1) I.P.'s parents allegedly knew about M.K.'s case before reporting I.P.'s assault, (2) the bushes lining the path where Petitioner exposed himself to M.K. were shorter than they appeared in the prosecution's photographs, and (3) cupcakes were not served for dessert at the 2009 Thanksgiving party. (Pet., Mem. P. & A. at 20-28, 74-76; Superseding Traverse at 8-13, 28-31.) In ground three he contends that his attorneys failed to consult with or present the testimony of a memory expert (Pet., Mem. P. & A. at 29-39; Superseding Traverse at 13-17), and in grounds four and five he claims that they should have called a "taint expert" to explain how I.P.'s and M.K.'s testimony might have been tainted by discussions with their parents and others (Pet., Mem. P. & A. at 40-64, 65-73; Superseding Traverse at 17-27). Lastly, in ground six he argues that Mkrtichian was ineffective when she misspoke during closing argument. (Pet., Mem. P. & A. at 76-77; Superseding Traverse at 31-32.)

A. Applicable Law

Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Strickland, 466 U.S. at 687-89. To show deficient performance, the petitioner must

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overcome a "strong presumption" that his lawyers "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90. 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. at 690. The reviewing court 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.

The Supreme Court has recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. Accordingly, to overturn the strong presumption of adequate assistance, the petitioner must demonstrate that the challenged action could not reasonably be considered sound strategy under the circumstances of the case. 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, 562 U.S. at 111 ("[i]n assessing prejudice under Strickland, the question is . . . whether it is 'reasonably likely' the result would have been different" if

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counsel had acted as petitioner claims they should have (citation omitted)). "The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112 (citation omitted). A court deciding an ineffective-assistance claim need not address both components of the inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

In Richter, the Supreme Court stressed that AEDPA review requires an additional level of deference to a state-court decision rejecting an ineffective-assistance-of-counsel claim:

> The standards created by Strickland and § 2254(d) are both "highly deferential," . . . and when the two apply in tandem, review is "doubly" so. . . . Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

562 U.S. at 105 (citations omitted).

In Premo v. Moore, 562 U.S. 115, 127-28 (2011), the Supreme Court reversed the Ninth Circuit's grant of habeas relief on an ineffective-assistance claim based on Supreme Court precedent "that did not involve ineffective assistance of counsel" and "says nothing about the Strickland standard." "The lesson of Premo is that Strickland bears its own distinct substantive standard for a constitutional violation; it does not merely borrow or incorporate other tests for constitutional error and

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prejudice." Walker v. Martel, 709 F.3d 925, 940 (9th Cir. 2013).

B. Court-of-Appeal Decision

Petitioner raised most of his ineffective-assistance claims in a new-trial motion (see Lodged Doc. 14, 1 Aug. Clerk's Tr. at 1-88), which the trial court denied after conducting an evidentiary hearing (see Lodged Doc. 15, 11 Rep.'s Tr. at 9027-9032; see also Lodged Doc. 2 at 7-9).

The court of appeal also rejected the claims:

> Like the trial court, we are not persuaded that the representation [Petitioner] received from his counsel at trial fell below an objective standard of reasonableness. Even if it had, there is no reasonable probability the verdict would have been different but for counsel's errors. Additional evidence regarding the height of the bushes at M.K.'s school would not have altered the jury's verdict on whether [Petitioner] sexually assaulted I.P. Photographs of the bushes were in evidence and the jury heard testimony regarding their accuracy. Second, M.K. testified about the incident and the jury had the opportunity to assess her credibility. The same analysis applies to I.P.'s statement that [Petitioner] gave her a cupcake after forcing his penis into her mouth. [Petitioner's] ex-wife testified there were no cupcakes at the Thanksgiving party. There is no reason to believe that additional evidence on this minor point would have affected the verdict.
>
> Similarly, we are unable to conclude [Petitioner] suffered any prejudice because trial counsel failed to

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show a link between the victims' parents. The hearing on [Petitioner's] motion for new trial produced no evidence supporting [Petitioner's] claim that I.P.'s parents knew [Petitioner] exposed himself to M.K. Their only link to M.K. was through the Kings, who had invited [Petitioner] and his family to Thanksgiving dinner. But the hearing on [Petitioner's] motion for new trial demonstrated that I.P.'s parents had little communication with the Kings after Thanksgiving 2009 and did not learn about [Petitioner's] assault on M.K. until after they had reported the assault on I.P. Even if they had been aware of the assault on M.K., that knowledge would not explain I.P.'s initial disclosure, which occurred on Thanksgiving night. There is no reasonable probability the verdict would have been different had the jury heard [Petitioner's] unpersuasive evidence of a link between the victims' parents.

[Petitioner] complains his trial counsel failed to call an expert witness on memory, to explain how I.P.'s parents corrupted her memory by talking with her about her disclosures. Like the trial court, we decline to second-guess this tactical choice by trial counsel. There is no reasonable probability that [Petitioner] would have achieved a more favorable verdict had counsel presented expert testimony. The jury heard evidence that I.P. initially disclosed her molestation on the night it occurred. She next mentioned the incident about two years later, volunteering a description of the event that

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> was generally consistent with her first disclosure. The jury also heard about the conversations I.P. had with her parents and with the social worker in Massachusetts who interviewed I.P. for law enforcement. The jurors were capable of evaluating I.P.'s credibility, given her age and the lapse of time between the event and her parents' decision to report it to law enforcement. They did not require an expert witness to advise them that factors such as youth and delayed reporting are relevant to assessing the credibility of a witness.
>
> Finally, during closing argument, [Petitioner's] trial counsel said, "And after considering all of that you will have no choice but to come back with the only reasonable verdict in this case which is the verdict of guilty." Counsel was immediately corrected by the trial court, apologized and then corrected herself. Like the trial court, we are convinced jurors did not take this slip of the tongue seriously. In addition, the trial court's immediate correction removed any possible confusion. There is no reasonable probability that trial counsel's inadvertent misstatement impacted the verdict.

(Lodged Doc. 2 at 9-11 (as modified on denial of reh'g by 2016 WL 7439015 (Cal. Ct. App. Jan. 9. 2017)) (citations omitted).)

That same day, the court of appeal also denied Petitioner's habeas petition, which raised the Petition's fourth ground, concerning counsel's failure to call a taint expert as to I.P., on the merits. (See Lodged Doc. 9 (citing Duvall, 9 Cal. 4th at 474-75, & Strickland, 466 U.S. at 687-88).) The state supreme

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court rejected Petitioner's later habeas petition raising ground five, concerning counsel's failure to call a taint expert as to M.K., as "repetitive." (Lodged Doc. 13.)

C. Analysis

1. Failure to investigate and present nonexpert evidence

a. *I.P.'s parents' knowledge of M.K.'s case*

Petitioner contends that his attorneys failed to investigate and present evidence showing that when I.P.'s parents reported to police in 2011 that Petitioner had molested her at the 2009 Thanksgiving party, they knew he had exposed his penis to M.K. (Pet., Mem. P. & A. at 20; see id. at 21-28.) Specifically, he argues that his attorneys "overlooked" that Lucas Reynolds, who attended the 2009 party, knew about M.K.'s case. (Id. at 20; see id. at 21, 24.) He claims that had the jury been aware of this "link" between I.P.'s and M.K.'s cases, it might have inferred that I.P.'s parents had learned from Reynolds or another party guest about M.K.'s case; it then might have credited an argument that I.P.'s parents baselessly decided that Petitioner had molested her as well, "attribut[ing] I.P.'s difficulties [in school][13] to the supposed molestation" and "caus[ing] I.P. to

[13] In 2011, I.P. changed schools and became afraid of the dark, avoided "remote spaces" and going to the bathroom by herself, bit her fingernails until they bled, was jumpy, and urinated in her pants several times a day. (See Lodged Doc. 14, 2 Aug. Clerk's Tr. at 114, 120, 123-24; Lodged Doc. 15, 10 Rep.'s Tr. at 8196-97, 8199, 11 Rep.'s Tr. at 8434, 8495, 8715-16; see also Lodged Doc. 15, 4 Rep.'s Tr. at 3022 (I.P. testifying that she "couldn't go to sleep at night and . . . was thinking about the man a lot" and "was really scared").)

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allege [Petitioner] abused her." (Id. at 21, 27; see id. at 24-25, 28.)

Petitioner's attorneys hired a private investigator to contact potential witnesses (see Lodged Doc. 14, 2 Aug. Clerk's Tr. at 284) and look into whether anyone at the Thanksgiving party later learned about the December 12, 2009 incident (see id. at 288 (Yanes Decl.), 290 (Mkrtichian Decl.)). Petitioner correctly points out that they apparently failed to discover that Reynolds was at the Thanksgiving party and that after Petitioner was accused of exposing himself to M.K. several weeks later, Reynolds helped Petitioner's wife take photographs of the crime scene at the school. (See Lodged Doc. 15, 3 Rep.'s Tr. at 2481-84, 2492, 10 Rep.'s Tr. at 8108, 8127, 8168-70, 8181-84, 8187; Lodged Doc. 14, 2 Aug. Clerk's Tr. at 251-52 (Jill McNeal's Decl.).) Petitioner's counsel had the photographs, some of which featured Reynolds, and therefore apparently could have discovered the connection. (Lodged Doc. 15, 10 Rep.'s Tr. at 8158-50, 8181-87.)

But Petitioner was not prejudiced by counsel's apparent failure to discover this tenuous link between I.P.'s and M.K.'s cases. As the court of appeal found, "[t]he hearing on [Petitioner's] motion for new trial produced no evidence supporting [his] claim that I.P.'s parents knew [he] exposed himself to M.K." (Lodged Doc. 2 at 9.) To the contrary, the hearing demonstrated that I.P.'s parents "did not learn about [his] assault on M.K. until after they had reported the assault of I.P." (Id. at 10.)

Specifically, at the new-trial hearing, I.P.'s parents

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testified that they did not learn about M.K.'s case until after Petitioner was arrested for molesting I.P., in December 2011. (See Lodged Doc. 15, 11 Rep.'s Tr. at 8472-73, 8477, 8492-93, 8702-03.) Further, the only person from the party they ever told about I.P.'s disclosure was Jacquire King, I.P.'s uncle and the host of the party, and only after Petitioner was arrested for molesting I.P. (Id., 10 Rep.'s Tr. at 8130, 11 Rep.'s Tr. at 8473-74, 8719, 8724; see also id., 3 Rep.'s Tr. at 2731-32 (Michaele testifying at trial that she had not discussed I.P.'s disclosure with Jacquire until after Petitioner was arrested).) For his part, Jacquire testified that he learned about Petitioner's involvement in M.K.'s case not from Reynolds but from Dave Wilder, another friend (id., 10 Rep.'s Tr. at 8110-11), and only after Petitioner had been arrested for molesting I.P. (id. at 8111, 8119, 8134, 8139, 8145, 8151-52, 8155-56).[14]

Notably, Petitioner never presented any evidence from Reynolds himself that he had told anyone, let alone I.P.'s

[14] Petitioner claims that Jacquire testified at the new-trial hearing that he learned of M.K.'s case sometime after April 2011 and cites a halt in email correspondence between them beginning that April as proof that Jacquire learned about M.K.'s case then, before Petitioner was arrested eight months later for molesting I.P. (Pet., Mem. P. & A. at 26 (citing Lodged Doc. 15, 10 Rep.'s Tr. at 8112).) But Jacquire testified that he learned about M.K.'s case "when [Petitioner] was accused of this current one" (Lodged Doc. 15, 10 Rep.'s Tr. at 8112-13) and explained that the drop-off in communication was the result of his not working with Petitioner during that time (id.; see id. at 8107). And although Jacquire's wife suggested that Michaele told her about the M.K. incident in January 2011 (see Superseding Traverse at 12 n.3), 10 months before I.P.'s renewed disclosure, she clarified that she spoke to Michaele after Michaele had already spoken to Jacquire about the incident and that that might have been in January 2012, not 2011 (Lodged Doc. 15, 10 Rep.'s Tr. at 8147-48, 8153, 8156).

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parents, about the M.K. case; nor did he present any evidence from Wilder, who told Jacquire about M.K.'s case, about how he learned about it and who he told. Moreover, I.P.'s parents' reports to the police about her molestation strongly suggest that they did not know about Petitioner's involvement in M.K.'s case: although they named Petitioner as the person they suspected of molesting I.P. (see Lodged Doc. 14, 2 Aug. Clerk's Tr. at 108-17 (Nov. 2011 statements to police), 119-24 (Nov. 2011 police report)), they never said he had also exposed himself to M.K. (see id.), which they likely would have if that was what in fact spurred them to suspect Petitioner in I.P.'s assault.

Further, even if Petitioner's attorneys could have argued that I.P.'s parents learned about M.K.'s case from Reynolds or someone else, it's unlikely they would have so argued or urged the jury to make the inferences he presses in his Petition. After all, focusing on I.P.'s behavioral problems in the months leading up to her 2011 renewed disclosure might have backfired, as the far more compelling explanation for that behavior, which included not wanting to go to the bathroom by herself, was that it was caused by trauma stemming from the molestation. Moreover, as the trial court noted in denying Petitioner's new-trial motion (Lodged Doc. 15, 11 Rep.'s Tr. at 9029), it would have been reckless for defense counsel to argue that awareness of Petitioner's sex offense against M.K. was widespread, particularly when the defense relied in part on character witnesses testifying that they trusted him with their children and that he never behaved inappropriately around them. (See id., 7 Rep.'s Tr. at 4531, 4590-91, 4598, 4603-05, 4614, 4623, 4626,

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4628); Bragg v. Galaza, 242 F.3d 1082, 1089 (9th Cir. 2001) (finding counsel not ineffective when "[e]ven if [his] investigation efforts were flawed . . . [Petitioner] did not show a reasonable probability that, but for [counsel's] alleged investigative omissions, the result would have been different").

Finally, Petitioner asserts that in denying his claim, the court of appeal "unreasonably relied on the findings the trial court made at the motion for new trial" instead of conducting its own "independent[] review." (Pet., Mem. P. & A. at 21-22.) He repeats that argument throughout his briefs. (See id. at 27-28, 74; Superseding Traverse at 8-9, 13-14, 29, 33.) That claim is unavailing. Because Petitioner raised many of the Petition's claims — including most of its ineffective-assistance-of-counsel claims — in his new-trial motion, the trial judge held a hearing to develop the record as to those claims. Petitioner can't be suggesting that the court of appeal improperly relied on the facts established at that hearing in reviewing Petitioner's claims because he cites them repeatedly to advance his own arguments. (See, e.g., Pet., Mem. P. & A. at 12 n.9, 21-24, 26-27, 29, 42.) That the court of appeal expressed its agreement with the trial court's reasoning when denying certain of Petitioner's claims (see Lodged Doc. 2 at 9-12) doesn't mean that it didn't independently review the record in arriving at those decisions. Indeed, after every instance it indicated agreement with the trial court's reasoning, the court of appeal set forth its own analysis for denying that particular claim. (Id.)

b. *The school's bushes*

M.K. testified that Petitioner lured her to a bush-lined

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pathway alongside the school (see Lodged Doc. 15, 5 Rep.'s Tr. at 3646-49, 3674); there, he told her to "close [her] eyes and open [her] mouth," "la[id] down in a weird position," and took out his penis (id. at 3648-51, 3653, 3680). The prosecutor introduced several photographs of the pathway, taken on August 9, 2010, nine months after the crime. (See id. at 3086-90, 3111-12, 3333-35, 3347-49, 5 Rep.'s Tr. at 3665-66, 3668 (Exs. 39, 40, & 46); see also 7 Rep.'s Tr. at 4637.) M.K. was in some of the photographs, and the bushes appeared taller than her. (Id., 5 Rep.'s Tr. at 3668.) The prosecutor also elicited testimony that the bushes lining the pathway were approximately seven feet tall and ran along its full length, hiding the pathway from view. (Id., 4 Rep.'s Tr. at 3092-94, 5 Rep.'s Tr. at 3712-13, 6 Rep.'s Tr. at 4227-29.)

Petitioner claims that in January 2010, approximately one month after Petitioner exposed his penis to M.K. and seven months before the prosecution's photographs were taken, Petitioner's wife took photographs to "reenact[]" the crime scene. (Pet., Mem. P. & A. at 75 (citing Lodged Doc. 14, 2 Aug. Clerk's Tr. at 250 & Lodged Doc. 15, 10 Rep.'s Tr. at 8177, 8186).) He argues that Petitioner's counsel had these photographs and should have used them during trial to show that the bushes were shorter than they appeared in the prosecution's photographs and that Petitioner would not have been hidden from view had he taken M.K. there. (Id.; see id., Exs. Vol. II at 183-91, Exs. Vol. III at 192-97 (photographs).)

Petitioner's attorneys did not recall if they saw the photographs Petitioner's wife had taken. (See Lodged Doc. 14, 2

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Aug. Clerk's Tr. at 288, 290.) They explained that if they had seen the photographs, they did not use them because they "did not consider them helpful." (Id.)[15] Even if counsel could have used the photographs to show that the bushes were shorter than they appeared in the prosecution's photographs, the court of appeal reasonably found that "[a]dditional evidence regarding the height of the bushes at M.K.'s school would not have altered the jury's verdict on whether [Petitioner] sexually assaulted I.P." (Lodged Doc. 2 at 9.)

The jury knew when the prosecution's photographs were taken (see Lodged Doc. 15, 7 Rep.'s Tr. at 4637) and heard testimony that in December 2009 the bushes were not as tall as they appeared in the photographs and did not obstruct view of the pathway. For instance, one of the photographs introduced during the defense case showed at least one gap in the bushes (id., 6 Rep.'s Tr. at 4235), a fact confirmed by Kenneth Schultz, a parent who volunteered with Petitioner the day he exposed himself to M.K. (see id. at 4285-86). Schultz also testified that the bushes had been lower than they appeared in the prosecution's photographs, about four feet high; the pathway was visible from the school; and people were using the pathway the day of the crime. (See id. at 4263, 4286-87, 4297, 4301.) Based on this testimony, counsel argued in closing that the bushes "may or may

[15] Although defense counsel introduced photographs of the pathway and the areas surrounding it during the defense case (see Lodged Doc. 15, 6 Rep.'s Tr. at 4232-33, 4236-37 (Defense Exs. R, S, & T)), it isn't clear when those photographs were taken or by whom, and a stipulation stated that "all" the photos of the school were taken in August 2010 (id., 7 Rep.'s Tr. at 4637).

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not have been obstructing the view" of the pathway (id., 8 Rep.'s Tr. at 4910) and were not how they appeared in the photographs (id. at 4911-12). Thus, even without photographs taken shortly after the crime, counsel were able to argue that the prosecution's photographs were inaccurate. See Matylinsky v. Budge, 577 F.3d 1083, 1097 (9th Cir. 2009) (holding that habeas petitioner "cannot show prejudice for failure to present what is most likely cumulative evidence").

Petitioner claims without explanation that "[t]he jury could not have considered the height of the bushes without actually seeing the height of the bushes as it existed during the alleged incident." (Superseding Traverse at 29.) But even if seeing the photographs might have convinced it that the bushes were in fact four, not seven, feet tall, that would not likely have changed the jury's assessment of whether Petitioner exposed himself to M.K. After all, M.K. identified Petitioner and testified about what he did to her, and the jury was able to assess her credibility. Thus, the jury likely wouldn't have been swayed if it had known that the bushes didn't provide Petitioner as much cover as the photos implied. Indeed, given that he was on trial for committing a sex crime against I.P. during which he also could easily have been caught, the jury inevitably had to consider whether he was willing to commit sex crimes in risky circumstances. (See id., 8 Rep.'s Tr. at 4861-63 (defense counsel insisting in closing argument that Petitioner would have had "to be a moron" to molest I.P. when he did).) The lower height of the bushes might only have convinced the jury that he was. Petitioner was therefore not prejudiced by counsel's

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failure to use his wife's photographs. See Bragg, 242 F.3d at 1088.

c. *Desserts at the 2009 Thanksgiving party*

Petitioner argues that his attorneys failed to present evidence to corroborate his wife's trial testimony that there weren't any cupcakes at the 2009 Thanksgiving party. (Pet., Mem. P. & A. at 75-76.)

I.P. testified that after Petitioner molested her, he removed a chocolate cupcake with sprinkles and whipped cream from his jeans' pocket and gave it to her. (Lodged Doc. 15, 4 Rep.'s Tr. at 3012, 3032-33.) Petitioner's wife testified that there weren't any cupcakes at the party. (Id., 6 Rep.'s Tr. at 4353.) She and Petitioner were responsible for dessert and brought two blueberry pies and fruit. (Id. at 4352.) Someone else brought two pumpkin pies. (Id.) Petitioner claims that counsel should have bolstered her testimony by introducing her preparty email exchanges with other guests, which he claims confirm that there weren't any cupcakes at the party. (See Pet., Mem. P. & A. at 76.)

Although Petitioner has provided declarations from trial counsel addressing aspects of their trial strategy that he now challenges, he never asked them to explain their decision not to present additional evidence that cupcakes weren't served at the party. (See Lodged Doc. 14, 2 Aug. Clerk's Tr. at 287-91.) His failure to do so is fatal to his claim. See Gentry v. Sinclair, 705 F.3d 884, 899-900 (9th Cir. 2012) (as amended Jan. 15, 2013). In any event, the court of appeal reasonably found that "[t]here [was] no reason to believe that additional evidence on this minor

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point would have affected the verdict." (Lodged Doc. 2 at 9.)

Initially, the emails do not establish that there weren't any cupcakes at the party. For instance, one email states that Petitioner's family would be bringing fruit and a blueberry pie. (Lodged Doc. 14, 2 Aug. Clerk's Tr. at 293.) Another exchange shows that Reynolds intended to bring several pineapples and a pie and that someone else was bringing pumpkin and apple pies. (Id. at 294-95.) Thus, although they corroborate Petitioner's wife's testimony, they do not foreclose the possibility that a guest brought cupcakes to the party or that the hosts already had some on hand.

More importantly, as the trial judge recognized in denying Petitioner's new-trial motion, the jury likely understood that I.P.'s assailant couldn't have removed a cupcake from his jeans' pocket. (Lodged Doc. 15, 11 Rep.'s Tr. at 9030.) Indeed, I.P. was extensively questioned on this score. (See id., 4 Rep.'s Tr. at 3012, 3032-33.) And in her closing argument, defense counsel argued that I.P.'s testimony was improbable. (Id., 8 Rep.'s Tr. at 4881-82.) Thus, the jury credited I.P.'s account of being molested despite the improbable cupcake testimony, not because of it, and introducing cumulative evidence to disprove that minor point was unnecessary and the failure to do so was not prejudicial. See Matylinsky, 577 F.3d at 1097; Dunn v. Long, No. 14-cv-1557-H-BLM, 2016 WL 3092107, at *9 (S.D. Cal. June 2, 2016) ("The right to present a defense is not implicated where a defendant seeks to introduce evidence that is irrelevant or repetitive.").

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2. Failure to call a memory expert

In ground three Petitioner contends that his attorneys failed to consult with or present the testimony of a memory expert. (Pet., Mem. P. & A. at 29-39.) Citing a declaration from Geoffrey R. Loftus, a psychology professor specializing in human perception and memory, he argues that a memory expert's testimony would have cast doubt on whether I.P. and her mother "could have recalled the incident details"; explained how their "memories would have become confused, decayed, and distorted"; and "shown how [her parents] tainted I.P.'s memory." (Id. at 29-30 (citing id., Ex. C at 22-35); see id. at 32.)

a. *Deficient performance*

The court of appeal reasonably "decline[d] to second-guess" counsel's "tactical choice" not to call a memory expert. (Lodged Doc. 2 at 10.) Petitioner contends that the court of appeal erred in so finding because counsel could not have made an informed decision to present a memory expert without first consulting one. (Pet., Mem. P. & A. at 30.) But as Petitioner acknowledges (see id.), his trial attorneys consulted with at least one psychiatrist with expertise in evaluating child-abuse claims (see Lodged Doc. 14, 2 Aug. Clerk's Tr. at 288 (Yanes declaring he consulted "psychiatrist with expertise in evaluating child abuse claims"), 290 (Mkrtichian declaring that before she was retained, "Yanes had consulted at least three psychiatrists with expertise in evaluating child abuse claims")). Petitioner doesn't elaborate on what those experts advised them, but it is reasonable to assume that they touched on some of the same issues Loftus discussed in his declaration.

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Indeed, after consulting with these psychiatrists, his attorneys likely understood that an expert witness on memory could be called to emphasize that I.P.'s and Michaele's memories of the party, which took place three years before trial, had deteriorated and that I.P., who was three at the time, had since been exposed to suggestive information. (See Pet., Mem. P. & A. at 29, 32-39.) The decision not to call such an expert (or any other) was nonetheless reasonable. "[T]he presentation of expert testimony is not necessarily an essential ingredient of a reasonably competent defense." Bonin v. Calderon, 59 F.3d 815, 834 (9th Cir. 1995). A defendant is not prejudiced by his counsel's failure to call an expert when counsel engages in the "skillful cross examination of eyewitnesses, coupled with appeals to the experience and common sense of jurors, [which] will sufficiently alert jurors to specific conditions that render" a witness's memory unreliable. Howard v. Clark, 608 F.3d 573, 574 (9th Cir. 2010) (citation omitted).

Here, counsel attempted to impeach I.P.'s credibility by highlighting details she had forgotten and her prior inconsistent statements, causing her to admit on cross-examination that she was "sort of forgetting stuff" about what happened at the party.[16] (Lodged Doc. 15, 4 Rep.'s Tr. at 3017; see id. at 3014-15, 3018-19, 3022-23, 3026-28, 3039-43.) And their questioning underscored that I.P. was not able to identify Petitioner in court. (Id., 5 Rep.'s Tr. at 3722.) They also extensively

[16] M.K. also admitted that it was "hard to remember a lot." (Lodged Doc. 15, 5 Rep.'s Tr. at 3693.)

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cross-examined Michaele about the party, forcing her to repeatedly admit that she didn't remember various details (see id., 3 Rep.'s Tr. at 2737, 2738, 2739, 2740, 2742, 2752, 2761, 2771, 2791) and that some of her memories had "resurfaced" after she spoke to police (id., 4 Rep.'s Tr. at 3068). They also impeached her with prior inconsistent statements (see id., 3 Rep.'s Tr. at 2773-79, 2803-09; 4 Rep.'s Tr. at 3058-74) and got her to admit that one of the reasons she and her husband didn't immediately report the molestation was that they weren't certain what had happened because I.P.'s "ability to articulate anything was that of a three-year-old" (id., 3 Rep.'s Tr. at 2716). Counsel also vigorously cross-examined Vecchia, the forensic interviewer who twice interviewed I.P., suggesting that she had asked I.P. leading questions (id., 5 Rep.'s Tr. at 3951-55) and attempted to elicit information she already knew (id. at 3956-57).

Mkrtichian capitalized on these points in her closing argument, urging the jury to question the strength of witnesses' memories because the party was "three years ago" and many of the witnesses "testif[ied] that they didn't remember a lot of things" and couldn't explain inconsistencies in their testimony. (Id., 8 Rep.'s Tr. at 4856-57; see id. at 4859.) To that end, she dissected the various inconsistencies in I.P.'s testimony (id. at 4877-86), remarking that the prosecution was asking the jury to "decide a man's fate based on [child witnesses'] memories that are pretty much non-existent now" (id. at 4857). She stressed that "child witnesses . . . are going to remember even less" (id.) and asserted that both I.P.'s and M.K.'s testimony was

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influenced by their parents, observing that "these kids have been talked to and have talked about [the crimes] for the last three years with their parents." (Id.) She emphasized that I.P. in particular had discussed the case with her parents "ad nauseam" (id. at 4892), her memory had been corrupted by her interviews with Vecchia (id. at 4918-19), and her "story kep[t] changing and . . . being molded" by her mother "towards trying to show that [Petitioner] is guilty" (id. at 4892-94, 4899-90; see id. at 4917-18).

Counsel's zealous advocacy, buttressed by the trial court's instruction that when evaluating a child's testimony the jury must consider the "child's age[,] level of cognitive development . . . [and] ability to perceive, understand, remember, and communicate" (Lodged Doc. 14, 2 Clerk's Tr. at 359; see Lodged Doc. 15, 9 Rep.'s Tr. at 4647-48), persuasively suggested that the witnesses' accounts were based on weak and potentially false memories. Indeed, Loftus, Petitioner's proposed expert, himself acknowledged that it was "obvious" that "significant forgetting likely occurred during the two-year interval" between disclosures. (Pet., Mem. P. & A., Ex. C at 29.) Under these circumstances, counsel didn't need to present an expert to explain to the jury that memories fade over time and that those of young children are particularly weak and susceptible to suggestive information (see Pet., Mem. P. & A. at 34-36), as the court of appeal recognized (Lodged Doc. 2 at 10 (noting that jurors "did not require an expert witness to advise them that factors such as youth and delayed reporting are relevant to assessing the credibility of a witness")). See United States v.

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Labansat, 94 F.3d 527, 530 (9th Cir. 1996) (noting that "[i]t is common knowledge that memory fades with time" and that "[c]ounsel can easily expose through cross-examination and closing argument the unreliability, if any, of delayed eyewitness identifications"); Taylor v. Cate, No. CV 10-6929-JST (MAN)., 2011 WL 2441451, at *9 (C.D. Cal. Apr. 11, 2011) (holding that state court reasonably denied ineffective-assistance claim based on counsel's failure to call eyewitness-identification expert when counsel "was well able to, and did, make an effective attack on [eyewitness's] identification of Petitioner without expert testimony"), accepted by 2011 WL 2415798 (C.D. Cal. June 14, 2011); see also Washington v. Schriver, 255 F.3d 45, 60 (2d Cir. 2001) ("[T]he basic idea that young children can be suggestible is 'not beyond the knowledge of the jurors.'" (citation omitted)).

b. *Prejudice*

The court of appeal also reasonably concluded that there was "no reasonable probability that [Petitioner] would have achieved a more favorable verdict had counsel presented expert testimony" on memory. (Lodged Doc. 2 at 10.)

As noted, counsel's questioning and closing argument skillfully exposed the risk that the witnesses' memories might have faded and that the child witnesses' memories in particular might have been impacted by subsequent conversations with their parents and police, something the jury was capable of understanding without the aid of an expert. See Lynch v. Gipson, No. CV 11-8439-JVS (SP)., 2015 WL 4162513, at *17 (C.D. Cal. Mar. 17, 2015) (holding that state court reasonably denied

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ineffective-assistance claim because petitioner couldn't show prejudice from counsel's failure to call memory expert when counsel extensively cross-examined witnesses; trial court instructed jury on how to evaluate eyewitness testimony; and during closing argument, counsel discussed identification concerns and appealed to jury's common sense), accepted by 2015 WL 4164835 (C.D. Cal. July 7, 2015).

Had counsel called a memory expert to elaborate on these issues, that likely would not have changed the outcome of trial. For instance, a memory expert would have testified that if "nothing out of the ordinary occurred" at the Thanksgiving party, the witnesses would not have "intensely attend[ed] to anything in particular that would have created lasting, detailed memories" (Pet., Mem. P. & A., Ex. C. at 29), calling into question whether "critical memories" had been "reconstructed" based on "suggestive post-event information" (id. at 25-27). Critically, however, a sexual assault was hardly "nothing out of the ordinary." Indeed, Loftus acknowledged that if I.P. "was abused, it [was] reasonable to expect that the abuse was an activity to which she would have attended and which she would have remembered." (Id. at 29 n.6.) Thus, calling a memory expert might have hurt the defense by confirming for the jury that although a child's memories are generally unreliable, that wasn't the case when the memories were about sexual abuse.[17] See United States v. Gabe, 237 F.3d 954,

[17] Testimony tending to "debunk[] the notion that [I.P.'s parents] could independently recall details from a Thanksgiving party that occurred two years earlier" (Superseding Traverse at 16) would also have cut both ways. After all, the defense case also (continued...)

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960 (8th Cir. 2001) ("[I]t is reasonable to assume that a victim of child abuse is not likely to forget such a traumatic event.").

Other aspects of a memory expert's potential testimony would have been irrelevant or damaging to the defense. For instance, Petitioner argues that a memory expert would have opined how memories are reconstructed based on suggestive information and "explained that I.P. believed she had been molested because of the conversations she had with her parents and the social worker who interviewed her." (Pet., Mem. P. & A. at 30; see id. at 31.) But that explanation wouldn't have been convincing here, given I.P.'s report of the molestation the same day it happened. A memory expert also might have testified about "confirmation bias" and explained that I.P.'s and her parents' memories were impacted by their knowledge that Petitioner had exposed himself to M.K. and by I.P.'s identification of Petitioner in a photograph her mother showed her. (Id. at 37-38.) But as discussed above, I.P.'s parents didn't learn about M.K.'s case until after Petitioner was arrested, by which time they had already given statements to the police generally consistent with their trial

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[17] (...continued)
relied on witnesses testifying about their memories of the party and the volunteer event at which Petitioner exposed himself to M.K. (See, e.g., Lodged Doc. 15, 6 Rep.'s Tr. at 4263 (Schultz testifying that people were using pathway where M.K. stated crime occurred); id. at 4352-53 (Petitioner's wife testifying about desserts at party); id. at 4357, 7 Rep.'s Tr. at 4503 (Petitioner's wife testifying that Petitioner wasn't wearing hat at party); id., 7 Rep.'s Tr. at 4525-28 (Petitioner's wife testifying that he didn't use bathroom during party).) Moreover, given that I.P. disclosed the abuse to her parents the day it happened, they too likely "intensely attended to" the details of the party, explaining Michaele's ability to recall details in her testimony. (See Pet., Mem. P. & A. at 34-35.)

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testimony. As for I.P.'s identification of Petitioner in a photograph, counsel successfully argued that any evidence of that identification should be excluded (see Lodged Doc. 15, 2 Rep.'s Tr. at 2117-18, 2131-48, 2168), and they might have been reluctant to potentially open the door to the prosecutor eliciting testimony about the identification by asking an expert to discuss it.

Lastly, even if counsel could have deployed a memory expert's testimony to cast doubt on I.P.'s or M.K.'s testimony in isolation, that wouldn't have made a difference in the result of the trial because the victims' testimony corroborated each other. After all, whatever the odds were that one of them was mistaken and her testimony had been corrupted by the passage of time or tainted by suggestive postevent information, it wasn't "reasonable to believe" that both mistakenly thought Petitioner had committed very similar sex crimes against them within a three-week span, as the prosecutor emphasized in her closing argument. (Id., 8 Rep.'s Tr. at 4935.) Thus, even if counsel were deficient for failing to call a memory expert, any error on that score didn't impact the trial's outcome. See Zapien v. Davis, 849 F.3d 787, 795 (9th Cir. 2016) (as amended) (holding that failure to undermine witness's account with expert's testimony did not amount to ineffective assistance when "jury would likely still have found her testimony credible"); Dalton v. Madden, No. EDCV 18-1445-JLS (KK), 2019 WL 8017863, at *7 (C.D. Cal. Dec. 13, 2019) (holding that petitioner was not prejudiced by absence of "taint and memory expert" because expert's testimony was "unlikely to have swayed" jury given that

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allegations of multiple victims corroborated each other), accepted by 2020 WL 883457 (C.D. Cal. Feb. 21, 2020), appeal filed, No. 20-55197 (9th Cir. Feb. 25, 2020).

3. Failure to call a taint expert

In grounds four and five Petitioner contends that his trial attorneys should have called an expert to explain how I.P.'s and M.K.'s testimony might have been tainted. (See Pet., Mem. P. & A. at 40-64, 65-73.) Citing a declaration from David W. Thompson, a forensic psychologist, he argues that an expert witness would have identified various factors that might have inaccurately shaped I.P.'s and M.K.'s recollections and statements. (Id. (citing id., Exs. A, B, & G).)

a. *I.P.*

After I.P. first told her parents that a man at the Thanksgiving party had wanted her to put his penis in her mouth, Michaele asked her to demonstrate what he did to her and I.P. did so. (See Lodged Doc. 15, 3 Rep.'s Tr. at 2711-14.) Her parents decided not to report the crime and didn't discuss it with her until she mentioned it again in 2011. (Id. at 2720, 2722-23.) After her renewed disclosure, they spoke with her several times about what happened to her, recording those sessions to have a record of what happened in her "own words." (Id., 11 Rep.'s Tr. at 8404-05, 8462, 8471-72, 8706-09; see Pet., Mem. P. & A., Ex. D (transcripts).) I.P. was then interviewed twice at a center for abused children, and the recordings of those interviews were played for the jury. (Lodged Doc. 15, 3 Rep.'s Tr. at 2726, 2730, 5 Rep.'s Tr. at 3924, 3937-38; see Pet., Mem. P. & A., Ex. E (transcripts).)

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Petitioner claims that his trial attorneys should have presented an expert to explain how I.P.'s parents and Vecchia "tainted her recollections." (Pet., Mem. P. & A. at 40; see id. at 44-62.) As an initial matter, Petitioner has failed to provide a declaration from counsel explaining their decision not to consult with or present an expert to testify about how I.P.'s recollections might have been tainted. That alone is reason to reject his claim. See Gentry, 705 F.3d 884, 899-900. Indeed, Yanes had "consulted [with] at least three psychiatrists with expertise in evaluating child abuse claims" (Lodged Doc. 14, 2 Aug. Clerk's Tr. at 290; see id. at 288), and it's likely those experts covered at least some if not all of the topics an expert witness like Thompson would have addressed.

In any event, counsel were able to persuasively argue that I.P.'s testimony was tainted by her parents and Vecchia without calling an expert. On cross-examination, I.P. admitted that she discussed the crime "a lot" with her parents. (Lodged Doc. 15, 4 Rep.'s Tr. at 3021-22.) And Michaele acknowledged discussing the crime with her many times. (Id., 3 Rep.'s Tr. at 2726.) Further, I.P.'s interviews with Vecchia were played for the jury (id., 5 Rep.'s Tr. at 3929-34, 3939), and Vecchia was questioned about having asked I.P. leading questions and attempting to elicit from her information that Vecchia already knew (id. at 3951-57). Mkrtichian then stressed in her closing argument that I.P. had discussed the case with her parents "ad nauseam" (id., 8 Rep.'s Tr. at 4892), her memory had been tainted by her interviews with Vecchia (id. at 4918-19), and her "story kep[t] changing and . . . being molded" by her mother "towards trying to

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show that [Petitioner] is guilty" (id. at 4893-94, 4899-90; see id. at 4917-18).[18]

Thus, the jury was aware that I.P. was subject to "repeated interviewing," and counsel made a strong argument that those interviews tainted I.P.'s recollections. Although an expert would likely have reinforced that point (see Pet., Mem. P. & A. at 44-62; id., Ex. B at 10-16), it wouldn't have changed the trial's outcome. Notably, although Thompson identified various leading and allegedly improper questions Vecchia posed and commented on her failure to follow up on or clarify certain responses (see Pet., Mem. P. & A. at 49-54; id., Ex. B at 12-16), he didn't point to a single instance when Vecchia fed I.P. an answer pertaining to what Petitioner did to her or his identifying features. Further, as discussed above, attempting to demonstrate that I.P.'s testimony was materially tainted by postevent information would have been difficult given M.K.'s testimony that Petitioner had done something very similar to her only three weeks later. For instance, Thompson opined that I.P.'s testimony might have been plagued with "source misattribution errors," suggesting that her testimony about

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[18] As Petitioner points out (see Pet., Mem. P. & A. at 63-64), the prosecutor argued in her closing that there was "no coaching by parents or law enforcement." (Lodged Doc. 15, 8 Rep.'s Tr. at 4811.) She repeated during her rebuttal argument that the witnesses weren't "coached," noting that I.P.'s testimony was consistent and never substantively changed. (Id. at 4934-35.) But the prosecutor's argument on that score was responsive to Petitioner's trial theory that I.P.'s memories were unreliable and had been corrupted by her conversations with her parents and others and that her mother had fabricated her own testimony to corroborate I.P. As demonstrated, Petitioner was able to persuasively present that theory to the jury without expert testimony.

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seeing Petitioner's penis was tainted by her having seen her father's penis when he walked around the house naked. (See Pet., Mem. P. & A. at 56-60; id., Ex. A at 3-6; id., Ex. B at 16-17; see also Lodged Doc. 15, 11 Rep.'s Tr. at 8478.) But any traction that theory might have gained was undermined by M.K.'s testimony that Petitioner also showed her his penis.

Petitioner also argues that counsel should have consulted with an expert before deciding not to introduce I.P.'s recorded conversations with her parents about the assault. (See Pet., Mem. P. & A. at 41-43.) Petitioner's habeas attorney wrote to counsel, asking whether they reviewed I.P.'s recorded conversations with her parents and, if so, why they didn't use them. (Pet., Mem. P. & A., Ex. F at 141; see id. at 142-43.) Yanes responded that he reviewed the statements and "found that they were either harmful or not helpful, as did [Petitioner]." (Id. at 137.) When habeas counsel called Yanes to ask "[w]hat could have been harmful about the interviews," however, he said he "no longer wished to talk [to her]." (Id. at 143.) Mkrtichian responded that she listened to "ALL the recordings and read ALL the accompanying transcripts." (Id. at 139 (emphasis in original).) If she didn't use them, it was because "it was a strategic decision not to do so": "[t]here were a lot of damaging statements in those recordings"; because she was cross-examining a "5-year-old child," she used her "best judgment of what to use and what not to use." (Id.) Thus, although habeas counsel asked Petitioner's trial attorneys about why they didn't use the tapes, she didn't ask them why they didn't consult with an expert in making that decision. Indeed, it is likely that they in fact did

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broach that topic with the psychiatrists they consulted. Petitioner's failure to develop the record on this score is decisive. See Gentry, 705 F.3d at 899-900.

Beyond that, as both counsel alluded to in their responses, there was good reason not to use the tapes. They consisted of emotionally raw conversations between a child reporting being molested and her parents. (See Pet., Mem. P. & A., Ex. D.) Not only did I.P. state during them that the man who played ball with her at the party "told [her] to suck his penis" in the bathroom and said to her, "[o]h, my god I'm coming" (id. at 61-62), but she also reported that her "heart broke" and "hurts" because of what happened (id. at 41-42). These statements corroborated I.P.'s testimony and had the potential to engender great sympathy for her. And there was little to be gained from them. Although Petitioner rightly points out that I.P.'s parents made statements on the recordings encouraging her to tell them what happened, offering her praise for doing so, and stressing that she hadn't done anything wrong (see id. at 40-41, 47-49, 56), mere encouragement to tell the truth was a far cry from telling her who they thought was her assailant or what they thought had happened to her. Under these circumstances, counsel, who contested the admissibility of all of I.P.'s statements about the assault (see e.g., Lodged Doc. 15, 2 Rep.'s Tr. at 356-58, 361-64), prudently chose not to enter the recordings into evidence.

b. *M.K.*

After M.K. reported to her mother that Petitioner had exposed himself to her, she was interviewed several times by police officers. (Lodged Doc. 15, 5 Rep.'s Tr. at 3747.)

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Petitioner argues that counsel was ineffective for not introducing the recordings of those interviews or presenting a "forensic child interview expert" to testify that M.K.'s recollections might have been tainted. (Pet., Mem. P. & A. at 73; see id., Ex. G.) Even on de novo review, he has failed to show that his counsel performed deficiently. See Richter, 562 U.S. at 105 ("Even under de novo review, the standard for judging counsel's representation is a most deferential one.").

Petitioner's failure to present a declaration from counsel shedding light on their decision not to introduce the recordings of M.K.'s interviews or expert taint testimony is reason alone to deny his claim. See Gentry, 705 F.3d at 899-900 (as amended); Wallace v. Montgomery, No. CV 15-05400-AB (DFM), 2017 WL 5001422, at *34 (C.D. Cal. Sept. 13, 2017) (denying ineffective-assistance claim on de novo review when petitioner never presented declaration from trial counsel to support his claims (citing Gentry, 705 F.3d at 899-900)), accepted by 2017 WL 4990492 (C.D. Cal. Oct. 30, 2017). Indeed, counsel did consult with several psychiatrists specializing in evaluating child-sex-abuse claims (Lodged Doc. 14, 2 Aug. Clerk's Tr. at 287-91), and Petitioner never asked counsel what information those experts provided and how that factored into their decision not to call them or play the tapes for the jury.

In any event, counsel was not ineffective for not presenting the recordings or calling an expert witness to testify about the way the interviews might have tainted M.K.'s testimony. First, counsel thoroughly questioned M.K. about the conversations she had with her parents and the police about the case, eliciting her

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acknowledgment that she had discussed the incident "a lot." (Lodged Doc. 15, 5 Rep.'s Tr. at 3688; see id. at 3684, 3735-42 (police officer testifying about interviews with M.K.).) Mkrtichian then asserted in her closing argument that M.K.'s testimony was influenced by her parents, observing that "[her and I.P.] have been talked to and have talked about [the crimes] for the last three years with their parents." (Id., 8 Rep.'s Tr. at 4857.)

The jury was therefore aware that M.K. had extensively discussed the case with others and might have been exposed to suggestive information, rendering it unnecessary to call an expert on that score. See Washington, 255 F.3d at 60. Further, as with the recordings of I.P.'s conversations with her parents, counsel might reasonably have decided that playing them could backfire by letting the jury hear incriminating statements consistent with M.K.'s trial testimony. Lastly, there was little benefit to be gained from arguing that M.K.'s testimony was tainted because she told her mother that a man had exposed his penis to her almost immediately after it happened, identifying Petitioner as the man who did it. Thus, even if Petitioner could prove that M.K.'s parents and the police used improper techniques while subsequently interviewing her (see Pet., Mem. P. & A. at 67-70; id., Ex. G), none of that would have undermined the abundant evidence that she reported that Petitioner had exposed himself to her immediately after he did so. Beyond that, given that M.K.'s testimony was corroborated by I.P.'s account that three weeks earlier Petitioner had put his penis in her mouth, it is unlikely that the jury would have believed her testimony

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inaccurate. See Dalton, 2019 WL 8017863, at *7.

4. Closing argument

In ground six Petitioner argues that Mkrtichian was ineffective when she misspoke during her closing argument, urging the jury to find him "guilty." (Pet., Mem. P. & A. at 76-77; see Superseding Traverse at 31-32.)

After she vigorously contested Petitioner's guilt during her thorough closing argument, she ended by stating:

> And after considering all of that you will have no choice but to come back with the only reasonable verdict in this case which is the verdict of guilty. Thank You.

(Lodged Doc. 15, 8 Rep.'s Tr at 4923.) The court and Yanes both immediately corrected her, remarking that she meant "Not guilty," prompting Mkrtichian to correct herself, twice repeating that she meant "Not guilty" and apologizing. (Id.)

The court of appeal reasonably found that there was "no reasonable probability that trial counsel's inadvertent misstatement impacted the verdict." (Lodged Doc. 2 at 11.) Petitioner argues that the jury might have believed that defense counsel made a "Freudian slip," revealing her subconscious belief in his guilt. (Pet., Mem. P. & A. at 76-77.) But counsel's zealous advocacy on his behalf during her closing argument, in which she drilled down on the inconsistencies in I.P.'s testimony and questioned her and the other witnesses' ability to recall what happened four years earlier (see Lodged Doc. 15, 8 Rep.'s Tr. at 4856-59, 4864, 4877-86), claimed that I.P.'s testimony was tainted by her conversations with her parents and Vecchia (see id. at 4857, 4892-94, 4918-19), accused Michaele of lying to

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buttress I.P.'s testimony (see id. at 4872-77, 4887, 4891, 4896-98, 4906, 4919), and suggested that Petitioner had too much to lose to commit the crimes against I.P. and M.K. (see id. at 4861-62), left no room for the jury to infer that she harbored doubt about Petitioner's innocence. Further, she immediately corrected herself, apologizing for the mistake.

Under these circumstances, counsel's mistake didn't constitute ineffective assistance of counsel. See United States v. Roberson, No. CV S-07-2608 WBS., 2008 WL 4966207, at *2 (E.D. Cal. Nov. 20, 2008) (holding that defense counsel was not ineffective for stating "don't acquit" during closing argument because "[a] minor misstatement, which was immediately corrected and made in the context of a closing argument advocating for defendant's innocence, d[id] not constitute ineffective assistance of counsel").

For all these reasons, habeas relief is not warranted on Petitioner's ineffective-assistance-of-counsel claims.

III. Petitioner's Prosecutorial-Misconduct Claim Does Not Warrant Habeas Relief

In ground seven Petitioner argues that the prosecutor committed prejudicial misconduct during her cross-examination of a defense witness and closing argument. (See Pet., Mem. P. & A. at 78-82; Superseding Traverse at 32-36.) Respondent argues that Petitioner has procedurally defaulted this claim by failing to raise a contemporaneous objection or request that the jury be admonished, as the court of appeal found. (See Superseding Answer, Mem. P. & A. at 45-48; Lodged Doc. 2 at 12-13.) Because it's easier to dispose of the claim on the merits, the Court

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resolves it solely on that basis. See Lambrix v. Singletary, 520 U.S. 518, 524-25 (1997); Franklin v. Johnson, 290 F.3d 1223, 1232 (9th Cir. 2002).

A. Applicable Law

A prosecutor's incorrect and improper comments violated the Constitution only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Parker v. Matthews, 567 U.S. 37, 45 (2012) (per curiam) (quoting Darden v. Wainright, 477 U.S. 168, 181 (1986)). In determining whether the prosecutor's remarks rendered a trial fundamentally unfair, they must be analyzed in the context of the entire proceeding to discern whether they influenced the jury's decision. See Boyde v. California, 494 U.S. 370, 385 (1990); Darden, 477 U.S. at 179-82. Likewise, a prosecutor's allegedly improper remark in closing should be considered in light of the nature of closing arguments:

> Because improvisation frequently results in syntax left imperfect and meaning less than crystal clear, a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Williams v. Borg, 139 F.3d 737, 744 (9th Cir. 1998) (citation omitted).

Even when a prosecutor's remarks violated due process, they provide grounds for habeas relief only if that misconduct had a "substantial and injurious effect or influence in determining the

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jury's verdict." Wood v. Ryan, 693 F.3d 1104, 1113 (9th Cir. 2012) (citing Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993)).

B. Background

As part of the defense case, Petitioner's attorneys called Schultz, a father of two children who attended school with M.K. (Lodged Doc. 15, 6 Rep.'s Tr. at 4242-43.) Schultz was volunteering at the school the day Petitioner exposed himself to M.K. and had worked on a landscaping project with him. (Id. at 4253-54, 4264-65, 4271.) He identified photographs of the area where he and Petitioner were working and the nearby pathway where M.K. testified Petitioner exposed himself to her. (Id. at 4261-64, 4271, 4286; see id., 5 Rep.'s Tr. at 3648, 3661, 3664-68.) Schultz testified that some of the bushes that lined the pathway had been only four feet tall, there were breaks in the bushes, and he could see down the pathway from the area where he was working. (Id., 6 Rep.'s Tr. at at 4286-87, 4289-92, 4297.) When the prosecutor impeached him with his testimony from a prior proceeding that the bushes were seven feet tall, he explained that he testified to that effect before he revisited the school in April 2012, and that when he did he realized the bushes were shorter and did not prevent him from seeing down the pathway. (Id. at 4299-301.) In response to that statement, the prosecutor remarked, "Perhaps they cut the bushes because someone had lured a child back there." (Id. at 4301.) Counsel objected that the prosecutor's remark was "argumentative," and the objection was sustained. (Id.) In the jury's presence, the trial court reprimanded the prosecutor, observing that this was the "second

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time [she had] done that"[19] and that her comment was "really uncalled for." (Id.)

The prosecutor began her closing argument by stating:

> [Petitioner] is the ultimate predator and sexual thrill seeker. His m.o., he targets little girls that he doesn't know. He lures them with something sweet and then he molests them. And he does this within yards of their unsuspecting parents.
>
> In this case you heard about [I.P.] and the fact that she was at a Thanksgiving party in 2009 with her family and [Petitioner] enticed her with a cupcake and then put his penis in her mouth.
>
> As remarkable as that may sound, you also heard from another child. You heard from [M.K.] and 15 days after [Petitioner] had molested [I.P.] he found [M.K.] on the campus of [the] school. He lured her with a piece of candy behind some bushes and exposed his penis to her.

(Id., 8 Rep.'s Tr. at 4803.)

She also argued:

> Not only did he commit a very serious sexual offense against [I.P.] and a sexual offense against [M.K.], he

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[19] Earlier in her cross-examination of Schultz, when he expressed confusion about what he meant during his testimony at a prior hearing, she stated that he was referring to a particular exhibit. (See Lodged Doc. 15, 6 Rep.'s Tr. at 4291-92.) The judge sustained defense counsel's objection, instructing the prosecutor to "ask questions" and not "make statements." (Id. at 4292.) He told the jury that "this is one of the reasons I took pains at the beginning of the case . . . to tell you that what the lawyers say is not evidence"; he instructed them to "disregard all of that back and forth." (Id.)

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> also took something from them. So he's not just a sexual predator. He's also a thief.
>
> [Petitioner] stole their innocence. You have a three-year-old child that doesn't even know that oral copulation is a sexual thing.
>
> . . . She won't even understand what that is until she's much older.
>
> And that at that point she will realize that innocence has been taken from her. She was only three and she's six sitting up here and telling you about it.
>
> And the same with [M.K.] This is a child who was on the campus of her elementary school thinking she's safe, thinking that [Petitioner] is a nice man because he gives her candy. And then he exposes himself to her.
>
> Think about the lack of trust and the issues that that creates. He's — there's emotional damage from these crimes as well.

(Id. at 4841-42.)

The court of appeal rejected Petitioner's claims that the prosecutor's statements constituted prejudicial misconduct.

> None of the statements rises to the level of prejudicial prosecutorial misconduct. . . . It would have been reasonable for the jury to infer that the height of the bushes could have changed between the incident with M.K. and the trial. The comment did not involve deceptive or reprehensible methods of persuasion and there is no reasonable probability that a result more favorable to [Petitioner] would have been reached had the

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> comment not been made. Like the trial court, we conclude the prosecutor's statement regarding the height of the bushes was so "minor[] that it didn't have anything to do with the outcome of the case."
>
> We reach the same conclusion with regard to the prosecutor's closing argument. . . . [T]here is no reasonable likelihood the comments caused unfair prejudice. It is not deceptive or reprehensible to remind a jury that sexual assault causes the victim to suffer emotional damage. Similarly, the argument that [Petitioner] chose victims who were strangers because they were less likely to identify him later was a fair inference from the evidence rather than an appeal to passion or prejudice. There was no prejudicial misconduct.

(Lodged Doc. 2 at 12-13.)

C. Analysis

1. Cross-examination

Petitioner claims that the prosecutor's assertion during her cross-examination of Schultz that the bushes were lower when he revisited the school in 2010 because the school cut them after "someone had lured a child back there" was impermissibly "inflammatory" and "argumentative." (Pet., Mem. P. & A. at 78.) The court of appeal reasonably found that the prosecutor's comment didn't "rise[] to the level of prejudicial . . . misconduct." (Lodged Doc. 2 at 12.) Indeed, the only thing wrong with her remark was its timing. Her argument that the bushes had been cut since Petitioner exposed his penis to M.K.

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was based on the evidence. Specifically, Police Officer Justin Malcuit testified that after Petitioner exposed himself to M.K., the bushes were "chopped" and are "now shorter." (Lodged Doc. 15, 5 Rep.'s Tr. at 3713-14.) Thus, although the prosecutor shouldn't have made that assertion in the middle of her cross-examination, it would likely have been appropriate had she made it in her closing argument. And it certainly didn't involve any "deceptive or reprehensible methods of persuasion," as the court of appeal observed. (Lodged Doc. 2 at 12.) Tellingly, although Petitioner maintains that the damage from the prosecution's question could not be "unrung" (Pet., Mem. P. & A. at 79), he doesn't articulate what that damage was.

In any event, any prejudice stemming from the prosecutor's remark was immediately ameliorated by the court's sustaining of defense counsel's objection and its reprimand that her comment was "uncalled for." (Lodged Doc. 15, 6 Rep.'s Tr. at 4301.) Further, earlier in Schultz's cross-examination, the court had reminded the jury "that what the lawyers say is not evidence," an instruction he repeated before closing arguments. (See id. at 4292; id., 8 Rep.'s Tr. at 4802.) Finally, as the court of appeal observed (see Lodged Doc. at 12) and as discussed above, the bushes' height was a "minor" point that wouldn't have impacted the trial's outcome.

2. Closing argument

Petitioner claims that in her closing argument, the prosecutor improperly appealed to the jury's passions and prejudices and argued outside the evidence. (Pet., Mem. P. & A. 80-82.) The court of appeal reasonably found that "[t]here was

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no prejudicial misconduct." (Lodged Doc. 2 at 13.)

Petitioner argues that the prosecutor appealed to the jury's passions and prejudices when she asserted that he "stole [I.P.'s and M.K.'s] innocence," causing them "emotional damage." (Pet., Mem. P. & A. at 80 (citing Lodged Doc. 15, 8 Rep.'s Tr. at 4841-42).) Initially, the prosecutor's argument was at least partially appropriate. Specifically, her observation that as a three-year-old I.P. didn't "even know that oral copulation is a sexual thing" (Lodged Doc. 15, 8 Rep.'s Tr. at 4841) was relevant to explain why she might not have told her parents about the assault during the party itself or kept it to herself for two years after first telling them.

But even if the prosecutor crossed the line in discussing the victims' "innocence" and the "emotional damage" they suffered, see Mendez v. Ochoa, No. CV 12-2122 JAK (JC)., 2015 WL 1809140, at *10 (C.D. Cal. Apr. 17, 2015) (prosecutor's comments were improper when he claimed that "theme . . . [of] entire case" was victim's "stole[n] . . . innocence" and revisited that argument in rebuttal), the comments Petitioner highlights were isolated remarks during a 75-page closing argument; the prosecutor didn't repeat them or dwell on the victims' emotional damage.

Moreover, the jury was well aware that counsel's argument was not evidence. It heard that from defense counsel (Lodged Doc. 15, 8 Rep.'s Tr. at 4848), the prosecutor (id. at 4803-04), and twice from the court (id., 6 Rep.'s Tr. at 4292, 8 Rep.'s Tr. at 4802; see also Lodged Doc. 14, 2 Clerk's Tr. at 363). The court also instructed the jury that it must not let "bias,

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sympathy, prejudice or public opinion influence [its] decision." (Lodged Doc. 15, 7 Rep.'s Tr. at 4639.) The jury is presumed to have followed its instructions. Weeks v. Angelone, 528 U.S. 225, 234 (2000). Under these circumstances, Petitioner has failed to show that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Matthews, 567 U.S. at 45 (citation omitted); see Mendez, 2015 WL 1809140, at *10 (holding that state court was not objectively unreasonable when it found that prosecutor's improper comments about victim's "stole[n] . . . innocence" did not "infect the trial with unfairness").

Petitioner also argues that the prosecutor committed misconduct when she argued that he "preyed on young girls." (Pet., Mem. P. & A. at 81 (citing Lodged Doc. 15, 8 Rep.'s Tr. at 4803).) He contends that because there was no proof that he had abused any young girls aside from I.P. and M.K., it was improper for the prosecutor to so argue. (Id. at 81-82; see Superseding Traverse at 34.) To the contrary, the prosecutor's argument was not outside the evidence. She argued that Petitioner "targets little girls that he doesn't know," "lur[ing] them with something sweet and then he molests them . . . within yards of their unsuspecting parents." (Lodged Doc. 15, 8 Rep.'s Tr. at 4803.) That is exactly what the prosecution contended he did with both I.P. and M.K. and what the evidence established. That "no other accuser" came forward doesn't make what the prosecutor asserted outside the evidence. Given how specific the prosecutor's description of Petitioner's approach was, it would have been clear to the jury that she was referring only to I.P. and M.K.

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And to the extent there was any confusion, as discussed above the jury was repeatedly warned that the attorneys' arguments were not evidence. (See id., 6 Rep.'s Tr. at 4292, 8 Rep.'s Tr. at 4802-04, 4848.)

Accordingly, habeas relief is not warranted.

IV. Petitioner's Commutative-Error Claim Does Not Warrant Habeas Relief

In ground eight Petitioner contends that the cumulative effect of the errors in grounds one through seven requires reversal. (Pet., Mem. P. & A. at 90; Superseding Traverse at 36.) Habeas relief is not warranted because, as the court of appeal recognized, "there was no error to cumulate." (Lodged Doc. 2 at 15 (citations omitted).)

Although cumulative error may deprive a petitioner of due process, see Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284, 290 n.3, 298, 302-03 (1973)), if none of his claims actually demonstrate constitutional error, no cumulative prejudice can stem from them. See Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) (finding that when "no error of constitutional magnitude occurred, no cumulative prejudice is possible"); cf. United States v. Solorio, 669 F.3d 943, 956 (9th Cir. 2012) ("There can be no cumulative error when a defendant fails to identify more than one error."). As discussed above, Petitioner has failed to establish that any of his claims resulted in constitutional violations.

Accordingly, habeas relief is not warranted.

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V. Petitioner's Eighth Amendment Claim Does Not Warrant Habeas Relief

Petitioner contends that his 15-years-to-life sentence was "grossly disproportionate" to his crime and therefore cruel and unusual under the Eighth Amendment. (Pet., Mem. P. & A. at 94; see id. at 91-93; Superseding Traverse at 36-39.)

A. Applicable Law

As a general matter, a criminal sentence that is not proportionate to the conviction offense may violate the Eighth Amendment. Solem v. Helm, 463 U.S. 277, 284 (1983). But outside the context of capital punishment, successful challenges to the proportionality of particular sentences are "exceedingly rare." Id. at 289-90 (citing Rummel v. Estelle, 445 U.S. 263, 272 (1980)). The Supreme Court has stated:

> The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

Ewing v. California, 538 U.S. 11, 23 (2003) (citing Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)). In the context of Eighth Amendment challenges to term-of-years sentences, "the only relevant clearly established law" is the gross-disproportionality principle. Lockyer v. Andrade, 538 U.S. 63, 73 (2003); see Norris v. Morgan, 622 F.3d 1276, 1293 (9th Cir. 2010) ("[W]e are aware of no case in which a court has found a defendant's term-of-years sentence for a non-homicide crime against a person to be grossly disproportionate to his or her crime." (emphasis omitted)).

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When reviewing a sentence under the Eighth Amendment, courts consider three factors: (1) the gravity of the offense and harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions. Solem, 463 U.S. at 290-92. The second and third factors need not be reached when consideration of the gravity of the offense and harshness of the penalty does not raise an "inference of gross disproportionality." Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring); see also Ramirez v. Castro, 365 F.3d 755, 770 (9th Cir. 2004) (as amended) (comparative analysis necessary only in the "extremely rare case that gives rise to an inference of gross disproportionality").

B. Court-of-Appeal Decision

The court of appeal rejected Petitioner's claim:

> The trial court sentenced [Petitioner] to a term in state prison of 15 years to life, as mandated by section 288.7. He contends this sentence violated the California and the federal Constitutions' prohibitions against cruel and unusual punishment. We are not persuaded.
>
> . . . .
>
> [Petitioner's] sentence of 15 years to life does not violate either the California or the federal Constitution. We note that the crime at issue is a serious one. [Petitioner] is a dangerous offender because, although he had only one prior conviction for a sex offense, both of his victims are very young girls who would likely be unable to identify him because he was a

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> stranger. [Petitioner's] sentence is proportional to those imposed under California law for other, similar offenses. He fails to persuade us that his sentence is grossly disproportionate to either the seriousness of his offense or to the sentences that would be imposed in other jurisdictions. As the court concluded in [People v. Meneses, 193 Cal. App. 4th 1087, 1094 (2011)], "In sum, although the sentence is significant, so was the crime. It was not 'so disproportionate to the crime for which it [was] inflicted that it shocks the conscience and offends fundamental notions of human dignity' and was not cruel or unusual."

(Lodged Doc. 2 at 15, 17 (citations omitted).)

C. Analysis

The court of appeal was not objectively unreasonable in denying Petitioner's Eighth Amendment claim. His case is not one of those "exceedingly rare" ones that merits relief based on the alleged disproportionality of his sentence. Solem, 463 U.S. at 289-90.

Petitioner's 15-years-to-life sentence was mandated by California law. See Penal Code § 288.7(b) ("Any person 18 years of age or older who engages in oral copulation . . . with a child who is 10 years of age or younger . . . shall be punished by imprisonment in the state prison for a term of 15 years to life."). That sentence "reflects the Legislature's zero tolerance toward the commission of sexual offenses against particularly vulnerable victims." People v. Alvarado, 87 Cal. App. 4th 178, 200-01 (2001); see also People v. Palmore, 79 Cal.

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App. 4th 1290, 1296 (2000) (state's one-strike sentencing law mandates 15-years-to-life sentence when "nature or method of the sex offense 'place[d] the victim in a position of elevated vulnerability'" and was "enacted to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction") (emphasis in original; citation omitted)). It has been upheld as constitutional despite its relative severity compared to other California mandatory sentences. (See Pet., Mem. P. & A. at 92-93; Superseding Traverse at 38-39); McPherson v. Paramo, No. SACV 16-170-AB (GJS), 2017 WL 9732426, at *33-36 (C.D. Cal. Dec. 5, 2017) (holding that state court reasonably rejected petitioner's Eighth Amendment challenge to mandatory 15-years-to-life sentence under section 288.7(b)), accepted by 2018 WL 1183355 (C.D. Cal. Mar. 7, 2018); see also Harmelin, 501 U.S. at 998 (Kennedy, J., concurring) ("[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" (citation omitted)).

Petitioner argues that the sentence was unconstitutional as applied to him. (See Pet., Mem. P. & A. at 93-94.) That claim is unavailing. As the court of appeal recognized, the "crime at issue [was] a serious one." (Lodged Doc. 2 at 17.) Petitioner put his penis in a three-year-old girl's mouth, knowingly inflicting significant trauma on a defenseless victim. See Cacoperdo v. Demosthenes, 37 F.3d 504, 508 (9th Cir. 1994) ("The impact of [child molestation] on the lives of [its] victims is extraordinarily severe."); see also Stogner v. California, 539 U.S. 607, 651 (2003) (Kennedy, J., dissenting) ("When a child

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molester commits his offense, he is well aware the harm will plague the victim for a lifetime."). Further, the evidence persuasively showed that just three weeks after molesting I.P., he exposed his penis to six-year-old M.K. What's more, he violated both girls in places where they likely felt safest: I.P. while she was among friends and family and M.K. while she was at school and with her mother nearby. And he committed both crimes with seemingly no concern for getting caught, with the parents of both victims nearby. Thus, as the court of appeal recognized, he was a "dangerous offender" despite his scant criminal history. (Lodged Doc. 2 at 17.) The sentence therefore matched the gravity of his crime.

Petitioner argues that he had "minimal contacts with law" and "had been living a productive, law-abiding, normal life" and that "many people attested to his good character." (Pet., Mem. P. & A. at 93-94.) But the Supreme Court has explicitly "refuse[d]" to apply any "mitigation" or "individualized sentencing" requirement into the Eighth Amendment proportionality jurisprudence for noncapital sentences. Harmelin, 501 U.S. at 995-96. Thus, the mitigation factors he cites are irrelevant to determining whether his sentence was grossly disproportionate.

Accordingly, habeas relief is not warranted.

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RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Judge accept this Report and Recommendation and direct that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: February 25, 2021

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

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Court of Appeal, Second Appellate District, Division Six - No. B260489

S239681

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

PETER IVAN McNEAL, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

MAR 29 2017

Jorge Navarrete Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PETER IVAN MCNEAL, Defendant and Appellant.	B260489 (Super. Ct. No. BA391776) (Los Angeles County)

Peter Ivan McNeal appeals his conviction, by jury, of oral copulation of I.P., a child under 10 years of age, in violation of Penal Code section 288.7, subdivision (b).[1] The trial court sentenced appellant to a term of 15 years to life in state prison. He contends: his conviction is not supported by substantial

[1] This was appellant's second trial. The jury was unable to reach a unanimous verdict on the first trial.

All statutory references are to the Penal Code unless otherwise stated.

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evidence because the victim's testimony is not reliable; he received ineffective assistance of counsel at trial[2]; the trial court erred in allowing evidence of a sex offense he committed against another child; he was denied due process when the trial court refused to release I.P.'s school records; the cumulative effect of these errors rendered his trial fundamentally unfair; and his sentence violates state and federal constitutional prohibitions against cruel and unusual punishment. We affirm.

Facts

In 2009, I.P., her parents Johann and Michaele, and her sister "Echo" were visiting Los Angeles from Massachusetts. They stayed with Michaele's sister and spent Thanksgiving at the home of Michaele's cousin, Jacquire King. I.P. was three years old at the time. King and his wife invited about 20 people for Thanksgiving dinner, including I.P.'s family. Appellant, his then-wife, his eight-year-old daughter and his six-year-old son were also guests at the party. During the party, appellant took one of King's sons, his own son and I.P. outside to play catch. Appellant was the only adult who played outside with the children.

That evening, after the party was over, I.P. spontaneously asked her parents, "Why did that man want to put his penis in my mouth?" One of the parents asked I.P. what she had said. I.P. repeated her question. Her parents asked which man did that. I.P. replied, "The man with the ball." Later, Michaele and I.P. took a bath together, as they often did. While they were in the bathtub, Michaele asked I.P. if I.P. wanted to

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[2] Appellant has filed a petition for writ of habeas corpus (B269374) alleging the same ineffective assistance of counsel claims. In a separate order, filed concurrently with this opinion, we have denied the petition for writ of habeas corpus.

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show her what happened. There was a large stainless steel thermos on the bathtub rim. I.P. picked up the thermos, held it to her crotch so that it stuck straight out from her body and told Michaele to, "Say aah, and open your mouth." Then, I.P. put the thermos into Michaele's mouth and moved her hips back and forth. Michaele asked I.P. what she did then. I.P. replied, "I said, Yuck!"

I.P.'s parents debated what they should do to minimize I.P.'s trauma. They eventually decided to do nothing, believing that I.P. would eventually forget the incident. They did not tell the Kings about I.P.'s disclosure.

A few days later, I.P. and her family returned to Massachusetts. I.P. did not mention the sexual assault again for nearly two years. In mid-November 2011, I.P. told her parents that during the Thanksgiving party, she played ball outside with the man who put his penis in her mouth and told her to suck on it. They were in the bathroom at her cousin Braden's house. The bathroom was white and had a big window. The man put his penis in her mouth more than once. After the "second round," the man took a cupcake out of his pocket and gave it to her. After the third time the man put his penis in her mouth, he took her out of the bathroom. I.P. also said it felt like the man punched her while she was in the bathroom with him.

Other Crimes Evidence

On December 11, 2009, 15 days after he sexually assaulted I.P., appellant was doing volunteer work at the charter school his son attended. While he was working outside, he came upon then six-year old M.K. who was playing in the school courtyard, waiting for her mother to finish volunteering. Appellant asked her if she wanted some Skittles. Appellant took

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the candy out of his pocket, walked down a path away from the school, and beckoned for M.K. to follow. When they reached some bushes, appellant told M.K., "close your eyes and open your mouth." She did as she was asked, thinking he was going to put some Skittles in her mouth. When she opened her eyes again, M.K. saw appellant's erect penis. M.K. went back to the classroom where her mother was working.

M.K. told her mother about the incident before they left the campus that day. Her mother reported the incident to the school's volunteer coordinators, who in turn informed one of the school directors. When the director arrived, the whole group went to the street to a police station, where M.K. made a statement. Appellant was prosecuted and given a probationary "sentence."

M.K. and I.P. did not know each other; their parents also had never met. One of the guests at the King's Thanksgiving party had children who attended the same school as M.K. and appellant's son. After that Thanksgiving weekend, I.P.'s parents had little contact with the Kings. M.K.'s mother sent an e-mail to the parents of students at M.K.'s school, describing appellant's conduct. There is no evidence I.P.'s parents saw the e-mail or spoke to anyone about M.K.

Discussion

Substantial Evidence. Appellant contends the judgment is not supported by substantial evidence because I.P.'s disclosure, made two years after the original incident and uncorroborated by any physical evidence, is not reliable. We are not persuaded.

As in every substantial evidence case, we review "'the entire record in the light most favorable to the prosecution to

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determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.)" (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The question is "'"whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.]' (*People v. Earp* (1999) 20 Cal.4th 826, 887.)" (*People v. Farnam* (2002) 28 Cal.4th 107, 142.) We "presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. . . . The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) We may not re-weigh the evidence or second-guess credibility determinations made by the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Simply put, if the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Farnam, supra*, 28 Cal.4th at p. 143.)

The testimony of a single witness is sufficient to prove a disputed fact and support a conviction, unless her testimony is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "'"To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.]

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Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]". . ." (*People v. Barnes* (1986) 42 Cal.3d 284, 306.) A witness's testimony will not be considered inherently improbable unless it is "'so inherently incredible, so contrary to the teachings of basic human experience, so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 996.)

I.P.'s testimony was not "physically impossible or inherently improbable[.]" (*People v. Young, supra*, 34 Cal.4th at p. 1181.) She first reported her sexual assault on the day it occurred, described it in detail, and identified appellant as the perpetrator. Her initial report included nothing that was physically impossible or "'so completely at odds with ordinary common sense, that no reasonable person would believe it beyond a reasonable doubt.'" (*People v. Hovarter, supra,* 44 Cal.4th at p. 996.) I.P.'s subsequent disclosure, made two years later, was consistent in many respects with her initial report. Specifically, she reported the same type of sexual assault and she continued to identify appellant as her abuser. A rational trier of fact could have found I.P.'s testimony believable. It constitutes substantial evidence in support of the judgment.

Ineffective Assistance of Counsel. Appellant contends he received ineffective assistance from his counsel at trial because counsel: did not demonstrate that I.P.'s parents knew about the incident with M.K.; did not call an expert witness to explain how I.P.'s parents corrupted her memory; did not

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present evidence regarding the height of the bushes where appellant assaulted M.K.; did not present evidence regarding the kinds of desserts available at the Thanksgiving party; and admitted appellant's guilt during closing argument. We are not persuaded.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

""Tactical errors are generally not deemed reversible; and counsel's decisionmaking must be evaluated in the context of the available facts. (*Strickland v. Washington* [(1984)] 466 U.S. [668], 690 . . . .) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . ." (*People v. Pope* [(1979)] 23 Cal.3d [412,] 426 . . . fn. omitted.) Finally, prejudice must be affirmatively proved; the record must demonstrate "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." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694; *People v. Ledesma* [(1987)]

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43 Cal.3d [171], 217-218.)' (*People v. Bolin* (1998) 18 Cal.4th 297, 333; [citations omitted].)" (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

Appellant raised each of these ineffective assistance claims in a motion for new trial. The trial court heard appellant's supporting evidence, taking additional testimony from I.P.'s parents, the Kings, and appellant's former wife. After considering the new evidence, the trial court rejected each claim, concluding there was no reasonable probability that any of the omitted evidence would have had an impact on the verdict. It found "a complete absence of proof at this hearing that there was any, quote, linkage, unquote" between the parents of I.P. and M.K. Had I.P.'s parents known about appellant's assault on M.K., the trial court reasoned, they would have told the police officers to whom they reported I.P.'s molestation. More importantly, the trial court reasoned, defense counsel could not have been expected to introduce evidence that rumors circulated about appellant being a child molester. "That stands on its head everything that all of us [who have] been in this criminal justice system know about how trials are conducted."

The trial court reached similar conclusions with regard to appellant's other claims of ineffective assistance. For example, it concluded photographs showing the height of the bushes at M.K.'s school would not "have made any difference. People who do this stuff don't really care about the height of the bushes." Similarly, the trial court concluded jurors would have been unmoved by evidence that appellant could not have given I.P. a cupcake from his pocket because there were no cupcakes at the party. "The jury [did not] believe there were cupcakes in the pocket. So who cares about what the desserts were at the party?"

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Finally, the trial court was not persuaded that a memory expert would have had any impact on the verdict. "Everybody knows that . . . the more time passes, the more your memory fades. Everybody knows that three-year-olds don't remember things as well as adults . . . . We don't need memory experts to tell us that."

Like the trial court, we are not persuaded that the representation appellant received from his counsel at trial fell below an objective standard of reasonableness. (*People v. Snow* (2003) 30 Cal.4th 43, 111.) Even if it had, there is no reasonable probability the verdict would have been different but for counsel's errors. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1003.) Additional evidence regarding the height of the bushes at M.K.'s school would not have altered the jury's verdict on whether appellant sexually assaulted I.P. Photographs of the bushes were in evidence and the jury heard testimony regarding their accuracy. Second, M.K. testified about the incident and the jury had the opportunity to assess her credibility. The same analysis applies to I.P.'s statement that appellant gave her a cupcake after forcing his penis into her mouth. Appellant's ex-wife testified there were no cupcakes at the Thanksgiving party. There is no reason to believe that additional evidence on this minor point would have affected the verdict.

Similarly, we are unable to conclude appellant suffered any prejudice because trial counsel failed to show a link between the victims' parents. The hearing on appellant's motion for new trial produced no evidence supporting appellant's claim that I.P.'s parents knew appellant exposed himself to M.K. Their only link to M.K. was through the Kings, who had friends with children in the same school as M.K. But the hearing on

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appellant's motion for new trial demonstrated that I.P.'s parents had little communication with the Kings after Thanksgiving 2009 and did not learn about appellant's assault on M.K. until after they had reported the assault on I.P. Even if they had been aware of the assault on M.K., that knowledge would not explain I.P.'s initial disclosure, which occurred on Thanksgiving night. There is no reasonable probability the verdict would have been different had the jury heard appellant's unpersuasive evidence of a link between the victims' parents.

Appellant complains his trial counsel failed to call an expert witness on memory, to explain how I.P.'s parents corrupted her memory by talking with her about her disclosures. Like the trial court, we decline to second-guess this tactical choice by trial counsel. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) There is no reasonable probability that appellant would have achieved a more favorable verdict had counsel presented expert testimony. The jury heard evidence that I.P. initially disclosed her molestation on the night it occurred. She next mentioned the incident about two years later, volunteering a description of the event that was generally consistent with her first disclosure. The jury also heard about the conversations I.P. had with her parents and with the social worker in Massachusetts who interviewed I.P. for law enforcement. The jurors were capable of evaluating I.P.'s credibility, given her age and the lapse of time between the event and her parents' decision to report it to law enforcement. They did not require an expert witness to advise them that factors such as youth and delayed reporting are relevant to assessing the credibility of a witness.

Finally, during closing argument, appellant's trial counsel said, "And after considering all of that you will have no

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choice but to come back with the only reasonable verdict in this case which is the verdict of guilty." Counsel was immediately corrected by the trial court, apologized and then corrected herself. Like the trial court, we are convinced jurors did not take this slip of the tongue seriously. In addition, the trial court's immediate correction removed any possible confusion. There is no reasonable probability that trial counsel's inadvertent misstatement impacted the verdict.

Prosecutorial Misconduct. Appellant contends the prosecutor committed misconduct with three statements. First, a witness testified that more than one year after appellant exposed himself to M.K., the witness went to the school and noted the bushes were not high enough to have concealed appellant. The prosecutor responded, "Okay. Perhaps they cut the bushes because someone had lured a child back there." Appellant contends this comment was argumentative and therefore misconduct. Second, during closing argument, the prosecutor argued that appellant is "not just a sexual predator. He's also a thief[,]" because he stole the innocence of his victims. This comment was misconduct, according to appellant, because it appealed to the passion or prejudice of the jury. In addition, the prosecutor argued appellant's "M.O. [was] little girls that don't know him and that he lures them with candy and molests them." Appellant contends the prosecutor was arguing "outside the evidence" because these comments suggest appellant had several other victims.

Prosecutorial misconduct is subject to harmless error analysis. (*People v. Prieto* (2003) 30 Cal.4th 226, 260.) As our Supreme Court has explained: "Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct

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infects the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 . . . .) By contrast, our state law requires reversal when a prosecutor uses 'deceptive or reprehensible methods to persuade either the court of the jury' (*People v. Price* (1991) 1 Cal.4th 324, 447 . . .) and "'it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct'" (*People v. Wallace* [(2008)] 44 Cal.4th [1032,] at p. 1071 . . . .) To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm. (*People v. Tafoya* [(2007)] 42 Cal.4th 147, 176.)" (*People v. Davis* (2009) 46 Cal.4th 539, 612; see also *People v. Valdez* (2004) 32 Cal.4th 73, 122.)

None of the statements rises to the level of prejudicial prosecutorial misconduct. First, while appellant's trial counsel objected to the prosecutor's comment about the bushes, counsel did not ask that the jury be admonished to disregard it. The claim is not preserved for review. (*People v. Davis*, *supra*, 46 Cal.4th at p. 612.) Had the claim been preserved, we would reject it. It would have been reasonable for the jury to infer that the height of the bushes could have changed between the incident with M.K. and the trial. The comment did not involve deceptive or reprehensible methods of persuasion and there is no reasonable probability that a result more favorable to appellant would have been reached had the comment not been made. Like the trial court, we conclude the prosecutor's statement regarding the height of the bushes was so "minor [ ] that it didn't have anything to do with the outcome of the case."

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We reach the same conclusion with regard to the prosecutor's closing argument. Appellant did not object to the comments at issue and appellate review of the claim is therefore forfeited. Moreover, there is no reasonable likelihood the comments caused unfair prejudice. It is not deceptive or reprehensible to remind a jury that sexual assault causes the victim to suffer emotional damage. Similarly, the argument that appellant chose victims who were strangers because they were less likely to identify him later was a fair inference from the evidence rather than an appeal to passion or prejudice. There was no prejudicial misconduct.

Evidence of Other Crimes. Appellant contends the trial court erred when it admitted evidence that appellant exposed himself to M.K. because the evidence consumed an undue amount of time and confused the jury. There was no error.

In sex crime prosecutions, evidence of uncharged sexual offenses is presumed admissible without regard to Evidence Code section 1101, if the evidence is not inadmissible under Evidence Code section 352. (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 405.) "Propensity evidence is made admissible in sex offense cases by Evidence Code section 1108, which provides in relevant part: 'In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] section 352.' In *People v. Falsetta* [(1999) 21 Cal.4th 903,] our Supreme Court upheld the constitutionality of section 1108 because, among other reasons, the trial court could exclude the evidence if the court believed its prejudicial nature outweighed its probative

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value, its production would consume an undue amount of time, or it would confuse the issues or mislead the jury." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40, fn. omitted.) The trial court had broad discretion to determine whether evidence of other sex offenses is admissible. Its determination will not be disturbed on appeal absent a showing that the trial court acted in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Here, the trial court correctly concluded that the exposure of appellant's penis to M.K. was admissible to show his propensity to sexually assault I.P. The two crimes occurred two weeks and one day apart. Both involved very young girls who were strangers to appellant. Each offense occurred when other adults were nearby, requiring appellant to conceal his actions from them. Appellant completed at least one act of oral copulation with I.P.; it is reasonable to infer that he intended to commit the same offense against M.K. This evidence was admissible to demonstrate appellant's "possible disposition to commit sex crimes." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 915.)

Appellant contends evidence of his offense against M.K. should have been excluded because the evidence was "confusing and inflammatory." We disagree. As noted above, appellant's offenses against the two victims shared several common characteristics, but they were not so similar that jurors would have difficulty distinguishing between them. The victims were of different ages and the crimes occurred in different locations. Nor was the evidence regarding M.K. "inflammatory" or unduly prejudicial. Appellant's offense against M.K. was less

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serious than his crime against I.P. because he was unable to force M.K. to orally copulate him. There is no reason to believe the evidence regarding M.K. had any unique tendency to evoke an emotional bias against appellant or an irrational response from jurors. (*People v. Jones* (2012) 54 Cal.4th 1, 62.)

I.P.'s School Records. I.P.'s behavior at school changed in the days before her 2011 disclosure to her parents. Appellant speculates that I.P.'s parents decided the behavioral changes were caused by her having been molested and then falsely accused appellant. In support of that theory, appellant's trial counsel subpoenaed I.P.'s school records. The trial court reviewed the records in camera, concluded they contained no discoverable information, and declined to disclose them to appellant's trial counsel.

The trial court did not abuse its discretion. There is no reasonable probability that I.P.'s school records contained discoverable information. I.P. first disclosed her assault, and identified appellant as her assailant, on the day the assault occurred, two years before these records were created.

Cumulative Error. Appellant contends the cumulative effect of these errors requires reversal. We disagree, because there was no error to cumulate. (*People v. Avila* (2009) 46 Cal.4th 680, 718; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

Sentence as Cruel and Unusual Punishment. The trial court sentenced appellant to a term in state prison of 15 years to life, as mandated by section 288.7. He contends this sentence violated the California and the federal Constitutions' prohibitions against cruel and unusual punishment. We are not persuaded.

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A sentence violates our state constitutional prohibition against cruel and unusual punishment if it is so disproportionate to the crime for which it is imposed that the sentence "shocks the conscience and offends fundamental notions of human dignity." (Cal. Const., art. 1, § 17.) The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." (U.S. Const., 8th Amend.) "The appropriate standard for determining whether a particular sentence for a term of years violates the Eighth Amendment is gross disproportionality. That is, '[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime. [Citations.]' (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc. opn. of Kennedy, J.), citing *Solem v. Helm* (1983) 463 U.S. 277, 288.) Successful grossly disproportionate challenges are '"exceedingly rare"' and appear only in an '"extreme"' case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73.)" (*People v. Em* (2009) 171 Cal.App.4th 964, 977.)

"'"'"A tripartite test has been established to determine whether a penalty offends the prohibition against cruel . . . [or] unusual punishment. First, courts examine the nature of the offense and the offender, "with particular regard to the degree of danger both present to society." Second, a comparison is made of the challenged penalty with those imposed in the same jurisdiction for more serious crimes. Third, the challenged penalty is compared with those imposed for the same offense in other jurisdictions. [Citations.] In undertaking this three-part analysis, we consider the "totality of the circumstances" surrounding the commission of the offense. [Citations.]'

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[Citation.]" [Citations.]' (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 569 [59 Cal.Rptr.3d 876].) A defendant has a 'considerable burden' to show a punishment is cruel and unusual (*People v. Wingo* (1975) 14 Cal.3d 169, 174), and '[o]nly in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive[ ] [citations]' (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494 [90 Cal.Rptr.2d 517].)" (*People v. Meneses* (2011) 193 Cal.App.4th 1087, 1092-1093.)

Appellant's sentence of 15 years to life does not violate either the California or the federal Constitution. We note that the crime at issue is a serious one. Appellant is a dangerous offender because, although he had only one prior conviction for a sex offense, both of his victims are very young girls who would likely be unable to identify him because he was a stranger. Appellant's sentence is proportional to those imposed under California law for other, similar offenses. (*People v. Meneses*, *supra*, 193 Cal.App.4th at p. 1093.) He fails to persuade us that his sentence is grossly disproportionate to either the seriousness of his offense or to the sentences that would be imposed in other jurisdictions. (*Ibid.*) As the court concluded in *Meneses,* "In sum, although the sentence in significant, so was the crime. It was not 'so disproportionate to the crime for which it [was] inflicted that it shocks the conscience and offends fundamental notions of human dignity' (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted) and was not cruel or unusual." (*Id.*, at p. 1094.)

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Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

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Frederick N. Wapner, Judge

Superior Court County of Los Angeles

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