NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEDRO RODRIGUEZ, Petitioner-Appellant, v. FISHER, Officer, Respondent-Appellee.	No. 22-55658 D.C. No. 3:21-cv-01442-BAS-MSB MEMORANDUM[*]

Appeal from the United States District Court
for the Southern District of California
Cynthia A. Bashant, District Judge, Presiding

Submitted February 15, 2024[**]
Pasadena, California

Before: BOGGS,[***] NGUYEN, and LEE, Circuit Judges.

Federal prisoner Pedro Rodriguez appeals the district court's granting of Respondent Fisher's motion to dismiss Rodriguez's federal habeas petition for

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

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

[***] The Honorable Danny J. Boggs, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

untimeliness. We have jurisdiction under 28 U.S.C §§ 1291 and 2253. We review de novo a district court's dismissal of a federal habeas petition as untimely. *Zepeda v. Walker*, 581 F.3d 1013, 1016 (9th Cir. 2009).

We affirm. Because the parties are familiar with the factual and procedural history of the case, we need not recount it here.

No one disputes that Rodriguez filed his federal habeas petition 531 days after the one-year AEDPA deadline. Instead, Rodriguez argues that he is entitled to statutory tolling of the time between the filing of his California Supreme Court habeas petition on July 5, 2019, and that court's eventual denial of the petition, after all intermediate proceedings, on July 14, 2021—a period of 740 days. If he is correct, then his federal habeas petition filed on July 28, 2021, would be timely.

Statutory Tolling. AEDPA's one-year statute of limitations is tolled if a properly filed application for habeas corpus is pending in state court. 28 U.S.C. § 2244(d)(2). "[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable [state] laws and rules governing filings." *Cross v. Sisto*, 676 F.3d 1172, 1176 (9th Cir. 2012) (citing *Artuz v. Bennett*, 531 U.S. 4, 8 (2000)). But an untimely state habeas petition is not properly filed, and thus cannot toll the AEDPA clock. *See, e.g.*, *Trigueros v. Adams*, 658 F.3d 983, 989 (9th Cir. 2011) ("[S]tatutory tolling under § 2244(d)(2) is unavailable where a state habeas petition is deemed untimely under California's timeliness standards.").

Here, by citing page 780 of *In re Robbins*, 18 Cal. 4th 770 (1998), the California Supreme Court clearly and unequivocally held that Rodriguez's state habeas petition was untimely. *Thorson v. Palmer*, 479 F.3d 643, 645 (9th Cir. 2007).[1] We are "bound by that decision." *Valdez v. Montgomery*, 918 F.3d 687, 692 (9th Cir. 2019). That is, in effect, the "end of the matter." *Robinson v. Lewis*, 795 F.3d 926, 929 (9th Cir. 2015).

Rodriguez cites *Walker v. Martin*, 562 U.S. 307, 312–21 (2011), for the proposition that an otherwise adequate state procedural rule could be inadequate as applied to a particular case if the petitioner can show that the state court imposed its rule in a "novel and unforeseeable" manner and without "fair or substantial support in prior state law." But the California Supreme Court's denial of Rodriguez's petition cannot be novel when "each year, the California Supreme Court summarily denies hundreds of habeas petitions by citing . . . *Robbins*." *Id.* at 318. Rodriguez may feel that the California Supreme Court ruled unfairly, but the court did not apply its timeliness bar "infrequently, unexpected, or freakishly." *Id.* at 320 (citation removed).[2]

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[1] The California Supreme Court decision applicable here is *In re Rodriguez*, No. S256832, 2021 Cal. LEXIS 5019, at *1 (July 14, 2021).

[2] Further, to the extent that Rodriguez generally argues that California's timeliness bar is an inadequate procedural bar, "the adequacy analysis used to decide procedural default issues is inapplicable to the issue of whether a state petition was 'properly filed' for purposes of section 2244(d)(2)." *White v. Martel*, 601 F.3d 882, 884 (9th Cir. 2010).

Rodriguez further argues that his state habeas petition was in fact timely under California's own timeliness standards, and thus was not subject to the procedural bars that the court cited. But we only examine the delay in filing when no California court "[gives] a clear indication whether it deemed [the] requests for appellate review to be timely." *Velasquez v. Kirkland*, 639 F.3d 964, 967 (9th Cir. 2011) (cleaned up). Here, the California Supreme Court gave a clear indication that it deemed Rodriguez's request for review untimely.

Finally, Rodriguez makes two arguments specific to his ineffective-assistance-of-appellate-counsel claim. First, he argues that none of the procedural bars asserted by the California Supreme Court actually applied to his IAAC claim. But again, when that court cited page 780 of *In re Robbins*, it clearly and unequivocally held that his entire petition, including his IAAC claim, was untimely. *See Thorson*, 479 F.3d at 645.

Second, Rodriguez argues that the district court erred by failing to consider his IAAC claim separately and cites *Mardesich v. Cate*, 668 F.3d 1164, 1171 (9th Cir. 2012), in support. But that case does not support the claim that the district court was required to analyze the timeliness of all of his claims separately and then "consider the ineffectiveness of appellate counsel claim as a standalone, exhausted claim." The California Supreme Court clearly indicated that the basis for rejecting

all of Rodriguez's claims was timeliness, and we are bound by that decision. *Valdez*, 918 F.3d at 692.

Equitable Tolling. To the extent that Rodriguez mentions equitable tolling in his briefing, he does so only as fodder for his statutory-tolling argument**,** or merely in reference to the district court's decision. Accordingly, Rodriguez has forfeited any arguments for equitable tolling. *See Hoyos v. Davis*, 51 F.4th 297, 304 n.5 (9th Cir. 2022). Moreover, Rodriguez does not cite any extraordinary circumstances that would warrant equitable tolling and a "pro se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling." *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006).

AFFIRMED.

United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

Pedro Rodriguez

Plaintiff,

V.

Officer Fisher, Warden

Defendant.

Civil Action No. 21-cv-01442-BAS-MSB

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

The Court:
(1) GRANTS Respondent's Motion to Dismiss based on timeliness. (ECF No. 27.)
(2) DENIES Petitioner's Discovery Motion. (ECF No. 43.)
(3) DENIES Petitioner's Motion for Appointment of Counsel. (ECF No. 48.)
(4) DENIES IN PART and GRANTS IN PART Petitioner's requests for judicial notice. (ECF Nos. 45, 50.)
(5) OVERRULES Petitioner's Objections. (ECF Nos. 45–46.)
Accordingly, the Court DISMISSES the Petition and GRANTS a certificate of appealability as to the availability of statutory tolling, equitable tolling, and discovery and/or expansion of the record. The case is hereby closed.

Date: 6/22/22

CLERK OF COURT
JOHN MORRILL, Clerk of Court
By: s/ J. Olsen
J. Olsen, Deputy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PEDRO RODRIGUEZ,

Petitioner,

v.

OFFICER FISHER, Warden,

Respondent.

Case No. 21-cv-1442-BAS-MSB

ORDER:

(1) GRANTING RESPONDENT'S MOTION TO DISMISS [ECF No. 27];

(2) DENYING PETITIONER'S MOTIONS FOR DISCOVERY [ECF No. 43] AND FOR APPOINTMENT OF COUNSEL [ECF No. 48];

(3) OVERRULING PETITIONER'S OBJECTIONS [ECF Nos. 45-46];

(4) GRANTING IN PART AND DENYING IN PART PETITIONER'S REQUESTS FOR JUDICIAL NOTICE [ECF Nos. 46, 49]; AND

(5) DENYING MOTION REQUESTING SAN DIEGO SHERIFF'S DEPARTMENT TO RECOGNIZE PETITIONER AS PRO SE [ECF No. 50]

State prisoner Pedro Rodriguez ("Petitioner") filed a Writ of Habeas Corpus ("Petition") pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254 *et seq.*, on July 28, 2021, approximately 531 days after his

deadline to do so under 28 U.S.C. § 2244(d)(1). (Pet., ECF No. 1.) The Petition stems from Petitioner's 2015 conviction in the California Superior Court for the County of San Diego ("California Superior Court") for thirteen offenses, for which he sentenced to a collective period of imprisonment of 13 years and four months. (*Id.*) He is proceeding *pro se* and *in forma pauperis*. (*See* ECF No. 7.)

Now before the Court is Respondent's motion to dismiss the Petition as untimely. (Mot. to Dismiss the Pet. ("MTD"), ECF No. 27; Mem. in supp. of MTD ("Mem."), ECF No. 27-1.) In support of its MTD, Respondent lodged the records of Petitioner's underlying criminal case and his state habeas proceedings. (Record, ECF No. 28.)[1] Petitioner traversed on February 17, 2022. (Traverse, ECF No. 38.) After briefing on the MTD closed, Petitioner filed a motion for leave to amend his Traverse (Mot. for Leave to Amend, ECF No. 51) and then subsequently filed an Amended Traverse, along with exhibits from his state court proceedings (Amended Traverse, ECF No. 53.)[2]

While the MTD was pending, Petitioner filed numerous other motions and objections. In particular, Petitioner filed motions seeking discovery (Mot. for Discovery ("Discovery Mot."), ECF No. 43) and for appointment of counsel, which is his second such request. (Mot. for Appointment of Counsel ("Appointment Mot."), ECF No. 48). Petitioner also filed several other miscellaneous documents, including (1) an Objection to Magistrate Judge Michael S. Berg's March 17, 2022 Order (*see* First Objection, ECF No. 45); (2) an Objection to Respondent's lodgment at ECF No. 28-18 (*see* Second Objection, ECF No. 46); (3) a Request for Judicial Notice (Request for Judicial Not. ("RJN"), ECF No. 49); and (4) Request that the San Diego Sheriff recognize Petitioner as a *pro se* litigant (ECF No. 50).

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[1] The state court record is comprised of 20 lodgments, all of which are annexed to ECF No. 28 as separate exhibits.

[2] Despite Petitioner's untimeliness, the Court considers the Amended Traverse in deciding the MTD. (*See* ECF Nos. 51, 53.)

For the reasons set forth herein, the Court **GRANTS** Respondent's MTD and **DISMISSES** the Petition. The Court further **DENIES** Petitioner's requests for discovery, for appointment of counsel, and to compel the San Diego Sheriff's Department to recognize him as a *pro se* litigant. The Court also **GRANTS IN PART** and **DENIES IN PART** Petitioner's requests for judicial notice. Finally, the Court **OVERRULES** Petitioner's Objections.

BACKGROUND

I. STATE COURT PROCEEDINGS

In approximately 2015, Petitioner was convicted in California Supreme Court of eleven offenses involving unlawful sexual conduct with a minor, one count of burglary, and one count of attempting to dissuade a witness from reporting a crime. (ECF No. 28-4 at 2.) He appealed the judgment to the California Court of Appeal. (ECF Nos. 28-2, 28-3.)[3] The Court of Appeal issued a reasoned opinion affirming the California Superior Court's judgment on July 19, 2018. (ECF No. 28-4.) Thereafter, Petitioner sought review of the judgment in the California Supreme Court; his request was summarily denied on November 14, 2018, at which point the judgment of conviction became final ("Final Judgment"). (ECF Nos. 28-8, 28-9.)

On March 18, 2019, Petitioner constructively filed a habeas petition in the California Superior Court challenging his conviction and sentence, which was denied on April 18, 2019.[4] (ECF No. 28-10.) He thereafter constructively filed a habeas petition in the California Court of Appeal on April 29, 2019, which that Court denied in a reasoned

[3] Petitioner also filed a writ of mandate with the California Supreme Court, which was denied on April 11, 2018. (ECF Nos. 28-6, 28-7.)

[4] "Under the 'mailbox rule,' a *pro se* prisoner's filing of a state habeas petition is deemed filed at the moment the prisoner delivers it to prison authorities for forwarding to the clerk of the court." *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003). Thus, where, as here, a habeas proceeding is brought by a *pro se* state prisoner, courts look not to the date on which the petition was deemed filed on the record, but rather to the date on which the petition was delivered to prison authorities, *i.e.*, the date on which the document was signed by the petitioner. This date is referred to as the "constructive" filing date. *Parker v. Salazar*, No. CV 08-04333 RSWL (RZ), 2009 WL 2355707, at *1 n.1 (C.D. Cal. July 28, 2009) (holding that "absent evidence to the contrary," the constructive filing date is the date on which the petitioner signed the petition (citing, *inter alia*, *Stillman*, 319 F.3d at 1201)).

decision on May 10, 2019. (ECF Nos. 28-12 at 7, 28-13.) While that habeas petition was pending, on June 1, 2019, Petitioner constructively filed a second habeas petition in the California Court of Appeal in which he principally alleged he had been denied access to his legal files and to a law library since being transferred to San Diego Central Jail ("San Diego Jail") on approximately March 21, 2019. (ECF No. 28-15.) Both of those habeas petitions were denied. On July 15, 2019, Petitioner constructively filed a habeas petition challenging his conviction and sentence in the California Supreme Court. (ECF Nos. 28-16, 28-17.) The California Supreme Court denied that petition on July 14, 2021 ("Habeas Denial"), stating in full:

> The petition for writ of habeas corpus is denied. (*See In re Robbins* (1998) 18 Cal.4th 770, 780 [courts will not entertain habeas corpus claims that are untimely]; *In re Clark* (1993) 5 Cal.4th 750, 767–769 [courts will not entertain habeas corpus claims that are successive].) Individual claims are denied, as applicable. (*See In re Dixon* (1953) 41 Cal.2 756, 759 [courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal]; *In re Miller* (1941) 17 Cal.2d 734, 735 [courts will not entertain habeas corpus claims that are repetitive].)

(Habeas Denial, ECF No. 28-18.)[5]

II. FEDERAL HABEAS PROCEEDING

On July 28, 2021, Petitioner filed the instant Petition. (*See* Pet.) Respondent moved to dismiss the Petition as untimely on January 21, 2022, in response to which Petitioner filed a Traverse alleging he is entitled to both statutory and equitable tolling. (*See* Traverse.) On March 18, 2022, Magistrate Judge Michael S. Berg, to whom this case is assigned, issued an order following a March 17, 2022 teleconference attended by the parties and a representative of the San Diego Sheriff's Department (*see* ECF No. 41). (Briefing Order at 2, ECF No. 42.) In the Briefing Order, Magistrate Judge Berg

[5] Petitioner constructively filed a third state habeas petition in approximately April of 2019 in the California Supreme Court, which raised claims concerning the denial of his parole. (ECF No. 28-19.) The California Supreme Court denied that petition as moot on July 14, 2021. (ECF No. 28-20.)

effectively deemed briefing on Respondent's MTD complete and opined "there is no reason the Court cannot rule on the [MTD]" based on the record before it. (*Id.*)

Nevertheless, on May 12, 2022, Petitioner constructively filed a Motion for Leave to Amend, seeking to file an Amended Traverse that contains additional arguments in favor of statutory and equitable tolling. (Mot. for Leave.) Although Petitioner did not append an Amended Traverse to his Motion for Leave, he later constructively filed an Amended Traverse on May 21, 2022, along with exhibits from his state court proceedings. (Amended Traverse.)

Additionally, Petitioner seeks discovery and appointment of counsel. (*See* Discovery Mot. and Appointment Mot.) Furthermore, Petitioner constructively filed a document styled as an "Objection" to the Briefing Order on March 30, 2022 (referred to above as the "First Objection"). (ECF No. 45.) The First Objection does not actually challenge the Briefing Order, but rather indicates that Petitioner was not receiving "mail or legal mail" during his confinement in the San Diego Jail in approximately March of 2022 and that, despite Respondent's assurances during the March 17, 2022 teleconference, Petitioner had not received a copy of the lodgments at ECF No. 28 or a filed version of his own Traverse. The First Objection also requests the Court to take judicial notice of a February 4, 2022 *San Diego Union-Tribune* article. On April 2, 2022, Petitioner constructively filed another Objection (referred to above as "Second Objection"), in which he argues the copy of the Habeas Denial filed at ECF No. 28-18 is "a misrepresentation of what the [California] Supreme Court decision says." (ECF No. 46.)

Petitioner also constructively filed an Request for Judicial Notice (referred to above as "RJN") on April 16, 2022, in which he requests that the Court judicially notice his unsuccessful "attempts to contact a [sic] attorney through his family[.]" Finally, on April 29, 2022, Petitioner constructively filed a document entitled "Petition for Order Directing San Diego Sheriffs to Recognize the Petitioner as a Pro Se Litigant" asking for "access to law library and legal work product" as he "is not receiving mail or legal mail"

and "relies on correspondence for copy service, case law, and redress in the courts." (ECF No. 50 at 1.)[6]

III. PETITIONER'S OTHER FEDERAL CASES

Despite Petitioner's repeated claims about his lack of access to legal materials and to a law library set forth in his pleadings and reiterated in his filings in this case, the Court takes judicial notice of the other federal and state court actions Petitioner has commenced and pursued since the Final Judgment in November of 2018.[7] For instance, Petitioner commenced two other habeas proceedings in this district in August of 2021. *See*, *e.g.*, *Pedro Rodriguez v. Kathleen Allison*, 21-cv-1395-JLS-AHG (S.D. Cal. Aug. 3, 2021), ECF No. 1 (federal habeas petition with over 1000 pages of attachments); *Pedro Rodriguez v. Kathleen Allison*, 21-cv-1443-MMA-WVG (S.D. Cal. Aug. 9, 2021), ECF No. 1 (federal habeas petition with over 100 pages of attachments). He also commenced a federal civil rights lawsuit under 42 U.S.C. § 1983 ("Section 1983") in the Eastern District of California in July of 2020. *Pedro Rodriguez v. Gavin Newsom et al.* 1:20-cv-1044-DAD-HBK (E.D. Cal. July 29, 2020), ECF No. 1 (Section 1983 complaint with 30 pages of attachments including sentencing brief, sentencing materials, and copy of a July 17, 2020, state appellate court decision). Petitioner also appears to have appealed decisions in two other Section 1983 suits originating in the Eastern District of California in July and November of 2020, respectively. *Pedro Rodriguez v. Scott Kernan, et al.*, 20-cv-16424 (9th Cir. July 24, 2020), Dkt. 1; *Pedro Rodriguez v. H. Longia, et al*., 20-17262 (9th Cir. Nov. 18, 2020), Dkt. 1. Finally, a review of Petitioner's federal filings further reveals he filed separate state habeas petitions in the California Court of Appeal on April

[6] Notably, in each of these filings Petitioner reiterates his lack of access to legal mail, his legal files, and a law library. (*See* ECF Nos. 46, 49, 50.)

[7] Courts may "take judicial notice of court filings and other matters of public record." *Reyn's Pasta Bell LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *United States v. Raygoza-Garcia*, 902 F.3d 994, 1001 (9th Cir. 2018) ("A court may take judicial notice of undisputed matters of public record, which may include court records available through [the Public Access to Court Electronic Records system]."); *see also Langer v. U.S. Green Techs., Inc.*, No. 20-cv-01717-BEN-BGS, 2020 WL 7353447, at *4 (S.D. Cal. Dec. 14, 2020) (judicially noticing PACER showed plaintiff commenced numerous, additional lawsuits).

7, 2021 and in the California Supreme Court on May 27, 2021. *See Pedro Rodriguez v. Kathleen Allison*, 21-cv-1395-JLS-AHG (S.D. Cal.), ECF Nos. 27, 33.

ANALYSIS

I. Motion to Dismiss the Petition

A. Statute of Limitations

AEDPA provides a one-year statute of limitations to file a petition for writ of habeas corpus in federal district court. *See* 28 U.S.C. § 2244(d)(1). Under the statute, the one-year period begins to run from the date the judgment becomes final at the conclusion of direct review "or the expiration of the time for seeking such review." *Id.* §§ 2244(d)(1)(A). A direct appeal becomes final upon the later of: (1) the expiration of the time for seeking review in the relevant state supreme court; or (2) if the Petitioner seeks review in the United States Supreme Court, the time at which the conviction is affirmed or the petition of certiorari is denied. *See Gonzalez v. Thaler*, 556 U.S. 134, 150 (2012); *Hemmerle v. Schriro*, 495 F.3d 1069, 1073–74 (9th Cir. 2007), *cert. denied*, 555 U.S. 829 (2008). Regardless of whether a petitioner actually files a petition for certiorari in the United States Supreme Court, the ninety-day period within which a petitioner can do so is included within AEDPA's period of direct review. *See Bowen v. Roe*, 188 F.3d 1157, 1158–59 (9th Cir. 1999).

Here, Petitioner's judgment became final on November 14, 2018. (*See* Final Judgment.) Petitioner thereafter had until February 13, 2019—or 90 days after the Final Judgment—to petition the United States Supreme Court for a writ of certiorari. *See* 28 U.S.C. § 2101 ("Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."). He did not do so. Thus, the one-year statute of limitations period in this case began to run on February 13, 2019, and to have timely commenced a federal habeas action Petitioner was required to file the instant Petition by no later than February 13, 2020. Yet Petitioner constructively filed his Petition on July 28, 2021, rendering it 531

days overdue. Therefore, unless Petitioner can establish he is entitled to either statutory and/or equitable tolling of an equivalent duration, the Petition must be dismissed. *See Zepeda v. Walker*, 581 F.3d 1013, 1019 (9th Cir. 2009) (affirming district court's dismissal of untimely federal habeas petition).

B. Statutory Tolling

The heart of the parties' dispute as it relates to statutory tolling is whether Petitioner is entitled to tolling for the period between July 15, 2019, when Petitioner constructively filed a habeas petition with the California Supreme Court, and July 14, 2021, when the California Supreme Court issued its Habeas Denial. If so, the Petition undoubtedly is timely, for the AEDPA statute of limitations would have run for less than its stated one-year period.

Under AEDPA, the statute of limitations period is tolled during the pendency of a "properly filed" state post-conviction proceeding or other collateral review. 28 U.S.C. § 2244(d)(2) ("The time during which a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." (emphasis added)); *see Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). "A petition for a writ of habeas corpus is 'properly filed' when its delivery to, and acceptance by, 'the appropriate court officer for placement into the official court record' are in 'compliance with the applicable laws and rules governing filings.'" *Moreno v. Harrison*, No. C-04-2933-MMC, 2006 WL 2411421, at *2 (N.D. Cal. Aug. 18, 2006) (quoting *Artuz v. Bennett*, 531 U.S. 4, 8 (2000)). State law "time limits, no matter their form, are filing conditions." *Pace*, 544 U.S. at 417. "When a postconviction petition is untimely under state law, that is the end of the matter for purposes of [28 U.S.C.] § 2244(d)(2)." *Id.*

Under California law, a state petition for habeas corpus must be filed "without substantial delay." *In re Robbins*, 18 Cal. 4th at 786. "Substantial delay" is "measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *Id.* The

United States Supreme Court has held that the denial of a state habeas application for untimeliness under *In re Robbins* is sufficient grounds to bar federal review. *Walker v. Martin*, 562 U.S. 307, 312–21 (2011). Moreover, "if a state court denies a petition as untimely, none of the time . . . during the court's consideration of that petition is statutorily tolled." *Bonner v. Carey*, 425 F.3d 1145, 1149 (9th Cir. 2005), *amended*, 439 F.3d 993 (9th Cir. 2006).

At the outset, the parties appear to be in agreement that Petitioner is entitled to statutory tolling for the time during which his state habeas petitions were pending review before the California Superior Court and the California Court of Appeal, *i.e.*, between March 18, 2019 and May 10, 2019. That period covers 53 days.[8] But this tolling, alone, is insufficient to render the Petition timely. Indeed, it hardly makes a dent, for Petitioner must still establish an additional 478 days are subject to tolling. Petitioner claims he is able to make up this difference. Specifically, he argues that he is entitled to statutory tolling for the nearly two-year period his habeas petition was pending before the California Supreme Court. (Traverse at 5–6.) Respondent disagrees. (Mem.) In Respondent's view, Petitioner is not entitled to statutory tolling for that period because his state habeas petition was not "properly filed." (*Id.* at 8–9.)

Here, contrary to Petitioner's assertion otherwise, it is clear the Habeas Denial is predicated upon California's timeliness bar in *In re Robbins*. (Habeas Denial ("The petition for writ of habeas corpus is denied. (*See In re Robbins* (1998) 18 Cal.4th 770, 780 [courts will not entertain habeas corpus claims that are untimely]").) *Peralta v. PBSP-Warden*, No. EDCV 14-1592 AB (FFM), 2015 WL 4885305, at *2 (C.D. Cal. Apr. 10, 2015) (holding the California Supreme Court's citation to *In re Robbins* is sufficient to indicate its decision to deny habeas was predicated upon the timeliness bar).

[8] By Respondent's calculations, Petitioner is entitled to just 35 days of statutory tolling. (Mem. at 8.) However, Respondent incorrectly uses the dates on which the state habeas petitions were deemed filed, as opposed to their constructive filing dates, to calculate the tolling period. *See Stillman*, 319 F.3d at 1201.

Generally speaking, the California Supreme Court's explicit application of California's timeliness bar precludes a federal court from finding the petitioner is entitled to statutory tolling during the pertinent period. *See White v. Martel*, 601 F.3d 882, 884 (9th Cir. 2010) (per curiam) ("When a California state court determines that a state prisoner's state habeas petition is untimely under state law, there is no 'properly filed' state petition, and [the state petitioner] is not entitled to statutory tolling under the AEDPA."). Federal courts typically should not undertake their own analysis to determine whether, in fact, there was a "substantial delay," or whether that delay was excusable, in replacement of the California Supreme Court's express determination on those issues in the decision denying habeas. *See Valdez v. Montgomery*, 918 F.3d 687, 692 (9th Cir. 2019) ("If a California court has held that a state habeas petition was timely or untimely, we are bound by that decision." (citing *Robinson v. Lewis*, 795 F.3d 926, 929 (9th Cir. 2015))).

However, as Petitioner correctly argues, the United States Supreme Court has also allowed for the possibility an otherwise adequate state procedural rule could be found inadequate in its application to a particular case if the petitioner shows the state court's imposition of the procedural rule was "novel and unforeseeable" and without "fair or substantial support in prior state law." *See Martin*, 562 U.S. at 320; *see also Lee v. Kemna*, 534 U.S. 362, 376 (2002) ("There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question."). Petitioner argues the California Supreme Court applied the timeliness bar in a "novel [and] unforeseeable manner" in its Habeas Denial. (Discovery Mot. at 1 (citing *Walker v. Martin*, 562 U.S. 307 (2011); *see also* Traverse at 10 (arguing Petitioner "has been timely, diligent and within statutory limitations in regard to [sic] filings" and "[t]here was no way to predict or indication [sic]

that the CA Supreme Court would declare the Petitioner untimely," which "did not occur until July 2021").)[9]

The Court is unpersuaded the California Supreme Court's imposition of the *In re Robbins* timeliness bar was either novel or unforeseeable. With the exception of Petitioner's ineffective assistance of appellate counsel claim, the claims raised in the state habeas petition were claims for which the factual basis was, or should have been, known well before Petitioner raised those claims in his 2019 state habeas petitions. For instance, with respect to Petitioner's "Ground One" claim of actual innocence, Petitioner himself indicates the factual basis for the claim was discovered in March 2016. (*See* Pet. at 17.) Meanwhile, Petitioner indicates "Ground Two" is premised on the "[s]ame operative facts as ground 1." (*Id*. at 23.) "Grounds Four, Five, Six and Nine" concern allegations of ineffective assistance of trial counsel, judicial bias, conviction under a vague and overbroad statute, and denial of right to self-representation, all of which appear based on facts Petitioner knew or should have known at the time of trial. (*See id.* at 26–31.) "Grounds Seven, Eight and Ten," which pertain to allegations of prosecutorial misconduct, prosecutorial deception, and denial of orderly legal procedure also appear to be based on the facts and prosecutorial acts discussed in Ground One, which again, Petitioner acknowledges he knew in March 2016. (*See id*. at 30–31.) Put simply, Petitioner knew, or should have known, practically all the grounds upon which his state habeas was premised approximately three years before pursuing any collateral attack upon his judgment. Thus, it cannot be said the California Supreme Court's invocation of

[9] In Petitioner's First Objection, he asserts: "The Petitioner is unable to rebut the state's arguments on novel application of the timeliness rule." (First Objection at 4 (citing *Bounds v. Smith*, 430 U.S. 817, 825-26 (1977)).) *Bounds* is a United States Supreme Court case holding access to courts requires providing prisoners with access to legal research, libraries, and other legal assistance to allow for challenges against their convictions and sentences and conditions of confinement. *See id.*, 430 U.S. at 825–28, *abrogated on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996). However, Respondent has not advanced any argument on the "novel application" matter. (*See* Mem.) Only Petitioner has offered argument concerning "novel" application of the timeliness rule. (*See e.g.*, Discovery Mot. at 1.) Thus, it is not apparent to this Court what argument he is unable to rebut due to any asserted lack of access to legal research or other assistance.

the *In re Robbins* time bar as to the state habeas petition in its entirety was either novel or unforeseeable.

Indeed, the contents of Petitioner's own state habeas petition reveal that even *he foresaw* that his habeas petition to California Supreme Court might encounter a timeliness issue. For example, in his July 2019 submission, petitioner contended that his "habeas should be considered timely," referenced the difficulties he has experienced accessing the law library and legal materials, and cited substantive case law concerning prisoners' due process rights to access legal research, libraries, and other legal assistance to allow for challenges against their convictions, sentences, and conditions of confinement. (ECF No. 28-16 at 24 (citing*, inter alia*, *Bounds*, 430 U.S. at 817).) Petitioner specifically argued that his "filing should be considered timely . . . [because] the [P]etitioner has been frustrated fromlaw [sic] library access both at Valley State Prison January 2019 forward and San Diego Sheriff's 3/20/2019 Forwa [sic] to wit the [P]etitioner filed a writ of habeas June 6, 2019 demanding access to his legal materials." (*Id.*) In view of Petitioner's clear contemplation his state habeas petition could potentially run afoul of California's timeliness requirements, the Court is not persuaded the California Supreme Court's imposition of *In re Robbins* was at all "unforeseeable" in this case. Nor does the Court find its imposition "novel" given the bulk of Petitioner's claims (again, save the claim of ineffective assistance of appellate counsel) arose from facts known at or around the time of trial.

Because Petitioner fails to establish the California Supreme Court imposed the timeliness bar in a novel or unforeseeable manner, this Court is bound to the California Supreme Court's explicit decision in the Habeas Denial that Petitioner's state habeas petition was untimely. *See also Valdez*, 918 F.3d at 692 (citing *Robinson v. Lewis*, 795 F.3d 926, 929 (9th Cir. 2015)). Thus, the Court concludes that Petitioner's state habeas petition with the California Supreme Court was not "properly filed" within the meaning of AEDPA and, therefore, he is not entitled to statutory tolling for the nearly two-year period that application was pending.

C. Equitable Tolling

A litigant will be entitled to equitable tolling only if he can show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (citing *Pace*, 544 U.S. at 418). This is a high bar, and equitable tolling will be "unavailable in most cases." *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) ("[T]he threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule."). "[A] *pro se* petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling." *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). "Ordinary" restrictions on a petitioner's access to legal materials and resources fall short of "outright den[ials]," and, thus, do not amount to "extraordinary circumstances" capable of invoking equitable tolling. *Ramirez v. Yates*, 571 F.3d 993, 998 (9th Cir. 2009) ("Ordinary prison limitations on [a petitioner's] access to the law library and copier (quite unlike the denial altogether of access to his personal legal papers) were neither 'extraordinary' nor made it 'impossible' for him to file his petition in a timely manner. Given even the most common day-to-day security restrictions in prison, concluding otherwise would permit the exception to swallow the rule"). Furthermore, even where extraordinary circumstances are present, a causal connection must be shown between the extraordinary circumstances alleged and the delay. *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003).

Petitioner avers he is entitled to equitable tolling for virtually the entire period between the Final Judgment and his filing of the instant Petition.[10] Specifically, he claims that he has had "difficulty" accessing his legal materials and a law library, which he attributes to a variety of reasons. First, he alleges that he was denied access to the law library in the facility at which he was held from late 2018 until early 2019. In support of that assertion, Petitioner provides a copy of a prison complaint he filed when he

[10] The Court notes that Petitioner need not establish he was entitled to equitable tolling prior to February 13, 2019. Until that time, the AEDPA statute of limitations had not even begun running.

attempted to use, but was denied access to, the library on December 21, 2018. (*Id.* at 242.) Petitioner's institutional appeal was denied, noting Petitioner had attempted to access the library outside of the scheduled time provided to him and Petitioner had been provided with the minimum required library time of four hours per week. Petitioner also filed an additional complaint after being denied access to the law library during the week of January 18, 2019. (*Id.*)

These allegations are a far cry from showing Petitioner was completely deprived of access to legal materials and a law library, which is needed to establish circumstances sufficiently extraordinary to invoke equitable tolling. What Petitioner complains of are ordinary (and reasonable) limitations placed upon his library access during this time period, *i.e.*, that he was denied access to the library on specific days, outside of scheduled hours, and beyond the total number of total weekly hours typically allotted to prisoners. But that sort of deprivation is insufficient as a matter of law to invoke equitable tolling. *See Ramirez*, 571 F.3d at 998 ("Ordinary prison limitations on [a petitioner's] access to the law library . . . [are] neither 'extraordinary' nor made it 'impossible' for him to file his petition in a timely manner."); *see also Afrah v. Sidhu*, No. 14-CV-02303-BAS(NLS), 2015 WL 8759131, at *3 (S.D. Cal. Dec. 14, 2015) ("A *complete* lack of access to a legal file may constitute an 'extraordinary circumstance'") (emphasis added).

The record of Petitioner's state habeas proceedings only further undermine his claim the restrictions upon library access to which he was subjected during late 2018 and early 2019 were extraordinary. Indeed, immediately following the timeframe about which Petitioner complains, he filed a voluminous and well-researched habeas petition in the California Superior Court in March of 2019 and two petitions in the California Court of Appeal in April and June of 2019. *See Ramirez*, 571 F.3d at 998 (permitting district courts, when faced with claims that a petitioner was deprived of access to legal materials and a library, to infer from a petitioner's legal filings in federal and state court during the relevant period that the alleged deprivation neither was "extraordinary" nor the actual cause of the delay); *Afrah*, 2015 WL 875913, at *3 (opining that a petitioner's filing of a

well-reasoned and timely habeas petition in state court militated against finding limitations on a petitioner's library access during that time amounts to "extraordinary circumstances" or caused the federal habeas petition to be untimely). Petitioner offers no explanation why his claimed lack of access to legal materials and a law library caused only a delay in the instant federal habeas Petitioner, but not his state court equivalents. *See Spitsyn*, 345 F.3d at 799 (holding a petitioner must show the extraordinary circumstances actually caused the delay for which equitable tolling his sought to cover).

Second, Petitioner alleges that he was deprived of necessary legal materials during his time at the California Health Care Facility in Stockton ("CHCF"), where he was involuntarily admitted in approximately late February of 2019, and his time at the San Diego Jail, where he was held between March and June of 2019.[11] Petitioner supports this contention by annexing to his Petition newspaper clippings and mail, reflecting he was in CHCF in late February of 2019—February 22, 2019 at the latest. (Pet. at 247–48.) Other documents indicate Petitioner was at some point thereafter transferred to the San Diego Jail in either late February or March of 2019. (*Id.* at 252 (a report filed by the San Diego Sheriff's Department resulting from a grievance Petitioner submitted on March 27, 2019, which was identical to another grievance Petitioner filed the prior day and which indicate Petitioner "came from prison on 3/21/19").) These documents reflect that Petitioner complained in a grievance report to San Diego Jail administrators about "not [being] allowed access to his legal mail." (*Id.*) The grievance report appears to confirm the lack of access to legal mail, noting that Petitioner "ha[d] 11 boxes of legal paper, which are currently being stored in the law library," and that "11 boxes of mail in an inmate's cell would in fact constitute a fire hazard, which is why [Petitioner] has not been given his mail in his cell. [Petitioner] is pro per, and therefore is not scheduled for law library were [sic] his legal mail has been stored." (*Id.*)

[11] This identical contention appears in Petitioner's state habeas petition filed with the California Supreme Court in July of 2019. (*See* ECF No. 28-16.) That Court clearly did not find it constituted sufficiently "good cause" to withhold application of the *In re Robbins* timeliness bar. (*See* Habeas Denial.)

In essence, it appears that Petitioner was transferred to CHCF either around the time his judgment became final on February 13, 2019, or shortly thereafter, and then transferred several weeks later to the San Diego Jail, where he remained until June of 2019 at the latest. (*See* ECF Nos. 27-11 at 4 (at Valley State Prison when California Superior Court issued denial of State Petition on April 18, 2019); 28-12 at 7 (at San Diego Jail on April 29, 2019 when State Petition constructively filed with California Court of Appeal); 28-14 (at San Diego Jail on June 1, 2019 when Second State Petition constructively filed with California Court of Appeal); 28-16 (at Valley State Prison on June 5, 2019 when State Petition constructively filed with California Supreme Court).)

Again, Petitioner's claim that, during his time at CHCF and the San Diego Jail, he was denied adequate access to his legal materials and a law library is belied by the record. Petitioner filed a substantive state habeas petition in California Superior Court in March of 2019, just after his admission to CHCF. He filed yet another state habeas petition with the California Court of Appeal in April of 2019, while he was held in San Diego Jail. *See Ramirez*, 571 F.3d at 998. In any event, as explained *supra* Analysis Sec. I.B, Petitioner already is entitled to statutory tolling for the 53-day period from March 18, 2019 through May 10, 2019, which significantly overlaps with the period during which he was held at the San Diego Jail. Thus, even assuming *arguendo* Petitioner has made the requisite showing he is entitled to equitable tolling during the period he was held in CHCF and San Diego Jail (he has not), which this Court charitably calculates to be between mid-February until the beginning of June, it would not render the Petition timely. Petitioner still would need to identify over 400 additional days during which he was subjected to extraordinary circumstances that caused his Petition to be delayed.

Third, Petitioner asserts that he was—and continues to be—denied adequate access to his legal materials and a law library beginning in March of 2020 because of COVID-19 lockdowns and quarantines. (Pet. at 32; Traverse at 8–10 ("Covid-19 made it impossible to file the petition on time and should qualify as an extraordinary circumstance the Petitioner is still suffering.").) The Petition, the Traverse, and the

Amended Traverse are devoid of any factual content that would enable this Court to determine whether the restrictions placed on Petitioner's access to legal materials and research during the COVID-19 pandemic amount to extraordinary circumstances. However, Petitioner's filings in this action and in other federal actions he has litigated during the complained-of period lead this Court to draw the inference that, whatever those restrictions might have been, they were neither extraordinary nor the cause of the Petition's delinquency. Indeed, despite Petitioner's allegations of limited access to legal resources in July of 2021, Petitioner was able to file the instant, well-researched and voluminous Petition—including 250 pages of attachments consisting of records from his state court proceedings—just two weeks after the Habeas Denial on July 14, 2021. Petitioner also commenced and pursued two other federal habeas petitions, a Section 1983 action, and two appeals to the Ninth Circuit during the COVID-19 pandemic. *See supra* Background Sec. III. Because Petitioner does not explain why COVID-19 restrictions purportedly placed upon his access to legal materials affected his ability to timely file his federal Petition only, the Court finds he is not entitled to equitable tolling for the period between March of 2020 and July of 2021. *See Ramirez*, 571 F.3d at 998.

Accordingly, the Court is not persuaded equitable tolling is available in sufficient measure such that it could render the federal Petition timely. Thus, the Court **GRANTS** Respondent's motion to dismiss for untimeliness and **DISMISSES** the Petition. (ECF No. 27.)

II. DISCOVERY MOTION

Petitioner requests discovery and expansion of the record pursuant to Rules 6 and 7 of the Rules Governing Section 2254 Cases in the United States District Courts, effective February 1, 1997, and amended on February 1, 2010 ("Habeas Corpus Rules"). (Discovery Mot.) Specifically, he requests

- "any and all grievances, complaints or documents, '602s' and informal requests to Valley State Prison submitted by the Petitioner May 2018 forward";

- "all sentencing memorandum in case 333477 and 340334";
- his "medical history c-file including requests and grievances May 2018 forward";
- "all modified [unintelligible] daily program status report plan of operation staff & inmate notification from January 2019 to [September 30, 2021]";
- his "housing history May 2018 forward";
- "any and all documents created by CDCR staff or official in response to 602's and grievances submitted by Petitioner"; and
- "all chronos generated by Petitioners mental health provider."

(*Id.* at 4.) He also requests interrogatories and production of documents from Valley State Prison, including materials concerning the duties of the librarian and any operating upgrades to the "Lexis-Nexus computers," as well as whether there is any case law concerning "state habeas corpus filed within the 'statute of limitations' but considered untimely by only the CA Supreme Court." (*Id.*) Petitioner avers that these materials are relevant to issues concerning his entitlement to tolling. (*Id.* at 1–4, 6–7.)

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Habeas Corpus Rule 6(a) provides district courts with discretion to authorize discovery in 28 U.S.C. § 2254 proceedings upon a finding of "good cause." *See* Rule 6(a), 28 U.S.C.A. foll. § 2254. Even so, the Ninth Circuit has cautioned that district courts "should not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation." *Calderon v. U.S. District Court for the N. Dist. of Cal.*, 98 F.3d 1102, 1106 (9th Cir. 1996); *Earp v. Davis*, 881 F.3d 1135, 1143 (9th Cir. 2018) ("Just as bald assertions and conclusory allegations do not afford a sufficient ground for an evidentiary hearing, neither do they provide a basis for imposing upon the state the

burden of responding in discovery to every habeas petitioner who wishes to seek such discovery." (quoting *Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987))).

Even where a petitioner satisfies the "good cause" standard and shows discovery is warranted, the material and information sought must be in accordance with the Rules of Federal Civil Procedure that govern the scope of discovery. That is, the discovery sought must be "relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1); *see Refco Grp. Ltd., LLC. v. Cantor Fitzgerald, L.P.*, 13 Civ. 1654 (RA) (HBP), 2014 WL 5420225, at *4 (S.D.N.Y. Oct. 24, 2014) ("The burden of demonstrating relevance is on the party seeking discovery.").

As an initial matter, the Court notes that at least some of Petitioner's discovery requests bear relevance to his claim of equitable tolling. *Gilani v. Hewlett Packard Co.*, 15 Civ. 5609 (NSR), 2017 WL 4236564, at *1 (S.D.N.Y. Sept. 22, 2017) ("'Relevance' has been broadly interpreted to include 'any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case."). That is, Petitioner's request for discovery of documents pertaining to his medical and housing issues clearly relates to his claim that he endured "extraordinary circumstances" while imprisoned, to which his delay in filing his Petition purportedly is attributable.

But it is not the case that discovery should issue in a 28 U.S.C. § 2254 proceeding simply because a petitioner seeks discovery that fits within the ambit of Rule 26(b). As explained above, a petitioner must establish "good cause" to warrant the endeavor into discovery in the first instance. From the voluminous record reflecting Petitioner's litigiousness in state and federal court during the period for which he seeks equitable tolling, the Court infers easily that Petitioner's housing and medical circumstances—whatever they may have been—did not not prevent him from timely filing the instant

Petition, just as they did not inhibit his filing (and continuing to file) numerous pleadings, motions, and other submissions in state court, this proceeding, and other federal actions he commenced between March of 2020 and July of 2021. *See supra* Background Sec. III and Analysis Sec. I.C.

Accordingly, the Court finds Petitioner fails to establish requisite good cause to warrant discovery and, thus, **DENIES** Petitioner's Discovery Motion.

III. MOTION FOR APPOINTMENT OF COUNSEL

District courts are provided with statutory authority to appoint counsel in a federal habeas case when a petitioner is financially eligible and "the court determines that the interests of justice so require." 18 U.S.C. § 3006A(a)(2)(b); *see also Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1086) ("Indigent state prisoners applying for habeas corpus relief are not entitled to appointed counsel unless the circumstances of a particular case indicate that appointed counsel is necessary to prevent due process violations.") (citations omitted).

On January 12, 2022, Petitioner constructively filed a motion requesting appointment of counsel in the instant habeas matter. (*See* ECF No. 29.) On February 7, 2022, Magistrate Judge Berg issued an order denying the request for counsel without prejudice, concluding Petitioner failed to establish the "exceptional circumstances" required for appointment of counsel in a civil case. (Order Denying Appointment of Counsel at 2 (quoting *Agyeman v. Corr. Cor. Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004)), ECF No. 32.) Magistrate Judge Berg reasoned that "[d]espite his claimed lack of legal training, access to legal work and resources, and less than ideal circumstances resulting from being incarcerated during a pandemic, Petitioner has sufficiently represented himself to date and has drafted and submitted numerous documents without the assistance of legal counsel," and that "Petitioner's filings indicate that he has a sufficient grasp of his case and the legal issues involved, and that he can articulate the grounds for his Petition." (*Id.* at 2-3 (citing *LaMere v. Risley*, 827 F.2d 622, 627 (9th Cir. 1987) and *Taa v. Chase Home Fin.*, No.5-11-cv-00554 EJD, 2012 WL 507430, at *2 (N.D. Cal. Feb. 15,

2012)).) Magistrate Judge Berg also observed that, despite his contention he had been separated from his legal materials, Petitioner's submissions have not only been supported by substantial case law but also exhibits from his state court proceedings. (*Id.* at 3-4.) Magistrate Judge Berg thus concluded "the interests of justice do not currently warrant the appointment of counsel in this case." (*Id.* at 4.)

Now before the Court is Petitioner's second application for appointment of counsel, which is predicated upon substantially the same ground as his first. (Appointment Mot. at 2-3 (averring appointment is necessary because he has been "obstructed from seeking legal representation as the lawyer directory is in the law library" which he cannot access, "is not receiving mail," and "is without" both legal work product and case law).) The Court remains unpersuaded that Petitioner's situation warrants a different outcome than Magistrate Judge Berg's Order Denying Appointment of Counsel. It is, again, plain from a review of the multitude of Petitioner's pleadings and filings in this case, including the detailed Petition and attached exhibits, the Traverse, the Motion for Leave to Amend the Traverse, and the Discovery Motion, that Petitioner is able to clearly communicate his claims and arguments, and to support those arguments with exhibits, documentation, and case law.[12] Counsel, thus, does not appear necessary to assist Petitioner in this respect. *See LaMere*, 827 F.2d at 626 (holding district court did not abuse discretion is declining to appoint counsel where "district court pleadings illustrate to us that [the petitioner] had a good understanding of the issues and the ability to present forcefully and coherently his contentions").)

Accordingly, the Court concludes the interests of justice currently do not warrant the appointment of counsel. Thus, the Court **DENIES** the Motion for Appointment.

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[12] In so concluding, the Court finds significant that Petitioner submitted many of the above-mentioned filings *after* Magistrate Berg's initial denial. (*See* ECF Nos. 38, 43, 45–46, 49.)

IV. MISCELLANEOUS REQUESTS AND OBJECTIONS

A. Requests for Judicial Notice

"The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'" *Von Saher v. Norton Simon Museum of Art Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (quoting *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n. 15 (3rd Cir. 2006)).

Petitioner asks the Court to take judicial notice of various facts across several filings. First, Petitioner asks the Court to judicially notice a *San Diego Union-Tribune* newspaper article concerning an "audit" of the housing and medical conditions at the San Diego Jail. (First Objection at 2–5.) He essentially avers that some of substandard conditions identified in that audit have "frustrated and impeded" his ability to present his own claims. (*Id.*) Notably, Petitioner not only seeks judicial notice of the fact the audit received news coverage from the *San Diego Union-Tribune*; he also seeks judicial notice of the contents of the article and the audit's findings. The Court declines to go so far, for the Court is restrained to judicially notice only the fact of news coverage, not its truth. *See Von Saher*, 592 F.3d at 960; *see also* Fed. R. Evid. 201(b). Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** Petitioner's request in his First Objection for judicial notice of the *San Diego Union-Tribune* article, and the Court judicially notices the news coverage "solely as an indication of what information was in the public realm at the time." *Von Saher*, 592 F.3d at 960.

Petitioner next requests judicial notice of the fact he has purportedly attempted to "contact a [sic] attorney through his family" and that that endeavor has been obstructed due to his inability to communicate via email and his classification in the correctional system. (RJN.) Such information is not properly subject to judicial notice. Indeed, these

facts are neither "generally known" nor "can [they] be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b). Accordingly, the Court **DENIES** Petitioner's request for judicial notice of his asserted attempts to contact counsel.

B. Objections

Petitioner has filed two Objections since submitting his Traverse. In the first one, Petitioner objects that he has not received the Habeas Denial or the remainder of the state court record lodged at ECF No. 28 or a copy of his own Traverse at ECF No. 38. (First Objection.) By way of background, the Briefing Order indicates that at the March 17, 2022 teleconference, the Respondent agreed to send Petitioner a copy of the lodgments at ECF No. 28 (including a copy of the Habeas Denial) and a copy of Petitioner's own Traverse. (Briefing Order.) While Petitioner indicated in his First Objection he had not yet received those copies, the discussion concerning the veracity of the Habeas Denial in his Second Objection indicates that Petitioner has since received the requested lodgements. Therefore, the Court **OVERRULES** Petitioner's First Objection and **DENIES** Petitioner's request for the additional lodgments.

In Petitioner's Second Objection, he claims that the Habeas Denial filed at ECF No. 28-18 is "not the actual California Supreme Court decision" on Petitioner's state habeas petition filed in July of 2019. (Second Objection at 1.) The Court finds no infirmity or misrepresentation in the Habeas Denial filed at ECF No. 28-18, which is the docket sheet/appellate court case information reflecting the California Supreme Court denied case number S256832 on July 14, 2021, in a decision which stated in full:

> The petition for writ of habeas corpus is denied. (See In re Robbins (1998) 18 Cal.4th 770, 780 [courts will not entertain habeas corpus claims that are untimely]; In re Clark (1993) 5 Cal.4th 750, 767-769 [courts will not entertain habeas corpus claims that are successive].) Individual claims are denied, as applicable. (See In re Dixon (1953) 41 Cal.2d 756, 759 [courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal]; In re Miller (1941) 17 Cal.2d 734, 735 [courts will not entertain habeas corpus claims that are repetitive].)

(ECF No. 28-18.)

Given Petitioner attached to the federal Petition what appears to be a copy of the decision issued by the California Supreme Court in case number S256832 (*see* Pet. at 305), and Petitioner also attached a copy of the docket sheet/appellate courts case information from the California Supreme Court to the federal Petition (*see id.* at 310), the Court has reviewed and compared these submissions alongside ECF No. 28-18. They are substantially identical. The only difference appears to be the lack of italicization of case citations in the docket entry, which are italicized only on the copy of the California Supreme Court's decision itself. (*Compare* Pet. at 305 *with* Pet. at 310 *and* ECF No. 28-18).) Because the three documents appear substantively identical, the Court **OVERRULES** Petitioner's Second Objection.

C. Request that San Diego Sheriff's Department Recognize Petitioner as *Pro Se*

On November 16, 2021, Petitioner filed an "Ex Parte Request for Order Directing San Diego Sheriffs to Recognize Petitioner as Pro [Se] Litigant." (ECF No. 24.) On December 20, 2021, Magistrate Judge Berg issued an Order denying that request, reasoning in relevant part Petitioner had only presented "generalized claims," which "do not directly relate to his ability to file a specific document" and Petitioner must show "what he specifically is lacking to be able to complete his pleadings." (*Id.* at 3 (citing *Lewis v. Casey*, 518 U.S. 343 (1996).) In that Order, Magistrate Judge Berg encouraged Petitioner "to seek redress through the Sheriff's Department's internal processes and stated: "If Petitioner lacks access to legal resources necessary to meet future deadlines, he should bring such issues (together with any specifics as related to his habeas petition in this case) to the Court's attention before he misses any deadlines." (*Id*. at 4–5.)

On April 29, 2022, Petitioner constructively filed a similar request, entitled "Petition for Order Directing San Diego Sheriffs to Recognize the Petitioner as a Pro Se Litigant," which seeks an Order from this Court "grant[ing] the Petitioner access to law

library and legal work product." (ECF No. 50 at 1.) In the instant request, Petitioner asserts:

> Since arriving at San Diego Central Jail the Petitioner has had no access to law library, legal work product is confiscated, little access to caselaw (when paging system works Petitioner can see five cases per month.) And no access to unlimited correspondence with the courts, Attached "A" The Petitioner has been housed for a time at George Bailey Detention Facility in a 39 man close quarter space where the Petitioner was continuously infected with Covid-19 and untreated Attached "B" [¶] The Petitioner was transferred to Vista Detention Facility and was housed for a time in darkness unable to read, Attached "C" [¶] Now transferred to San Diego Central Jail Petitioner is not receiving mail, Attached "A"

(*Id.* at 1–2.) He also complains of "not receiving mail or legal mail," and that he "relies on correspondence for copy service, case law, and redress in the Courts." (*Id.* at 1.)

As with his November 16, 2021 request, Petitioner's claims are generalized and do not appear to relate to an asserted inability to file any specific document in this case. To date, the Court is not aware of any missed deadlines by Petitioner in this case, and Petitioner was granted the one extension of time he recently requested. (*See* ECF Nos. 36, 37.) Nor does Petitioner demonstrate an inability to file pleadings or other documents with the Court. Indeed, Petitioner has not only filed an Opposition/Traverse to Respondent's motion to dismiss, but also recently has filed numerous objections, motions, and requests for judicial notice. (*See* ECF Nos. 38, 43, 45–46, 48–53.) Thus, no "actual injury" is apparent, despite Petitioner's claimed inadequate access to legal materials. *See Lewis*, 518 U.S. at 351 ("Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense . . . . the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." (citing *Bounds*, 430 U.S. at 817)).

Accordingly, Petitioner's request is **DENIED**. Petitioner is again encouraged to seek redress through the processes of the institution in which he is currently confined.

V. CERTIFICATE OF APPEALABILITY

When a district court issues a final order adverse to the habeas petitioner, it must also issue or deny a certificate of appealability. Rule 11(a), 28 U.S.C.A. foll. § 2254. This requirement includes a district court's decision based on procedural grounds, *e.g.*, timeliness. *See Buck v. Davis*, --- U.S. ---, 137 S.Ct. 759, 777 (2017) ("[A] litigant seeking a COA must demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason; otherwise, the appeal would not 'deserve encouragement to proceed further.'" (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Court finds issuing a certificate of appealability is appropriate in this instance as reasonable jurists could potentially find debatable the Court's conclusion Petitioner is not entitled to statutory or equitable tolling sufficient to render the federal Petition timely as well as the Court's conclusion Petitioner is not entitled to discovery/expansion of the record. *See* 28 U.S.C. 2253(c); Slack, 529 U.S. at 484. Accordingly, the Court **GRANTS** a certificate of appealability as to the availability of statutory tolling, equitable tolling, and discovery/expansion of the record.

CONCLUSION

For the reasons stated above, the Court:

(1) **GRANTS** Respondent's Motion to Dismiss based on timeliness. (ECF No. 27.)

(2) **DENIES** Petitioner's Discovery Motion. (ECF No. 43.)

(3) **DENIES** Petitioner's Motion for Appointment of Counsel. (ECF No. 48.)

(4) **DENIES IN PART** and **GRANTS IN PART** Petitioner's requests for judicial notice. (ECF Nos. 45, 50.)

(5) **OVERRULES** Petitioner's Objections. (ECF Nos. 45–46.)

Accordingly, the Court **DISMISSES** the Petition and **GRANTS** a certificate of appealability as to the availability of statutory tolling, equitable tolling, and discovery and/or expansion of the record. The Clerk of Court is **DIRECTED** to terminate all pending motions and to enter judgment accordingly. The Clerk of Court is further **DIRECTED** to close this case.

IT IS SO ORDERED.

DATED: June 22, 2022

Hon. Cynthia Bashant
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 26 2024

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

PEDRO RODRIGUEZ, Petitioner-Appellant, v. FISHER, Officer, Respondent-Appellee.	No. 22-55658 D.C. No. 3:21-cv-01442-BAS-MSB Southern District of California, San Diego ORDER

Before: BOGGS,* NGUYEN, and LEE, Circuit Judges.

Appellant Pedro Rodriguez's petition for panel rehearing is denied. Dkt. No. 81.

* The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

21cv1442-BAS (MSB)
Lodgment No. 20

S255555

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re PEDRO RODRIGUEZ on Habeas Corpus.

The request for judicial notice is denied.
The petition for writ of habeas corpus is denied as moot.

CANTIL-SAKAUYE
Chief Justice

In re Rodriguez

Supreme Court of California

July 14, 2021, Opinion Filed

S256832

Reporter
2021 Cal. LEXIS 5019 *

In re PEDRO RODRIGUEZ on Habeas Corpus.

Prior History: *People v. Rodriguez, 25 Cal. App. 5th 1100, 236 Cal. Rptr. 3d 304, 2018 Cal. App. LEXIS 695 (July 19, 2018)*

Opinion

The petition for writ of habeas corpus is denied. (See *In re Robbins (1998) 18 Cal.4th 770, 780 [77 Cal. Rptr. 2d 153, 959 P.2d 311]* [courts will not entertain habeas corpus claims that are untimely]; *In re Clark (1993) 5 Cal.4th 750, 760–769 [21 Cal. Rptr. 2d 509, 855 P.2d 729]* [courts will not entertain habeas corpus claims that are successive].) Individual claims are denied, as applicable. (See *In re Dixon (1953) 41 Cal.2d 756, 759 [264 P.2d 513]* [courts will not entertan habeas corpus claims that could have been, but were not, reised on appeal]; *In re Miller (1941) 17 Cal.2d 734, 735 [112 P.2d 10]* **[*1]** [courts will not entertain habeas corpus claims that are repetitive].)

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re PEDRO LUIS RODRIGUEZ on Habeas Corpus.	D075770 (San Diego County Super. Ct. Nos. SCN333477 & HCN1582)

THE COURT:

The petition for writ of habeas corpus has been read and considered by Presiding Justice McConnell and Associate Justices Nares and Haller. Judicial notice is taken of the opinion filed in appeal No. D071405.

Pedro Luis Rodriguez was sentenced to prison in November 2016 for 13 years four months after a jury found him guilty of multiple sex crimes against a minor, burglary, and dissuading a witness from reporting a crime. On appeal, Rodriguez claimed the evidence was insufficient to support the burglary and dissuading a witness convictions, the trial court erroneously instructed the jury on the burglary charge, and the burglary conviction denied Rodriguez the equal protection of the laws. This court rejected those claims of error and affirmed the judgment of conviction. (*People v. Rodriguez* (July 19, 2018, D071405) [nonpub. opn.].)

By the present petition, Rodriguez collaterally attacks the judgment on multiple grounds. He alleges he is actually innocent and was convicted based on the prosecutor's misconduct in suborning perjury from the victim, planting incriminating evidence ("pornographic images and texts and videos") on his electronic devices, and withholding evidence that would have proved that incriminating evidence had been planted on his electronic devices. Rodriguez alleges this misconduct required him to accept representation by counsel and to testify at trial and thereby violated his constitutional rights to represent himself, to remain silent, and to receive a fair trial. Rodriguez accuses the trial judge of bias in denying his requests for a "computer expert" and in commenting at the hearing on his motion for a new trial that he had not presented any evidence that exculpatory evidence had been withheld or that disclosure of any allegedly withheld evidence would have made a difference in the outcome of the trial. Rodriguez contends his convictions of burglary and dissuading a witness from reporting a crime are based on

"unconstitutionally vague and overbroad statute[s]" and "cannot stand" because the concept of "possessory interest is not well defined and [he] was given permission to interview the alleged victim." Finally, Rodriguez claims trial counsel was incompetent for failing to obtain the evidence that would have proved that incriminating evidence had been planted on his electronic devices, and appellate counsel was incompetent for not raising the prosecutor's withholding of that exculpatory evidence as a ground for reversal of the judgment.

Rodriguez is not entitled to habeas corpus relief. As explained below, all his claims are procedurally barred and/or fail to state a prima facie case for relief.

Rodriguez's current challenges to his burglary and dissuading a witness convictions are procedurally barred. This court considered and rejected on appeal his claim he could not be convicted of burglary because he had an unconditional possessory interest in the hotel room which he rented and in which he engaged in sex acts with the victim. This court also considered and rejected on appeal his claim the evidence was insufficient to establish his attempt to dissuade the victim from reporting the sex crimes. "[L]egal claims that have previously been raised and rejected on direct appeal ordinarily cannot be reraised in a collateral attack by filing a petition for writ of habeas corpus." (*In re Reno* (2012) 55 Cal.4th 428, 476.) Rodriguez cannot escape the procedural bar by recharacterizing his attack on the convictions as vagueness challenges to the underlying criminal statutes, because "a litigant is not entitled to raise an issue on habeas corpus after having failed to raise the same issue on direct appeal." (*Id.* at p. 490.) Even if not procedurally barred, the challenges would fail because neither of the statutes at issue is unconstitutionally vague. Under the void-for-vagueness doctrine, " 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' " (*People v. Ewing* (1999) 76 Cal.App.4th 199, 206.) A person of common intelligence would know that a statute stating that "[e]very person who enters any . . . room . . . with intent to commit . . . any felony is guilty of burglary" (Pen. Code, § 459) applies to a person like Rodriguez who entered a hotel room to have sex with a minor. A person of common intelligence also would know that asking a minor who had sex with a defendant to sign a statement that she was pressured into making an inaccurate police report and only knew the defendant through a dating application, as Rodriguez asked his victim to do, violates the statute prohibiting any "attempt[] to prevent or dissuade another person who has been the victim of a crime" from "[m]aking any report of that victimization to any peace officer or state or local law enforcement officer." (*Id.*, § 136.1, subd. (b)(1).) The language of these statutes " 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices' " so that they are not unconstitutionally vague. (*Ewing*, at p. 209.)

The claim that the trial judge was biased is procedurally barred. Rodriguez could have moved to disqualify the trial judge for bias (Code Civ. Proc., §§ 170.1, subd.

(a)(6)(A)(ii), (iii), 170.3, subd. (c)(1)); and, if the judge refused to disqualify himself, he could have sought writ review of the refusal (*id.*, § 170.3, subd. (d)). "A criminal defendant, like any other party to an action, may not sit on his or her rights. Thus, just as a defendant generally may not raise *on appeal* a claim not raised at trial [citation], a defendant should not be allowed to raise on *habeas corpus* an issue that could have been presented at trial. If a claim that was forfeited for appeal could nonetheless be raised in a habeas corpus proceeding, the main purpose of the forfeiture rule—to encourage prompt correction of trial errors and thereby avoid unnecessary retrials—would be defeated." (*In re Seaton* (2004) 34 Cal.4th 193, 199-200.) The claim also fails on the merits because the trial judge's denial of Rodriguez's request for a "computer expert," even if erroneous, and the judge's comments on the evidence and arguments presented at the hearing on the motion for a new trial do not establish any disqualifying bias. (See *Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1031 ["Expressions of opinion uttered by a judge, in what he conceived to be a discharge of his official duties, are not evidence of bias or prejudice."]; *Dietrich v. Litton Industries, Inc.* (1970) 12 Cal.App.3d 704, 719 ["Erroneous rulings against a litigant, even when numerous and continuous, do not establish a charge of bias and prejudice."].)

Rodriguez's claims based on the prosecutor's alleged misconduct in suborning perjury from the victim, planting incriminating evidence on his electronic devices, and withholding exculpatory evidence are procedurally barred. The facts that the victim reported her sexual relationship with Rodriguez to police, denied the relationship at the preliminary hearing, and testified at trial consistently with her report to police were presented at trial. Rodriguez's claims the prosecutor planted pornographic images, texts, and videos on his electronic devices and withheld evidence that would have exposed the planting were the subject of his motion for a new trial. Rodriguez therefore could have raised his current claims of prosecutorial misconduct on appeal, but he did not. "[H]abeas corpus generally may not be used as a second appeal," and "matters that could have been, but were not, raised on appeal are not cognizable on habeas corpus in the absence of special circumstances warranting departure from that rule." (*In re Bower* (1985) 38 Cal.3d 865, 872.) Rodriguez has shown no fundamental constitutional error, jurisdictional error, or change in law that would allow him to avoid the procedural bar. (*In re Reno*, *supra*, 55 Cal.4th 478, 490-491 [listing exceptions to procedural bar].) Even if they were not procedurally barred, the prosecutorial misconduct claims would be rejected for failure to state a prima facie case. A prisoner challenging a presumptively valid final judgment of conviction by petition for writ of habeas corpus bears a heavy burden to plead a prima facie case by alleging with particularity the facts on which the claim is based and submitting declarations, pertinent trial transcripts, and other reasonably available documents in support of the claim. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) Rodriguez has submitted no declarations or other evidence that the victim gave false testimony at trial or that the prosecutor solicited false testimony from her, planted incriminating evidence on his electronic devices, or withheld evidence that would have exposed the planting. The victim's trial testimony was corroborated by photographs she took of Rodriguez orally

copulating her and of the two of them lying naked on a bed together, and by communications about their sexual relationship on a telephone Rodriguez had given her and she turned over to police. Documents attached to Rodriguez's petition indicate the defense expert who examined his electronic devices found no evidence of "tampering" or "improprieties." On this record, Rodriguez's " '[c]onclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing,' " on his claims of prosecutorial misconduct. (*Duvall*, at p. 474.)

Finally, the related claims of ineffective assistance of counsel fail to state a prima facie case for habeas corpus relief. To establish a claim of ineffective assistance based on counsel's failure to discover and present evidence at trial, a habeas corpus petitioner "must demonstrate that counsel knew or should have known that further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover." (*People v. Williams* (1988) 44 Cal.3d 883, 937.) Rodriguez has not identified the evidence that allegedly was withheld and would have proved incriminating images had been planted on his electronic devices, which he faults his trial counsel for not discovering and presenting at trial. As discussed above, documents attached to Rodriguez's petition indicate no such planting of evidence occurred. Trial counsel cannot be found incompetent for failing to discover or present exculpatory evidence that has not been shown to exist. Nor can appellate counsel be faulted for refusing to urge reversal of the judgment based on the prosecutor's alleged withholding of such evidence. Appellate counsel "had no duty to argue every issue [Rodriguez] wanted to raise, but rather was entitled to assess which issues were potentially meritorious." (*Redante v. Yockelson* (2003) 112 Cal.App.4th 1351, 1357.) In a letter to Rodriguez attached to his petition, appellate counsel wrote: "I did not raise your issue of the withholding of exculpatory evidence as I do not believe the evidence in the appellate record supported that argument. First, after an extended hearing on your motion for a new trial, which the court eventually denied, no evidence presented supported that theory. As well, as the court correctly pointed out to you at the motion for new trial, that even if you could show that the police withheld evidence (which you couldn't), it would not have mattered because of the other evidence against you, including from [the victim's] testimony and the texts and photographs extracted from her electronics." Counsel's "professional judgment that [Rodriguez's] proposed issues were not arguable cannot form the basis of a[n] [ineffective assistance] claim." (*Ibid.*)

The petition is denied.

McCONNELL, P. J.

Copies to: All parties

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

IN THE MATTER OF THE APPLICATION OF: PEDRO RODRIGUEZ, Petitioner.	HCN 1582 SCN 333477 ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

UPON REVIEW OF THE PETITION FOR WRIT OF HABEAS CORPUS AND THE COURT FILE IN THE ABOVE-CAPTIONED MATTER, THE COURT FINDS:

On June 15, 2015, Petitioner was found guilty by a jury of eleven offenses involving unlawful sexual conduct with a minor, one count of Penal Code § 459, burglary and one count of Penal Code § 136.1(b)(1), attempting to dissuade a witness from reporting a crime. On November 10, 2016, Petitioner was sentenced to 13 years and 4 months. Petitioner filed an appeal and judgment was affirmed on July 19, 2018.

Petitioner now asserts that he is actually innocent of committing the charged offenses and that his conviction is in violation of the 4th, 5th, 8th and 15th Amendments. Petitioner claims that the prosecutor in this case, D.D.A. Matt Greco downloaded evidence onto Petitioner's electronics and then misrepresented the fabricated evidence as true to the jury and suppressed evidence of those bad acts. He asserts that the state failed to disclose evidence favorable to the accused which was in their possession and failed to disclose evidence which weighed greatly to

the credibility of the alleged victim and that they knowingly induced her to commit perjury. Petitioner asserts that there was prosecutorial misconduct in this regard. Petitioner further asserts that his appellate attorney was ineffective in refusing to raise the issue that the D.D.A. allegedly withheld exculpatory evidence. Petitioner also asserts that his trial attorney was ineffective in refusing to investigate the allegedly withheld exculpatory evidence. Petitioner further claims that there was judicial bias against him. Petitioner claims he was unconstitutionally convicted of burglarizing his own hotel room. He further claims that Mr. Greco's actions forced him to give up his right to self-representation.

Petitioner's claims regarding his conviction for burglarizing his own hotel room were raised and rejected on appeal. All of Petitioner's other claims which pertain to the alleged exculpatory evidence were litigated extensively on the record during motions for new trial and could have been raised on appeal. Claims which have been raised and rejected on appeal or which could have been raised on appeal ordinarily cannot be renewed in a petition for habeas corpus because habeas corpus ordinarily cannot serve as a second appeal. In re Dixon (1953) 41 Cal.2d 756, 759; In re Waltreus (1965) 62 Cal.2d 218. Postappeal collateral attacks will only serve as a second appeal under four very narrow exceptions: constitutional error is clear and strikes at the heart of trial process; lack of fundamental jurisdiction; the trial court acted in excess of jurisdiction that does not require a redetermination of facts; or there was a change in the law after appeal. In re Harris (1993) 5 Cal.4th 813. "Postconviction habeas corpus attack on the validity of a judgment of conviction is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension. (See In re Hall (1981) 30 Cal.3d 408, 420)". In re Clark (1993) 5 Cal.4th 750, 766-67. None of these factors apply in Petitioner's case.

To show ineffective assistance of counsel, Petitioner must make a showing that his attorney's actions in allegedly failing to produce evidence or call witnesses was not an informed choice among tactical alternatives. People v. Pope (1979) 23 Cal.3d 412, 424. Petitioner must also show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In re Jackson (1992) 2 C.4th 578. The burden of proving a claim of ineffective

assistance of counsel is on the petitioner. He must also show that it is reasonably probable a more favorable result would have been obtained in the absence of counsel's failings. People v. Duncan (1991) 53 Cal. 3d 955, 966. Petitioner has failed to show that his trial attorney was ineffective in any way or that, even assuming there were errors, that the result of the proceeding would have been different.

Petitioner also claims that his appellate attorney was ineffective. "It is not required that an attorney argue every conceivable issue on appeal, especially when some may be without merit. Indeed, it is his professional duty to choose among potential issues, according to his judgment as to their merit and his tactical approach." Jones v. Barnes (1983) 463 U.S. 745, 749. There is nothing to indicate that Petitioner's appellate attorney was ineffective. Indeed, Petitioner provides a letter from his appellate attorney (Exhibit "G") which specifically supports the reasonable tactical approach she took when she did not raise the issue of the withholding of exculpatory evidence. She states "First, after an extended hearing on you motion for a new trial, which the court eventually denied, no evidence presented supported that theory. As well as the court correctly pointed out to you at the motion for new trial, that even if you could show the police withheld evidence (which you couldn't), it would not have mattered because of the other evidence against you…".

Petitioner has failed to make a prima facie showing of specific facts which would entitle him to habeas corpus relief under existing law. In re Hochberg (1970) 2 Cal.3d 870, 875 fn 4. As such, the Petition for Writ of Habeas Corpus is hereby denied.

IT IS SO ORDERED.

DATED: 18 April 2019

Harry M Elias

HARRY M. ELIAS
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO	FOR COURT USE ONLY
☐ COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814 ☐ HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827 ☐ FAMILY COURT, 1555 6TH AVE, SAN DIEGO, CA 92101-3294 ☐ MADGE BRADLEY BLDG., 1409 4TH AVE., SAN DIEGO, CA 92101-3105 ☐ KEARNY MESA BRANCH, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123-1187 ☒ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92083-6643 ☐ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941 ☐ RAMONA BRANCH, 1428 MONTECITO RD., RAMONA, CA 92065-5200 ☐ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649 ☐ JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792 ☐ JUVENILE COURT, 325 S. MELROSE DR., VISTA, CA 92083-6634	FILED Clerk of the Superior Court APR 18 2019 By: S. M. Smith
PLAINTIFF(S)/PETITIONER(S) IN THE MATTER OF THE APPLICATION OF:	
DEFENDANT(S)/RESPONDENT(S) PEDRO RODRIGUEZ	JUDGE: HARRY M. ELIAS DEPT: 25
CLERK'S CERTIFICATE OF SERVICE BY MAIL (CCP 1013a(4))	CASE NUMBER HCN 1582/ SCN333477

I, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s): ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at: ☐ San Diego ☒ Vista ☐ El Cajon ☐ Chula Vista ☒ Ramona, California.

NAME & ADDRESS

Pedro Rodriguez- BC6583
Valley State Prison
P O Box 96
Chowchilla, CA 93610

NAME & ADDRESS

District Attorney Office
Att: Appellate Div
325 S. Melrose Dr.
Vista, CA 92081
Via: Interoffice Mail

Date: April 18, 2019

CLERK OF THE SUPERIOR COURT

by _____, Deputy
S.M. Smith-Deputy

Court of Appeal, Fourth Appellate District, Division One - No. D071405

S251142

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

PEDRO RODRIGUEZ, Defendant and Appellant.

The petition for review is denied. On the court's own motion, the Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed July 19, 2018, which appears at 25 Cal.App.5th 1100. (Cal. Const., art. VI, section 14; Cal. Rules of Court, rule 8.1125(c)(2).)

Liu and Kruger, JJ., are of the opinion the petition should be granted.

CANTIL-SAKAUYE
Chief Justice

People v. Rodriguez

Court of Appeal of California, Fourth Appellate District, Division One

July 19, 2018, Opinion Filed

D071405

Reporter
25 Cal. App. 5th 1100 *; 236 Cal. Rptr. 3d 304 **; 2018 Cal. App. LEXIS 695 ***

THE PEOPLE, Plaintiff and Respondent, v. ***PEDRO RODRIGUEZ***, Defendant and Appellant.

Notice: NOT CITABLE—ORDERED NOT PUBLISHED

Subsequent History: [*1]** The Publication Status of this Document has been Changed by the Court from Unpublished to Published August 8, 2018.

Time for Granting or Denying Review Extended *People v. Rodriguez, 2018 Cal. LEXIS 8802 (Cal., Nov. 7, 2018)*

Review denied and ordered not published by *People v. Rodriguez, 2018 Cal. LEXIS 8821 (Cal., Nov. 14, 2018)*

Writ of habeas corpus denied *In re Rodriguez, 2021 Cal. LEXIS 5019 (Cal., July 14, 2021)*

Habeas corpus proceeding at, Motion denied by *Rodriguez v. Fisher, 2021 U.S. Dist. LEXIS 242637, 2021 WL 5999965 (S.D. Cal., Dec. 20, 2021)*

Prior History: APPEAL from a judgment of the Superior Court of San Diego County, No. SCN333477, K. Michael Kirkman, Judge.

People v. Rodriguez, 2018 Cal. App. Unpub. LEXIS 4883, 2018 WL 3468836 (Cal. App. 4th Dist., July 19, 2018)

Disposition: Affirmed.

Counsel: Sheila O'Connor, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Judges: Opinion by Benke, J., with McConnell, P. J., and Huffman, J., concurring.

Opinion by: Benke, J.

Opinion

[305]** **BENKE, J.**—***Pedro Rodriguez*** met ***Rebecca*** on an online dating application when he was 41 and she was 16 years old. Rodriguez arranged an in-person meeting with ***Rebecca*** a few weeks later and, on numerous occasions over the next several months, engaged in various sexual acts with her in hotel rooms he had rented. A jury convicted Rodriguez of 11 offenses involving unlawful sexual conduct with a minor, one count of ***burglary*** in violation of *Penal Code section 459*,[1] and one count of attempting to dissuade a witness from reporting a crime in violation of *section 136.1, subdivision (b)(1)*.

Rodriguez contends there was insufficient evidence **[***2]** to support the conviction for ***burglary*** because *section 459* requires an invasion of a possessory interest in the subject room or building and, much like the lessee of an apartment, he had an unconditional possessory interest in the hotel room he rented. He asserts the trial court should have either dismissed the charge or provided the jury with a pinpoint instruction regarding the significance **[**306]** of any such possessory interest. To the extent this court concludes there is a relevant distinction between his possessory interest in the hotel room and a homeowner's or lessee's possessory interest in a home or apartment, Rodriguez argues the result would be a violation of his constitutional right to equal protection. In addition, Rodriguez contends there was insufficient evidence to support the conviction for attempting to dissuade a witness pursuant to *section 136.1, subdivision (b)(1)* because any attempt he made to dissuade ***Rebecca*** occurred only after she made an initial report to the police.

We conclude there was sufficient evidence to support both convictions, that the court did not err in its refusal to dismiss the ***burglary*** charge or its **[*1104]** instruction to the jury concerning ***burglary***, and that the *equal protection clause* is not applicable because individuals **[***3]** renting hotel rooms are not similarly situated to those owning or leasing a residence. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Rebecca went on a trip to San Francisco with a school group in January 2014 when she was 16 years old. While on the trip, she logged into a social media dating application on her phone that allowed her to create a profile and locate other individuals in the same geographic area. Using the application, ***Rebecca*** made contact with an individual identifying himself as "Max Powers." "Max" initially told ***Rebecca*** he was 16, but she eventually learned his real name was ***Pedro Rodriguez*** and that he was actually 41 years old.

Rebecca and Rodriguez continued talking on various messaging applications and exchanged telephone numbers within a couple of weeks. By mid-February, ***Rebecca*** had sent Rodriguez nude photographs of herself at his request. Around that time, they also started discussing meeting in person, but ***Rebecca*** told Rodriguez that she did not want to have sex until marriage and that she did not believe in using birth control, due to her religious beliefs.

On February 22, 2014, Rodriguez drove from San Francisco to San Diego County to see **[***4]** ***Rebecca***. Rodriguez rented a hotel room and then drove to ***Rebecca***'s neighborhood. He parked his car in a cul-de-sac behind ***Rebecca***'s house and she snuck out through the backyard to ensure her parents would not see them. They drove around running errands together for a while, and then drove to the hotel Rodriguez was staying at so he could get a different shirt from his room. Rodriguez asked ***Rebecca*** to come up to the room but she said she did not feel comfortable and waited for him in the car. When Rodriguez returned, he continued to pressure her to go up to the hotel room, saying that he did not think she trusted him, and

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

Rebecca eventually agreed. As soon as they entered the room Rodriguez grabbed her and kissed her. He then removed her clothes and engaged in various sex acts with her.

Rodriguez drove back to San Diego County on March 8, 2014, and rented a room at the same hotel. He took ***Rebecca*** out to breakfast, then back to the hotel, where he took her clothes off, orally copulated her, and engaged in intercourse with her. ***Rebecca*** took several photographs during the encounter, including one of Rodriguez orally copulating her and one of the two of them lying in bed together without **[***5]** any clothes.

Over the course of the next several months, Rodriguez met ***Rebecca*** and engaged in various sex acts with her on several other occasions. At their last **[*1105]** meeting, in May 2014, Rodriguez was upset that ***Rebecca*** had been talking and sending pictures **[**307]** to another individual—a boy closer to her own age—and told her if she did not stop, he would tell her mother everything they had been doing and would send her mother illicit pictures and videos that ***Rebecca*** had sent to him. They continued to argue throughout the following week. ***Rebecca*** felt Rodriguez was blackmailing her with his threats so she decided to tell her mother what had happened with Rodriguez herself. She gave her mother a phone that Rodriguez had given her so they could communicate without anyone knowing and told her what had been happening.

Shortly thereafter, ***Rebecca***'s mother took her to the police station to make a report. The next day, after discovering ***Rebecca*** had talked to the police, Rodriguez sent ***Rebecca*** an e-mail asking her to sign a statement that said she was forced to give an inaccurate statement to the police after being told she was a party to a crime, and that she only knew Rodriguez from an online dating **[***6]** application. ***Rebecca*** did not sign the statement and, instead, spoke with a detective from the police department several more times and went with the detective to identify each of the hotel rooms she had visited with Rodriguez. However, she also remained in contact with Rodriguez, both directly and through an intermediary, and he continued to threaten her and pressure her to change her story.

The police arrested Rodriguez in June. While in jail, he had his brother send another phone to ***Rebecca*** so he could communicate with her. He also moved to represent himself at the preliminary hearing and rehearsed the questions he planned to ask ***Rebecca*** over the phone with her. By the time of the preliminary hearing in August, Rodriguez had convinced ***Rebecca*** to change her testimony to say that she never had a sexual relationship with him. However, the court did not find her testimony credible and allowed the case to continue.

After the preliminary hearing, Rodriguez moved to set aside the ***burglary*** charge pursuant to *section 995*. He argued he could not be guilty of ***burglary*** in violation of *section 459* because, in accordance with *People v. Gauze (1975) 15 Cal.3d 709 [125 Cal. Rptr. 773, 542 P.2d 1365]* (*Gauze*), *section 459* requires an entry that invades a possessory right and he had an unconditional possessory **[***7]** right to the hotel room he rented. The People opposed the motion and the trial court denied it.

In late 2014, the police discovered Rodriguez and ***Rebecca*** were still in contact and, in January 2015, they seized three phones from ***Rebecca***'s home, including two that Rodriguez had sent to her. ***Rebecca*** had no further contact with Rodriguez after that and, several months later, she testified at trial **[*1106]** consistent with her original report to the police; specifically, she stated that Rodriguez did engage in sexual acts with her on several occasions in various hotel rooms he had rented, including on March 8, 2014. Rodriguez also testified and admitted he had a relationship with ***Rebecca*** but claimed it was never sexual.

At the conclusion of the case, Rodriguez asked the court to dismiss all of the charges pursuant to section 1118.1, which the People opposed. The court granted the motion as to count 5 (sodomy of a person under the age of 18 in violation of § 286, subd. (b)(1)) after finding ***Rebecca***'s testimony was incomplete as to that particular charge, but denied it as to all other charges.

The jury found Rodriguez guilty on all remaining charged offenses, including one count of ***burglary*** in violation of section 459, and one count of attempting **[***8]** to dissuade a witness from reporting a crime in violation of section 136.1, subdivision (b)(1). **[**308]** Rodriguez filed a motion for a new trial, which the trial court denied.

Rodriguez appeals.

DISCUSSION

I. ***Burglary*** *Conviction*

Rodriguez contends he could not have committed ***burglary*** by entering the hotel room because he had an unconditional possessory interest in the room during the rental period. He therefore asserts there was insufficient evidence to support the ***burglary*** conviction, and that the trial court should have granted either his section 995 motion to set aside the information prior to trial or his section 1118.1 motion to dismiss the ***burglary*** charge after the trial. In the alternative, he argues the court should have provided a pinpoint instruction to the jury regarding the significance of a possessory interest with respect to the ***burglary*** charge, and that the conviction must be reversed as a result. In addition, Rodriguez asserts any determination that he did not have an unconditional possessory interest in the hotel room would violate his constitutional right to equal protection by treating him differently than a homeowner or lessee. In response, the People argue Rodriguez waived his argument with respect to at least the section 995 motion, and that **[***9]** the trial court did not err in any event by denying the motions or instructing the jury as to the ***burglary*** charge.

A. *Court's Refusal To Dismiss the* ***Burglary*** *Charge*

Rodriguez combines his arguments that there was insufficient evidence to support the ***burglary*** conviction and that the court erred in failing to dismiss **[*1107]** the charge based on either his section 995 or section 1118.1 motion in his briefing on appeal, and we consider the arguments collectively as well.

1. *Waiver*

We turn first to the People's assertion Rodriguez waived his argument that the trial court erred by denying his section 995 motion to dismiss the ***burglary*** charge. The People assert section 999a required Rodriguez to seek a writ of prohibition within 15 days of the trial court denying his section 995 motion, and that his failure to do so precludes him from raising the argument on appeal.

(1) The People rely on People v. Alcala (1984) 36 Cal.3d 604 [205 Cal. Rptr. 775, 685 P.2d 1126], in which the California Supreme Court concluded arguments concerning a lack of probable cause at a preliminary hearing are waived if not timely pursued prior to trial, but they misinterpret the court's conclusion therein. (Id. at p. 628.) The court in *Alcala* made that statement in the context of explaining that failures of evidence at the preliminary hearing are not jurisdictional defects **[***10]** because they are waived for all purposes if not raised prior to trial. (*Ibid.*) Here, Rodriguez *did* raise the issue prior to trial, pursuant to the mechanism for doing so set forth in section 995, and therefore complied with the court's

statement in *Alcala*. (§ 995.) While section 999a sets forth the timeframe for filing a writ of prohibition challenging the trial court's denial of a section 995 motion prior to trial, neither *Alcala* nor any other authority requires a defendant to file such a writ to preserve the argument on appeal. Accordingly, we conclude Rodriguez has not waived his argument that the trial court erred by denying his section 995 motion.

2. *Merits*

(2) Turning to the merits, a person commits ***burglary*** in violation of section 459 **[**309]** when he or she enters a house, room, apartment, or other type of structure enumerated in section 459 with the intent to commit a felony. (§ 459.) Here, the evidence presented at trial established Rodriguez rented a hotel room on March 8, 2014, and entered the room with the intent to commit felonious acts—specifically, the underlying felony charges on which he was convicted. While Rodriguez argues there is insufficient evidence to support the verdict, he does not dispute the evidence concerning the hotel room or the verdicts on **[***11]** the underlying felonies. Instead, his sole contention is that he could not have committed ***burglary*** pursuant to section 459 because he had an unconditional possessory interest in the room. This is primarily a legal **[*1108]** question that we review de novo.[2] (See People ex rel. Lockyer v. Shamrock Foods Co. (2000) 24 Cal.4th 415, 432 [101 Cal. Rptr. 2d 200, 11 P.3d 956]; Ghirardo v. Antonioli (1994) 8 Cal.4th 791, 799 [35 Cal. Rptr. 2d 418, 883 P.2d 960].)

(3) In Gauze, supra, 15 Cal.3d 709, the California Supreme Court discussed the legislative history of section 459 and concluded "the Legislature has preserved the concept that ***burglary*** law is designed to protect a possessory right in property, rather than broadly to preserve any place from all crime," and that, therefore, a "***burglary*** remains *an entry which invades a possessory right in a building*." (Gauze, at pp. 713–714, italics added.) As a result, an individual does not violate section 459 if he or she has an unconditional possessory right to enter as the occupant of the structure. (People v. Salemme (1992) 2 Cal.App.4th 775, 781 [3 Cal. Rptr. 2d 398] (*Salemme*).) Since this pronouncement in *Gauze*, appellate courts in California have concluded an individual can commit a ***burglary*** by entering a hotel room with the intent to commit a felony when the hotel room was rented by the victim, but have not directly addressed whether the same is true in the case of a hotel room rented by the alleged burglar. (See People v. Villalobos (2006) 145 Cal.App.4th 310, 316–317 [51 Cal. Rptr. 3d 678] (*Villalobos*); but see People v. Minervini (1971) 20 Cal.App.3d 832, 840–841 [98 Cal. Rptr. 107] (*Minervini*) [predating *Gauze* but concluding the **[***12]** fact that defendants acquired and paid for hotel rooms did not mitigate against a finding that they violated § 459 by entering the rooms with the intent to commit theft].)

The question the court addressed in *Gauze* was whether an individual could commit ***burglary*** in his or her own home. (Gauze, supra, 15 Cal.3d at p. 711.) There, Gauze shared an apartment with two other roommates and, after arguing with one of the roommates at another location earlier in the day, entered the shared apartment with a shotgun and shot his roommate. (*Ibid.*) The court concluded Gauze did not violate section 459 by entering the apartment because he had an absolute right to enter his own apartment, even if

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[2] We review assertions the evidence was insufficient for substantial evidence. (People v. Casares (2016) 62 Cal.4th 808, 823 [198 Cal. Rptr. 3d 167, 364 P.3d 1093] (*Casares*).) However, as stated here, Rodriguez does not seriously contend the evidence was insufficient, except insofar as it did not establish he invaded a possessory right in a building when he entered his own hotel room. Thus, to the extent we conclude, as we do, that one does not have an unconditional possessory interest in a rented hotel room and can commit ***burglary*** in violation of section 459 by entering one's own hotel room with the intent to commit a felony, we likewise conclude substantial evidence supports the ***burglary*** conviction, and that the court did not err by denying Rodriguez's sections 995 and 1118.1 motions.

for a felonious purpose. (*Gauze, at p. 714*.) In so holding, the court explicitly distinguished an **[**310]** other case, *People v. Barry (1892) 94 Cal. 481 [29 P. 1026]*, and its progeny, in which the court had previously concluded a person *could* be convicted of ***burglary*** of a store even though he or she entered **[*1109]** during regular business hours and therefore had an implied invitation to be in the store as a member of the public. (*Gauze, at p. 713*; see *People v. Deptula (1962) 58 Cal.2d 225, 226–228 [23 Cal. Rptr. 366, 373 P.2d 430]* [applying *Barry* and concluding a manager violated *§ 459* when he entered the business with the intent to commit a felony despite having his own set of keys to the business].) While the defendant's invitation **[***13]** to enter the store in *Barry* was presumably limited to entry for legal purposes, the court concluded Gauze had an *unconditional* possessory right to enter his own apartment for any reason and regardless of his intent. (*Gauze, at pp. 714–715*.)

(4) However, in a subsequent case, the court differentiated between the unconditional possessory interest at issue in *Gauze* and consent, explaining, "one may be convicted of ***burglary*** even if he enters [a room or building] with consent, provided he does not have an *unconditional* possessory right to enter." (*People v. Pendleton (1979) 25 Cal.3d 371, 382 [158 Cal. Rptr. 343, 599 P.2d 649]*, italics added (*Pendleton*).) Thereafter, in *Salemme*, the court further clarified the distinction between possessory interest and consent and summarized the state of the law as follows: "a person who enters a structure enumerated in *section 459* with the intent to commit a felony is guilty of ***burglary*** *except* when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent." (*Salemme, supra, 2 Cal.App.4th at p. 781* [concluding defendant violated *§ 459* despite homeowner's consent to entry because homeowner had no knowledge of defendant's felonious intent].) Consistent with these cases, various appellate courts, **[***14]** in other more recent cases, have upheld ***burglary*** convictions where the defendant entered a building or room with the intent to commit a felony and without an *unconditional* possessory interest. (See, e.g., *Salemme, at p. 781*; *People v. Ulloa (2009) 180 Cal.App.4th 601, 606–607 [102 Cal. Rptr. 3d 743]* [defendant guilty of ***burglary*** when he entered apartment he had coleased with his spouse because there was substantial evidence he had moved out and no longer had an unconditional possessory interest]; *People v. Clayton (1998) 65 Cal.App.4th 418, 421–424 [76 Cal. Rptr. 2d 536]* [defendant convicted of ***burglary*** when he entered a home with the intent to kill the victim even though husband who also lived in the home gave defendant a key].)

(5) Here, Rodriguez claims he had an unconditional possessory interest in the hotel room he rented akin to that of a homeowner or lessee of a residence, but the law does not support his assertion. Instead, California law has long recognized a distinction between the possessory rights a tenant has in a home or apartment versus those a temporary lodger has in a rented room in a hotel, motel, or similar establishment; while a tenant has exclusive legal possession of the premises, a lodger only has a right to use the premises, subject to the renter's control and right of access. (See *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal.2d 416, 421 [282 P.2d 890]* (*Stowe*); *Bullock v. City and County of San **[*1110]** Francisco (1990) 221 Cal.App.3d 1072, 1097 [271 Cal. Rptr. 44]* (*Bullock*) [possessory interest of lodger **[***15]** "vastly inferior" to tenant]; *Roberts v. Casey (1939) 36 Cal.App.2d Supp. 767, 771 [93 P.2d 654]* (*Roberts*) [guests in a hotel have a contractual right but no interest **[**311]** in the realty].) Thus, at most an individual who rents a hotel room may have some temporary possessory interest in that room, but that interest is not equivalent to the possessory interest of a homeowner or lessee and is not unconditional. Accordingly, Rodriguez did not have an unconditional possessory interest in the hotel room he rented and the possessory interest exception set forth in *Gauze* is inapplicable.

Rodriguez argues he had an unconditional right to possession during the rental period because he alone had the legal right to come and go from the hotel room. We disagree. Presumably the hotel maintained access to the room as well—for such purposes as housekeeping and maintenance—and the hotel had the right to eject him from the room should he engage in illegal activity therein. (See *Minervini, supra, 20 Cal.App.3d at p. 840* [guest may be excluded from hotel premises and his or her privilege of occupancy forfeited because of unlawful conduct].) Rodriguez asserts a hotel's ability to eject a guest is no different than a lessor's ability to evict a tenant, but evicting a tenant involves a complex legal process aimed in **[***16]** part at protecting the tenant's occupancy rights while ejecting a hotel guest does not. (See, e.g., *Code Civ. Proc., § 1161*; *Roberts, supra, 36 Cal.App.2d at p. Supp. 771* [hotel guest's rights are contractual].) While Rodriguez may have had the hotel's *consent* to enter and use the room during the rental period, consent is not equivalent to a possessory interest and, in any event, the consent was not given with knowledge of Rodriguez's felonious intent. (*Pendleton, supra, 25 Cal.3d at p. 382*; *Salemme, supra, 2 Cal.App.4th at p. 781*; *People v. Sherow (2011) 196 Cal.App.4th 1296, 1304 [128 Cal. Rptr. 3d 255]*.) Regardless, Rodriguez did not argue a consent defense in the trial court, nor does he expressly raise the issue of consent on appeal.

(6) Rodriguez also points the court to a number of cases regarding a hotel guest's expectation of privacy, but those cases are not instructive. The right to privacy at issue in those cases derives from the right to be free of unlawful searches and seizures set forth in the *Fourth Amendment to the United States Constitution*, and Rodriguez provides no authority indicating that right is dependent on a possessory interest, let alone an unconditional possessory interest. (See *Rakas v. Illinois (1978) 439 U.S. 128, 146–147 [58 L. Ed. 2d 387, 99 S. Ct. 421]* [suggesting one may have a right to privacy even absent a possessory interest in the searched property]; *People v. Koury (1989) 214 Cal.App.3d 676, 686 [262 Cal. Rptr. 870]* [possessory interest not required to assert a reasonable expectation of privacy under the *4th Amend.*]; *People v. Zabelle (1996) 50 Cal.App.4th 1282, 1286 [58 Cal. Rptr. 2d 105]* [hotel room is considered a dwelling *for the purpose **[***17]** of the *4th Amend.*]; see also *Stoner v. **[*1111]** California (1964) 376 U.S. 483, 489 [11 L. Ed. 2d 856, 84 S. Ct. 889]*; *People v. Superior Court (Walker) (2006) 143 Cal.App.4th 1183, 1206 [49 Cal. Rptr. 3d 831]*.) Instead, the right to privacy in a hotel room arises primarily from its status as a sleeping place, where one is vulnerable and cannot monitor the safety and security of one's own belongings. (*Villalobos, supra, 145 Cal.App.4th at p. 319*.) There was no search or seizure at issue in the present case and the mere fact that Rodriguez had some expectation of privacy in the hotel room he rented does not indicate he also had an *unconditional* possessory interest in the room.

(7) Based on the foregoing, we conclude Rodriguez did not have an unconditional possessory right to his hotel room and, thus, substantial evidence supports the **[**312]** ***burglary*** conviction. Accordingly, we conclude the trial court did not err in refusing to grant Rodriguez's motions to dismiss the charge pursuant to *section 995* or *section 1118.1*.

B. *Jury Instruction*

Alternatively, Rodriguez contends the trial court should have given a pinpoint instruction to the jury regarding the significance of an unconditional possessory interest to the elements of *section 459*.

(8) The People contend Rodriguez forfeited this argument as well and he concedes he did not request a pinpoint instruction, but argues the trial court had a sua sponte duty to provide the instruction because it concerned a general principle **[***18]** of law relevant to the issues raised by the evidence. (See *People v. Martinez (2010) 47 Cal.4th 911, 953 [105 Cal. Rptr. 3d 131, 224 P.3d 877]*; *People v. Earp (1999) 20*

Cal.4th 826, 885 [85 Cal. Rptr. 2d 857, 978 P.2d 15].) However, the cases Rodriguez primarily relies on relate to the trial court's sua sponte duty to instruct on defenses where there is sufficient evidence to support the defense and, similarly, lesser included offenses when the evidence raises a question of whether the elements of the charged offense are met. (*Martinez, at p. 953*; *Earp, at p. 885*; *People v. Breverman (1998) 19 Cal.4th 142, 157 [77 Cal. Rptr. 2d 870, 960 P.2d 1094]*.) Pinpoint instructions, on the other hand, relate to the elements of a charged offense and, specifically, whether the prosecution has met its burden of proof as to each such element. (*People v. Anderson (2011) 51 Cal.4th 989, 996–997 [125 Cal. Rptr. 3d 408, 252 P.3d 968]* (*Anderson*).) Pinpoint instructions must be given only upon request, and the trial court has no sua sponte obligation to give them absent such a request. (*Ibid.*; *People v. Hernandez (2010) 183 Cal.App.4th 1327, 1331 [107 Cal. Rptr. 3d 915]* ["Once the trial court adequately instructs the jury on the law, it has no duty to give clarifying or amplifying instructions absent a request."].)
[*1112]

Here, the court instructed the jury as to the elements of ***burglary*** using the standard instruction.[3] Much of the discussion regarding jury instructions was held off the record, but Rodriguez does not contend that he objected to the form of the ***burglary*** instruction and concedes he did not ask for a pinpoint instruction regarding **[***19]** possessory interest. Moreover, in his closing statement, defense counsel did not argue the prosecution had failed to prove the ***burglary*** charge based on his alleged possessory interest in the hotel room, and instead asserted no sexual conduct occurred between Rodriguez and ***Rebecca*** in the first instance. Thus, the court had no obligation to give a pinpoint instruction on possessory interest.

Regardless, as we have concluded *ante*, in part I.A., Rodriguez did not have an unconditional possessory right to the hotel room and the prosecution presented substantial evidence to support each element of the ***burglary*** charge. Therefore, we conclude the trial court did not err by failing to provide a pinpoint jury instruction on possessory interest and, even if the court had erred, any such error was harmless. **[**313]** (*Anderson, supra, 51 Cal.4th at pp. 996–997*; see *People v. Merritt (2017) 2 Cal.5th 819, 831 [216 Cal. Rptr. 3d 265, 392 P.3d 421]* [failure to instruct on an element of a charged offense subject to harmless error analysis].)

C. *Equal Protection*

Finally, Rodriguez asserts any distinction this court has drawn between the possessory interest he had in the hotel room he rented and the possessory interest a homeowner or lessee has in a home or apartment violates his constitutional right to equal protection. We disagree. **[***20]**

(9) To prevail on an equal protection claim, the defendant must show that the state has adopted a classification that affects two or more similarly situated groups unequally. (*Cooley v. Superior Court (2002) 29 Cal.4th 228, 253 [127 Cal. Rptr. 2d 177, 57 P.3d 654]*.) Here, as discussed, California law has long recognized a distinction between the rights of a long-term tenant and a temporary lodger. (See *Stowe, supra, 44 Cal.2d at p. 421*; *Bullock, supra, 221 Cal.App.3d at p. 1097*; *Roberts, supra, 36 Cal.App.2d at p. Supp. 771*.) Accordingly, an individual renting a hotel room—particularly when, as is the case here, the

[3] The court instructed the jury, in part: "The defendant is charged in Count 3 with ***burglary*** in violation of … *section 459*. To prove the defendant is guilty of this crime, the People must prove that: The defendant entered a building/room; and, when he entered a building—within the building or room, he entered and intended to commit unlawful sexual intercourse with a minor more than three years younger or oral copulation with a person under 18."

room is rented for a short period and is not used as a residence—is not similarly situated to a homeowner or lessee of a home or apartment, and the *equal protection clause* does not apply.
[*1113]

Regardless, even if individuals renting hotel rooms and homeowners or lessees were similarly situated, individuals renting hotel rooms are not members of a protected class. Therefore, Rodriguez would need to show the allegedly disparate treatment of hotel room renters bears no rational relationship to a legitimate stated purpose. (See *People v. Hofsheier (2006) 37 Cal.4th 1185, 1200 [39 Cal. Rptr. 3d 821, 129 P.3d 29]*.) To the contrary, precluding individuals from entering a rented hotel room with the intent to commit a felony serves the public interest of protecting citizens by discouraging criminals from utilizing hotel rooms in areas where they are unknown and less likely to be recognized to carry **[***21]** out criminal conduct, as Rodriguez did in the present case. Accordingly, Rodriguez cannot establish a claim for equal protection.

II. *Dissuading a Witness*

Rodriguez also contends there was insufficient evidence to support his conviction on the charge of attempting to dissuade a witness from reporting a crime in violation of *section 136.1, subdivision (b)(1)*. He argues that the only evidence the prosecutor presented related to actions he took after ***Rebecca*** made her initial report to the police, that the statute requires an attempt to prevent the initial reporting of a crime, and that we must therefore reverse the conviction. We review assertions the evidence was insufficient to support the conviction for substantial evidence, and review any related issues of statutory interpretation de novo. (*Casares, supra, 62 Cal.4th at p. 823*; *Weatherford v. City of San Rafael (2017) 2 Cal.5th 1241, 1247 [218 Cal. Rptr. 3d 394, 395 P.3d 274]*.)

(10) *Section 136.1, subdivision (b)(1)* makes it a crime to dissuade the victim of a crime, or a witness, from "[m]aking any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge." (*§ 136.1, subd. (b)(1)*.) Thus, a plain reading of the statute includes *any* report of a crime to a law enforcement officer, including both the initial report and additional information about the **[***22]** offense provided thereafter. (See *People v. Fernandez (2003) 106 Cal.App.4th 943, 948 [131 Cal. Rptr. 2d 358]* (*Fernandez*).) **[**314]** Accordingly, an attempt to dissuade a witness from making a future or additional report to the police is sufficient to sustain a conviction pursuant to *section 136.1, subdivision (b)(1)*. (*People v. Pettie (2017) 16 Cal.App.5th 23, 54–55 [224 Cal. Rptr. 3d 160]*.)

Here, the prosecution presented evidence Rodriguez attempted to dissuade ***Rebecca*** immediately after he found out she made an initial report to the police. Specifically, the day after ***Rebecca*** went to the police, Rodriguez asked her to sign a statement indicating she was pressured to make an **[*1114]** inaccurate report to the police and that she only knew him through a dating application. ***Rebecca*** did not sign the statement and, instead, continued talking with the police, providing additional information and identifying the specific locations where the crimes occurred. During this time, Rodriguez continued to pressure and threaten ***Rebecca***, causing her to feel "overwhelmed and stressed out and scared." Although the evidence showed Rodriguez continued to pressure ***Rebecca*** up until the preliminary hearing—perhaps to explain why she testified inconsistently at that hearing—the prosecution relied primarily on the e-mail and early threats as a basis for the charge of attempting to dissuade a witness. **[***23]** The evidence related to those early attempts to dissuade ***Rebecca*** from continuing to provide information regarding the crimes to the police is sufficient to support the conviction pursuant to *section 136.1, subdivision (b)(1)*.

Rodriguez contends this case is akin to *Fernandez,* in which the court concluded the defendant did not violate *section 136.1, subdivision (b)(1)* by attempting to dissuade a witness from testifying, but it is not. (See *Fernandez, supra, 106 Cal.App.4th at p. 945*.) The court in *Fernandez* concluded the defendant did not violate *section 136.1, subdivision (b)(1)* because testimony was not the same as "reporting" and the "detailed and comprehensive statutory scheme for penalizing the falsification of evidence and efforts to bribe, influence, intimidate or threaten witnesses" required the court to construe the individual subdivisions of the statute narrowly. (*Fernandez, at p. 948*.) Here, as discussed, the People did not rely on Rodriguez's attempts to dissuade ***Rebecca*** from testifying, but instead asserted he violated *section 136.1, subdivision (b)(1)* by attempting to dissuade ***Rebecca*** from making further reports to the police in the very early days of the investigation. No other subdivision of *section 136.1*, or any related statute, covers attempts to dissuade a victim from providing additional information to the police after the initial reporting but before the defendant's **[***24]** arrest, and certainly the Legislature did not intend to permit intimidation of a victim or witness solely during that time. Thus, we decline to extend the reasoning of the court in *Fernandez* to interpret *section 136.1, subdivision (b)(1)* as narrowly as Rodriguez suggests.

(11) Rodriguez also asserts his actions are distinguishable from those of the defendant in *People v. Navarro (2013) 212 Cal.App.4th 1336 [152 Cal. Rptr. 3d 109]*, wherein the defendant took a phone from the victim to prevent her from calling the police. (*Id. at p. 1349*.) Although the facts of the present case do differ from *Navarro*, there is more than one way for a given defendant to violate a given statute and, here, as discussed, there was substantial evidence indicating Rodriguez attempted to dissuade ***Rebecca*** from making further reports to the police. In any event, the court in *Navarro* also found the defendant there violated *section 136.1, subdivision (b)(1)* when he later threatened the victim and told her to tell the police everything was **[*1115]** fine after she called 911 on another telephone line. (*Navarro, at pp. 1343, 1349*.) **[**315]** Thus, if anything, *Navarro* supports the conclusion that it is a violation of *section 136.1, subdivision (b)(1)* to dissuade a witness from *continuing* to report a crime, even after the initial report has been made.

We therefore conclude substantial evidence supports the conviction of attempting to dissuade a **[***25]** witness in violation of *section 136.1, subdivision (b)(1)*.

DISPOSITION

The judgment is affirmed.

McConnell, P. J., and Huffman, J., concurred.

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