UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEREMIAH BANKS, Petitioner-Appellant, v. KATHLEEN ALLISON, Respondent-Appellee.	No. 22-55512 D.C. No. 5:21-cv-00051-JWH-JPR Central District of California, Riverside ORDER

Before: GOULD, BENNETT, and LEE, Circuit Judges.

Appellant Jeremiah Banks filed a petition for panel rehearing or rehearing en banc on September 2, 2025. Dkt. No. 52. The panel has unanimously voted to deny the petition for panel rehearing and for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40.

The petition for panel rehearing or rehearing en banc is **DENIED**.

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06/18/2025	49		FILED OPINION (RONALD M. GOULD, MARK J. BENNETT and KENNETH K. LEE) AFFIRMED. This filing postdates the district court's judgment. Banks requests that we take judicial notice of his state court records. Dkt. 18. Because this motion is unopposed and the materials are judicially noticeable, this motion is GRANTED. See Fed. R. Evid. 201(b). For these reasons, the district court's denial of a Rhines stay and dismissal of Banks's habeas petition is AFFIRMED. Opinion by Judge Bennett. FILED AND ENTERED JUDGMENT. [12932053] (CPA)
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEREMIAH BANKS, *Petitioner-Appellant*, v. KATHLEEN ALLISON, *Respondent-Appellee*.	No.22-55512 D.C. No. 5:21-cv-00051- JWH-JPR OPINION

Appeal from the United States District Court
for the Central District of California
John W. Holcomb, District Judge, Presiding

Argued and Submitted January 13, 2025
Pasadena, California

Filed June 18, 2025

Before: Ronald M. Gould, Mark J. Bennett, and Kenneth K. Lee, Circuit Judges.

Opinion by Judge Bennett

SUMMARY*

Habeas Corpus

The panel affirmed the district court's denial of Jeremiah Banks's motion for a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), and its dismissal of Banks's 28 U.S.C. § 2254 habeas corpus petition alleging nine claims.

Two of Banks's claims were exhausted, but the remaining seven were unexhausted. When Banks filed his federal petition in January 2021, he moved for a stay and abeyance under *Rhines* so that he could return to state court and exhaust the unexhausted claims. After filing his federal petition, Banks took no action to exhaust his seven unexhausted claims for over a year. In April 2022, the district court denied Banks's motion for a *Rhines* stay because Banks failed to show good cause excusing his post-filing lack of diligence and intentionally delayed the review of his federal petition.

The panel held that a district court does not abuse its discretion by considering a petitioner's diligence in pursuing his state court remedies after he files his federal petition when evaluating good cause under *Rhines*. The panel also held that in exercising sound discretion when evaluating good cause under *Rhines*, the district court must consider a petitioner's diligence (or lack thereof) in pursuing his state court remedies after he files his federal petition.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court did not err in considering Banks's post-filing diligence in assessing whether he demonstrated good cause for a *Rhines* stay. Banks failed to demonstrate cause excusing his lack of diligence, and the district court did not abuse its discretion by denying Banks's request for a *Rhines* stay and abeyance.

The panel rejected Banks's argument that the district court contravened *Rose v. Lundy*, 455 U.S. 509 (1982), by not offering him the choice of withdrawing his entire mixed habeas petition and instead dismissing his petition without prejudice. The panel explained that Banks did not have such a choice because, as part of the order denying Banks's application for a *Rhines* stay, the district court dismissed Banks's two exhausted claims with prejudice.

COUNSEL

Raj N. Shah (argued), Deputy Federal Public Defender; Cuauhtémoc Ortega, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Petitioner-Appellant.

Matthew Mulford (argued), Deputy Attorney General; Daniel Rogers, Supervising Deputy Attorney General; Charles C. Ragland, Senior Assistant Attorney General; Rob Bonta, California Attorney General; Office of the California Attorney General, San Diego, California; for Respondent-Appellee.

OPINION

BENNETT, Circuit Judge:

On January 8, 2021, Petitioner Jeremiah Banks, a state prisoner, filed a habeas corpus petition under 28 U.S.C. § 2254 alleging nine claims. Two of his claims were exhausted, but the remaining seven claims were unexhausted. When Banks filed his federal petition, he also moved for a stay and abeyance under *Rhines v. Weber*, 544 U.S. 269 (2005), so that he could return to state court and exhaust his seven unexhausted claims. After filing his federal petition, Banks took no action to exhaust his seven unexhausted claims for over a year. On April 26, 2022, the district court denied Banks's motion for a *Rhines* stay because Banks failed to show good cause excusing his post-filing lack of diligence and intentionally delayed the review of his federal petition. We must decide whether, when analyzing good cause under *Rhines*, a district court may take into account a petitioner's lack of diligence after filing his federal habeas petition. We hold that a district court must take post-filing diligence into account and that the district court appropriately did so here. Thus, we affirm.

FACTS AND PROCEDURAL BACKGROUND

In 2017, Banks was found guilty in California state court of one count of human trafficking of a minor, one count of pimping a minor under 16 years old, and one count of pandering by procuring a minor under 16 years old. The jury found that Banks used force or fear when committing certain of the offenses and that he had a sentence-enhancing prior conviction. In 2018, the California Superior Court sentenced Banks to an aggregate term of 30 years to life.

On January 8, 2021, Banks filed a federal petition for writ of habeas corpus in the United States District Court for the Central District of California. Banks asserted nine claims: (1) erroneous admission of prior acts evidence; (2) erroneous admission of inadmissible hearsay evidence; (3) use of perjured hearsay testimony; (4) ineffective assistance of counsel; (5) prosecutorial misconduct; (6) failure to adjudicate a motion to set aside preliminary hearing testimony; (7) *Brady* violations; (8) ineffective assistance of appellate counsel on direct appeal; and (9) prejudicial admission of perjured hearsay testimony.

Banks had exhausted his two claims for erroneous admission of prior acts and inadmissible hearsay evidence in California state court by November 2019. The California Superior Court and California Court of Appeal rejected these claims and the California Supreme Court denied review. For his other seven claims, Banks filed a state habeas petition raising these challenges, which was rejected by the California Superior Court in October 2020. But after the Superior Court rejected his claims, Banks failed to appeal its decision to the California Court of Appeal or the California Supreme Court. In his federal petition, Banks acknowledged that he had not appealed these seven claims.[1]

Along with his federal habeas petition, Banks also filed a motion for a stay and abeyance under *Rhines* in order to

[1] The federal petition included the following question: "If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons[.]" Banks responded: "[S]ubmitted Habeas to Superior Court, where it was denied, in process of con[verting] denial issues for submission to Court of Appeal, and subsequently CA Supreme[] Court."

exhaust his state court remedies and "return to federal court for review of his perfected petition" (quoting *Rhines*, 544 U.S. at 272). Seven days after Banks filed his federal petition and application for a *Rhines* stay, the magistrate judge reminded Banks that "[t]o the extent the Petition includes any unexhausted claims, nothing prevents Petitioner from immediately returning to state court to attempt to exhaust them." Banks nevertheless took no action to exhaust his seven unexhausted claims.

In February 2021, the State moved to dismiss Banks's habeas petition. The State wrote:

> In counsel for the State's view, it is likely that the California Court of Appeal or California Supreme Court may impose one or more procedural bars if presented with Banks's unexhausted claims because they have already been ruled to be untimely. Still, the reviewing courts exercise independence when considering habeas corpus claims.

(citation omitted).

In June 2021, Banks, with the help of another inmate, filed an opposition to the State's motion to dismiss. Banks urged that his "constructively filed request for Stay and Abeyance should be granted so as to allow for the introduction of additional evidence to support Petitioner's habeas claims." Banks claimed in his opposition that he had now filed an appeal to the California Court of Appeal of his seven unexhausted claims and was "awaiting reply." But no such appeal had been filed.

In August 2021, the magistrate judge issued a Report and Recommendation, recommending that "Petitioner's stay motions be denied, [the State]'s motion to dismiss be granted, and this action be dismissed, some claims with prejudice and some without."

As to Banks's two exhausted claims, the magistrate judge recommended that they be dismissed as meritless. As to Banks's seven unexhausted claims, the magistrate judge recommended that the district court deny Banks a *Rhines* stay. The magistrate judge found that "Petitioner has likely shown good cause for his failure to exhaust up to the time he filed his [federal] Petition" due to a lack of representation in his initial-review collateral proceedings before the California Superior Court. But the magistrate judge found Petitioner "ha[d] not adequately explained the subsequent seven-month delay in attempting to exhaust grounds three through nine" through the state appeals process.

The magistrate judge noted that Banks "was aware that [those grounds] were unexhausted when he filed his Petition and that he was required to exhaust them" and that Banks was advised by the court in January 2021 that nothing prevented him from exhausting his claims in state court. In response to the State's motion to dismiss, Banks argued that he waited to exhaust his state court remedies "because he hoped to gather 'additional evidence to support' his claims." But the magistrate judge found that Banks "fail[ed] to explain why he was able to present his claims to [the federal district court] without gathering additional evidence but [was] unable to present those same claims to the California Supreme Court."

The magistrate judge also found that Banks failed to show that ineffective assistance of appellate counsel, even if

present, "impacted his ability to exhaust his state-court remedies." The magistrate judge concluded that this argument was unavailing because:

> [Petitioner] filed a habeas petition in the superior court in September 2020. To date, almost 10 months have passed since the superior court denied that petition, but he has not returned to state court to try to exhaust his claims despite being advised by this Court that he could do so. Nothing that appellate counsel did or did not do has any bearing on Petitioner's most recent dilatory conduct. Thus, he cannot establish the requisite good cause since then for a *Rhines* stay based on his appellate counsel's performance.

The magistrate judge also rejected Banks's arguments that COVID-19 restrictions limited his access to the prison law library because that lack of access did not explain why Banks pursued his federal petition but declined to pursue his state appeal. The magistrate judge concluded that "Petitioner [was] not entitled to a *Rhines* stay because he cannot show good cause for not having earlier exhausted his claims and has engaged in intentionally dilatory tactics."

In April 2022, the district court accepted the findings and recommendations of the magistrate judge, denied Banks's motion for a *Rhines* stay, and dismissed his petition. The district court agreed with the magistrate judge's findings on Banks's two exhausted claims. For Banks's seven unexhausted claims, the district court noted that "[n]one of [Petitioner's] allegations . . . explain why he has failed to exhaust" his other state claims "in the 15 months since filing

the [federal] Petition." The district court observed that even to the date of its order (April 26, 2022), Banks "still [had] not even attempted to exhaust them."[2] The district court reviewed Banks's explanations for his lack of diligence and found them unavailing. The district court denied Banks a *Rhines* stay and dismissed his exhausted claims with prejudice and his unexhausted claims without prejudice.

In December 2022, Banks filed an appeal in the California Court of Appeal of his seven unexhausted claims.[3] Dkt. 18 at Ex. A. The California court held that Banks's claims were all barred as untimely and lacked merit. Dkt. 18 at Ex. B. Banks appealed this decision to the California Supreme Court which summarily denied his petition in April 2023. Dkt. 18 at Ex. D.

We granted a certificate of appealability as to whether the district court abused its discretion in denying Banks a *Rhines* stay. We also granted a certificate of appealability as to whether the district court erred by failing to provide Banks the choice between dismissing without prejudice his mixed habeas petition to pursue state court exhaustion or abandoning his unexhausted claims under *Rose v. Lundy*, 455 U.S. 509 (1982).

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[2] Although Banks contends that he thought another inmate had filed the appeal of his seven unexhausted claims in June 2021, he was informed by the magistrate judge in August 2021 that this appeal had not been filed. Banks nevertheless did not file an appeal in California state court for his unexhausted claims at any time before the district court's dismissal of the case on April 26, 2022.

[3] This filing postdates the district court's judgment. Banks requests that we take judicial notice of his state court records. Dkt. 18. Because this motion is unopposed and the materials are judicially noticeable, this motion is **GRANTED**. *See* Fed. R. Evid. 201(b).

JURISDICTION AND STANDARD OF REVIEW

"We have jurisdiction to review the dismissal of a habeas petition under 28 U.S.C. § 2253(a)." *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th Cir. 2008). "We review the district court's denial of a stay and abeyance for abuse of discretion." *Blake v. Baker*, 745 F.3d 977, 980 (9th Cir. 2014).

DISCUSSION

The history and purpose of a *Rhines* stay inform our conclusion that the district court did not abuse its discretion by considering Banks's conduct after he filed his federal habeas petition. In *Rose v. Lundy*, the Supreme Court confronted the issue of mixed habeas petitions: petitions for habeas corpus "that contain[] both exhausted and unexhausted claims." 455 U.S. at 513. The Supreme Court held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Id.* at 522. The Supreme Court explained that "[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings," *id.* at 518, because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity [for] the state courts to correct a constitutional violation," *id.* (quoting *Darr v. Buford*, 339 U.S. 200, 204 (1950)). The Supreme Court reasoned that comity "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Id.* (quoting *Darr*, 339 U.S. at 204).

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA preserved *Lundy*'s total exhaustion requirement, *see* 28 U.S.C. § 2254(b)(1), (b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . . ."), but also imposed a one-year statute of limitations for filing a federal habeas petition, *see id.* § 2244(d)(1). This created a potential timing issue with *Lundy*'s dismissal requirement: "[i]f a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review." *Rhines*, 544 U.S. at 275. "Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion. Thus, whether a petitioner ever receives federal review of his claims may turn on which district court happens to hear his case." *Id.*

In response to this problem, in *Rhines*, the Supreme Court authorized a stay-and-abeyance procedure for mixed habeas petitions. Recognizing the district courts' equitable ability to issue stays and Congress's enactment of AEDPA "against the backdrop of *Lundy*'s total exhaustion requirement," *id.* at 276, the Supreme Court authorized district courts to toll the one-year limitations period "while a 'properly filed application for State post-conviction or other collateral review' is pending," *id.* (quoting 28 U.S.C. § 2244(d)(2)).

But the Supreme Court recognized that stay and abeyance, "if employed too frequently," "frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings"

and "undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition." *Id.* at 277. "For these reasons," the Supreme Court instructed that "stay and abeyance should be available only in *limited circumstances*" and that a "mixed petition should not be stayed indefinitely." *Id.* (emphasis added).

The Supreme Court set out three requirements for a *Rhines* stay. First, "[b]ecause granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court." *Id.* Second, a stay is appropriate only if the petitioner's unexhausted claims are not "plainly meritless." *Id.* Third, "if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all." *Id.* at 278.

Here, the district court denied Banks's motion for a stay and abeyance because Banks failed to explain why he did not exhaust his state court remedies for more than fifteen months while his federal petition was pending.[4] The

[4] Banks filed his partially unexhausted federal petition on January 8, 2021. Banks acknowledged that some of his claims "were not previously presented to the California Supreme Court" and that he was "in process of con[verting] denial issues for submission to Court of Appeal, and subsequently CA [Supreme] Court."

On January 15, 2021, the magistrate judge advised in an order: "To the extent the Petition includes any unexhausted claims, nothing prevents Petitioner from immediately returning to state court to attempt to exhaust them."

question before us is whether the district court abused its discretion in considering Banks's conduct following the filing of his federal habeas petition in its good cause analysis.[5]

We hold that a district court does not abuse its discretion by considering a petitioner's diligence in pursuing his state court remedies after he files his federal petition when evaluating good cause under *Rhines*. We also hold that in exercising sound discretion when evaluating good cause under *Rhines*, the district court must consider a petitioner's diligence (or lack thereof) in pursuing his state court remedies after he files his federal petition.

The objectives of AEDPA and the principles of *Rhines* instruct us that a petitioner's post-filing conduct is relevant

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In her August 5, 2021 Report and Recommendation, the magistrate judge wrote:

> Despite his assertion otherwise, Petitioner has not filed any habeas petitions concerning his underlying convictions in the state court of appeal or supreme court. *See* Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/ (searches for "Jeremiah" with "Banks" in fourth appellate district and supreme court yielding no relevant results) (last visited Aug. 4, 2021).

Banks had still not filed any appeal in California state court before the district court dismissed his federal petition on April 26, 2022.

[5] The magistrate judge found that Banks's delay both undercut his argument for good cause and constituted intentional delay in violation of two *Rhines* requirements. Because we find that Banks does not meet the requirement for good cause under *Rhines*, we do not assess whether his conduct also constituted "abusive litigation tactics or intentional delay." 544 U.S. at 278.

to the good cause analysis. The equitable nature of a *Rhines* stay supports our holding, because a petitioner's duty to exhaust his state court remedies does not end when he files his federal petition. Because a *Rhines* stay is meant to be a temporary remedy, the district court should consider a petitioner's post-filing delay in assessing good cause.

The objectives of AEDPA inform us that a petitioner's post-filing diligence is relevant to the *Rhines* good cause analysis. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences," *Woodford v. Garceau*, 538 U.S. 202, 206 (2003), and to "further the principles of comity, finality, and federalism," *Williams v. Taylor*, 529 U.S. 420, 436 (2000). "A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Lundy*, 455 U.S. at 518–19. "[I]t would be unseemly" under our federal system for a federal court to reverse a state court conviction without first affording the state court the opportunity to address its error. *Duncan v. Walker*, 533 U.S. 167, 179 (2001) (quotation marks omitted) (quoting *Lundy*, 455 U.S. at 518).

The Supreme Court has instructed that "in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Id.* at 732.

A petitioner who presents a mixed petition has, by definition, not presented some claims to the state courts—

the courts of the first review. The Supreme Court emphasized that a stay and abeyance is meant to be a temporary remedy to cure this problem in accord with AEDPA. But "[a] mixed petition should not be stayed indefinitely." *Rhines*, 544 U.S. at 277. "[T]he district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA," and "district courts should place reasonable time limits on a petitioner's trip to state court and back." *Id.* at 277, 278. Petitioners who fail to pursue their state court remedies after filing their federal petitions contravene these goals and may indefinitely delay the completion of their state and federal appeals. A petitioner's failure to seek state court review after filing a mixed federal petition, thereby acting contrary to the instructions of, and federalism and comity interests inherent in AEDPA, necessarily informs whether a stay and abeyance is appropriate.

"There is no doubt Congress intended AEDPA to advance" "the principles of comity, finality, and federalism." *Williams*, 529 U.S. at 436. AEDPA advanced "the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts." *Id.* In respect of "this delicate balance," the Supreme Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Id.* For that reason, "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Id.* at 437. And "[f]or state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error."

Id. This works to "safeguard[] the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh[] and lends finality to state court judgments within a reasonable time," which vindicates AEDPA's goals of federalism and comity. *Day v. McDonough*, 547 U.S. 198, 205–06 (2006) (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)).

The principles of equity also support (and indeed command) our holding. A *Rhines* stay is a form of equitable relief. *See Blake*, 745 F.3d at 982 ("The good cause element is the equitable component of the *Rhines* test. It ensures that a stay and abeyance is available only to those petitioners who have a legitimate reason for failing to exhaust a claim in state court."). The equities of good cause do not, and indeed cannot, end on the day a petitioner files his federal petition. Rather, a petitioner's ongoing failure to exhaust his state court remedies informs whether it would be equitable to dismiss or stay the mixed petition. Nothing in *Rhines* or our precedent indicates that the equities stop once a petitioner files his federal claim. And such a strange rule would directly conflict with the policy goals that underlay the passage of AEDPA.

For example, the Supreme Court has noted "AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan*, 533 U.S. at 181 (citing 28 U.S.C. §§ 2254(b), 2254(e)(2), 2264(a)). And the Supreme Court has also observed that "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences." *Woodford*, 538 U.S. at 206. Allowing a federal petition to linger while the petitioner fails to act diligently in seeking state relief undermines both purposes.

In other equitable contexts, we consider a party's behavior after an initial filing to assess whether relief is appropriate. For example, Federal Rule of Civil Procedure 16(b) requires parties to show good cause to modify a scheduling order. Fed. R. Civ. P. 16(b)(4). This court has held that parties that fail to seek to amend their complaints by a scheduling order's deadline, despite having the knowledge and need to do so, weighed against a finding of good cause. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294–95 (9th Cir. 2000).

And in many other contexts, we consider a party's ongoing behavior in assessing the equities. *See, e.g.*, *United States ex rel. Alexander Volkhoff, LLC v. Janssen Pharmaceutica N.V.*, 945 F.3d 1237, 1242 (9th Cir. 2020) (considering a party's conduct after filing a complaint in considering the equities of a nonparty appeal); *Marin v. HEW, Health Care Fin. Agency*, 769 F.2d 590, 593–94 (9th Cir. 1985) (finding the application of res judicata was not unfair because the plaintiff could have appealed but failed to take action); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1146–47 (9th Cir. 1983) (defining contempt as a party's failure "to take all the reasonable steps within his power to insure compliance with the court's order" (cleaned up) (quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 406 (9th Cir. 1976))); *United States v. Terabelian*, 105 F.4th 1207, 1218 (9th Cir. 2024) (considering a party's conduct after filing an appeal in applying the fugitive-disentitlement doctrine).

Our holding aligns with the opinion of the First Circuit, which is our only sister circuit to have considered a similar issue. In *Sena v. Kenneway*, 997 F.3d 378 (1st Cir. 2021), the petitioner filed a pro se federal habeas petition two days after counsel was appointed to pursue his claims in state

court. *Id.* at 385. The district court found that the petitioner lacked good cause excusing his failure to exhaust his state remedies because he had "both the opportunity and ability to pursue state court collateral relief while awaiting the appointment of counsel . . . for more than six months." *Id.* The First Circuit held that "delay was an appropriate integer in the good cause calculus: when determining good cause in a variety of contexts, courts typically gauge the scope of the moving party's delay and measure it against that party's window of opportunity within which to act." *Id.* at 386. Because the petitioner made "no move to initiate state-court proceedings during the seven-plus months after [the state] notified him that it would not furnish him with representation," the petitioner failed to show diligence and good cause excusing his failure to exhaust. *Id.*

Our holding also adheres to our approach for equitably tolling the statute of limitations for habeas petitions. The Supreme Court emphasized that, even if there was an extraordinary circumstance justifying equitable tolling, a petitioner must still pursue his petition diligently to qualify for equitable tolling. In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), Pace contended that extraordinary circumstances tolled the statute of limitations for filing his federal habeas petition because his state court petition was pending. *Id.* at 418. The Supreme Court found that even if his state court petition tolled the statute of limitations, Pace was nevertheless ineligible for relief because "he ha[d] not established the requisite diligence." *Id.* The Supreme Court emphasized that "petitioner waited years, without any valid justification, to assert" his state court claims and then "sat on them for five more months *after* his [state court] proceedings became final before deciding to seek relief in federal court." *Id.* at 419. The Supreme Court concluded that "[u]nder long-

established principles, petitioner's lack of diligence precludes equity's operation." *Id.*

In *Smith v. Davis*, 953 F.3d 582 (9th Cir. 2020) (en banc), we found that the Supreme Court "evaluated Pace's diligence in all time periods, including those when he was free from impediments to preparing and filing his habeas petition that had been caused by any extraordinary circumstance." *Id.* at 594. We declined to adopt a rule that the presence of an extraordinary circumstance paused the accrual of the limitations period, regardless of whether the petitioner was diligent in filing his petition after the impediment was removed. *Id.* at 598–99. We justified our opinion because "courts must take a flexible approach in applying equitable principles," *id.* at 590, "AEDPA seeks to eliminate delays in the federal habeas review process," *id.* at 591 (quoting *Holland v. Florida*, 560 U.S. 631, 648 (2010)), and the Supreme Court favors a "flexible, circumstance-specific approach" to equitable tolling, *id.* at 593.

The inherently flexible nature of equitable relief, combined with the purposes of AEDPA of promoting comity with the state courts, the timely execution of state sentences, and the need for finality, support our holding that district courts must consider a party's post-filing diligence (or lack thereof) in assessing good cause for a *Rhines* stay. To hold otherwise would invite parties to endlessly delay resolution of their federal claims by not seeking state court relief and invite piecemeal litigation that AEDPA is designed to protect against.

We do not doubt that a petitioner may fail to exhaust his state court remedies without trying to delay the proceedings. Or that such a failure to exhaust might not be due to a lack of diligence. But that does not inform whether a district

court must look at all relevant facts, *including* a petitioner's post-filing conduct, in order to properly exercise its discretion in deciding whether to grant a *Rhines* stay. And that is the question we answer here—in the affirmative.

Banks argues that "the good cause inquiry is *backward-looking* in nature" because "every single time the Supreme Court mentioned the good cause requirement in *Rhines*, the Court phrased it in the *past* tense, not the present tense." We reject that the Supreme Court's use of past tense signaled that post-filing conduct is off-limits. In *Rhines*, the petitioner filed his state petition after for the district court granted a stay and abeyance for his federal petition. 544 U.S. at 272. It was appropriate for the Supreme Court to use past tense to discuss whether Rhines had good cause excusing his failure to exhaust because his petition had already been filed.

Banks also argues that "even assuming [he] *was* required to show good cause after the filing of his federal petition, the District Court's analysis still does not withstand scrutiny" because Banks's "lack of post-conviction counsel" excused his failure to exhaust.[6] We have held that a petitioner meets the standard for good cause under *Rhines* if he meets the standard for good cause announced in *Martinez v. Ryan*, 566

[6] Banks contends that "the State has forfeited any arguments as to the good cause requirement" because it "did not contest that Banks established good cause for his failure to exhaust based on the absence of counsel." We disagree. First, the State cited *Rhines* in its motion to dismiss. *See W. Watersheds Project v. U.S. Dep't of the Interior*, 677 F.3d 922, 925 (9th Cir. 2012) (explaining there is "no waiver if the issue was raised, the party took a position, and the district court ruled on it"). Second, most of Banks's delay in exhausting his state court remedies occurred after the State moved to dismiss in February 2021. The State cannot be expected to anticipate Banks's lack of diligence that followed its motion to dismiss.

U.S. 1 (2012). *See Blake*, 745 F.3d at 983–84. *Martinez* provided that deficient counsel or a lack of counsel "in the initial-review collateral proceeding" may provide cause to excuse procedural default. 566 U.S. at 14.

But *Martinez* "does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts." *Id.* at 16. We have not addressed whether good cause under *Rhines* extends past the limits of *Martinez* to include instances where a petitioner lacks post-conviction counsel to file an appeal. *See Blake*, 745 F.3d at 983–84 (finding that the good cause standard under *Rhines* "cannot be any more demanding than a showing of cause under *Martinez*"). But we need not address that issue here.

Regardless of a lack of counsel, Banks had full notice that his claims were unexhausted but failed to act. Banks received a copy of the California Superior Court's denial order in November 2020. He did not act to exhaust his state court remedies until December 2022. Dkt. 18 at Ex. A. Banks argues that he thought his fellow inmate had filed his appeal by June 2021, but that argument still fails to explain why Banks did not exhaust his state remedies after the magistrate judge's report and recommendation issued in August 2021 but before the district court ruled in April 2022. Banks knew that some of his claims were unexhausted, but he nevertheless did not act to cure that deficiency. That weighs against good cause even if he was unrepresented in his appeals.

Banks's remaining arguments before the district court also fall short. Banks argued that good cause existed because he suffered a knee injury in June 2019 that affected his daily

functioning, that he was retaliated against by prison officials in December 2019, and that his mail was illegally opened in February 2020. But as the district court noted, these incidents occurred before Banks filed his federal petition.[7] They cannot excuse his lack of diligence after he filed his federal petition.

Banks also asserts that he has a Test of Adult Basic Education (TABE) score of 8.3, which is equivalent to an eighth-grade education, but he was not found to have physical or developmental disabilities precluding his ability to communicate.[8] Banks finally contends that the prison's COVID-19 protocols limited his access to the prison library and restricted his communication with his fellow inmate assisting his appeal. But the prison's COVID-19 restrictions were lifted on March 1, 2021, which means Banks had access to the law library for five months before the magistrate judge's report and recommendation and still failed to exhaust his state court remedies.[9]

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[7] The district court observed that Banks filed his federal petition on January 8, 2021, and "[n]one of his allegations concerning the purported retaliation or his knee injury explain why he has failed to exhaust grounds three through nine in the 15 months since filing the Petition."

[8] The district court similarly rejected this argument finding that Banks "does not have a mental impairment impacting his ability to communicate." The district court further concluded that "even if [Banks] could establish a mental impairment, it nevertheless did not affect his ability to exhaust his state-court remedies. On the contrary, he filed his original Petition, a motion to stay, and an amended motion to stay in this Court despite his TABE score."

[9] The district court similarly observed that Banks "admits that the protocols were lifted or eased on March 1, 2021, and that access to the law library was restored, but he has not even attempted to exhaust his

The district court did not err in considering Banks's post-filing lack of diligence in assessing whether he demonstrated good cause for a *Rhines* stay, and indeed would have erred had it not considered it. Banks did not attempt to exhaust his state court remedies for fifteen months after filing his federal petition despite being informed that some of his claims were unexhausted. Banks failed to demonstrate good cause excusing his lack of diligence.[10] The district court did not abuse its discretion by denying Banks's request for a *Rhines* stay and abeyance.

Banks argues, in the alternative, that "the District Court contravened *Lundy* by failing to offer Banks the choice of withdrawing his entire mixed habeas petition" and instead dismissing his petition without prejudice. We have stated that *Rhines* left the choice under *Lundy* intact, which requires that a district court must "give [the petitioner] the choice of exhausting the unexhausted claim by returning to state court, or abandoning the claim and pursuing the remaining claims in federal court" before dismissal. *Jefferson v. Budge*, 419 F.3d 1013, 1016 (9th Cir. 2005). But Banks did not have such a choice because Banks did not have any exhausted claims left. As part of the same order denying Banks's application for a *Rhines* stay, the district court dismissed Banks's two exhausted claims with prejudice. Banks could not "let the unexhausted claims fall by the wayside" because there were no exhausted claims remaining. *Id.* at 1017.

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unexhausted claims during the more than nine months since then" (citation omitted).

[10] Because we find that Banks failed to demonstrate good cause, we do not reach the questions of whether his claims are not "plainly meritless" or whether he engaged in "abusive litigation tactics or intentional delay." *Rhines*, 544 U.S. at 277–78.

Because the district court did not abuse its discretion in finding that Banks was not eligible for a *Rhines* stay, the district court did not err in dismissing Banks's habeas petition.

CONCLUSION

For these reasons, the district court's denial of a *Rhines* stay and dismissal of Banks's habeas petition is **AFFIRMED**.

Appellate Courts Case Information

Search Results - Supreme Court

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Search by Case Party

Last Name or Organization: banks
First Name: jeremiah

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Click on the case number for more information about a case.

Supreme Court Case Number	Court of Appeal Case Number	Trial Court Case Number
S289531 PEOPLE v. BANKS	B332966	YA081449
S278581 BANKS (JEREMIAH) ON H.C.		
S258589 PEOPLE v. BANKS	D075934	FSB1404047
S217397 PEOPLE v. BANKS	B245223	YA081449

Appellate Courts Case Information

Supreme Court

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Case Summary

Supreme Court Case:	S278581
Court of Appeal Case(s):	No Data Found
Case Caption:	BANKS (JEREMIAH) ON H.C.
Case Category:	Original Proceeding - Habeas
Start Date:	02/10/2023
Case Status:	case closed
Issues:	none
Disposition Date:	04/26/2023
Case Citation:	none

Cross Referenced Cases:
No Cross Referenced Cases Found

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Appellate Courts Case Information

Supreme Court

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Docket (Register of Actions)

BANKS (JEREMIAH) ON H.C.
Division SF
Case Number S278581

Date	Description	Notes
02/10/2023	Petition for writ of habeas corpus filed	Petitioner: Jeremiah Banks Pro Per
04/26/2023	Petition for writ of habeas corpus denied	

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Appellate Courts Case Information

Search Results - 4th Appellate District Division 1

Change court

Search by Case Party

Last Name or Organization: banks
First Name: jeremiah

<< Search screen
1 - 2 of 2 Records Found.

Click on the case number for more information about a case.

Court of Appeal Case Number	Trial Court Case Number	Case Caption
D081368	FSB1404047	In re JEREMIAH BANKS on Habeas Corpus
D075934	FSB1404047	The People v. Banks

Appellate Courts Case Information

4th Appellate District Division 1

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Case Summary

Trial Court Case:	FSB1404047
Court of Appeal Case:	**D081368**
Division:	
Case Caption:	In re JEREMIAH BANKS on Habeas Corpus
Case Type:	CR
Filing Date:	12/01/2022
Completion Date:	01/17/2023
Oral Argument Date/Time:	

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Appellate Courts Case Information

4th Appellate District Division 1

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Docket (Register of Actions)

In re JEREMIAH BANKS on Habeas Corpus
Case Number D081368

Date	Description	Notes
12/01/2022	Petition for a writ of habeas corpus filed.	
12/05/2022	Case transferred to San Diego per Supreme Court order.	CRC 10.1000(b)(1)(A)

01/17/2023	Order denying petition filed.	The petition for writ of habeas corpus has been read and considered by Presiding Justice McConnell and Justices Do and Buchanan. Judicial notice is taken of the prior opinion in appeal No. D075934. In December 2017, a jury found Jeremiah Banks guilty of one count of human trafficking of a minor, one count of pimping a minor under 16 years of age, and one count of pandering by procuring a minor under 16 years of age. The jury also found true allegations that Banks used force or fear during the commission of one count, and that he had suffered a prior conviction within the meaning of Penal Code section 12022.5. In November 2018, the trial court sentenced Banks to an aggregate term of 30 years to life. In his direct appeal, Banks argued the trial court erred in admitting evidence of a prior incident of pandering committed by Banks and by admitting prior statements made by the victim. In September 2019, this court modified the judgment to correct a minor sentencing error and affirmed the judgment as modified. In September 2020, Banks filed a petition for habeas corpus in the superior court. In October 2020, the superior court summarily denied the petition. In his present petition, filed in December 2022, Banks collaterally attacks the judgment of conviction. He sets forth seven separate grounds for relief, which can be summarized as follows: 1) the victim's pretrial interview statements that were introduced at the preliminary hearing were coerced by the investigating officer; 2) trial and appellate counsel provided ineffective assistance in many regards, including by not conducting adequate investigations, by not filing pretrial motions to suppress certain evidence, and by not asserting meritorious arguments on appeal; 3) the prosecutor violated Brady v. Maryland (1963) 373 U.S. 83 (Brady) by failing to disclose exculpatory evidence; and 4) the cumulative effect of these errors warrants reversal. Based on these grounds, Banks seeks an order vacating the judgment of conviction. Banks is not entitled to habeas corpus relief. His petition, filed more than four years after he was initially sentenced, and more than two years after his habeas petition in the superior court was denied, is barred as untimely. (In re Sanders (1999) 21 Cal.4th 697, 703; In re Swain (1949) 34 Cal.2d 300, 302.) As to his petition in this court, Banks claims that he had another inmate help him with the petition. Banks believed the petition had been filed until he learned on August 25, 2021 that no habeas petition concerning his underlying convictions had been filed in the California Court of Appeal. However, Banks provides no explanation for the delay between August 2021 when he discovered that no habeas petition had been filed, and December 2022 when he did ultimately file a petition with this court. "[T]he filing of untimely claims without any serious attempt at justification is an example of abusive writ practice." (In re Reno (2012) 55 Cal.4th 428, 460.) Even if Banks's petition were not procedurally barred, it would be denied on the merits. A prisoner attacking a final judgment of conviction by petition for writ of habeas corpus bears a heavy burden to plead a prima facie claim for relief, and to do so should state with particularity the facts underlying the claim and also submit declarations, pertinent trial transcripts, and other reasonably available documents supporting the claim. (People v. Duvall (1995) 9 Cal.4th 464, 474.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (People v. Karis (1988) 46 Cal.3d 612, 656.)Banks alleges that false evidence was introduced at his preliminary hearing consisting of coerced statements elicited by the police during the victim's pretrial interview. To be entitled to habeas corpus relief on this basis, Banks must show that "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced." (Pen. Code, § 1473,

Pet. App. 033

subd. (b)(1).) Regarding the use of coerced witness statements, "[t]he defendant has no standing to assert a violation of another's constitutional rights." (People v. Boyer (2006) 38 Cal.4th 412, 444.) "A defendant may assert a violation of his or her own right to due process of the law and a fair trial based upon third party witness coercion, however, if the defendant can establish that trial evidence was coerced or rendered unreliable . . . and that the admission of this evidence would deprive the defendant of a fair trial. [Citations.]" (People v. Williams (2010) 49 Cal.4th 405, 452-453.) Defendant bears the burden of showing how the coercion " 'directly impaired the free and voluntary nature of the . . . testimony in the trial itself' [citation] and impaired the reliability of the trial testimony [citation]." (Id. at p. 453, fn. omitted.) Here, Banks contends that the victim's statements that were introduced into evidence at his preliminary hearing were improperly coerced, because she was questioned by the investigating officer "in a cold/freezing interview room . . . possibly under the influence of drugs and /or alcohol," and at the time of her interview, she was 15 years old. Although Banks contends that the circumstances of the victim's pretrial interview were coercive, he does not specify what aspects of her testimony were false and why such false testimony was essential to establishing the essential elements of the crimes. Thus, Banks has not shown that any of the testimony that he contends was false was "substantially material or probative" (Pen. Code, § 1473, subd. (b)(1)), such that there is a reasonable probability that the outcome of his preliminary hearing would have been different had the testimony not been introduced (In re Roberts (2003) 29 Cal.4th 726, 742). Conclusory allegations that the outcome would have been different absent the victim's allegedly false testimony are insufficient to state a prima facie case for relief. (See People v. Williams (1988) 44 Cal.3d 883, 937 [habeas corpus petitioner must show "prejudice as a 'demonstrable reality,' not simply speculation as to the effect of errors or omissions of counsel"].)Banks's claims of ineffective assistance of counsel also do not state a prima facie case for habeas corpus relief. With respect to the claim that trial and appellate counsel did not conduct adequate investigations, Banks has not shown that "counsel knew or should have known that further investigation was necessary," nor has he "establish[ed] the nature and relevance of the evidence that counsel failed to present or discover." (People v. Williams, supra, 44 Cal.3d at p. 937.) Counsel's decisions whether to file a pretrial motion, whether to object to the admission of evidence at the preliminary hearing, whether to call certain witnesses at the preliminary hearing, and whether to raise certain arguments on appeal are all tactical decisions for counsel to make, are accorded substantial deference by reviewing courts, and rarely establish counsel's incompetence. (See, e.g., People v. Riel (2000) 22 Cal.4th 1153, 1185 [failure to object]; People v. Bolin (1998) 18 Cal.4th 297, 334 [failure to call witnesses]; (People v. Turner (1992) 7 Cal.App.4th 1214, 1220, 1222 [failure to file pretrial motion to suppress]; In re Spears (1984) 157 Cal.App.3d 1203, 1211 [appellate counsel's duties on appeal].) Nor has Banks submitted any declarations from trial or appellate counsel or any other attorney regarding counsels' performance or whether any deficiency in their performance caused him prejudice. (See Strickland v. Washington (1984) 466 U.S. 668, 687; People v. Ledesma (1987) 43 Cal.3d 171, 215-218.) Although Banks is clearly dissatisfied with counsel's representation at trial and in his direct appeal, his repeated allegations that counsel provided constitutionally ineffective assistance are insufficient to sustain his pleading burden. "The burden of establishing incompetence rests with defendant and it must be shown as demonstrable reality, not as mere speculation." (People v. Lewis (1977) 71 Cal.App.3d 817, 821.)

Banks also fails to state a prima facie claim of a Brady violation entitling him to habeas corpus relief. The prosecution has a duty to disclose evidence to a criminal defendant when the evidence is both favorable to the defendant and material on either guilt or punishment. (In re Miranda (2008) 43 Cal.4th 541, 575.) Banks contends that prior to the preliminary hearing, the prosecution withheld evidence related to the victim's pretrial interviews. Banks's assertion that this evidence was exculpatory, however, is conclusory and speculative, and he fails to sufficiently explain how this evidence would have been favorable to him and thus had to be

		disclosed under Brady. In particular, he does not explain why the disclosure of this evidence could have led to a different outcome at the preliminary hearing. (See Cone v. Bell (2009) 556 U.S. 449, 469-470 ["evidence is material within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different"].) Banks also claims that the police should have interviewed the victim's stepmother. However, even if the victim's stepmother had information that was helpful to the defense, police have no duty to collect all evidence that could benefit the defense absent a showing of bad faith. (See Arizona v. Youngblood (1988) 488 U.S. 51, 57-58.) Finally, because Banks's individual claims of error lack merit, his claim of cumulative prejudice from those errors necessarily fails. (People v. Covarrubias (2016) 1 Cal.5th 838, 910; People v. Bolin (1998) 18 Cal.4th 297, 345.) The petition is denied.
01/17/2023	Case complete.	

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Appellate Courts Case Information

4th Appellate District Division 1

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Disposition

In re JEREMIAH BANKS on Habeas Corpus
Case Number D081368

Description:	Petition summarily denied by order
Date:	01/17/2023
Disposition Type:	Final
Publication Status:	
Author:	
Participants:	
Case Citation:	none

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Appellate Courts Case Information

Search Results - 4th Appellate District Division 2

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Search by Case Party

Last Name or Organization: banks
First Name: jeremiah

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Click on the case number for more information about a case.

Court of Appeal Case Number	Trial Court Case Number	Case Caption
E080285	FSB1404047	In re Jeremiah Banks on Habeas Corpus
E069821	FSB1404047	The People v. Jeremiah Banks
E067582	FSB1404047	City of San Bernardino v. The Superior Court; Jeremiah Banks

Appellate Courts Case Information

4th Appellate District Division 2

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Case Summary

Trial Court Case:	FSB1404047
Court of Appeal Case:	**E080285**
Division:	
Case Caption:	In re Jeremiah Banks on Habeas Corpus
Case Type:	CR
Filing Date:	12/01/2022
Completion Date:	12/05/2022

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Appellate Courts Case Information

4th Appellate District Division 2

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Docket (Register of Actions)

In re Jeremiah Banks on Habeas Corpus
Case Number E080285

Date	Description	Notes
12/01/2022	Petition for a writ of habeas corpus filed.	
12/05/2022	Intra District Transfer to Division One	CRC 10.1000(b)(1)(A)
12/05/2022	Case complete.	

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Disposition

The People v. Jeremiah Banks
Case Number E069821

Description:	Transferred to Court of Appeal
Date:	05/21/2019
Disposition Type:	Final Division 1
Publication Status:	
Author:	
Participants:	
Case Citation:	none

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Appellate Courts Case Information

4th Appellate District Division 2

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Disposition

City of San Bernardino v. The Superior Court; Jeremiah Banks
Case Number E067582

Description:	Petition summarily denied by order
Date:	01/26/2017
Disposition Type:	Final
Publication Status:	
Author:	
Participants:	
Case Citation:	none

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 30 2023

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

JEREMIAH BANKS, Petitioner-Appellant, v. KATHLEEN ALLISON, Respondent-Appellee.	No. 22-55512 D.C. No. 5:21-cv-00051-JWH-JPR Central District of California, Riverside ORDER

Before: SCHROEDER and SANCHEZ, Circuit Judges.

After reviewing the underlying petition and concluding that it states at least one federal constitutional claim debatable among jurists of reason, namely whether trial counsel was ineffective, we grant the request for a certificate of appealability (Docket Entry No. 9) with respect to the following issues: (1) whether the district court abused its discretion in denying appellant's motion for a stay under *Rhines v. Weber*, 544 U.S. 269 (2005); and (2) whether the district court erred by failing to provide appellant the choice of either dismissing his mixed habeas petition without prejudice to pursue exhaustion in state court or abandoning his unexhausted claims to proceed only the exhausted claims, as required by *Rose v. Lundy*, 455 U.S. 509, 522 (1982), and then dismissing several claims with prejudice. *See* 28 U.S.C. § 2253(c)(3); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Slack v. McDaniel*, 529

U.S. 473, 483-85 (2000); *Lambright v. Stewart*, 220 F.3d 1022, 1026 (9th Cir. 2000); *see also* 9th Cir. R. 22-1(e).

Appellant's motion for leave to proceed in forma pauperis status (Docket Entry No. 5) is granted. The Clerk will change the docket to reflect appellant's in forma pauperis status.

Counsel is appointed sua sponte for purposes of this appeal. *See* 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983).

If appellant does not wish to have appointed counsel, appellant must file a motion asking to proceed pro se within 14 days of the date of this order.

The Clerk will electronically serve this order on the appointing authority for the Central District of California, Riverside, who will locate appointed counsel. The appointing authority must send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

The opening brief is due November 7, 2023; the answering brief is due December 7, 2023; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk will serve on appellant a copy of the "After Opening a Case – Counseled Cases" document.

If Kathleen Allison is no longer the appropriate appellee in this case, counsel for appellee must notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

Appellant's motion for transcripts at government expense (Docket Entry No. 6) is denied.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEREMIAH BANKS, Petitioner, v. DAVID HOLBROOK, Warden, Respondent.	Case No. EDCV 21-0051-JWH (JPR) **J U D G M E N T**

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

It is hereby **ORDERED, ADJUDGED,** and **DECREED** that this action is **DISMISSED with prejudice** as to grounds one and two and **without prejudice** as to grounds three through nine.

IT IS SO ORDERED.

DATED: April 26, 2022

JOHN W. HOLCOMB
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEREMIAH BANKS, Petitioner, v. DAVID HOLBROOK, Warden, Respondent.	Case No. EDCV 21-0051-JWH (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

The Court has reviewed the Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. See 28 U.S.C. § 636(b)(1). Petitioner filed objections to the R. & R. on October 27, 2021; Respondent did not reply.

Most of Petitioner's objections raise arguments that were convincingly rejected in the R. & R., particularly concerning why grounds one and two of the Petition must be dismissed with prejudice. For example, he contends that the R. & R. erroneously concluded that his Confrontation Clause claim in ground two was procedurally barred because the trial court understood counsel's objection to admission of the victim's out-of-court statements to be based on both hearsay and Confrontation Clause grounds. (See Objs. at 20-21.) But Petitioner acknowledges that the portion of the transcript he cites shows that counsel declined to assert a Confrontation Clause objection when the trial court explicitly asked him if he was objecting on that basis. (See id. at 21 (quoting 4 Rep.'s Tr. at 745 as counsel replying that he would "leave it up to the appellate court to decide" when asked if he was objecting on hearsay or Confrontation Clause grounds).) The state court reasonably interpreted any Confrontation Clause claim as forfeited. (See Mot. Dismiss, Ex. 4 at 12-13.) Thus, this objection is meritless.[1]

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[1] In any event, even if counsel had objected on Confrontation Clause grounds, the objection would have been futile because, as related in the R. & R., the victim testified and was subject to cross-examination. (See R. & R. at 12.) There is no merit to Petitioner's argument that his Confrontation Clause rights were nonetheless violated because the victim's out-of-court statements were admitted after she testified and had been excused. (See Objs. at 21.) As the Supreme Court has explained, "when the declarant

A few of Petitioner's objections concerning his request for a stay under Rhines v. Weber, 544 U.S. 269 (2005), warrant discussion. He argues that good cause exists for his failure to exhaust grounds three through nine because prison officials retaliated against him for engaging in protected conduct and because he suffered a debilitating knee injury. (See Objs. at 4-5.) Both of those things occurred long before he filed his Petition: the alleged acts of retaliation and misconduct took place before October 2020 (see id. at 5-6), and Petitioner's knee injury, which allegedly happened in June 2019, required him to use crutches only until November 2019 (see id. at 4). But as explained in the R. & R. (see R. & R. at 15), he has likely shown good cause for his failure to exhaust up until January 8, 2021, when he filed his federal Petition. Thus, it is of no consequence that newly alleged facts may show good cause before that date. None of his allegations concerning the purported retaliation or his knee injury explain why he has failed to exhaust grounds three through nine in the 15 months since filing the Petition. Indeed, to this day, he has still not even attempted to exhaust them. See Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov (searches for "Jeremiah"

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appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [her] prior testimonial statements." Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004). Moreover, no clearly established Supreme Court authority exists governing Petitioner's claim, and therefore it necessarily fails. See King v. Frauenheim, No. 14-cv-05267-SI, 2016 WL 4425093, at *17-19 (N.D. Cal. Aug. 19, 2016) (so finding on facts nearly identical to those here and noting that because footnote 9 of Crawford is ambiguous and the Supreme Court has not clarified it, no clearly established law exists).

with "Banks" in fourth appellate district and supreme court yielding no relevant results) (last visited April 23, 2022).

Petitioner's TABE score (see Objs. at 4) is likewise insufficient to show good cause for his failure to exhaust — or even attempt to exhaust — grounds three through nine in the last 15 months. Although a prison record shows that he has an 8.3 TABE score, equivalent to an eighth-grade education, the same record states that he does not have a mental impairment impacting his ability to communicate. (See Objs., Ex. A); Moore v. Kernan, No. 2:17-cv-2080 MCE KJN P, 2018 WL 3322910, at *5 (E.D. Cal. July 5, 2018) (declining petitioner's request for Rhines stay when he had fifth-grade education); Hernandez v. California, No. C 08-4085 SI (pr)., 2010 WL 1854416, at *2 (N.D. Cal. May 6, 2010) (same when petitioner had sixth-grade education).

And even if he could establish a mental impairment, it nevertheless did not affect his ability to exhaust his state-court remedies. On the contrary, he filed his original Petition, a motion to stay, and an amended motion to stay in this Court despite his TABE score. Cf. Gaston v. Palmer, 417 F.3d 1030, 1034-35 (9th Cir. 2005) (holding that district court did not err in denying petitioner equitable tolling based on alleged mental impairment when he was able to file state habeas petitions during period for which he sought tolling). Although he insists that he was able to do so only with the assistance of a fellow inmate (see Objs. at 6-7), he apparently filed his amended motion to stay without assistance (see Objs. at 7 ("Due to the COVID-19 restrictions and lack of access to the law library, I was unable to communicate with Inmate Ingram . . . ."), 23 ("Petitioner here

argues that he has established good cause because he was unable to effectively access or utilize . . . the services of his inmate legal assistant due to the prison's response to the extraordinary global COVID pandemic due to quarantine protocols and his subsequent repeated transfers.")). The amended stay motion is supported by multiple case citations and includes cogent legal arguments. His apparently self-filed objections likewise present well-framed arguments and are supported by case citations and relevant exhibits.[2] In any event, losing an inmate assistant is not sufficient to show good cause. See Diederich v. Paramo, No. EDCV 17-00153-GW (JDE), 2017 WL 9538858, at *14 (C.D. Cal. Sept. 19, 2017) ("Petitioner's allegation that he had to rely on a 'jailhouse lawyer' is insufficient to establish good cause for his failure to timely exhaust his new claims" (collecting cases)); see also Labon v. Martel, No. CV 14-6500-DSF (RNB)., 2015 WL 1321533, at *7 (C.D. Cal. Mar. 17, 2015) ("The fact that petitioner . . . lacked legal assistance does not constitute good cause for petitioner's delay in exhausting his state remedies."); cf. Chaffer v. Prosper, 592 F.3d 1046, 1049 (9th Cir. 2010) (per curiam) (loss of inmate helpers who were "transferred or too busy" not sufficient for equitable tolling). In short, he has not shown that his TABE score or lack of inmate assistance constituted good cause for his failure to exhaust grounds three

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[2] Petitioner was also able to send correspondence to prison officials and the state appellate court without assistance while the COVID-19 protocols were in place. (See Objs. at 23 (alleging that he wrote "prison officials over and over again," notified appellate court of changed circumstances, and obtained requested materials from appellate court).)

through nine.

Similarly, he cannot establish good cause simply because he is "a layperson, untrained in the law." (Objs. at 3.) Ignorance of the law does not constitute "good cause" for a Rhines stay. Cf. Blake v. Baker, 745 F.3d 977, 981 (9th Cir. 2014) (ignorance of whether claim was exhausted not good cause); see also Mitchell v. Hedgepeth, No. CV 08-562 RGK (FFM), 2015 WL 8567384, at *4 (C.D. Cal. Aug. 14, 2015) ("ignorance of the law does not constitute good cause" (collecting cases)), accepted by 2015 WL 8664149 (C.D. Cal. Dec. 11, 2015); Patton v. Beard, No. 14-CV-569-BEN (BLM)., 2015 WL 1812811, at *5 (S.D. Cal. Apr. 20, 2015) (petitioner's being "layman at law" not good cause (collecting cases)).

Finally, Petitioner's new allegations concerning the prison's COVID-19 protocols (see Objs. at 6, 24-25) are insufficient to establish the requisite good cause for a Rhines stay. Most of those allegations concern dates before he filed his Petition. (See id. (stating that COVID-19 protocols in effect in November and December 2020 limited his access to law library, legal materials, and inmate assisting him) & Ex. M.) But as related above, the Court has already determined that good cause likely existed during that time and up until he filed his Petition, in January 2021. And none of his allegations concerning the time after that justify a Rhines stay. Indeed, although he maintains that the prison limited his access to the law library and the inmate assisting him in January and February 2021 (see id. at 7-8, 25), he nevertheless was able to file not only the Petition and a motion to stay but also an amended motion

to stay during that same time.[3] Moreover, he concedes that during all relevant times, the prison implemented a paging system whereby prisoners could have legal materials delivered to their cells.[4] (See id. at 7.) Putting that aside, he admits that the protocols were lifted or eased on March 1, 2021, and that access to the law library was restored (see id. at 25), but he has not even attempted to exhaust his unexhausted claims during the more than nine months since then. And in that time, he was able to file an opposition to Respondent's motion to dismiss as well as extensive objections to the R. & R., with numerous exhibits. Put simply, Petitioner has not shown that the prison's COVID-19 protocols prevented exhaustion of grounds three through nine or constitute good cause for a Rhines stay.

Having reviewed de novo those portions of the R. & R. to which Petitioner objects, see 28 U.S.C. § 636(b)(1)(C), the Court accepts the findings and recommendations of the Magistrate Judge. IT THEREFORE IS **ORDERED** that Respondent's motion to dismiss is **GRANTED**, Petitioner's requests for a stay are **DENIED**, and

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[3] In his Objections, Petitioner suggests that he did not file the Petition or the initial stay motion; rather, his inmate assistant did without his immediate knowledge. (See Objs. at 6-7.) But Petitioner does not disclaim or renounce the Petition or stay motion; instead, he appears to adopt them as his own.

[4] Petitioner offers somewhat inconsistent explanations for why he did not use the paging system. On the one hand, he claims that prison officials refused to bring or collect legals materials. (See Objs. at 25.) On the other, he says he feared contracting COVID-19 so much that he self-isolated. (See id. at 7.) In any event, he provides no evidence that he ever requested materials through that system. See Blake, 745 F.3d at 982 (explaining that "a bald assertion cannot amount to a showing of good cause," whereas "a reasonable excuse, supported by evidence," will).

Judgment should be entered denying the Petition and dismissing grounds one and two with prejudice and grounds three through nine without prejudice.

IT IS SO ORDERED.

DATED: April 26, 2022

JOHN W. HOLCOMB
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEREMIAH BANKS, Petitioner, v. DAVID HOLBROOK,[1] Warden, Respondent.	Case No. EDCV 21-0051-JWH (JPR) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

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

PROCEEDINGS

On January 8, 2021, Petitioner filed pro se a Petition for Writ of Habeas Corpus by a Person in State Custody, raising nine claims concerning his 2017 convictions for human trafficking of a minor, pimping a minor, and pandering by procuring a minor. He

[1] David Holbrook is the warden of Chuckawalla Valley State Prison, where Petitioner is housed, and is substituted in under Federal Rule of Civil Procedure 25(d) as the proper Respondent. See also R.2(a), Rules Governing § 2254 Cases in U.S. Dist. Cts.

admitted that seven of his claims were unexhausted (see Pet. at 6-7)[2] and simultaneously filed a motion for a stay under Rhines v. Weber, 544 U.S. 269, 277-78 (2005), to exhaust his unexhausted grounds; he filed an amended stay motion on February 4, 2021.[3] On January 15, 2021, the Court advised him that nothing prevented him from immediately returning to state court to exhaust his unexhausted grounds. Respondent did not oppose Petitioner's stay motions but instead moved to dismiss on February 8, 2021. Petitioner opposed on June 4, 2021. Respondent did not reply.

For the reasons discussed below, the Court recommends that Petitioner's stay motions be denied, Respondent's motion to dismiss be granted, and this action be dismissed, some claims with prejudice and some without.

PETITIONER'S CLAIMS

I. The trial court violated Petitioner's right to due process by allowing admission into evidence under California Evidence Code section 1109 of his prior pandering conviction. (Pet. at 5.)

II. The trial court violated his constitutional right to confrontation by permitting a detective to relay to the jury the

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[2] For nonconsecutively paginated documents, the Court uses the pagination generated by its Case Management/Electronic Case Filing system.

[3] Petitioner captioned both stay motions as requesting "stay and abeyance, equitable tolling, and leave to amend." Any request for equitable tolling is premature because Respondent has not argued that the Petition is barred by the applicable statute of limitations. Any request for leave to amend is likewise premature because Petitioner has identified no grounds other than those alleged in his Petition that he seeks to assert.

victim's out-of-court testimonial statements. (Id. at 5-6.)

III. Petitioner was prejudiced by the use of perjured testimony at his preliminary hearing. (Id. at 6.)

IV. Petitioner received ineffective assistance of counsel when his trial attorney failed to investigate his case, defend him at the preliminary hearing, or prepare a defense at trial. (Id.)

V. The prosecutor committed misconduct by presenting testimony at the preliminary hearing that he knew or should have known was false. (Id.)

VI. The trial court erred in refusing to adjudicate Petitioner's motion to set aside the information based on the prosecutor's knowing presentation of false evidence and failure to disclose exculpatory evidence. (Id. at 7.)

VII. The prosecution failed to disclose material exculpatory evidence consisting of pretrial interviews of the victim and her stepmother. (Id.)

VIII. Appellate counsel was constitutionally ineffective for failing to investigate the record, communicate with Petitioner, assert meritorious claims, and keep Petitioner apprised of relevant proceedings. (Id.)

IX. Petitioner was prejudiced by admission of perjured hearsay evidence and the prosecutor's failure to disclose material exculpatory evidence. (Id.)

BACKGROUND

In December 2017, a San Bernardino County Superior Court jury convicted Petitioner of human trafficking of a minor, pimping a minor under 16 years of age, and pandering by procuring

a minor under 16 years of age. (See Pet. at 2; Mot. Dismiss, Ex. 4 at 2.) The jury found he used force or fear when committing the charged human trafficking and that he had suffered a prior conviction. (Mot. Dismiss, Ex. 4 at 2.) The trial court sentenced him to 30 years to life in state prison. (Id.)

Petitioner appealed, raising grounds one and two of the Petition, among others. (Id., Ex. 1.) On September 19, 2019, the court of appeal modified the judgment to correct a sentencing error but otherwise affirmed. (Id., Ex. 4 at 16.) Petitioner filed a petition for review in the state supreme court, raising grounds one and two of the Petition, among others. (Id., Ex. 5.) On November 20, 2019, the court summarily denied review. (Id., Ex. 6.)

In September 2020, Petitioner filed a habeas petition in San Bernardino County Superior Court, alleging claims that appear to correspond to grounds three through seven and nine of the Petition. (See Opp'n, Ex. 1.) On October 8, 2020, the court denied the petition, reasoning that the claims were procedurally barred and, alternatively, meritless. (See id., Ex. 2.) Despite his assertion otherwise (see Opp'n at 14), Petitioner has not filed any habeas petitions concerning his underlying convictions in the state court of appeal or supreme court. See Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/ (searches for "Jeremiah" with "Banks" in fourth appellate district and supreme court yielding no relevant results) (last visited Aug. 4, 2021).

DISCUSSION

I. Petitioner's Challenge to Admission of His Prior Pandering Conviction Is Not Cognizable on Federal Habeas Review

Petitioner contends that the trial court violated his right to due process by allowing admission under California Evidence Code section 1109 of evidence concerning his prior conviction for pandering. (Pet. at 5.)

This claim is subject to dismissal for several reasons. First, it involves only state law. A state prisoner is entitled to federal habeas corpus relief only if he is held in custody in violation of the Constitution, laws, or treaties of the United States. See 28 U.S.C. § 2254(a); see also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Petitioner claims only that the trial court misapplied Evidence Code section 1109, the state statutory provision providing for admission into evidence of prior acts of domestic abuse. Because the rule about which he complains is not embodied in the Constitution, he cannot challenge on federal habeas review its application to him.

Moreover, that Petitioner alludes to his right to due process (Pet. at 5) is insufficient to transform his state-law claim into a cognizable federal one. See Gray v. Netherland, 518 U.S. 152, 163 (1996) (explaining that petitioner may not convert state-law claim into federal one by making general appeal to constitutional guarantee); see also Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994) (habeas petitioner's mere reference to due process was insufficient to render his claims viable under 14th Amendment). Further, on direct review, the California Court of Appeal held that evidence of the prior pandering conviction

was properly admitted under California law. (Mot. Dismiss, Ex. 4 at 7-10.) That holding is binding on this Court. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (per curiam) ("[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); see also Himes v. Thompson, 336 F.3d 848, 852 (9th Cir. 2003) ("We are bound by a state's interpretation of its own laws.").

Second, there is no clearly established law to support Petitioner's claim that the evidence's admission violated due process. The Supreme Court has not yet decided whether admission of propensity evidence violates due process. See McGuire, 502 U.S. at 75 n.5 (expressly reserving issue); (see also Opp'n at 2-3 ("[W]hether the admittance of propensity evidence will rise to a due process violation warranting relief under 28 U.S.C. [§] 2254 remains an open question."). Because no clearly established Court precedent exists, AEDPA precludes relief. See Wright v. Van Patten, 552 U.S. 120, 126 (2008); Crater v. Galaza, 491 F.3d 1119, 1123 (9th Cir. 2007) (noting that Supreme Court has "explained that if habeas relief depends upon the resolution of 'an open question in [Supreme Court] jurisprudence, § 2254(d)(1) precludes relief'" (alteration in original) (quoting Carey v. Musladin, 549 U.S. 70, 76 (2006))). Indeed, the Ninth Circuit has repeatedly found that a state court's rejection of a claim that admission of propensity evidence violated due process cannot be an unreasonable application of clearly established federal law. See, e.g., Garza v. Yates, 472 F. App'x 690, 691-92 (9th Cir. 2012); Larson v. Palmateer, 515 F.3d 1057, 1066 (9th

Cir. 2008); Alberni v. McDaniel, 458 F.3d 860, 866 (9th Cir. 2006).

Likewise, even if Petitioner could show that the evidence of his prior pandering conviction was unduly prejudicial, his claim would fail because the Supreme Court has not ruled "that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ." Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009); see also Walden v. Shinn, 990 F.3d 1183, 1204 (9th Cir. 2021) (noting that Holley's observation concerning lack of controlling precedent pertaining to admission of irrelevant or overtly prejudicial evidence "remains true").

Finally, even under the Ninth Circuit's standard for assessing whether admission of evidence violates due process, Petitioner's challenge fails. Despite the lack of clearly established authority from the Supreme Court on the issue, the Ninth Circuit has held that the introduction of evidence violated a petitioner's due process rights when no permissible inference existed that the jury could have drawn from the challenged evidence and the evidence was "of such quality as necessarily prevent[ed] a fair trial." Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991) (citing Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986)). Under this standard, a "habeas petitioner bears a heavy burden in showing a due process violation based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005). Petitioner cannot meet that burden here. As the court of appeal observed, his prior pandering conviction was relevant to show his intent to commit

the charged crimes, his common plan to commit human trafficking of females, and his knowledge that his victim in the underlying crime was a prostitute, which was a required element to prove the charged crime of pimping a minor. (See Mot. Dismiss, Ex. 4 at 7-9.)

Accordingly, this ground for relief must be denied.[4]

II. Ground Two Is Procedurally Barred

To preserve a Confrontation Clause claim on appeal, California requires a defendant to raise a timely and specific objection at trial. See People v. Alvarez, 14 Cal. 4th 155, 186 (1996). The contemporaneous-objection rule has been found by the Ninth Circuit to be an independent and adequate state bar. See Tong Xiong v. Felker, 681 F.3d 1067, 1075 (9th Cir. 2012); Fairbank v. Ayers, 650 F.3d 1243, 1256-57 (9th Cir. 2011); see also Upshaw v. Holland, No. CV-15-295-JAK (RAO), 2016 WL 3869944, at *7-8 (C.D. Cal. Mar. 22, 2016) (holding that state court's

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[4] Respondent argues that Petitioner's challenge to the admission of his prior pandering conviction is also barred by the antiretroactivity provisions of Teague v. Lane, 489 U.S. 288 (1989), because he is seeking the benefit of a new "rule" — namely, that admission of prior-crimes evidence to demonstrate a propensity to commit the charged crime violates due process. (Mot. Dismiss, Mem. P. & A. at 3-5.) But long before Petitioner's conviction became final, there was ample circuit-court precedent holding that admission of evidence that rendered a trial fundamentally unfair could serve as the basis for federal habeas relief. See Alberni, 458 F.3d at 865 ("We are mindful that every circuit, in cases decided prior to the enactment of AEDPA, has acknowledged, at least implicitly, that the improper introduction of evidence may violate due process if it renders a trial fundamentally unfair."); see also Leavitt v. Arave, 383 F.3d 809, 819 (9th Cir. 2004) (explaining that circuit-court holdings suffice to create clearly established rule of law under Teague). Accordingly, Petitioner's challenge to admission of his pandering conviction is not barred by Teague.

finding that petitioner forfeited his Confrontation Clause claim barred federal review because "California's contemporaneous objection rule constitutes an independent and adequate ground precluding federal habeas review"), accepted by 2016 WL 3876600 (C.D. Cal. July 15, 2016).

Here, Petitioner claimed on appeal that the trial court violated his constitutional right to confrontation by allowing a witness to relay the victim's out-of-court testimonial statements. (Mot. Dismiss, Ex. 1 at 41-50.) The court of appeal found that he had "forfeited his [C]onfrontation [C]lause argument" because "he did not assert a timely and specific objection on grounds that the prior statements violated the [C]onfrontation [C]lause." (Id., Ex. 4 at 12-13.) Although Petitioner's counsel objected to the out-of-court statements as inadmissible hearsay, he never challenged them on Confrontation Clause grounds. (See id. at 12); Salazar v. Montgomery, No. CV 18-8144-MWF (PLA), 2019 WL 1751846, at *5-6 (C.D. Cal. Feb. 29, 2019) (holding that Confrontation Clause claim was procedurally barred under California's contemporaneous-objection rule when petitioner objected at trial to challenged statements on hearsay grounds but not on Confrontation Clause grounds), accepted by 2019 WL 2331457 (C.D. Cal. May 30, 2019); People v. Chaney, 148 Cal. App. 4th 772, 779-80 (2007) (noting that Confrontation Clause "analysis is distinctly different than that of a generalized hearsay problem" and holding that appellant's objection at trial to statements on hearsay grounds was insufficient to preserve Confrontation Clause issue for appellate review).

Petitioner, however, argues that his failure to object on Confrontation Clause grounds does not bar federal review because any such objection would have been "futile" given that the trial court had determined that there was no hearsay violation. (See Opp'n at 7.) As an initial matter, Petitioner does not explain why he should not have been expected to object on the basis of hearsay and the Confrontation Clause at the same time. After all, he was required to object on any basis "contemporaneously" to admission of the evidence. Moreover, California recognizes that a Confrontation Clause "analysis is distinctly different than that of a generalized hearsay problem." Chaney, 148 Cal. App. 4th at 779. Thus, there is no reason to conclude, as Petitioner does, that a trial court's hearsay determination "renders the success of a [corresponding] Confrontation Clause claim impossible." (Opp'n at 7.) Had Petitioner objected on Confrontation Clause grounds, the trial court would have evaluated that claim based on entirely different considerations from a state-law hearsay objection. Thus, he cannot show that objecting on Confrontation Clause grounds would have been futile.

Putting that aside, his argument fails because it would require this Court to second-guess the court of appeal's application of state law concerning the preservation of claims on appeal. Indeed, he maintains that California recognizes an exception to the contemporaneous-objection rule when an objection would have been futile (see id.) and presumably believes that the court of appeal erred in failing to apply that exception. But the court of appeal held that under California's contemporaneous-objection rule, he had forfeited his Confrontation Clause

objection. That holding necessarily reflected the court of appeal's finding that any futility exception under California law did not apply. That holding is binding on this Court. See Bradshaw, 546 U.S. at 76; see also Himes, 336 F.3d at 852.

Respondent has therefore asserted an independent and adequate state procedural ground barring review of the Confrontation Clause claim. (See Mot. Dismiss, Mem. P. & A. at 5-7.) When, as here, a habeas petitioner

> has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). The petitioner has the burden of proving both cause and prejudice. See Bousley v. United States, 523 U.S. 614, 622 (1998).

Petitioner has not alleged sufficient facts to overcome the procedural bar to his claim. At best, he maintains that trial counsel erred in failing to supplement his hearsay objection to the victim's out-of-court statements with a Confrontation Clause objection. (See Opp'n at 8-9.) To be sure, a counsel's failure to preserve an issue for appeal can establish cause to excuse a procedural default if the failure was "so ineffective as to violate the Federal Constitution." Edwards v. Carpenter, 529 U.S. 446, 451 (2000).

Petitioner, however, cannot show that counsel's decision to

forgo a Confrontation Clause objection was unreasonable or prejudicial. See Strickland v. Washington, 466 U.S. 668, 687 (1984) (petitioner cannot succeed on claim of ineffective assistance of counsel absent showing that counsel's performance was unreasonable and that reasonable likelihood exists that but for his counsel's performance, result would have been different). Indeed, the victim testified and was subjected to cross-examination (see Mot. Dismiss, Ex. 4 at 13); thus, any Confrontation Clause objection to admission of her out-of-court statements would have failed. See Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [her] prior testimonial statements."); see also Martin v. Lewis, 599 F. App'x 628, 628 (9th Cir. 2015) (holding that detective's testimony "relaying [two witnesses'] out-of-court statements did not violate the Confrontation Clause because both [witnesses] testified at [petitioner's] trial and were subject to cross-examination" (citing Crawford, 541 U.S. at 59 n.9)).[5] And for that reason, Petitioner also cannot show prejudice from the procedural default.

[5] Petitioner's suggestion that appellate counsel's performance provides sufficient cause to excuse the procedural default likewise fails because appellate counsel in fact argued that Petitioner did not forfeit his Confrontation Clause challenge. (See Mot. Dismiss, Ex. 3 at 13-16 (appellate counsel arguing that trial counsel's hearsay objection sufficiently apprised trial court of corresponding Confrontation Clause objection and, alternatively, that counsel's failure to preserve this issue for appeal constituted ineffective assistance of trial counsel).)

As a result, ground two is procedurally barred.

III. Grounds Three Through Nine Are Unexhausted and Petitioner Is Not Entitled to a Rhines Stay

A. Applicable law

Under 28 U.S.C. § 2254(b), habeas relief generally may not be granted unless a petitioner has exhausted the remedies available in state court. Exhaustion requires that the petitioner's contentions were fairly presented to the state courts, Ybarra v. McDaniel, 656 F.3d 984, 991 (9th Cir. 2011), and disposed of on the merits by the highest court of the state, Greene v. Lambert, 288 F.3d 1081, 1086 (9th Cir. 2002). As a matter of comity, a federal court will not entertain a habeas petition unless the petitioner has exhausted the available state judicial remedies on every ground presented in it. See Rose v. Lundy, 455 U.S. 509, 518-19 (1982).

Two procedures are available to a habeas petitioner who wishes to have a pending federal petition stayed while he exhausts claims in state court: one under Rhines, 544 U.S. at 277-78, and the other under Kelly v. Small, 315 F.3d 1063, 1070-71 (9th Cir. 2003), overruled on other grounds by Robbins v. Carey, 481 F.3d 1143, 1149 (9th Cir. 2007). See King v. Ryan, 564 F.3d 1133, 1139-40 (9th Cir. 2003) (explaining differences between Kelly and Rhines stays). Under Rhines, a Court may stay a "mixed" federal petition — one that includes both exhausted and unexhausted claims — while the Petitioner returns to state court to exhaust his unexhausted claims; all claims remain pending in federal court and are protected from any statute-of-limitations issues. 544 U.S. at 277-78. Under Kelly, the petitioner

voluntarily dismisses any unexhausted claims from the pending federal petition and only the exhausted claims are stayed; the petitioner may then seek to amend the dismissed claims into the petition after he has exhausted them in state court. King, 564 F.3d at 1135. Under Kelly, the newly exhausted claims are not necessarily protected from any time bar. See King, 564 F.3d at 1140-41. "In this regard, the Kelly procedure . . . is a riskier one for a habeas petitioner because it does not protect a petitioner's unexhausted claims from expiring during a stay." Morris v. California, No. 2:11-cv-1051 MCE DAD P., 2012 WL 2358720, at *2 (E.D. Cal. June 20, 2012).

Rhines applies in "limited circumstances." See 544 U.S. at 277. For a Rhines stay, the petitioner must show that (1) he has good cause for failing to earlier exhaust the claims in state court, (2) the unexhausted claims are not "plainly meritless," and (3) he has not engaged in "abusive litigation tactics or intentional delay." Id. at 277-78. The Supreme Court has not precisely defined what constitutes "good cause" for a Rhines stay. See Blake v. Baker, 745 F.3d 977, 980-81 (9th Cir. 2014). The Ninth Circuit has found that good cause does not require "extraordinary circumstances." Jackson v. Roe, 425 F.3d 654, 661-62 (9th Cir. 2005). Rather, "good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify" the failure to exhaust. Blake, 745 F.3d at 982. That a petitioner was without counsel in state habeas proceedings generally establishes "good cause" because such a petitioner could not "be expected to understand the technical requirements of exhaustion and should not be denied the

opportunity to exhaust a potentially meritorious claim simply because he lacked counsel." Dixon v. Baker, 847 F.3d 714, 721 (9th Cir. 2017).

Under Kelly, the petitioner need not show good cause for a stay of any remaining totally exhausted claims. See King, 564 F.3d at 1135. But a petitioner may amend a newly exhausted claim into a pending federal habeas petition after the expiration of the limitation period only if it shares a "common core of operative facts" with one or more of the claims in the pending petition. Mayle v. Felix, 545 U.S. 644, 659, 664 (2005). A new claim "does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." Id. at 650.

B. Analysis

Petitioner concedes that grounds three through nine are unexhausted. (See Pet. at 6-8.) The Petition is therefore mixed and subject to dismissal absent a stay.[6] See Rose, 455 U.S. at 518.

Under Dixon, Petitioner has likely shown good cause for his failure to exhaust up to the time he filed his Petition in this Court because he was not represented by counsel on habeas review in the superior court. But he has not adequately explained the

[6] Respondent argues that grounds three through nine are also procedurally barred because the superior court rejected them as untimely. (See Mot. Dismiss, Mem. P. & A. at 7-8.) The Court declines to reach this argument because the claims are unexhausted, and the California Supreme Court may ultimately reject them on some other basis, not as untimely.

subsequent seventh-month delay in attempting to exhaust grounds three through nine. To be sure, he was aware that they were unexhausted when he filed his Petition and that he was required to exhaust them. (See Pet. at 6-8; Mot. Stay, ECF Nos. 2 & 11.) Indeed, he filed a motion for a Rhines stay on the same day he filed his Petition. (See Mot. Stay, ECF No. 2.) Moreover, he was advised on January 15, 2021, that "[t]o the extent [his] Petition includes any unexhausted claims, nothing prevents [him] from immediately returning to state court to attempt to exhaust them." (Order, ECF No. 5. at 2 n.2.) Although he indicated that he anticipated attempting to exhaust grounds three through nine as early as February 2021 (see Am. Mot. Stay, Pet'r's Decl. ¶ 14), he has yet to file a habeas petition in the state court of appeal or supreme court.[7] He has moreover offered no justification for his inaction, much less a "reasonable excuse, supported by sufficient evidence," Blake, 745 F.3d at 982, and none is apparent to the Court.

In any event, even if Dixon dictates that he continues to have "good cause" for a stay simply because he is unrepresented — which is far from clear — he cannot satisfy Rhines's requirement that he not have engaged in intentional delay. See Dixon, 847 F.3d at 722 ("[A] dilatory litigant's failure to exhaust his claims in state court will not be condoned."); Stankewitz v.

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[7] In his opposition, Petitioner asserts that he filed a habeas petition in the state court of appeal and "is awaiting reply." (Opp'n at 14.) There is, however, no indication that such a petition was ever filed. See Cal. App. Cts. Case Info., http://appellatecases.courtinfo.ca.gov/ (searches for "Jeremiah" with "Banks" in fourth appellate district and supreme court yielding no relevant results) (last visited Aug. 4, 2021).

Adams, No. 1:06-cv-01221-LJO-JLT HC., 2010 WL 1904839, at *2 (E.D. Cal. May 7, 2010) (lifting Rhines stay because pro se petitioner no longer met good-cause or diligence requirements when he had allowed unexhausted claim to "languish in a state of complete inactivity" for 15 months after court of appeal denied habeas petition), accepted by 2010 WL 2509196 (E.D. Cal. June 17, 2010). Indeed, he seems to acknowledge that he chose not to exhaust his claims in state court in favor of asserting them here because he hoped to gather "additional evidence to support" his claims while this action was stayed. (See Opp'n at 19.) But he does not indicate what specific facts he hopes to uncover or how those facts would support his claims. More importantly, he fails to explain why he was able to present his claims to this Court without gathering additional evidence but unable to present those same claims to the California Supreme Court. As such, he fails to show how any ongoing investigation concerning his unexhausted claims excuses his failure to exhaust. See Reyes v. Soto, No. CV 15-8566-CJC (SP), 2016 WL 4951150, at *6-7 (C.D. Cal. Aug. 1, 2016) (finding that petitioner's ongoing investigation concerning unexhausted grounds did not constitute good cause for Rhines stay when he was able to assert unexhausted grounds in federal habeas petition); Putnam v. Hopper, No. 2:17-cv-0832-GEB-EFB P, 2017 WL 5526516, at *3 (E.D. Cal. Nov. 16, 2017) (same), accepted by 2017 WL 5526516 (E.D. Cal. Jan. 17, 2018), aff'd by Putnam v. Att'y Gen., 794 F. App'x 645 (9th Cir. 2020).

Petitioner's argument that he should be granted a Rhines stay because his appellate counsel abandoned him is also meritless. As an initial matter, it is not clear whether

ineffective assistance of appellate counsel can constitute the required good cause under Rhines. While some courts appear to have so held, see, e.g., Jauregui v. Jones, No. CV 16-1711 DSF (RAO), 2016 WL 4257147, at *2 (C.D. Cal. July 7, 2016), accepted by 2016 WL 4251572 (C.D. Cal. Aug. 8, 2016); Nogueda v. California, No. 2:14-cv-1045 GGH P, 2014 WL 5473548, at *2 & n.4 (E.D. Cal. Oct. 23, 2014), that approach deemphasizes the reasoning of Blake to the effect that a petitioner who justifiably relies on incompetent postconviction habeas counsel would have no reason to separately raise claims during the limitation period. See 745 F.3d at 983-84. But a petitioner does not rely on trial or appellate counsel to raise claims during the habeas limitation period.

In any event, even if ineffective assistance of appellate counsel can constitute good cause, Petitioner has not shown that counsel's allegedly deficient performance impacted his ability to exhaust his state-court remedies. At most, he maintains that counsel's abandonment resulted in a delay in filing his habeas petition in superior court. (See Am. Mot. Stay at 2-3.) Although counsel's neglect may have justified Petitioner's failure to exhaust up until July 2020 (see id. at 2-4), when Petitioner allegedly received his case file and learned that his petition for review had been denied (see id.), it could not have affected his ability to exhaust thereafter. Indeed, he filed a habeas petition in the superior court in September 2020. To date, almost 10 months have passed since the superior court denied that petition, but he has not returned to state court to try to exhaust his claims despite being advised by this Court

that he could do so. Nothing that appellate counsel did or did not do has any bearing on Petitioner's most recent dilatory conduct. Thus, he cannot establish the requisite good cause since then for a Rhines stay based on his appellate counsel's performance. Cf. Putnam, 2017 WL 5526516, at *2 (abandonment by appellate counsel insufficient to establish good cause under Rhines when petitioner filed habeas petition in superior court, had access to trial transcripts, and was aware of factual basis of each of his claims).[8]

Finally, Petitioner cannot establish good cause for a Rhines stay for this most recent period based on the restrictions on his access to the prison law library from COVID-19. (See Am. Mot. Stay at 6.) He does not allege that he was denied access to the law library altogether but instead only that his access to the library was "affected." (Id., Pet'r's Decl. ¶¶ 11-12.) Such generalized allegations concerning COVID-19's impact are insufficient to establish good cause. See Palmero v. Robertson, No. 1:20-cv-00413-NONE-SKO (HC), 2020 WL 4674279, at *2 (E.D. Cal. Aug. 12, 2020) (petitioner's allegations concerning modified

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[8] Petitioner also argues that he has established good cause because counsel neglected to provide him any information concerning AEDPA's one-year statute of limitations to exhaust his state-court claims. (See Am. Mot. Stay at 2.) This argument is meritless because Petitioner was aware of the AEDPA limitation period long before he filed the Petition. (See id. at 20 (letter, dated October 23, 2020, stating, "Petitioner requests that a complete copy of the [superior court's October 8, 2020] order be provided to him so that he may appeal the decision and toll the AEDPA time limitations"); Opp'n, Ex. 4 (application to state court of appeal, dated October 27, 2020, stating, "The requested tolling is necessary for both AEDPA constraints, as well as time constraints to file habeas corpus in the court of appeal from superior court denial").)

program for law-library access based on COVID-19 were insufficient to establish good cause when he failed to show that he could not access library at all). In any event, as explained above, he knew when he filed his Petition in this Court that he needed to exhaust grounds three through nine but nevertheless opted to file a federal petition instead of — and not even in addition to — a habeas petition in the state supreme court. "Before filing his federal petition, [he] could easily have instead [or simultaneously] submitted his arguments to the California Supreme Court, which would have exhausted his claims." Putnam, 794 F. App'x at 646. He chose not to, and his suggestion that the prison's COVID-19 protocols prevented him from doing so "do[es] not withstand scrutiny" because he was able to file his Petition in this Court. Id.; see Palmero, 2020 WL 4674279, at *2 (petitioner's allegations concerning prison's COVID-19 restrictions did not establish good cause when petitioner was able to file federal habeas petition days before restrictions were adopted).

Thus, Petitioner is not entitled to a Rhines stay because he cannot show good cause for not having earlier exhausted his claims and has engaged in intentionally dilatory tactics. Moreover, a Kelly stay is unwarranted because the only exhausted grounds in the Petition must be dismissed as either not cognizable or procedurally barred, and Kelly stays are not available for fully unexhausted petitions. See Sangurima v. Montgomery, No. 2:17-cv-05022-PSG-KES, 2017 WL 7371168, at *4 (C.D. Cal. Dec. 12, 2017) ("[A] Kelly stay is unavailable where a habeas petition is completely unexhausted because the 'Kelly

procedure is premised on the assumption that a petitioner has a mixed petition,' since 'such a stay requires the petitioner to file an amended petition deleting all unexhausted claims' and a petitioner who is bringing only unexhausted claims cannot do this." (quoting Jimenez v. Sutton, No. 17-00333, 2017 WL 5875306 at *3 (E.D. Cal. Nov. 29, 2017))).

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Judge accept this Report and Recommendation, grant Respondent's motion to dismiss the Petition, deny Petitioner's stay motions, and direct that Judgment be entered dismissing grounds one and two of the Petition with prejudice and grounds three through nine without prejudice.

DATED: August 5, 2021

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEREMIAH BANKS, Petitioner, v. KATHLEEN ALLISON, Warden, Respondent.	Case No. EDCV 21-0051-JWH (JPR) ORDER REQUIRING RESPONSE TO PETITION

The parties to this action are directed to read this order carefully, as it may differ from other judges' orders on responses to habeas petitions.

On January 8, 2021, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody. In order to facilitate the just, speedy, and inexpensive determination of this action, **IT IS ORDERED** that

1. The Clerk of this Court must promptly serve on the Attorney General for the State of California an electronic copy of (a) the Petition, (b) Petitioner's executed form consenting to

magistrate-judge jurisdiction,[1] and (c) this Order. The Clerk should also serve a copy of this Order on Petitioner.

2. Within 14 days of the date of this Order, Respondent must file and serve a notice of appearance that designates the Deputy Attorney General(s) in charge of the case.

3. If Respondent contends that the Petition can be decided without the Court reaching the merits of any of Petitioner's claims (for example, because Petitioner is unable to satisfy the "in custody" requirement or has failed to exhaust his state remedies as to any ground for relief alleged in the Petition,[2] or because the Petition is barred by the applicable statute of limitations), Respondent should file a motion to dismiss within 30 days of the date of this Order.[3] The motion to dismiss should not address the merits of Petitioner's claims but rather should be confined to the basis for Respondent's contention that dismissal without reaching the merits is warranted.[4] At the time the motion to dismiss is filed, Respondent must lodge with the

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[1] If Respondent is also willing to consent to magistrate-judge jurisdiction, the Attorney General should execute and file the consent form concurrently with the filing of the initial response to the Petition.

[2] To the extent the Petition includes any unexhausted claims, nothing prevents Petitioner from immediately returning to state court to attempt to exhaust them.

[3] If Respondent contends that only some of Petitioner's claims are procedurally defaulted, that contention should not be made in a motion to dismiss but rather should be made in an answer to the Petition, which should in the alternative address the allegedly defaulted claims on the merits.

[4] If Respondent contends that Petitioner has failed to exhaust any state remedies as to any ground for relief alleged in the Petition, the motion to dismiss should also specify the state remedies still available to Petitioner.

Court all records bearing on Respondent's contention in this regard. Respondent must simultaneously deliver a paper copy of any lodged documents to the Magistrate Judge's chambers, Roybal Courthouse, 255 East Temple Street, Los Angeles, CA 90012, outside Room 181-L, Clerk's Office.

4. If Respondent files a motion to dismiss, Petitioner must file his opposition to the motion, if any, within 20 days of the date of service of the motion. When the opposition is filed, Petitioner should lodge with the Court any records not lodged by Respondent that Petitioner believes may be relevant to the Court's determination of the motion.

5. Unless the Court orders otherwise, Respondent may file a reply to Petitioner's opposition within 14 days of service of the opposition. If the motion is denied, the Court will afford Respondent adequate time to answer Petitioner's claims on the merits.

6. If Respondent does not contend that the Petition can be decided without the Court reaching the merits of Petitioner's claims, then Respondent should file and serve an answer to the Petition within 45 days of the date of this Order. When the answer is filed, Respondent must lodge with the Court all records bearing on the merits of Petitioner's claims, including the briefs specified in Rule 5(d) of the Rules Governing § 2254 Cases in the U.S. District Courts, as well as all records supporting Respondent's contentions.[5] Respondent must simultaneously

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[5] If Petitioner has challenged the competency of counsel or a trial court's conduct or rulings relating to proceedings under People v. Marsden, 2 Cal. 3d 118 (1970), Respondent should ensure

deliver a paper copy of all lodged documents to the Magistrate Judge's chambers at the address in paragraph 3.

7. Within 30 days of the date of service of the answer, Petitioner may file a single reply responding to matters raised in it. Any reply filed by Petitioner must (a) state whether Petitioner admits or denies each allegation of fact contained in the answer; (b) be limited to facts or arguments responsive to matters raised in the answer; and (c) not raise new grounds for relief that were not asserted in the Petition. Grounds for relief raised for the first time in the reply will not be considered unless the Court grants leave to amend the Petition. No reply should exceed 20 pages absent advance leave of Court for good cause shown.

8. Respondent must give timely notice of any court proceeding to any person who is a "crime victim" within the meaning of 18 U.S.C. § 3771.

9. A request by a party for an extension of time within which to file any of the pleadings required or permitted in this Order will be granted only upon a showing of good cause and should be made in advance of the due date of the pleading. Any such request should be accompanied by a declaration explaining why an extension of time is necessary and by a proposed order granting the requested extension.

10. To the extent any represented party seeks to file an

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that the lodged documents include transcripts of any Marsden hearings. If Petitioner has raised a challenge relating to a photospread or lineup, Respondent should ensure that the lodged documents include a color copy or the original of that photospread or lineup.

oversized brief in this matter, counsel is directed to file an ex parte application seeking permission to file the oversized brief, with a lodged copy of the proposed brief attached, no later than three days before the brief is due. Counsel should not separately file the oversized brief before leave of court is given.

11. Unless otherwise ordered by the Court, this case will be deemed submitted on the day following the date Respondent's reply to Petitioner's opposition to a motion to dismiss or Petitioner's reply to Respondent's answer is due.

12. Every document delivered to the Court must include a certificate of service attesting that a copy of the document was served on opposing counsel (or on the opposing party, if the party is not represented by counsel). Any document delivered to the Court without a certificate of service may be returned to the submitting party without consideration by the Court.

13. Petitioner must immediately notify the Court and counsel for Respondent of any change of Petitioner's address. If Petitioner fails to keep the Court informed of where Petitioner may be contacted, this action will be subject to dismissal for failure to prosecute. See C.D. Cal. R. 41-6.

DATED: January 15, 2021

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

S278581

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JEREMIAH BANKS on Habeas Corpus.

The petition for writ of habeas corpus is denied.

Chief Justice

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JEREMIAH BANKS on Habeas Corpus.	D081368 (San Bernardino Super. Ct. No. FSB1404047)

THE COURT:

The petition for writ of habeas corpus has been read and considered by Presiding Justice McConnell and Justices Do and Buchanan. Judicial notice is taken of the prior opinion in appeal No. D075934.

In December 2017, a jury found Jeremiah Banks guilty of one count of human trafficking of a minor, one count of pimping a minor under 16 years of age, and one count of pandering by procuring a minor under 16 years of age. The jury also found true allegations that Banks used force or fear during the commission of one count, and that he had suffered a prior conviction within the meaning of Penal Code section 12022.5. In November 2018, the trial court sentenced Banks to an aggregate term of 30 years to life.

In his direct appeal, Banks argued the trial court erred in admitting evidence of a prior incident of pandering committed by Banks and by admitting prior statements made by the victim. In September 2019, this

court modified the judgment to correct a minor sentencing error and affirmed the judgment as modified.

In September 2020, Banks filed a petition for habeas corpus in the superior court. In October 2020, the superior court summarily denied the petition.

In his present petition, filed in December 2022, Banks collaterally attacks the judgment of conviction. He sets forth seven separate grounds for relief, which can be summarized as follows: 1) the victim's pretrial interview statements that were introduced at the preliminary hearing were coerced by the investigating officer; 2) trial and appellate counsel provided ineffective assistance in many regards, including by not conducting adequate investigations, by not filing pretrial motions to suppress certain evidence, and by not asserting meritorious arguments on appeal; 3) the prosecutor violated *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by failing to disclose exculpatory evidence; and 4) the cumulative effect of these errors warrants reversal. Based on these grounds, Banks seeks an order vacating the judgment of conviction.

Banks is not entitled to habeas corpus relief. His petition, filed more than four years after he was initially sentenced, and more than two years after his habeas petition in the superior court was denied, is barred as untimely. (*In re Sanders* (1999) 21 Cal.4th 697, 703; *In re Swain* (1949) 34 Cal.2d 300, 302.) As to his petition in this court, Banks claims that he had another inmate help him with the petition. Banks believed the petition had been filed until he learned on August 25, 2021 that no habeas petition

concerning his underlying convictions had been filed in the California Court of Appeal. However, Banks provides no explanation for the delay between August 2021 when he discovered that no habeas petition had been filed, and December 2022 when he did ultimately file a petition with this court. "[T]he filing of untimely claims without any serious attempt at justification is an example of abusive writ practice." (*In re Reno* (2012) 55 Cal.4th 428, 460.)

Even if Banks's petition were not procedurally barred, it would be denied on the merits. A prisoner attacking a final judgment of conviction by petition for writ of habeas corpus bears a heavy burden to plead a prima facie claim for relief, and to do so should state with particularity the facts underlying the claim and also submit declarations, pertinent trial transcripts, and other reasonably available documents supporting the claim. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

Banks alleges that false evidence was introduced at his preliminary hearing consisting of coerced statements elicited by the police during the victim's pretrial interview. To be entitled to habeas corpus relief on this basis, Banks must show that "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced." (Pen. Code, § 1473, subd. (b)(1).) Regarding the use of coerced witness statements, "[t]he defendant has no standing to assert a violation of another's constitutional rights." (*People v. Boyer* (2006) 38 Cal.4th 412, 444.) "A defendant may assert a violation of his or her own right to due process of the law and a fair

trial based upon third party witness coercion, however, if the defendant can establish that *trial* evidence was coerced or rendered unreliable . . . and that the admission of this evidence would deprive the defendant of a fair trial. [Citations.]" (*People v. Williams* (2010) 49 Cal.4th 405, 452-453.) Defendant bears the burden of showing how the coercion " 'directly impaired the free and voluntary nature of the . . . testimony in the trial itself' [citation] and impaired the reliability of the trial testimony [citation]." (*Id.* at p. 453, fn. omitted.) Here, Banks contends that the victim's statements that were introduced into evidence at his preliminary hearing were improperly coerced, because she was questioned by the investigating officer "in a cold/freezing interview room . . . possibly under the influence of drugs and /or alcohol," and at the time of her interview, she was 15 years old. Although Banks contends that the circumstances of the victim's pretrial interview were coercive, he does not specify what aspects of her testimony were false and why such false testimony was essential to establishing the essential elements of the crimes. Thus, Banks has not shown that any of the testimony that he contends was false was "substantially material or probative" (Pen. Code, § 1473, subd. (b)(1)), such that there is a reasonable probability that the outcome of his preliminary hearing would have been different had the testimony not been introduced (*In re Roberts* (2003) 29 Cal.4th 726, 742). Conclusory allegations that the outcome would have been different absent the victim's allegedly false testimony are insufficient to state a prima facie case for relief. (See *People v. Williams* (1988) 44 Cal.3d 883, 937 [habeas corpus petitioner must show "prejudice as a 'demonstrable reality,' not simply speculation as to the effect of errors or omissions of counsel"].)

Banks's claims of ineffective assistance of counsel also do not state a prima facie case for habeas corpus relief. With respect to the claim that trial and appellate counsel did not conduct adequate investigations, Banks has not shown that "counsel knew or should have known that further investigation was necessary," nor has he "establish[ed] the nature and relevance of the evidence that counsel failed to present or discover." (*People v. Williams, supra,* 44 Cal.3d at p. 937.) Counsel's decisions whether to file a pretrial motion, whether to object to the admission of evidence at the preliminary hearing, whether to call certain witnesses at the preliminary hearing, and whether to raise certain arguments on appeal are all tactical decisions for counsel to make, are accorded substantial deference by reviewing courts, and rarely establish counsel's incompetence. (See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1185 [failure to object]; *People v. Bolin* (1998) 18 Cal.4th 297, 334 [failure to call witnesses]; (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1220, 1222 [failure to file pretrial motion to suppress]; *In re Spears* (1984) 157 Cal.App.3d 1203, 1211 [appellate counsel's duties on appeal].) Nor has Banks submitted any declarations from trial or appellate counsel or any other attorney regarding counsels' performance or whether any deficiency in their performance caused him prejudice. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) Although Banks is clearly dissatisfied with counsel's representation at trial and in his direct appeal, his repeated allegations that counsel provided constitutionally ineffective assistance are insufficient to sustain his pleading burden. "The burden of establishing incompetence rests with defendant and it must be shown as demonstrable reality, not as mere speculation." (*People v. Lewis* (1977) 71 Cal.App.3d 817, 821.)

Banks also fails to state a prima facie claim of a *Brady* violation entitling him to habeas corpus relief. The prosecution has a duty to disclose evidence to a criminal defendant when the evidence is both favorable to the defendant and material on either guilt or punishment. (*In re Miranda* (2008) 43 Cal.4th 541, 575.) Banks contends that prior to the preliminary hearing, the prosecution withheld evidence related to the victim's pretrial interviews. Banks's assertion that this evidence was exculpatory, however, is conclusory and speculative, and he fails to sufficiently explain how this evidence would have been favorable to him and thus had to be disclosed under *Brady*. In particular, he does not explain why the disclosure of this evidence could have led to a different outcome at the preliminary hearing. (See *Cone v. Bell* (2009) 556 U.S. 449, 469-470 ["evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different"].) Banks also claims that the police should have interviewed the victim's stepmother. However, even if the victim's stepmother had information that was helpful to the defense, police have no duty to collect all evidence that could benefit the defense absent a showing of bad faith. (See *Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58.)

Finally, because Banks's individual claims of error lack merit, his claim of cumulative prejudice from those errors necessarily fails. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 910; *People v. Bolin* (1998) 18 Cal.4th 297, 345.)

The petition is denied.

DO, Acting P. J.

Copies to: All parties

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO

In the matter of	Case No. WHCJS2000506
Jeremiah Banks, Petitioner	ORDER
for Writ of Habeas Corpus	

Petitioner Jeremiah Banks filed a petition for writ of habeas corpus on September 21, 2020.

On December 13, 2017, a jury convicted Petitioner of human trafficking of a minor for sex act by force (Pen. Code, § 236.1, subd. (c)(2)), pimping a minor under 16 years of age (Pen. Code, 266h, subd. (b)(2)), and pandering by procuring a minor under age 16 (Pen. Code, § 266i, subd. (b)(2)). The jury also found true the allegation that Petitioner had previously been convicted of a strike offense (Pen. Code, §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). On January 11, 2018, the trial court sentenced Petitioner to an indeterminate term of 30 years to life in state prison. On September 11, 2019, the Court of Appeal affirmed the judgment of conviction with directions, and the Supreme Court denied review on November 20, 2019.[1]

This lengthy and convoluted petition contends the testimony used at Petitioner's preliminary hearing was untrue and inadmissible resulting in the denial of substantial rights during the preliminary hearing and an illegal holding order. In related claims, Petitioner blames his lawyer for ineffective assistance and the prosecutor for misconduct.

[1] The Court takes judicial notice of pertinent portions of FSB1404047, D075934, and S258589 as referenced herein. (See Evid. Code, § 452, subd. (d).)

The court receiving a petition for writ of habeas corpus evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. (*In re Figueroa* (2018) 4 Cal.5th 576, 586; *In re Clark* (1993) 5 Cal.4th 750, 769, fn. 9; *In re Lawler* (1979) 23 Cal.3d 190, 194.) "If no prima facie case for relief is stated, the court will summarily deny the petition." (*People v. Duvall* (1995) 9 Cal.4th 464, 475.) A procedurally defective petition may also be summarily denied. (*Gomez v. Superior Court* (2012) 54 Cal.4th 293, 301.) The petition fails to state a prima facie claim for habeas relief and is procedurally barred.

The preliminary hearing occurred on December 11, 2014. This petition challenging the propriety of the holding order was not filed for almost six years after the preliminary hearing and almost three years following Petitioner's conviction (see *In re Delong* (2001) 93 Cal.App.4th 562, 568 [date of verdict is the date of conviction]). This delayed Petition is untimely and may be denied on that basis alone. "Because a criminal defendant enjoys the right to appointed trial counsel, to a jury trial, and to an appeal, the various procedural limitations applicable to habeas corpus petitions are designed to ensure legitimate claims are pressed early in the legal process, while leaving open a 'safety valve' for those rare or unusual claims that could not reasonably have been raised at an earlier time." (See *In re Reno* (2012) 55 Cal.4th 428, 452.) A claim should be asserted in a habeas corpus petition as promptly as the circumstances would allow. (*Id.* at 460; *In re Robbins* (1998) 18 Cal.4th 770, 780.) Generally, a court will not consider on habeas review a claim that was not presented in a timely manner. (*Reno*, 55 Cal.4th at 459; *In re Clark* (1993) 5 Cal.4th 750, 797-798.) A court will not consider the merits of a delayed petition unless the petitioner provides an adequate justification for the failure to present all known claims in a timely manner. (*Clark*, 5 Cal.4th at 783 ["Our decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim."], citing *In re Swain* (1949) 34 Cal.2d 300, 304.)

Petitioner suggests it is his appellate lawyer's fault it took him so long to challenge the magistrate's holding order following the Supreme Court's denial of review. Petitioner ignores that it has been almost six years since his preliminary hearing. Petitioner also ignores that this petition is barred by the rule of *Seaton*, because Petitioner should have presented these claims to the trial court. (See *In re Seaton* (2004) 34 Cal.4th 193, 199-200 ["[J]ust 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."]; *In re Kirchner* (2017) 2 Cal.5th 1040, 1052 [habeas corpus is extraordinary remedy and generally not available where another remedy exists].)

The petition also fails on the merits. The evidence at Petitioner's trial included (from the Court of Appeal decision, *People v. Banks* (2019) 2019 Cal.App. Unpub. LEXIS 6044, pgs. 2-5, 2019 WL 4299889): In the summer of 2014, 15-year-old Jane Doe moved in with a friend in an apartment complex. [Petitioner] lived in a neighboring apartment and invited Jane over one evening. She accepted the invitation, smoked marijuana and drank alcohol with [Petitioner] and nine to 12 of his friends, and had sex with [Petitioner] in his bedroom. Later, several of his male friends entered the bedroom and engaged in group sex with Jane.

After that night, Jane began prostituting for [Petitioner]. He showed her advertisements for prostitution on a classified advertising website and taught her how to create and post her own advertisements. He taught her the language to use in her advertisements and how to pose for photographs. Further, he obtained clothing for her to wear in photographs and created her first prostitution advertisement. He also provided her cell phones to use to contact clients, taught her how to converse with clients, instructed her how much to charge for sex acts, booked motel rooms for her to use for prostitution, and drove her to clients or streets to search for clients. [Petitioner] was physically violent and verbally abusive with her, particularly when she was unable to procure a client. She provided [Petitioner] the money she received from her clients and, in return, stayed part time with him in his apartment. Eventually, Jane stopped prostituting for [Petitioner], stopped answering calls from him, and stopped going over to his apartment. In total, Jane performed 20 to 30 sex acts while prostituting under [Petitioner]'s direction.

During the same summer as the events involving Jane, the Riverside County Sheriff's Department conducted an undercover sting operation in a nearby city during which it placed a prostitution advertisement on the same website Jane and [Petitioner] used to solicit clients for Jane. The advertisement stated a "Latin Princess" needed a "daddy" and was intended to solicit pimps in search of prostitutes to work for them. [Petitioner] responded to the advertisement and showed up at a motel room occupied by a deputy posing as an undercover prostitute. In a recorded conversation, he asked the deputy if he "look[e]d like a trick to [her]," to which she replied, "No." [Petitioner] asked whether she was "looking for a daddy" and if she was "working on [her] own ... ." [Petitioner] then asked if she had paid for the motel room and said, "You on my program all this shit got to go. Like everything. [¶] ... [¶] ... [W]e could wrap this shit up and you could come with me right now cause I got everything. You don't have to worry about nothing. [¶] ... [¶] ... I'm telling you if you pay my pockets right you will be straight. Do you understand what I'm saying? [¶] ... [¶] You will be taken care of fully, point, to the top to the tee. My other bitch taken care of. You feel me? [¶] ... [¶] ... I'm a give you a

choosing fee." The deputy asked if she would be provided protection and [Petitioner] replied, "You get all, you get all that, do you hear me? Once you pay me, I'm a tell you exactly what you gone get."

Shortly after, deputies entered the motel room and arrested [Petitioner]. In a postarrest interview, he told the interviewing deputy he responded to the advertisement to find a girl to "take care" of him, not to prostitute for him. He claimed he believed the term "daddy" meant "sugar daddy," but later admitted he knew the term referred to a pimp. In a separate proceeding, [Petitioner] was prosecuted for his conduct during the undercover sting operation and accepted a plea agreement for pandering (Pen. Code, § 266i). [End of summary from Court of Appeal decision.]

The court in *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265 confirmed that "deprivation of a substantial right" during a preliminary hearing may be raised by a "nonstatutory motion to dismiss." (*Id.* at 271.) When a criminal defendant is denied a substantial right at the preliminary hearing, the "ensuing commitment" is "illegal and entitles a defendant to dismissal of the information on timely motion." (*Ibid.*, citing *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 523, and *Jennings v. Superior Court* (1967) 66 Cal.2d 867, 875-876.) A "substantial right" includes the right to cross-examination (*Jennings*, 66 Cal.2d at 875-876; Pen. Code, § 865), the right to have the prosecutor disclose "all substantial material evidence favorable to an accused" (*Stanton*, 193 Cal.App.3d at 271), the right to the effective assistance of counsel (*Galindo v. Superior Court* (2010) 50 Cal.4th 1, 9; *People v. Cudjo* (1993) 6 Cal.4th 585, 615), the right to present evidence to "establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness" (Pen. Code, § 866, subd. (a); see *Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074, 1084), and the right to due process (*Mills v. Superior Court* (1986) 42 Cal.3d 951, 959; *People v. Gutierrez* (2013) 214 Cal.App.4th 343, 348.)

The Court has reviewed the preliminary hearing transcript (Exhibit 1) and the several pages of exhibits attached to the petition, including the transcripts from Jane Doe's recorded statements (Exhibit 3). The many conclusions asserted in the habeas petition could be understood as manipulative mischaracterizations of Officer Jones' testimony when compared to the recorded statement transcripts. For example, the petition objected to Officer Jones reference to the "gang rape" of the victim. However, 15-year old Jane Doe described Petitioner forcing her to do "sexual stuff" with Petitioner and"[a] lot" of Petitioner's friends. Jane Doe was asked, "So he forced you to have sex with him?" She responded, "I said no, that I didn't want to do it. …" The suggestion the

prosecutor committed misconduct is not evident from or supported by any of the documents submitted with the petition.

Petitioner's allegation the *Miranda* [2] rights of Jane Doe were violated and that Petitioner should somehow benefit does not support this habeas claim. Jane Doe was properly advised of her *Miranda* rights near the beginning of her interviews. "In determining whether a confession was voluntary, '"[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne."' [Citation.] Whether the confession was voluntary depends upon the totality of the circumstances. [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 169.)

In evaluating the voluntariness of a statement, no single factor is dispositive. (*People v. Williams* (1997) 16 Cal.4th 635, 661 [rejecting the view that an offer of leniency necessarily renders a statement involuntary].) The question is whether the statement is the product of an "'essentially free and unconstrained choice'" or whether the defendant's "'will has been overborne and his [or her] capacity for self-determination critically impaired'" by coercion. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225.) Relevant considerations are "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.'" (*Williams*, 16 Cal.4th at 660.) "In assessing allegedly coercive police tactics, '[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' [Citation.]" (*People v. Smith* (2007) 40 Cal.4th 483, 501.) Although Jane Doe could be viewed as reluctant (primarily due to her fear of retribution from Petitioner), there is nothing in the transcripts from the recorded statements that would indicate her statements were not free and voluntary.

The petition also fails to allege facts sufficient to show the interrogation of Jane Doe somehow violated Petitioner's due process rights.[3] "The principles applicable to a coerced-testimony claim are settled. The defendant has no standing to assert a violation of another's constitutional rights. The coerced testimony of a witness other than the accused is excluded in order to protect the defendant's own federal due process right to a fair trial, and in particular, to ensure the reliability of testimony offered against him. A claim that a witness's testimony is coerced thus cannot prevail simply on grounds that the

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] The various exhibits that normally "accompany a petition . . . do not constitute evidence, but rather supplement the allegations to the extent they are incorporated by reference." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 675.)

testimony is the 'fruit' of some constitutional transgression against the witness. Instead, the defendant must demonstrate how such misconduct, if any, has directly impaired the free and voluntary nature of the anticipated testimony in the trial itself." (*People v. Boyer* (2006) 38 Cal.4th 412, 444, quoting *People v. Badgett* (1995) 10 Cal.4th 330, 342–350; see *People v. Douglas* (1990) 50 Cal.3d 468, 501–502.) In this regard, the petition is fatally deficient. The petition does not allege facts that would constitute misconduct by Officer Jones, and does not allege a factual basis to conclude that any of the circumstances related to Jane Doe's interviews impaired the free and voluntary nature of what she had to say or resulted in statements that were somehow unreliable.

In the context of a *Stanton* motion, the analysis is whether the matters objected to in this untimely petition were "material" to the magistrate's holding order. (See *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586, 1596 ["material on the issue"]; see also *Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074, 1087 ["Accordingly, the standard of materiality is whether there is a reasonable probability that disclosure of the exculpatory or impeaching evidence would have altered the magistrate's probable cause determination with respect to any charge or allegation."]; accord *People v. Hull* (2019) 31 Cal.App.5th 1003, 1034.) Having reviewed all of Petitioner's contentions with reference to the preliminary hearing transcript, the statements from Jane Doe, and the other exhibits submitted, this Court finds that if a *Stanton* motion for denial of a substantial right at the preliminary hearing been brought by Petitioner that motion would have been properly denied.

Moreover, a motion challenging the magistrate's holding order for violation of a substantial right at the preliminary hearing must be made "timely." (*Stanton*, 193 Cal.App.3d at 270; *Pompa-Ortiz*, 27 Cal.3d at 523; *Jennings*, 66 Cal.2d at 881 ["timely motion"].) The *Jennings* court explained the timeliness requirement: "We further recognize that when a defendant fails to challenge, by motion to dismiss and writ of prohibition, errors of the magistrate in ruling on the admissibility of evidence (as distinguished from such fundamental deprivations as denial of counsel or of an unbiased jury), he will ordinarily receive a fair trial if correct rulings are thereafter made at the trial on the merits; in that event, on an appeal from a judgment of conviction the errors may be found to have been cured in the subsequent proceedings." (66 Cal.2d at 881.)

The rationale for the timeliness requirement is to avoid a per se reversible error rule. (See *People v. Hampton* (1981) 116 Cal.App.3d 193, 197-198.) For example, "Penal Code section 995 gives a defendant the opportunity … to challenge the regularity of … the preliminary examination, as well as the existence of probable cause." (*Ibid.*) "Insufficiency of the evidence … at the preliminary examination is 'jurisdictional' only

in a special procedural sense that the ruling of the trial court … [on the motion under Penal Code section 995] may be reviewed by writ of prohibition under Penal Code section 999a." (*Ibid.*) "Such defect has been held not to be jurisdictional in the fundamental sense; it was subject to waiver." (*Ibid.*, citing *People v. Warburton* (1970) 7 Cal.App.3d 815, 821-822; see also *People v. Partlow* (1978) 84 Cal.App.3d 540, 555 ["[I]nsufficiency of evidence … at the preliminary examination is jurisdictional in the special procedural sense that the ruling of the trial court may be reviewed by writ of prohibition …, but the defect is not jurisdictional in the fundamental sense because it is subject to waiver."].)

The Supreme Court said in *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 713: "The jurisdictional problem is akin to that resulting from a defective commitment which, if subjected to ***a timely and proper attack***, is deemed to fail to confer jurisdiction on the superior court to entertain criminal proceedings. [Citation.] In such an instance, however, the commitment is only voidable … and unless voided by a ***proper and timely attack*** the court is not divested of jurisdiction to proceed against the accused. [Emphasis added.]" (See also *Pompa-Ortiz*, 27 Cal.3d at 529 [*Pompa-Ortiz* overruled *People v. Elliot* (1960) 54 Cal.2d 498 insofar as *Elliot* required reversal of a judgment of conviction because of errors committed in the course of the preliminary hearing without first assessing the prejudicial effect of such error."].)

The Supreme Court explained the rule:

> Henceforth irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall ***require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination***. The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities. At that time, by application for extraordinary writ, the matter can be expeditiously returned to the magistrate for proceedings free of the charged defects. [Emphasis added.]

(*Pompa-Ortiz*, 27 Cal.3d at 529.) This petition is not "timely" – not as a habeas petition and not as a motion to vacate the magistrate's holding order from December 11, 2014.

After reading the summary of evidence elicited at trial, this Court fails to see any potential for prejudice resulting from the preliminary hearing in Petitioner's case. The petition totally ignores the prejudice requirement and fails to discuss it. In that sense, the

entire petition is conclusory and insufficient to allege a basis for habeas relief. (*In re Martinez* (2009) 46 Cal. 4th 945, 955-956 ["[T]he petition should … state fully and with particularity ***the facts*** on which relief is sought [citations], … . [Emphasis added.]"]; *People v. Duvall* (1995) 9 Cal.4th 464, 474 ["Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to ***plead*** sufficient grounds for relief, and then later to ***prove*** them."]; *In re Reno* (2012) 55 Cal.4th 428, 493 ["[C]onclusory allegations without specific factual allegations do not warrant relief."].)

The fact that Petitioner was represented by a different lawyer during his trial than at the preliminary hearing is also relevant to the prejudice analysis and Petitioner failed to address it. Under both the Sixth Amendment to the United States Constitution and Article I, Section 15 of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 686; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; *In re Cordero* (1988) 46 Cal.3d 161, 179-180. This right entitles a criminal defendant to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate. (*Ledesma*, 43 Cal.3d at 215; *Cordero*, 46 Cal.3d at 180; see, *Strickland*, 466 U.S. at 686.)

To prevail on a claim of ineffective assistance of counsel, Petitioner "must show that counsel's representation fell below an objective standard of reasonableness" measured against "prevailing professional norms," and that prejudice resulted. (*Strickland,* 466 U.S. at 687-688, 694; see, *People v. Anderson* (2001) 25 Cal.4th 543, 569; *In re Cordero* (1988) 46 Cal.3d 161, 180.) With a different lawyer representing Petitioner at trial and the evidence presented subject to proof beyond a reasonable doubt, the petition lacks a factual basis for habeas relief related to Petitioner's right to the effective assistance of counsel. (See *People v. Bolin* (1998) 18 Cal.4th 297, 334 [unsubstantiated speculation regarding an alleged failure to investigate is insufficient for a claim of ineffective assistance].)

The petition is DENIED.

Dated: October 8, 2020

Hon. Gregory S. Tavill
Judge of the Superior Court

Court of Appeal, Fourth Appellate District, Division One - No. D075934

S258589

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JEREMIAH BANKS, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

Filed 9/11/19

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JEREMIAH BANKS, Defendant and Appellant.	D075934 (Super. Ct. No. FSB1404047-1)

APPEAL from a judgment of the Superior Court of San Bernardino County, Steve Malone, Judge. Affirmed as modified.

Alan S. Yockelson, 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, Collette C. Cavalier and Arlene A. Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury found Jeremiah Banks guilty of one count of human trafficking of a minor (Pen. Code,[1] § 236.1, subd. (c); count 1), one count of pimping a minor under 16 years of age (§ 266h, subd. (b)(2); count 2), and one count of pandering by procuring a minor under 16 years of age (§ 266i, subd. (b)(2); count 3). The jury found true allegations Banks used force or fear during the commission of count 1 (§ 236.1, subd. (c)(2)), and, as to counts 1–3, suffered a prior conviction within the meaning of section 12022.5. The trial court sentenced Banks to an aggregate term of 30 years to life.

On appeal, Banks contends the trial court erred in permitting the People to introduce evidence of a prior incident of pandering committed by Banks and prior statements made by the victim in this case. Further, Banks asks us to review for error the trial court's in camera assessment of peace officer personnel records. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

We conclude the trial court did not err in admitting the evidence at issue or in assessing the personnel records. We modify the judgment to correct a minor sentencing inaccuracy and affirm the judgment as modified.

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1 All further statutory references are to the Penal Code unless otherwise noted.

II

BACKGROUND

For purposes of this section, we state the evidence in the light most favorable to the judgment. (*People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.)

A

In the summer of 2014, 15-year-old Jane Doe moved in with a friend in an apartment complex. Banks lived in a neighboring apartment and invited Jane over one evening. She accepted the invitation, smoked marijuana and drank alcohol with Banks and nine to 12 of his friends, and had sex with Banks in his bedroom. Later, several of his male friends entered the bedroom and engaged in group sex with Jane.

After that night, Jane began prostituting for Banks. He showed her advertisements for prostitution on a classified advertising website and taught her how to create and post her own advertisements. He taught her the language to use in her advertisements and how to pose for photographs. Further, he obtained clothing for her to wear in photographs and created her first prostitution advertisement. He also provided her cell phones to use to contact clients, taught her how to converse with clients, instructed her how much to charge for sex acts, booked motel rooms for her to use for prostitution, and drove her to clients or streets to search for clients. He was physically violent and verbally abusive with her, particularly when she was unable to procure a client. She provided him the money she received from her clients and, in return, stayed part time with him in his apartment.

Eventually, Jane stopped prostituting for Banks, stopped answering calls from him, and stopped going over to his apartment. In total, Jane performed 20 to 30 sex acts while prostituting under Banks's direction.

B

During the same summer as the events involving Jane, the Riverside County Sheriff's Department conducted an undercover sting operation in a nearby city during which it placed a prostitution advertisement on the same website Jane and Banks used to solicit clients for Jane. The advertisement stated a "Latin Princess" needed a "daddy" and was intended to solicit pimps in search of prostitutes to work for them.

Banks responded to the advertisement and showed up at a motel room occupied by a deputy posing as an undercover prostitute. In a recorded conversation, he asked the deputy if he "look[e]d like a trick to [her]," to which she replied, "No." He asked whether she was "looking for a daddy" and if she was "working on [her] own …." He then asked if she had paid for the motel room and said, "You on my program all this shit got to go. Like everything. [¶] … [¶] … [W]e could wrap this shit up and you could come with me right now cause I got everything. You don't have to worry about nothing. [¶] … [¶] … I'm telling you if you pay my pockets right you will be straight. Do you understand what I'm saying? [¶] … [¶] You will be taken care of fully, point, to the top to the tee. My other bitch taken care of. You feel me? [¶] … [¶] … I'm a give you a choosing fee." The deputy asked if she would be provided protection and Banks replied, "You get all, you get all that, do you hear me? Once you pay me, I'm a tell you exactly what you gone get."

Shortly after, deputies entered the motel room and arrested Banks. In a postarrest interview, he told the interviewing deputy he responded to the advertisement to find a girl to "take care" of him, not to prostitute for him. He claimed he believed the term "daddy" meant "sugar daddy," but later admitted he knew the term referred to a pimp. In a separate proceeding from the instant case, Banks was prosecuted for his conduct during the undercover sting operation and accepted a plea agreement for pandering (§ 266i).

III

DISCUSSION

A

Prior to trial, the People filed a motion in limine to introduce evidence of Banks's pandering of the undercover deputy. They argued it was relevant to prove his motive to pimp and pander, intent to traffic Jane, and knowledge of the pimping culture. Banks opposed the request on grounds that: (1) the pandering incident was not sufficiently similar to the acts alleged in the instant case to support an inference of motive, intent, or knowledge; and (2) the probative value of the evidence was substantially outweighed by the probability its admission would create undue prejudice. The trial court found the evidence was prejudicial, but granted the motion. It reasoned the pandering incident was "similar" to the conduct charged in the present case and "highly relevant" because both incidents occurred "close in time" and involved "defendant contact[ing] someone for the express purpose [of] procur[ing] that person as a prostitute." Banks challenges the admission of the evidence concerning his pandering of the undercover deputy.

" 'Character evidence, sometimes described as evidence of propensity or disposition to engage in a specific conduct, is generally inadmissible to prove a person's conduct on a specified occasion.' " (*People v. Leon* (2015) 61 Cal.4th 569, 597 (*Leon*); Evid. Code, § 1101, subd. (a).) "The purpose of this rule is to avoid placing an accused in the position of defending against crimes for which he has not been charged and to avoid having a jury convict him on prejudicial character evidence alone." (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 430.)

However, evidence that a person committed a crime, civil wrong, or other act (hereinafter, uncharged misconduct) may be admitted to prove a material fact other than the person's predisposition to commit such an act, including the person's intent or common plan, among other facts.[2] (Evid. Code, § 1101, subd. (b).) "As long as there is a direct relationship between the [uncharged misconduct] and an element of the charged offense, introduction of that evidence is proper." (*People v. Daniels* (1991) 52 Cal.3d 815, 857.) A ruling on the admissibility of uncharged misconduct evidence is reviewed under an abuse of discretion standard. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.)

"In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the

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2 "Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.] .... [¶] Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, '[i]n proving design, the act is still undetermined....' " (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2 (*Ewoldt*).)

same intent in each instance." [Citations.]' [Citation.] [¶] A greater degree of similarity is required in order to prove the existence of a common design or plan.... [I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' " (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.) The common "plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Id.* at p. 403.)

Applying these standards, we conclude the trial court did not abuse its discretion in admitting the uncharged misconduct evidence at issue. The pandering incident involving the undercover deputy and the conduct alleged in the charged offenses were sufficiently similar and marked by common features from which it could be inferred that Banks: (1) had a common design or plan; and (2) acted with the requisite intent to violate the sex offenses specified in the human trafficking statute (§ 236.1, subd. (c)) and to influence Jane to become a prostitute (§ 266i, subd. (b)(2)). In both incidents, Banks used the same classified advertising website to further his conduct. In both incidents, he promised assistance to (as far as he knew) unaccompanied females in return for money. Additionally, both incidents occurred just one month apart and in close geographic proximity to one another. For all these reasons, the uncharged misconduct evidence was probative of both Banks's intent and the existence of a common plan.

The uncharged misconduct evidence was also relevant to show Banks knew Jane was a prostitute, which the prosecution was required to prove to sustain a conviction of

the offense of pimping. (§ 266h, subd. (b)(2).) As the prosecution's expert in pimping, pandering, and prostitution opined, street-level pimps and prostitutes use language specific to their subculture. The uncharged misconduct evidence revealed Banks was conversant in this language, as well as pimping and pandering procedures. For instance, during the recorded sting operation, he referenced a "choosing fee" (a fee a prostitute pays a pimp to begin working for the pimp) and asked the undercover deputy whether he looked like a "trick" (a prostitute's client). In the interrogation following his arrest, he further explained a "daddy" was synonymous with a pimp. Such evidence was probative of Banks's familiarity with pimping culture, which could in turn be used to demonstrate his knowledge that Jane was a prostitute. (*People v. Scally* (2015) 243 Cal.App.4th 285, 293 [evidence showing defendant was "steeped in the pimping culture" admissible to show intent to pimp].)

If evidence of uncharged misconduct is sufficiently similar to the charged crimes to be probative of a material fact other than predisposition to commit a crime, " 'the trial court then must consider whether the probative value of the evidence "is 'substantially outweighed by the probability that its admission [would] ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' " ' " (*Leon*, *supra*, 61 Cal.4th at p. 599; Evid. Code, § 352.) Here, the trial court found the uncharged misconduct evidence was prejudicial, but nevertheless admitted the evidence after concluding its "probative value outweighs the prejudicial effect." The trial court did not abuse its discretion in reaching this finding.

The probative value of the uncharged misconduct was quite high, as it showed Banks had used the same website he later used to advertise Jane's prostitution services. Further, the uncharged misconduct involved an adult female (the undercover deputy) and was no more inflammatory—and, in fact, was decidedly less inflammatory—than the charged offenses, which involved a 15-year-old victim. (*Ewoldt*, *supra*, 7 Cal.4th at p. 405.) Further, the guilty plea Banks entered for the uncharged misconduct minimized "the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses …." (*Ibid.*) Considering all these factors, we conclude the trial court did not abuse its discretion in admitting the evidence of Banks's pandering of the undercover deputy.

B

The prosecutor questioned Jane about the first night she went over to Banks's apartment, among other topics. Jane testified she did not remember numerous details about the evening, including whether Banks tried to persuade her to have sex with him or his friends, the number of men with whom she had sex that evening, whether he remained in the bedroom while she engaged in group sex with his friends, or the content of her conversations with him that evening or the following day. After Jane's testimony concluded, the prosecutor told the court she intended to call Officer Aaron Jones of the San Bernardino Police Department, who interviewed Jane on two occasions, to testify about statements she made to him during the interviews. She contended Jane's prior statements fell within an exception to the rule against hearsay, and were therefore admissible, because the prior statements were inconsistent with her in-court testimony.

Over defense counsel's objection, the trial court found "some inconsistencies" between Jane's prior statements and her in-court testimony, in which she claimed not to remember details about the night in question.[3] Therefore, it permitted the prosecutor to call Officer Jones to testify about Jane's prior statements. Under questioning, Officer Jones then testified Jane had told him she did not want to have sex with Banks and he told her it would "be fun." Officer Jones further testified Jane had told him she was under the influence of alcohol and marijuana when she had sex with Banks and his friends.

" 'A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.' " (*People v. Chism* (2014) 58 Cal.4th 1266, 1294.) Banks contends the trial court erred in admitting Jane's prior statements on grounds that there was no inconsistency between Jane's prior statements and her trial testimony. According to Banks, Jane "truly did not remember" the evening she went to Banks's apartment during her trial testimony.

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3 The People assert Banks did not object with sufficient particularity to preserve his arguments regarding the admissibility of Officer Jones's testimony. We disagree. The trial court asked the prosecutor whether any witnesses would be called "to testify as to prior inconsistent statements" and the prosecutor replied that she intended to call Officer Jones, at which point Banks's counsel stated he was "vehemently opposed" to the testimony and the "Court would have to decide" whether Jane's prior statements were inconsistent with her trial testimony. Banks's stated opposition to the testimony adequately preserved the issue for our review.

" 'Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, ... [w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper.' " (*People v. Ledesma* (2006) 39 Cal.4th 641, 711 (*Ledesma*); see *People v. Rodriguez* (2014) 58 Cal.4th 587, 633 [no hearsay violation where record provided a "reasonable basis" for the conclusion that jail inmate's "repeated 'I don't recall' claims" were untruthful]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 950 ["to the extent a claimed lack of memory amounts to deliberate evasion, as the court could readily have found here, inconsistency is implied"].)

There was ample basis in the record from which the trial court could have concluded Jane was evasive at trial when asserting lack of memory. Jane admitted she did not want to testify in the trial. She failed to comply with multiple prior subpoenas compelling her to appear and was in custody to compel her appearance. Further, her professed lack of memory concerned a topic she described as embarrassing and "very disturbing." For all these reasons, there was a "reasonable basis" for concluding that Jane's testimony was deliberately evasive. (*Ledesma*, *supra*, 39 Cal.4th at p. 712.)

C

Officer Jones testified as the prosecution's pimping, pandering, and prostitution expert and, as noted *ante*, relayed prior statements made by Jane during pretrial

interviews. In the previous section, we concluded the trial court did not violate state hearsay law by permitting Officer Jones to testify about Jane's prior statements because they were prior inconsistent statements and therefore fell within a recognized exception to the hearsay rule. (Evid. Code, §§ 700, 1235.) Banks also contends the prior statements constituted testimonial hearsay, the admission of which violated his rights under the confrontation clause of the Sixth Amendment to the federal Constitution.

"The admission of … testimony is governed not only by state evidence law, but also by the Sixth Amendment's confrontation clause, which provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' [Citation.] As the United States Supreme Court observed, 'this bedrock procedural guarantee applies to both federal and state prosecutions.' [Citations.] ' "The main and essential purpose of confrontation is *to secure for the opponent the opportunity of* cross-examination." ' " (*People v. Sanchez* (2016) 63 Cal.4th 665, 679.) The confrontation clause therefore guarantees that testimonial statements of witnesses absent from trial may be admitted in a criminal trial only where the declarant is unavailable and the criminal defendant has had a prior opportunity to cross-examine the declarant. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, 68 (*Crawford*).)

Banks's confrontation clause argument fails for at least two reasons. Although Banks objected to the admission of testimony concerning Jane's prior statements as violative of state hearsay law, he did not assert a timely and specific objection on grounds that the prior statements violated the confrontation clause. Therefore, Banks has forfeited

his confrontation clause argument. (*People v. Redd* (2010) 48 Cal.4th 691, 730 & fn. 19 [hearsay objection did not preserve confrontation clause objection].)

Banks's argument fails on the merits as well. As the *Crawford* decision makes clear, "when the declarant appears for cross-examination at trial, the [c]onfrontation [c]lause places no constraints at all on the use of his prior testimonial statements." (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9; see *People v. Sanchez* (2019) 7 Cal.5th 14, 42 [defendant's confrontation rights not violated because declarant was subject to cross-examination at trial]; *People v. Clark* (2011) 52 Cal.4th 856, 927 [same].) This is true even if the witness experiences an alleged lack of memory while testifying at trial. (*Sanchez*, at p. 42; *Clark*, at p. 927.) In the present case, Jane testified at trial and was subject to cross-examination. In fact, Banks's counsel cross-examined her extensively about the evening she went to Banks's apartment, including the discussions in which she engaged and her sexual encounters with Banks and his companions. Because Banks could (and did) cross-examine Jane at trial, there was no violation of the confrontation clause.

D

Banks filed a pretrial *Pitchess* motion requesting discovery of information relevant to certain misconduct allegations and complaints in the personnel records of two police officers: (1) Officer Aaron Jones, who interviewed Jane; and (2) Officer David

Baughman, who assisted Officer Jones in the interview of Jane.[4] The trial court found good cause to conduct an in camera review of documents relating to possible instances of coercive or abusive tactics as to alleged victims. It then conducted an in camera inspection of potentially relevant documents procured from the personnel files of the officers and found no discoverable materials.

In his appellate brief, Banks asks us to review the sealed in camera materials to determine whether the trial court properly exercised its discretion in concluding there were no discoverable materials. The People do not oppose this request.

"When a trial court concludes a defendant's *Pitchess* motion shows good cause for discovery of relevant evidence contained in a law enforcement officer's personnel files, the custodian of the records is obligated to bring to the trial court all 'potentially relevant' documents to permit the trial court to examine them for itself." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228–1229.) "The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion. Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined." (*Id.* at p. 1229.)

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4 The clerk of the superior court was unable to locate Banks's *Pitchess* motion and therefore did not include it in the clerk's transcript. We draw our description of the motion from the People's brief in opposition to the *Pitchess* motion.

We have independently reviewed the sealed record of the trial court's in camera proceeding. Based on that review, we conclude the trial court conducted the proper inquiry into the discovery of the police officers' personnel records, made an adequate record for our review, and correctly found there was no relevant information to disclose.

E

The trial court imposed an indeterminate sentence of 15 years to life for count 1 (§ 236.1, subd. (c)(2)), doubled to 30 years to life due to the prior strike; the upper term of 8 years for count 2 (§ 266h, subd. (b)(2)), doubled to 16 years due to the prior strike; and the upper term of 8 years for count 3 (§ 266i, subd. (b)(2)), doubled to 16 years due to the prior strike. It found section 654 applicable to counts 2 and 3 and stayed execution of the sentences for those counts. During the oral pronouncement of judgment, however, the court further indicated the stayed sentences for counts 2 and 3 were concurrent, even though execution of the sentences was stayed.

Banks contends the trial court erred in designating the sentences for counts 2 and 3 as concurrent because it stayed execution of the sentences under section 654. The People agree and ask us to modify the judgment accordingly.

The determination whether to stay execution of a sentence under section 654 precedes a determination regarding whether the sentence is concurrent or consecutive. (Cal. Rules of Court, rule 4.424.) If the court finds execution of the sentence must be stayed, there is no need to proceed further; the sentence is simply imposed in full and execution is stayed, with no determination made as to whether it is consecutive or concurrent. (See *People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164 ["the imposition

of a 'consecutive' and 'stayed' sentence would be meaningless because the stayed sentence would only operate if the principal count were eliminated"].)

In accordance with the foregoing principles, the trial court should have imposed the full sentences for counts 2 and 3 and stayed execution of the sentences without designating them concurrent or consecutive. Therefore, pursuant to our inherent authority to modify judgments (§ 1260), we strike the concurrent designation of the stayed sentences for counts 2 and 3.

IV

DISPOSITION

The judgment is modified to strike the concurrent designation of the stayed sentences for counts 2 and 3. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

McCONNELL, P.J.

WE CONCUR:

O'ROURKE, J.

IRION, J.

Jeremiah Banks
CDCR #BF3043
Chuckawalla Valley State Prison
P.O.Box 2349 A2-8-3Low
Blythe, California 92226-2349

UNITED STATES DISTRICT COURT
Central District of California

Jeremiah Banks, Petitioner	Case No. EDCV 21-0051-JWH(JPR)
v.	Objection To Report and Recommendation of U.S. Magistrate Judge
David Holbrook, Respondant	

To the Honorable Jean P. Rosenbluth, U.S. Magistrate Judge:

Proceeding

On January 8, 2021, Petitioner filed *pro se* a petition for writ of habeas corpus by a person in state custody, raising nine claims concerning Petitioner's 2017 convictions for human trafficking of a minor, pimping a minor, and pandering by procuring a minor. Petitioner admits that seven of Petitioner's claims were unexhausted. (See pet., at p 6-7) Petitioner also filed a motion for a stay and abeyance under *Rhines v. Weber* 544 U.S. 269, 277-278 (2005) to exhaust Petitioner's unexhausted grounds. Petitioner filed an amended stay motion on February 4, 2021. On January 15, 2021, this court advised Petitioner that nothing prevented Petitioner from immediately returning to State Court in order to exhaust Petitioner's unexhausted grounds. This court now recommends that the Petitioner's stay and abeyance motions be denied, Respondent's motion to dismiss be granted, and this instant action be dismissed, some claims with prejudice, and some without.

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PETITIONER'S CLAIMS

I. THE TRIAL COURT VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS BY ALLOWING ADMISSION INTO EVIDENCE UNDER CALIFORNIA EVIDENCE CODE SECTION 1109 WITH REGARD TO PETITIONER'S PANDERING CONVICTION. (PET., AT p 5)

II. THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO CONFRONTATION BY PERMITTING A POLICE DETECTIVE TO RELAY TO THE JURY THE VICTIM'S OUT-OF-COURT TESTIMONIAL STATEMENTS (PET. AT pp 5-6)

III. PETITIONER WAS PREJUDICED BY THE USE OF PERJURED TESTIMONY AT HIS PREMILINARY HEARING (PET. AT p 6)

IV. PETITIONER RECEIVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL WHEN PETITIONER'S TRIAL ATTORNEY FAILED TO PROPERLY INVESTIGATE THE CASE AND DEFND PETITIONER AT THE PRELIMINARY HEARING OR TO PREPARE A DEFENSE AT TRIAL. (ID.)

V. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY PRESENTING TESTIMONY AT THE PRELIMINARY HEARING THAT HE KNEW OR SHOULD HAVE KNOWN WAS FALSE. (ID)

VI. THE TRIAL COURT ERRED IN REFUSING TO ADJUDICATE PETITIONER'S MOTION TO SET ASIDE THE INFORMATION BASED ON THE PROSECUTOR'S KNOWING PRESENTATION OF FALSE EVIDENCE AND FAILURE TO DISCLOSE EXCULPATORY EVIDENCE. (ID AT p 7)

VII. APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO INVESTIGATE THE RECORD OR COMMUNICATE WITH PETITIONER; ASSERT MERITOREOUS CLAIMS; AND KEEPING PETITIONER APPRISED OF RELEVANT PROCEEDINGS. (ID)

IX. PETITIONER WAS PREJUDICED BY ADMISSION OF PERJURED HEARSAY EVIDENCE AND THE PROSECUTOR'S FAILURE TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE. (ID.)

BACKGROUND

In December 2017, a San Bernardino County Superior Court jury convicted Petitioner of human trafficking of a minor; pimping a minor under 16 years of age; and pandering by procuring a minor under 16 years of age. (See pet., at p 2; mot.dismiss, Ex. 4 at p 2)

The jury found Petitioner used force or fear when committing the charged human trafficking and that he had suffered a prior conviction (Mot. Dismiss, Ex 4, at p 2). The trial court sentenced petitioner to a term of 30 years to

life in state prison. (Id.)

Petitioner timely appealed raising Grounds One and Two of the petition, among others. (Id., Ex 1) On September 19, 2019, the California Court of Appeal modified the judgment to correct a sentencing error, but otherwise affirmed. (Id, Ex 4, at p 16) Petitoner timely filed a petition for review in the California Supreme Court, raising Grounds One and Two of the petiton, among other issues. (Id, Ex. 5) On November 20, 2019, the California Supreme Court summarily denied review. (Id., Ex. 6)

In September 2020, Petitioner filed a habeas petition in the San Bernardino Superior Court, raising claims that correspond with Grounds Three through Seven and Nine of the instant petition. (See Opin, Ex. 1) On October 8, 2020, the Court denied the petition, reasoning that the claims were procedurally barred and, alternatively, meritless. (See Id., Ex. 2) Petitioner has not filed any habeas petition concerning the underlying conviction in the California State Court of Appeal nor the California State Supreme Court. The Honorable Magistrate Judge had performed research for "Jerimiah" with "Banks" in the Fourth Appellate District and California Supreme Court (R&R, p 4:22-26) with negative results. However, for the reasons developed *infra*, Petitioner further objects to the Magistrate's insinuation that Petitioner is either being dilatory or less than truthful in this matter.

Discussion

The Ninth Circuit has found that good cause does not require "extraordinary circumstances." (*Jackson v Roe* (9th Cir., 2005) 425 F3d 654, 661-662) Petitioner can set forth a reasonable excuse and show this court sufficient evidence to justify Petitioner's failure to exhaust. (*Blake*, 745 F3d, at 982)

Petitioner is acting in *propria persona* and *in forma pauperis* at the time of Petitioner's filing of his habeas petition. Petitioner was also being assisted by another inmate (Petitioner being a lay person, untrained in the law, with

an eighth grade reading level, requiring any assistance Petitioner could get). Petitioner's inmate legal assistant was in the process of drafting said habeas petition to the California Court of Appeals when during that process, Petitioner and his legal assistant were separated by CDCR prison tactics designed to separate Petitioner and his legal assistant in retaliation for Petitioner filing grievances administratively against CDCR in other matters. (See Exhibits C and D) Petitioner was under the good faith and reasonable belief that his habeas petition was completed and filed in a timely manner as he was told it would be by his legal assistant. Petitioner did not have, and does not have,any intent to deceive this Court or Respondant nor to engage in any dilatory tactics, but again, was operating under a reasonable belief (at that time) that Petitioner's habeas petition was both prepared and filed.

Due to the deliberate indifference and malfeasance of CDCR's retaliatory tactics (See *Rhodes v Robinson* 408 F3d 559) Petitoner has shown he innocently misspoke based on his reasonable belief in this matter.

Petioner would like to point out to the Court that he is without counsel in this matter. He is also without a high school education and he has a TABE (Test of Adult Basic Education) score of 8.3. Petitioner would like the Court to take notice of Exhibit 'A', which refers to Petitioner's housing unit at that time to be Ironwood State Prison, A2-134Low.

On June 14, 2019, Petitioner suffered an injury to his left knee. Petioner was on crutches until Novenber 14, 2019. (See Exhibit 'B' dated January 2, 2020) At that time, Petitoner was still awaiting the decision on his direct appeal in the California state court. Due to his medical issues, Petitioner was unaware the California Court of Appeal had affirmed his conviction on September 11, 2019 and that the California Supreme Court had denied review on November 20, 2019. On November 23, 2019, Petitioner filed an administrative Health Care Grievance due to Ironwood State Prison's failure to provide adequate

medical care with regard to Petitioner's knee problems despite Petitioner being in persistant and debilitating pain affecting daily functioning. (See Exhibit 'C' Health Care Grievance dated Nov. 20, 2019).

Upon Petitioner filing the Health Care Grievance as well as other Administrative Grievances alleging prison official's failure to do their jobs correctly, Petitioner was retaliated against by prison officials on December 13, 2019 when Petitioner recieved an unjustified Counseling Chrono. Since Petitioner has problems with both reading and writing, Petitioner had asked an inmate named Ingram (CDCR #AE6335) to assist me with filing a better administrative grievance regarding these matters. (Please see Exhibit 'D') Since Petitioner had been filing such administrative grievances, Petitoner's mail began to be tampered with. On February 19, 2020, Petitioner's legal mail was illegally opened and inspected by prison mailroom staff. Petitioner wrote the Riverside Court House to request his abstract of judgment and minute orders on his prior case. (See Exhibit 'E')

On June 16, 2020, Petitioner received the direct appeal record from his appointed counsel in the instant case without any accompanying letter of instruction, notice, or California Supreme Court denial order. (See Exhibit 'F')

A printout of CDCR's "Legal Mail Log - Legal In" shows Petitoner wrote his appointed counsel on appeal on July 3, 2020, but there was no response. That same day, Petitioner wrote the California Supreme Court (Exhibit 'F' "Legal Log - Legal Out Mail" dated July 3, 2020). On July 9, 2020, Petitioner wrote a letter to his trial counsel, but received no response (See Exhibit 'G' "Legal Mail Log - Out Mail", July 9, 2020). All of which shows diligence on the part of Petitioner in pursuing his legal documents and determining the status of his pending appellate matters.

Upon recieving his records, Petitioner was immediately moved to B-Yard at ironwood State prison in retaliation for Petitoner filing a separate admini-

strative grievance against staff. The Court will note on the Legal Logs, Petitioner's cell number changed on July 13, 2020. (Exhibit 'F') On September 21, 2020 Petitioner filed a petition for writ of habeas corpus with the assistance of inmate Ingram doing the work for Petitioner.

On October 8, 2020, the habeas court summarily denied the petition on the merits stating that Petitioner failed to state a *prima facie* claim for habeas relief and was procedurally barred.

On October 23, 2020, Petitoner wrote the Superior Court stating that the order denying the petition for writ of habeas corpus was incomplete as it was missing page 3 of the copy. (Exhibit 'H') Letter of request and Legal-Out Logs dated October 23, 2020 (Exhibit 'F') Petitioner also requests this Court take notice of Exhibit 'I' showing copies of envelopes that the Court mailed to him. The Court will note evidence of tape over the sealed part, evincing that mail room staff had opened Petitioner's legal mail without Petitioner being present. Petitioner asserts this is *not* a mistake on the part of the mailroom staff as the Court of Appeals address can be clearly seen. This is a clear violation of CCR, Title 15, §3143(a) regarding the processing in incoming legal mail.

Petitioner submitted an application for California Rules of Court, Rule 8.66 Tolling on October 27, 2020. (See Exhibit 'J') Petitioner was seeking to toll his time until on or about November 19, 2020. Petitioner received a response from the Calfornia Court of Appeal indicating he must use an MC-275 habeas corpus for state incarcerated persons form. (Exhibit 'K'; and "Legal-In Log" Nov. 19, 2020 Exhibit 'F')

During this time, COVID-19 restrictions were implimented at my prison and across all CDCR institutions. Petitioner wrote staff time and time again to request Ironwood State Prison's program status reports so that Petitioner could accurately report the availability of inmate access to the prison law library to the Court of Appeals to no avail. During the time COVID restrictions were

implemented and the prison placed on quarantine, isolation protocols, inmate Ingram took it upon himself to file a writ of habeas corpus to this court and on the same day filed a stay and abeyance motion in an attempt to toll petitioner's time. Due to the COVID-19 restrictions and lack of access to the law library, I was unable to communicate with Inmate Ingram during these filings. Ironwood State Prison implemented a legal 'paging' system whereby inmates could request certain legal materials and copies of case citations from the prison law library, however, staff refused to come into the housing units to pick up or deliver such requested materials due to their fear of catching COVID from our quarantined housing unit. Additionally, inmates with verified inmate legal assistants were unable to meet with those assistants due to the COVID lockdown.

On or about January 17, 2021, Facility 'B' of Ironwood State Prison suffered a major COVID-19 outbreak among inmates and staff. The prison placed all inmates, including Petitioner, on an even more restrictive modified program immediately. However, due to prison official's systemic deliberate indifference malfeasance and nonfeasance in their handling of infected inmates to prevent exposure of non-infected inmates, Petitioner was in reasonable fear for his health and safety, self-isolating and would not come out of his cell. Petitioner filed several grievances against Ironwood State Prison administration and CCHCS (California Correctional Health Care Services) due to the fact that in Petitioner's housing unit, all but 30 inmates, including Petitioner, were infected with COVID. The administration later moved the infected inmates to Facility 'C' to be quarantined, but failed to otherwise provide any protection for uninfected incarcerated individuals especially from staff whom has been identified as the "main vector" for introducing and spreading COVID within the prison system both by the Secretary of CDCR Kathleen Allison and Federal Receiver J. Clark kelso.

On January 29, 2021, Petitioner was forced to move to an infected housing unit against his will. (See Exhibit 'L') As a result of Petitioner filing this

administrative grievance, Petitioner was moved once again, (See Exhibit 'L') and now resided in A4-132Low.

As a result of Petitioner being moved so many times, often with little or no notice or ability to gather his property, including his legal materials, Petitioner lost or was forced to leave behind legal paperwork which was in the possession of his legal assistant, inmate Ingram. Staff refused to allow Petitioner leave to retrieve it nor take any steps to assist in its recovery (by giving notice to Inmate Ingram to return Petitioner's legal materials or make arrangements for its transfer. This forced Petitioner, a layman untrained in the law with below average education and totally reliant on the assistance of others, to find anybody who could help with Petitioner's on-going legal situation against the backdrop of a ticking filing deadline clock.

This Court imposed a deadline upon Petitioner after the Attorney General filed a Motion To Dismiss on February 22, 2021 pursuant to this Court's January 15, 2021 order. Petitioner's deadline for filing opposition was March 14, 2021. The person who was now assisting me stated he needed more time in order to research the issues and file, so Petitioner asked the Court for an enlargement of time and the opposition was due June 7, 2021. Petitioner, with assistance, diligently filed a timely opposition.

Petitioner places himself at the mercy of this Court. Petitioner has been moved once again, and in the intervening time has finally recieved the evidence he has been asking for and needed in order to prove to this Court why Petitioner could not go back to the California Court of Appeals to exhaust his claims. (See Exhibit 'M')

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Objections

The trial court violated Petittioner's Constitutional right to due process by allowing admission into evidence under California Evidence Code section 1109 of his prior pandering conviction.

Petitioner objects to the magistrate's recommendation that Petitioner's challenge to the admission of Petitioner's prior pandering conviction is not cognizable on federal habeas review.

The honorable magistrate stated this claim is subject to dismissal for several reasons. One of the reasons is that Petitioner argues only a state law violation.

A state prisoner is entitled to federal habeas corpus relief only if he is held in custody in violation of the Constitution, law, or treaties of the United States of America.

When challenging the trial court's discretion under California Evidence Code section 352, the rule promulgated in *Estelle v McGuire* 502 U.S. 62, 67-68 (1991) was conveniently left out. State court evidenciary rulings cannot serve as a basis for habeas relief, unless the error asserted rises to the level of a federal Constitutional violation.

Petitioner once again relies on *Valle v Gonzalez* (2015) U.S.Dist. LEXIS 106935 in which the district court reasoned that there has been ample Circuit Court precedents holding that the admission of evidence which rendered a trial fundamentally unfair could serve as a basis for federal habeas relief (see also *Alberni v McDaniel* (9th Cir., 2006) 458 F3d 860, 865 to which the Honorable Magistrate Jean P. Rosenbluth agreed; see R&R p 7:17-21.)

The 14th Amendment states, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, nor shall any state deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction, the equal protection of the law."

The United States Supreme Court has left open the question of whether admission of propensity evidence violates due process. Although the magistrate cited the case of *Estelle v McGuire, supra,* Petitioner objects. To support the conclusion that a due process claim was unavailable to the petitioner, if challenging the trial court's discretion under California Evidence Code 352, if Petitioner can show that the improper introduction of evidence which rendered Petitioner's trial fundamentally unfair, a federal court may grant habeas relief when a Petitioner shows that his custody violates federal law. (See 28 U.S.C. §§2241(a)(C)(3); 2254(a))

The court's discretion, however, may not run afoul of the fundamental rule that evidence may not be admitted when its probative value is outweighed by its prejudicial effect.

When the inference of the uncharged evidence is weak, the probative value is also weak pursuant to Evidence Code section 1101, subdivision (a). Except as provided in this section and in section 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occassion. (Federal Rule of Evidence §404(b)(1)) Prohibited use of evidence of any other crime, wrong, or act is not admissible to prove a person's character to show that on a particular occassion the person acted in accordance with that character.

To prove common design, plan, or *modus operandi,* is whether there is some clear connection between that offense and the one charged so that it may be logically inferred that if Petitioner is guilty of one, then he must be guilty of the other. (*Roberson v Knowles* 2003 U.S. Dist LEXIS 9746) When the trial court admits propensity evidence, the similarities of the uncharged act and charged offenses must meet the requirements. (*Kipp v Davis* 971 F3d 939)

The improper introduction of the propensity evidence violates a Petition-

er's right to due process under the Fourteenth Amendment. The erroneous admission of evidence that violates petitioner's due process rights is reviewed for prejudice under the standard described in *Chapman v California* (1967) 386 U.S. 18, 24.

The U.S. Supreme Court reversed the decision of the Appeals Court and held that the prosecution's continual reminder to the jury that the petitioner had failed to testify, inferring guilt, was not harmless error because the repeated comments affected petitioner's substantial rights and improperly influenced the jury to convict. In the instant case, Petitioner's previous conviction for attemtped pandering played a significant role in the prosecutor's case and there is far more than an abstract possibility that the erroneously admitted evidence contributed to the conviction. Petitioner was only convicted of three out of the four counts in the information. Petitioner was not convicted of count four, a felony, in violation of California Penal Code section 266(i), subdivision (b)(2), prompting the trial court to declare a mistrial as to that count.

During closing argument, the prosecutor used the facts in the attempted pandering case to compare Petitioner's conduct in the current case. (4RT935-936) The prosecutor told the jury to "remember how [Petitioner] was with a grown woman who he thought was a prostitute? How aggressive he was? Now, this conversation, this game he ran on her, on the undercover officer, it may not be the exact thing he said to Jane Doe, but can you imagine the attitude in his own room with a child?" (4 RT 935-936)

The facts between the attempted pandering conviction and the charged offenses were not similar and the prosecutor acknowledged that. (4 RT 935-936) The prosecutor made this argument to show that the Petitioner's actions with the undercover officer would have been consistent with Petitoner's actions in trying to persuade Jane Doe to prostitute herself, even though Jane Doe did not, and

could not recall any such conversation with Petitioner. (3 RT 391; 4 RT 935-936) Petitioner would like to point out to the Honorable Magistrate Judge Jane Doe's own statements. (R&R 7:28-8:1-4)

As the Court of Appeal observed, Petitioner's prior pandering conviction was relevant to show his intent to commit the charged crimes, his common plan to commit human trafficking of females, and his knowledge that his victim in the underlying crime was a prostitute, which was a required element to prove the charged crime of pimping a minor.

So which one is it? The Court of Appeal states that Jane Doe *was* a prostitute, but the prosecutor and the officer at trial said she *was not* a prostitute and that the Petitioner turned her out. (See preliminary hearing transcript, dated December 11, 2014, p 39:12-23)

If Jane Doe was a prostitute, then what was the evidence that the prosecutor offered to the jury? The prosecution's case-in-chief was based on the prosecution's star witness, Officer Aaron Jones's testimony, and *not* that of Jane Doe. The prosecution knew, or should have known, that Jane Doe's story was false. That is why the prosecution relied on a professional story teller in Officer Jones.

Petitioner can show inside the record that the prosecution knew they could not rely uponJane Doe's testimony to be truthful, accurate, credible, or consistant. That is why the prosecution had to introduce propensity evidence to win its case.

The Honorable Magistrate Judge stated Petitioner's complaints are not embodied in the Constitution and cannot transform Petitioner's state-law claim into a federal one by making an appeal to a Constitutional guarantee. (R&R p 5)

Petitioner objects. As the federal court has held in *Alberai*, the United States Supreme Court has established a general principle that evidence that is so fundamentally unfair that its administration violates fundamental conceptions

of justice may violate due process. (458 F3d at p 864 quoting *Dowling* 493 U.S. at 352)

Petitioner humbly asks this Court to be mindful that Courts in every circuit, in cases decided prior to the enactment of AEDPA, has acknowledged at lest implicitly, that the improper introduction of evidence may violate due process if it renders a trial fundamentally unfair. (See *Jervis v Hall* (1st Cir 1980) 622 F2d 19, 22 [The admissibility of evidence is generally a matter of state law which does not properly concern a federal habeas court *unless it inpugns the fundamental fairness of the trial court.*] (emphasis added); *Lucas v Johnson* (5th Cir., 1998) [Habeas relief is warranted [for erroneous admission of evidence] when the erroneous admission played a crucial, critical, and highly significant role in the trial.])

On December 1, 2016, the prosecution held a conditional examination which, in this hearing, Jane Doe had over *170* "I don't know" or "I don't remember" responses to things that allegedly happened only two years prior. (See conditional examination pp 58:20-23; 59:23; 60:2-3; 63:15-17; 64:13-14; 67:1-25; 69:15; 70:1-28; 71:1-17; 72:14-25; 74:7-26; 77:12-26; 80:23-28; 81:6-24; 83:21-22; 84:13; 85:24; 90:7-9; 97:27-28; 98:15-23; 101:1-28; 102:7-10; 103:12-21; 106:22-26; 109:16-18; 110:11-12; 113:18-22; 114:11; 120:4-12)

On direct examination, Hane Doe had a total of 27 "I don't remember" responses, and on cross examination, she had 115. (pp 120-195) On re-direct, she had 23 (pp195-216) and on re-cross, she had two out of two questions asked.

Just as a prior false allegation of rape is relevant on the issue of an alleged rape victim's credibility, a prior false accusation of human trafficking is equally relevant on the issue of the alleged human trafficking victim's credibility. The instance of conduct being placed before the jury as bearing on credibility is the making of the false statement, *not* the sexual conduct which is the content of the statement. Even though the statement has to do with

sexual conduct, the sexual conduct is not the fact from which the jury is asked to draw an inference about the witness's credibility. The evidence is admissible under Evidence Code §780 (matter having tendency to prove or disprove truthfulness of testimony); 1103 (evidence of crime victim's character); and 787 (which excluded specific instances of conduct to attack credibility, but which is abrogated by the truth-in-evidence law (relevant evidence shall not be excluded)) *Holley v Yarborough* (9th Cir, 2009) 568 F3d 1091, 1101 (when the trial court admits propensity evidence, the similarities of the uncharged acts and charged offenses must meet the requirements).

Introduction of this prior bad act evidence was used sole to prove Petitioner's alleged character trait of pimping. The argument for introducing this evidence in the current case was that Petitioner attempted to pander an undercover officer on a previous occassion by answering a "backpage ad." Thus, according to the prosecution's theory, the Petitioner must have pimped Jane Doe. Using this evidence as motive amounted to impermissible character trait evidence which Evidence Code section 1101, subdivision (a) prohibits.

Petitoner would like to point out for the court 2 RT 413:4-6 whereupon opening statements were made by the People, reported, but *not* made part of the normal record on appeal. Petitoner humbly asks the Court why the People's opening statement was not made a part of the record for the Appeals Court, and requests judicial notice thereof. This is important because on November 16, 2016, the prosecution filed a motion to admit prior acts evidence; admit expert testimony, and to limit testimony about Jane Doe's sexual history.

In the prosecution's opening statements, however, the prosecution stated that this case is about *two* pimps. These statements should have opened the door for Petitioner to present evidence that Jane Doe had previously advanced false allegations using substantially the same operative facts against another individual, namely Craig Parker. (Exhibit 'P' at p 5)

This would have allowed Petitoner to show evidence which would have allowed a reasonable doubt to form in the minds of the jury about the credibility of Jane Doe, who was both the alleged victim and sole witness to the alleged crime Petitioner was charged with.

The trial judge silenced Petitioner's trial attorney from bringing this issue to light. (3 RT 642:21;643; 644; 645; 647; 648; 649; 650; 651) The court abused its discretion in not allowing the Petitioner to investigate or even ask Jane Doe about the similar alleged violence she had told Officer Aaron Jones regarding a second person [Parker] known to be her pimp when she was arrested. this prevented the jury from hearing evidence going to the veracity of Jane Doe and her propensity or willingness to allege the same or similar criminal conduct against others in which she claimed to be the alleged victim in order to deflect the filing of criminal charges against herself in which she is a suspect. Such claims are federally cognizable. (*United States v Williams* 668 F2d 1064 [The admission of evidence renders a trial fundamentally unfair if its prejudicial effect outweighs its probative value such that its admission likely changed the outcome of the trial.]; *Cabrena v Hinsley* (7th Cir., 2003) 324 F3d 527 [questions regarding the admissibility of evidence are reviewable in a habeas corpus proceeding if the asserted error...was so prejudical as to deny due process]; *McKinney* 993 F2d, at p 1380 [the use of character evidence to show propensity may violate due process]; *Davis v Alaska* 415 U.S. 308 [In addition, the exclusion of otherwise appropriate cross-examination designed to allow a prototypical form of bias on the part of the witness can rise to the level of a violation of the confrontation clause inquiry is (1) whether the excluded evidence was relevant; (2) whether there were other legitimateinterests outweighing the defendant's interest in presenting the evidence; and (3) whether the exclusion of evidence left the jury with sufficient information to assess the witness's credibility.])

II. Ground Two Is Not Procedurally Barred Petitoner Objects

The Honorable Magistrate states the contemporaneous-objection rule has been found by the Ninth Circuit to be an independent and adequate state bar.

The Sixth Amendment's Confrontation Clause as well as state rules of evidence govern the admission of expert testimony. (*People v Sanchez* (2016) 63 Cal 4th 665, 679 ["[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him....(Ibid, quoting U.S. Const; 6th Amend.) The Confrontation Clause secures that the petitoner and that the accused has the right to cross-examine those witnesses."] In *Davis v Alaska* ((1974) 415 U.S. 308, 315) the high court found "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." (Id at p. 316) As clarified by the United States Supreme Court in *Crawford v Washington*, unless a hearsay exception was "recognized at the time of the Sixth Amendment's adoption, admission of testimonial hearsay against a criminal petitioner violates the Confrontation Clause unless (1) the declarant is unavailable to testify, and (2) the petitioner had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing." "[T]he first step of a [Confrontation Clause analysis] is a traditional hearsay inquiry: is the statement one made out of court; is it offered to prove the truth of the facts it asserts; does it fall under the hearsay exception." (*People v Sanchez, supra*, 63 Cal 4th at p. 680) "In alayzing whether evidence is admissible under the Confrontation Clause, there is a second step to the analysis. If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to Confrontation if the statement is testimonial hearsay as the High Court defines

that term." (*People v Sanchez, supra,* 63 Cal 4th at p 680)

The Evidence Code does not contain a similar limitation, accordingly, the state law error of admission of hearsay reaches evidence beyond that which should have been excluded under the Confrontation Clause, it reaches evidence that is not 'testimonial.'

In the instant case, Officer jones interviewed Jane Doe for four hours at the San Bernardino Police Department regarding how she met Petitioner (3 RT 360) Officer Jones testified to the contents of that interview, which the court allowed as a prior inconsistant statement. (3 RT 660-667) In offering these thatements, the prosecution argued that Jane Doe's statements were prior inconsistant statements. (3 RT 657-658) After Jane Doe's testimony, the prosecutor called Officer Jones for the sole purpose of introducing Jane Doe's original statement to him regarding the first night she allegedly had group sex at Petitioner's alleged apartment. (3 RT 656) The statement the prosecutor wanted to introduce was that Jane Doe did not want to have sex and that Petitioner said it would be fun. (3 RT 656) Petitioner's attorney objected to this testimony, however, the trial court overruled the objection and allowed the statement as a prior inconsistent statement. (3 RT 657) Officer Jones also testified as an expert regarding his August 1 and August 4, 2014 interviews of Jane Doe. (4 RT 745) Petitioner's attorney objected on hearsay grounds, however, the court allowed the testimony and hearsay as an expert opinion because Jane Doe had already testified. (4 RT 745)

Officer Jones testified that on August 1, 2014, he interviewed Jane Doe, who told him about the night she allegedly had group sex with Petitioner and his friends. (3 RT 660) Jane Doe allegedly informed Petitoner that she did not want to have sex with them, but that Petitioner allegedly told her that it would be fun, which resulted in Jane Doe having group sex. (3 RT 661) Officer Jones also testified that Jane Doe allegedly told him that she drank alcohol, smoked weed,

and that everyone was drunk, (3 RT 661-662) Officer Jones asked Jane Doe whether Petitioner had ever threatened her, and that she did not answer. (3 RT 666) Officer Jones decided that Jane Doe did not need to answer because in [Officer Jones'] experience, "they're always threatened." (3 RT 666) Officer Jones said that Jane Doe did not want to reveal "Penguin's" (Petitioner's alleged moniker) name because she feared for Charisma and her family. (3 RT 668-669) At some point, Jane Doe became emotional and Officer jones took it as it was out of fear of Petitioner. (3 RT 664) Officer Jones clarified that Jane Doe did not actually say she was threatened, but the fact that she was crying meant that she had been, in Officer Jones's opinion. (3 RT 666) Jane Doe also allegedly informed Officer Jones that Petitioner did *not* force her to have sex with all the guys. (3 RT 666-667)

The issue witht he court's ruling is that Jane Doe's testimony was *not* inconsistent with any statement that Officer Jones testified to. Jane Doe was not asked on direct examination if she wanted to have sex with Petitioner and she truly did not remember any statements allegedly made by Petitioner more than three years after she was first interviewed.

Moreover, the prosecution used an alleged prior inconsistent statement from jane Doe's prior testimony where she stated she was in Petitioner's sister's bedroom on another occassion, talking on the phone, and lost a "date" causing Petitioner to hit her a couple of times with his belt allegedly. (3 RT 619-621) Jane Doe only remembered the incident a little, but did not remember the specifics. (3 RT 621) The People then read from her prior testimony regarding a time when a customer grew violent with her, which allegedly cause Petitioner to get angry with her. (3 RT 622-623) Jane Doe had no independent recollection of this incident. (3 RT 622-623) Again, there was nothing inconsistent between the fact that Jane Doe gave a previous statement in a prior testimony and her truthful admission that she had no idenpendent recollection of that alleged incident.

In the People's closing argument, while ackowledging that Jane Doe only recounted two acts of alleged violence, they stated that other incidents happened so many times, Jane Doe really couldn't count. (4 RT 945)

Here, the trial court did not expressly find Jane Doe's repeated "I don't know" or "I don't remember" claims to be untruthful. The record does not disclose a reasonable basis for a belief that Jane Doe's testimony given at trial was at all inconsistent with the testimony she gave at the condiditonal examination or to Officer jones.

Given the state of Jane Doe's memory at the time of trial, the prosecutor bootstrapped her argument to introduce the contents of a prior police interview and a conditional examination under the guise of a prior inconsistent statement as an exception to the hearsay rule. Since there was no inconsistency, and therefore no impeachment value in Jane Doe's statement, which she forgot, its only value to propenent would be as substantive evidence of the facts asserted.

Prior to the first time Officer Jones testified, the Petitioner objected as hearsy to any statements that Jane Doe allegedly made to Officer Jones during his interviews with her; however, the court allowed Officer Jones's testimony regarding any prior inconsistent statements. (3 RT 657-658) The second time Officer Jones testified, Petitioner again timely objected to hearsay regarding any alleged statements that Jane Doe made to Officer Jones during his interviews with her. (4 RT 745) The court asked Petitioner's trial attorney if the objection was on hearsay or confrontation grounds. Petitioner's attorney stated he would leave it up to the appeals court to decide. Again, the court overruled the objection(s) stating, "it's going for opinion. She testified and was cross-examined, so an expert can rely on hearsy to form an opinion." (4 RT 745:15-17) Petitoner's objection should have been sustained.

In *United States v Escalante-Reyes* (689 F3d 415) the federal court ruled the "plain language of the standard announced by the Supreme Court [holds] we

may exercise our discretion to reverse on plain-error review only where the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Of course any and every error affects, to some degree, the fairness and integrity of our judicial system, but we are to reverse only those that are exceptional. (*Kinson* 297 U.S. at p 160) Particularly egregious errors can undermine the fundamental fairness of our system. (*Young*, 470 U.S. at pp 15-16) An error that warrants reversal despite the contemporaneous-objection rule is one that if left uncorrected, would shock the conscience of common man, serve as a powerful indictment against our system of justice or seriously call into question the competence or integrity of the district."

A state's procedural rules serve vital purposes at on appeal and on state collateral attack. Each state's complement of procedural rules channel(s) to the extent possible, the resolution of various types of questions to the stage of judicial process at which they can be resolved most fairly and efficiently. (*Reed v Ross* 468 U.S. 1, 10 (1984))

Failure to allow Petitioner to go back to raise these claims to the California State Appellate Court reduces the finality of appellate proceedings and which deprives the appellate court of an opportunity to review trial error. In this case, the substantial right was affected and the nature of this error was called to the attention of the judge.

Federal Evidence Code 103 Ruling on Evidence states:

> "[A] Preserving a claim of error.
>
> A party claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and;
>
> (1) If the ruling admits evidence, a party, on the record,
> (B) states the specific ground, unless it was apparent from the context."

In the instant case, the ground was specific. Petitioner's attorney objected to hearsay, and it was apparent to the judge the contect of the

objection. The judge asked the attorney if he was objecting on hearsay or confrontation grounds. Knowing the objection would be denied, and therefore futile based on the court's previous rulings and the issue, Petitioner's trial attorney stated he would leave it up to the appellate court to decide, thus placing the trial court on notice as to the nature of the objection and preserving the issue for appellate review. It is abundently clear that the trial court understood both the nature and the scope, as well as the intent, of the objection which is all preservation requires.

If, *arguendo*, the trial court somehow misunderstood the context of these objections due to some failure on the part of Petitioner's trial counsel, the inability to properly preserve the issue for appeal would then be Constitutionally ineffective assistance of counsel, both trial and/or appellate.

In closing of the objection argument as recognized in the California Court of Appeal case *People v Burciago* (1978) 81 Cal App 3d 151, where a denial of a previous statement is presented at trial, the test of admissibility under section 1235 of the Evidence Code is controlled by the threefold purpose of confrontation as discussed in *California v Green* and phrased in *People v Green* (1971) 3 Cal 3d 981, 989: ("(1) To ensure reliability by means of the oath; (2) to expose the witness to the probe of cross-examination; and (3) to permit the trier of fact to weigh his demeanor." (Id at p 175)

Petitioner did not have full opportunity to fully cross-examine the witness on the statements that Officer Jones attributed to Jane Doe because Jane Doe had already been dismissed as a witness. This smacks of "gamesmanship" on the part of the prosecution, which has no place in our criminal justice system.

The matter of cause and prejudice is one that warrants further development of this case via state exhaustion and determinations to be made regarding evidentiary hearing(s).

In light of *California v Green* (1970) 399 U.S. 149, it can be concluded

that the objection to hearsay and confrontation, made by Petitioner's trial counsel, necessarily required a compulsory process analysis, meaning that the state court's findings were not independent of federal law and are therefore reviewable by this Court.

III. Petitioner Agrees Grounds Threee Through Nine Of Petitioner's Claims Are Unexhausted, However, Petitoner Objects That Petitioner Is Not Entitled To A *Rhines* Stay

Under 28 U.S.C. § 2254(b), habeas relief generally may not be granted unless a petitioner has exhausted the remedies available in the state court. The United States Supreme Court, however, permits a district court to stay all the claims in a petition while the petitioner returns to the state court to exhaust his already pled, but unexhausted claim(s). (*Rhines v Weber* (2005) 544 U.S. 269, 277-278)

A stay and abeyence, however, is available only in limted circumstances because issuing a stay undermines the AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust his claims in state court prior to filing his federal petition. A petitioner must satisfy three factors to warrant a *Rhines* stay:

(1) Petitioner must demonstrate there is good cause for the failure to exhaust.

Here, Petitioner has shown in this Objection that there is good cause for the stay to be granted. (See e.g. Exhibit 'M')

(2) The unexhausted claims are not plainly meritless.

Here, Petitioner has shown through his exhibits that the reports and transcripts did not add up to the facts. (*Giles v Marlang* 386 U.S. 66)

(3) The petitioner did not engage in intentionally dilatory litigation tactics.

Here, Petitioner has shown that Petitioner had engaged the services of an assistant in the filing of his petition, but was not aware of the arguments presented within the petition through circumstances beyond Petitioner's control

Petitioner is mindful that unspecific, unsupported excuses for failing to exhaust, such as unjustified ignorance does not satisfy the good cause requirement. (*Blake*, 745 F3d at p 981) Rather, good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify his failure to exhaust his claim. (Id)

Here, Petitioner has shown both diligence and good cause for his stay to be granted. (See *Balassa v Gamboa*, 2021 U.S. Dist. LEXIS 153130))

Additionally, Petitioner here argues that he has established good cause because he was unable to effectively access and utilize either the prison law library or the services of his inmate legal assistant due to the prison's response to the extraordinary global COVID pandemic due to quarantine protocols and his subsequent repeated transfers. Petitioner is unable to provide documentation of the dates that the law library was closed. Petitoner asserts that he requested documentation from Avenal State Prison, ironwood State Prison, and Chuckawalla State prison and in each case his request was denied. In *Balassa v Gamboa*, good cause was not established, therefore the petitioner's stay in that case was not granted.

However, in the instant case, Petitoner went through the same problem as in *Balassa*. Petitioner wrote prison officials over and over again trying to receive documentation, *inter alia*, about access to the law library or his legal assitant in each prison in which he was housed [Petitoner wishes the court also take judicial notice of the fact that CDCR now uses a Request For Interview form which is a single half sheet of paper - without carbon - and which is not able to be copied prior to be sent to prison officials, who may or may not answer and inmate's request or return his copy to him.] as well as trying to notify the Appellate Court of his situation and updated address(es). After his transfer to Chuckawalla State Prison, Petitioner was finally able to obtain the documentation needed to prove to this court that the facts Petitioner has been

stating are, in fact, true.

Petitioner argues that he has satisfied the extraordinary circumstances test.

In *Jackson v Roe* (425 F3d 654), the inmate's federal habeas corpus petition raised the same issues he had unsuccessfully presented in his state habeas proceedings. In his traverse to the state's motion to dismiss, he alleged for the first time that his appellate and trial counsel had been ineffective. A magistrate judge found no extraordinary circumstance to warrant a stay of the proceedings as there was no reason why the inmate could not have raised the ineffective assistance claim in state court before presenting it in federal court. The district court adopted the magistrate's report. The Appellate Court noted that under *Rhines*, decided after the inmate's petition had been dismissed, a district court had discretion to stay a mixed habeas corpus petition to allow a petitioner time to return to state court to present unexhausted claims. Further, under *Rhines*, a petitioner had to show good cause for the failure to exhaust. The district court thus erred be adopting the magistrate's "extraordinary circumstances" test.

Whether the inmate's proffered reason amounted to "good cause" sufficient to warrant a stay and abeyence had to be decided by the district court on remand. (Id.)

The district court's order was vacated and the case was remanded to allow an opportunity to apply the standards enunciated in *Rhines* regarding staying a mixed habeas petition.

Petitioner objects to the Magistrate's finding that Petitioner cannot establish good cause for a *Rhines* stay for this most recent period based on the restrictions on his access to both the prison law library and to his legal assistant due to COVID-19. (See R&R 19:10-19; 20:1-28; 21:1-6) It can now be confirmed that on November 26, 2020, Ironwood State Prison was placed on a state

mandated modified program. On December 11, 2020, due to multiple confirmed COVID-19 cases among staff and inmates alike, incarcerated individuals were placed on an even more restrictive modified program. Because Petitioner was not considered a "priority library user" (PLU) for incarcerated individuals with court-ordered deadlines, Petitioner was afforded *no* access to the institution's law library and was absent the ability to respond effectively. In addition to having no access to the law library, a "paging system" was implemented whereby incarcerated persons can request copies of no more than three case citations at any one time. However, due to quarantine protocols, library staff did not come out to the housing units to retrieve such requests nor to deliver requested items. The restriction movement protocols deprived Petitioner the opportunity to navigate the confusing waters of habeas litigation. (See e.g. Exhibit 'M') The three "status reports" included therein confirm that the modified program was re-evaluated on December 14, 2020, reinforced, and re-evaluated again on March 1, 2021. (Id)

Since March 1, 2021, Petitioner had to satisfy a response to the Attorney General's motion to dismiss his 28 U.S.C. 2254 federal habeas. Although a deadline to reply was set for Petitoiner, no access was allowed to the law library at Ironwood State prison where Petitioner was then housed, until March 1, 2021 due to the pandemic quarantine.

The above mentioned listing of impediments are due to no fault or lack of diligence on the part of Petitioner. Petitioner is not astute in the law and has always relied on the assistance of others. Petitioner in this Objection offers this statement of facts as an explanation for any perceived dely.

Petitioner acknowledges this court's advisement to return to the appellate court in California in order to exhaust Petitioner's unexhausted claims. Petitioner is now able to go back and raise the unexhausted claims. Petitioner is asking this Court to please reconsider the Report and Recommendation.

////

Conclusion

Petitioner contends that he has shown that good cause is warranted for Petitioner's claims to be stayed and allow Petitioner to have the opportunity to return to state court in order to exhaust his claims under *Rhines v Weber*.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of October 2021, at Chuckawalla Valley State Prison, Blythe California, in the County of Riverside.

Respectfully submitted,

Jeremiah Banks,
Petitioner in *pro se*

Jeremiah Banks
Ironwood State Prison
19005 Wiley's Well Road
Blythe, CA 92225

In pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

JEREMIAH BANKS, Petitioner, v. KATHLEEN ALLISON, Warden, Respondent.	Case No. 5:21-cv-00051-JWH-JPR PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS.

To The Honorable Jean P. Rosenbluth, U.S. Magistrate Judge:

Petitioner hereby respectfully contests Respondent's motion to dismiss his petition for writ of habeas. Petitioner's claims are not subject to dismissal as being procedurally defaulted, nor does there exist any need for a "prohibited new legal rule." Rather than dismissal with prejudice, as a suggested remedy postured in the alternative by Respondent, Petitioner counters with the suggestion that this Court grant the pending stay and abeyance, so as to allow for the full exhaustion of State remedies, and that motion for dismissal be denied.

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TABLE OF CASES AND AUTHORITIES

Jeremiah Banks
Ironwood State Prison
19005 Wiley's Well Road
Blythe, CA 92225

In pro se

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JEREMIAH BANKS, Petitioner, v. KATHLEEN ALLISON, Warden, Respondent.	Case No. 5:21-CV-00051-JWH-JPR MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S RESPONSE TO MOTION TO DISMISS.

STATEMENT OF THE CASE

Pursuant to the California Court of Appeal, Banks pimped, or sexually trafficked a fifteen-year-old girl, who performed twenty to thirty acts of prostitution at his direction. People v. Banks, No. D075934, 2019 WL4299889, at*1 (Cal. Ct. App. Sept. 11, 2019) (not published) (cited under Cal. R. Ct. 8.1115(b)) The jury found Banks guilty of the human trafficking of a minor (Cal. Pen. Cd., sect. 236.1 (c)(2)) on Count 1; the pimping of a minor under sixteen years of age (Cal. Pen. Cd., sect. 266h(b)(2)) on Count 2; and pandering by procurement of a minor under the age of sixteen (Cal. Pen. Cd., sect. 266i (b)(2).) Banks was sentenced to thirty years to life. People v. Banks, Supra.

Respondent incorrectly implied that Appellant only argued, on Ground One of appeal, that the trial court "erred under state law in permitting the jury to hear uncharged misconduct evidence regarding a prior conviction and hearsay statements from the victim." (Mot. to Dismiss, p. 2:12-18.) It should be clarified that Appellant did, indeed, raise the fact that Appellant's Federal due process rights "under the Fourteenth Amendment", may have been violated. (See App. Open. Brf., p. 32.) The California Court of Appeal elected not to address the Federal aspects of Appellant's Ground One claim.

To this end, Petitioner agrees with Respondent's reassessments of the case history ("Background"), to be addendumed with the fact that Petitioner's Federal claims, pertaining to Ground One and Ground Two, have been exhausted in State courts.

ARGUMENT

I

GROUND ONE IS NOT BARRED BY THE TEAGUE V. LANE RULE

Respondent appears to have relegated and pigeonholed Petitioner's Ground One due process claim to one that may only contest the propensity features associated with the admission of prior crimes evidence. Respondent has further misconstructed Petitioner's Ground One claim by erroneously characterizing it as an evidentiary state law challenge. Such implications are totally off-point.

Petitioner does not disagree with Respondent's reference to a prior act that was admitted, at trial, to be used as evidence to purportedly prove a material fact. Namely, the trial court allowed the prosecutor the opportunity to present to jurors evidence of Banks prior pandering conviction. (I.e., see Closing Argument, 4 RT 935-936.)

Nor does Petitioner disagree with Respondent's recitations of the present United States Supreme Court posture as it pertains to challenges to the admissibility of propensity evidence under State law. As reiterated by Respondent, "the Supreme Court has not granted relief for '"prior crimes"' evidence under state law that showed a 'propensity to commit a charged crime.' Estelle v. McGuire, 502 U.S. 62, 74 n.5 (1991)." (Mot. to Dis., p.4.) No argument exists on this point; whether the admittance of propensity evidence will rise to a due process

violation warranting relief under 28 USC 2254 remains an open question.

On the other hand, aside from any State law challenges or empty pursuits of caselaw in limbo, Petitioner's due process stance rests on more stable precedence already tried and tested against the strictures of Teague v. Lane.

Although Respondent cited the case of Estelle v. McGuire, supra, to support the conclusion that a due process claim was unavailable to Banks if challenging the trial court's discretion under California Evidence Code, section 352, the rule promulgated in Estelle v McGuire, supra, was conveniently omitted: "State court evidentiary rulings cannot serve as a basis for habeas relief unless the asserted error rises to the level of a federal constitutional violation." (At 502 US 62, 112 S.Ct. 475, 480.) This implies that there exists a method for presenting the appropriate due process claim for this Court's consideration.

Indeed, this Central District provided the answer. In Valle v. Gonzalez, 2015 U.S. Dist. LEXIS 106935, this district reasoned that, "[t]here has been ample circuit court precedent holding that the admission of evidence which rendered a trial fundamentally unfair could serve as the basis for federal habeas relief. See Alberni v McDaniel, 458 F3d 860, 865 (9th Cir. 2006)

["We are mindful that every circuit, in cases decided prior to the enactment of AEDPA has acknow-

ledged, at least implicitly, that the improper introduction of evidence may violate due process if it renders a trial fundamentally unfair.']

At p.*59

The court in Valle went on to explain that Teague does not foreclose the specific application of a previously established rule. See Wright v. West (1992) 505 U.S. 277, 112 S.Ct. 2482, 2499. (Kennedy, J., concurring.)

['if the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.'] In the Ninth Circuit, circuit court holdings suffice to create an 'old' rule under Teague. Ayala v. Wong, 756 F.3d 656-687-88 (9th Cir. 2014), rev'd and remanded on other grounds by Davis v Ayala, 135 S.Ct. 2187 (2015); Leavitt v Arave, 383 F.3d 809, 819 (9th Cir. 2004) (per curiam); Bell v. Hill, 190 F.3d 1089, 1091-92 (9th Cir. 1999).

Valle, supra, at pp. *61-62.

In closing on this Ground One discussion, Petitioner again correctly proffers his Ground One claim as one that challenges the

introduction of other crimes evidence; specifically that regarding Banks previous plea-bargained pandering conviction. This challenge is lodged on the grounds that it violated Banks' Fourteenth Amendment right to due process, in that it caused Banks to be rendered a fundamentally unfair trial. Such a claim is not one that calls for a new rule of law to be announced by the United States Supreme Court. To the extent that, at this premature stage, Respondent has simply misconstrued the substance of Petitioner's properly presented claim, it may be timely to remind the record of this Court's instruction, that "'Supreme Court precedent includes not only the bright-line rules it establishes, but also the legal principles and standards flowing from it.' Id., 397 F3d at 1242. (Fn. omitted.)

> Thus, petitioner need not produce a 'spotted calf' on the precise issue at hand to warrant habeas relief. Rather, it is sufficient that the due process violation involved here offends the principles previously enunciated by Supreme Court precedent and reaffirmed by our case law.' Bradley v Duncan, 315 F3d 1091, 1101 (9th Cir. 2002), cert. den., 540 U.S. 963 (citations omitted).

Robinson v. Cate, 2012 U.S. Dist. LEXIS 83182 *5.

There exists no "new rule", Teague limitation, on the face of Banks untraversed claim. Surely this is not the stage or time for such a response that will involve factually debatable issues.

II

RESPONDENT IS PREMATURE AND MISTAKEN IN THE ASSERTION THAT BANKS HAS PROCEDURALLY DEFAULTED ALL OF HIS CLAIMS OTHER THAN GROUND ONE.

INTRODUCTION

At the onset, it becomes necessary to bring distinction to Respondent's merging of claims. We must be reminded that Ground Two of Petitioner's habeas claims has been fully exhausted in State courts. On the other hand, Grounds Three thru Nine are still in the process of being exhausted in State court. Therefore, it would be misleading to merge Petitioner's Ground Two claim with Grounds Three thru Nine.

a. Ground Two - Petitioner's Ground Two opposition is based upon California's "contemporaneous objection rule." In highlighting this general rule, Respondent makes no reference to the applicable exception. It is this applicable exception to California's "contemporaneous objection rule" that supports Petitioner's forthcoming contention that the State courts' denials did not rest on an independant and adequate procedural bar. Walker v. Martin (2011) 562 U.S. 307, 315-321.

Respondent makes reference to the fact that the State Court of Appeal denied Appellant's charge, that his Sixth Amendment right

of Confrontation and Cross-examination was violated when hearsay evidence was introduced at trial, on the ground that Defendant failed to object to a Confrontation Clause violation. Yet, Defendant did object to a hearsay violation regarding the same set of facts. (Court of Appeal Opinion (COA), case no. D075934, p. 12.) The COA cited People v. Redd (2010) 48 Cal. 4th 691, 730 and fn. 19 to convey that Defendant forfeitted his right to challenge a Confrontation Clause violation, because such a challenge cannot be preserved by a mere heresay challenge. (COA, at pp. 12-13.)

In bringing clarity to Petitioner's claim that, in this case, the COA's ruling, that Appellant's Federal claim was not preserved by his timely hearsay objection does not rest on an independent and adequate bar, California's "contemporaneous objection rule" cannot be viewed in isolated fashion. There exists an exception to California's "contemporaneous objection rule"; this is only the "general rule." A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. People v. Arias (1996) 13 Cal. 4th 92, 159; People v. Noguera (1992) 4 Cal. 4th 592, 638.

Under California state law, a matter regarding a claim of a Federal Confrontation Clause violation is futile once it is determined that there is no hearsay violation, because such a determination renders the success of a Confrontation Clause claim impossible.

• The Martinez Rule - In the alternative, should this Court find that similar to trial counsel, appellate counsel's contentions on this matter were incomplete, such incompleteness may provide cause to excuse a procedural default, for if the attorney appointed by the State is ineffective, the petitioner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claim. Martinez v. Ryan (2012) 566 U.S. 1, 6-12.

In other words, if it is to be concluded that, under California law, trial attorney's objection on hearsay grounds fell short of an objection on Federal compulsory process grounds, it must also be concluded that appellate counsel's ineffectiveness deprived Petitioner his opportunity to present an exception to the standard California contemporaneous rule. Such an analysis is conducted under the Federal "cause and prejudice" standard.

* "cause" - To show cause, the petitioner must show that "some objective factor impeded efforts to raise the claim in State court. Constitutionally ineffective assistance of trial or appellate counsel plus actual prejudice will satisfy the cause-and-prejudice standard and allow habeas review of procedurally defaulted claim." Walker v. Martel (9th Cir. 2013) 709 F3d 925, 938; also see Martinez v. Ryan, supra, at 9.

In an unpublished disposition, the Ninth Circuit has observed that Californians' "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical claim that a defendant will have a meaningful opportunity to raise a case of ineffective assistance of trial counsel on direct appeal." Rodri-

quez v. Adams (9th Cir. 2013) 545 Fed. Appx. 620, 623.

"Prejudice" - To show prejudice the petitioner must show that, "the error or errors complained of worked to the petitioner's actual and substantial disadvantage so as to infect the entire trial." U.S. v. Frady (1982) 456 U.S. 152, 170 ; White v. Lewis (9th Cir. 1989) 874 F.2d 599, 603,

The matter of prejudice is one that warrants further development of this case via State exhaustion and determinations to be made regarding evidentiary hearing(s).

- In Light of California v. Green (1970) 399 U.S. 149, It Can Be Concluded That The Objection To Hearsay, Made By Defendant's Appointed Counsel, Necessarily Required A Compulsory Process Analysis, Meaning That State Courts' Findings Were Not Independent Of Federal Law And Are Therefore Reviewable By This Court.

As recognized in the California Court of Appeal case, People v. Burciago (1978) 81 Cal. App. 3d 151, where a denial of a previous statement is presented at trial, the test of admissibility under section 1235 of the Evidence Code is controlled by the three-fold purpose of confrontation as discussed by the United States Supreme Court in California v. Green [, supra] and phrased in People v. Green [(1971)] 3 Cal. 3d [981,] at p. 989 : (1) To insure reliability by means of the oath ; (2) to expose the witness to the probe of cross-examination ; and (3) to permit the trier of fact to weigh his demeanor. (At p. 75.)

Our United States Supreme Court has long-ago established that, when the resolution of a state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, "and our jurisdiction is not precluded. See Herb v. Pitcairn, 324 U.S. 117 (1945)." Ake v. Oklahoma (1985) 470 U.S. 68, 75. Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the Constitutional question. Ibid.

In California v. Green, supra, the United States Supreme Court remanded the case back to the California Supreme Court for resolution of the Confrontation Clause question necessarily entangled with the State hearsay question. Within these parameters, it cannot be said that defense counsel's objection, on hearsay grounds, did not preserve Petitioner's claim of a violation of his Sixth Amendment right to confront and cross-examine Jane Doe when hearsay testimonial evidence of Officer Jones was admitted at Petitioner's trial. This is particularly so when it is considered that further State exhaustion will reveal that the unlawfully admitted hearsay testimony constituted perjury and concealed the existence of coercion of Jane Doe's testimony.

In this case, the COA determined that "[t]here was ample basis in the record from which the trial court could have concluded Jane was evasive at trial when asserting lack of memory." (COA Opinion, p.11.) Petitioner's contention that such a finding was "unreasonable", falling within the strictures of 28 USC

2254(d), cannot lawfully be subjected to Respondent's suggestion to prematurely dismiss.

To say that state courts may assume the legal gadgetries behind findings that the official court record reflects were never made invites the potential for undetected arbitrariness for which habeas corpus was employed to arrest. Just as the trial court may or may not have considered the "evasiveness" feature, necessary under California law to permit an exception to the hearsay rule, it is equally true that the trial court may or may not have considered the "Confrontation Clause" feature as to whether Jane was "available" for Defendant to confront and cross-examine her in accordance with the Sixth Amendment to the United States Constitution.

Dismissal must be denied, as to Ground Two, considering the fact that unexhausted state grounds will directly influence the constitutional finding as to whether or not Jane was actually available for Petitioner to confront and cross-examine.

For example, it may be said that Defendant was afforded an opportunity to confront and cross-examine Jane by proxy when examining Officer Jones. Yet, more questions remain. Brady violations will address questions of perjury, coercion of Jane's testimony, and other matters of reliability.

The above questions cannot be resolved based upon a superficial view of the face of the record and without a full exhaustion of State claims. Certainly, Federal Habeas Rule 4 is inapplicable here.

6. Grounds Three Thru Nine - Respondent's argument to support this motion to dismiss rests on the fact that "the San Bernardino County Superior Court expressly invoked the timeliness rule in finding each of Bank's claims barred, which the court interpreted as focusing on events that occurred during or as a result of a pretrial, preliminary hearing. (Ex. 8 at 2 citing, e.g., In re Reno, 55 Cal. 4th at 452.)" (Mot. to Dis., pp. 7-8.) However, it should be corrected that Petitioner's Grounds, presented to the Superior Court on habeas corpus, did not simply address preliminary hearing matters. For instance:

• Ground One of State habeas speaks of perjured testimony introduced at the preliminary hearing (Ex. 1, p. 3 of 6), but goes on to contest how the use of this "false evidence", under the Federal test for "materiality", might have "affected the trial outcome", and how the perjured testimony of SBDP Officer Aaron Jones amounted to a product of coercion where Jane's "will was overborne." To this extent, Petitioner contended that his "conviction is founded in whole or in part on an involuntary confession or other incriminatory statement." (Ex. 1, p. 6 (self-numerated))

• Ground Two appears to piggy-back off of Ground Two claims, further illustrating supporting facts of perjury and coercion. (Ex. 1, pp. 8-21 (self-numerated).)

• Ground Three raises Ineffective Assistance of Counsel (IAC) at the preliminary hearing stage, but evolves to address how appointed

counsel's failures to investigate, "analyze all hearsay statements, police reports" and to "pursue discovery of the subsequent custodial interrogations", "shows a reasonable possibility that a different result could have been reached but for counsel's failure to investigate and present an affirmative defense." (Ex. 1, pp. 22-26.)

• Ground Four encompasses the prosecutor's failures to correct false evidence under Napue v. Illinois (1950) 360 U.S. 264, along with other claims which may not be addressable in Federal court. (Ex. 1, pp. 30-33.)

• Ground Five addresses a motion filed by Defendant, seeking to Set Aside Information that was insufficient and illegally obtained. Again, this Ground may not be addressable in Federal court, as Defendant, who filed this motion (or attempted to) was not the attorney of record at the time. (Ex. 1, pp. 34-38.)

• Ground Six raises a Legitimate Brady Violation - claiming that the prosecutor failed to turn over exculpatory evidence of custodial interrogations of Jane and Jane's stepmother, and that such failures to disclose amounted to "a 'reasonable probability' that outcome will be changed by disclosure." (Quoting Kyles v. Whitley, 514 U.S 419, 421 (1995).) (Ex. 1, p. 39-40.)

c. Respondent's Claim That Petitioner Is Untimely In Presenting His Grounds Three Thru Nine Federal Claims Is Premature And Based On Conjecture.

Respondent has employed impermissible psychic predictions in

seeking to convince this Court that, "it is likely that the California Court of Appeal or California Supreme Court may impose one or more procedural bars if presented with Bank's unexhausted claims because they have already been ruled to be untimely (citing In re Reno, 55 Cal. 4th at 452)." (Resp. Mot. to Dis., pp. 10-11.) This is simply not the law. Respondent's asserted assumption is based upon the findings of a State superior court judge. A habeas petitioner cannot be held to matter-of-factly assume he will be found to be deemed untimely at the initial filing of a State habeas petition, when he does not initially believe he is untimely. This contention has yet to be exhausted.

What is not mentioned is the fact that, after the Superior Court denied Petitioner's habeas corpus and found it to be untimely on October 8, 2020 (Exhibit 2), Petitioner constructively filed his document, entitled "Application for CRC Rule 8.66 Tolling," on October 27, 2020. (Exhibit 3.) Petitioner is a layperson at the law. It can be readily ascertained that this tolling application was an attempt, by Petitioner, to explain any perceived delays in Petitioner's habeas filing. Petitioner's tolling application was mailed by CDCR mailing staff on October 28, 2020 (Exhibit 4.)

Petitioner has since been advised that his explanation for delay may be better presented within the body of a newly filed habeas corpus petition addressed to the California Court of Appeal. Petitioner has now done that and is awaiting reply. At this point, Respondent cannot know what

State courts' decisions will be in light of the fact that Petitioner's newly-filed habeas contains explanations for his delay. Nor can Respondent effectively predict, with certainty, whether or not any, or all, State decisions may be challengable as not being "independant and adequate", "independant of federal law", "unreasonable in finding that Federal claims were unpreserved", or whether "equitable tolling" is warranted under the "cause and prejudice" standard.

At this early stage, it cannot be said that Petitioner has failed to explain his delay sufficiently. The assumed 60-day window recognized as the standard for filing in the interim between courts is simply an estimated point of reference set by the United States Supreme Court, but this number is not binding.

As recognized by numerous Federal courts, California has a unique system by which State habeas petitioners are to challenge adverse State habeas decisions. Rather than requiring a petitioner whose habeas has been dismissed to appeal that decision to a higher court, California law provides that an original petition may be filed at each level of the California court system. Such a petition is timely if filed within a reasonable time. California courts allow a longer delay if the petitioner demonstrates good cause. I.e., see Evans v. Chavis, 546 U.S. 189, 192-193 (2006), quoting In re Harris, 5 Cal. 4th 813, 828 n.7, and In re Robbins, 18 Cal. 4th

770, 780 (1998).

While the Chavis court set an uncertain benchmark of 30 to 60 days between filings to higher California Courts, given the conjectural nature of such a benchmark, Chavis suggested that a certified question be submitted to the California Supreme Court, to address the uncertain scope of California's "'reasonable time' standard." Chavis, at p. 199. Such a certified question was submitted by the Federal Court of Chaffer v. Prosper, 542 F3d 662 (9th Cir. 2008), to no avail.

More recently, the Federal Court of Robinson v. Lewis, 795 F3d 926 (2015) issued another certified question to this point. This certified question was answered by Robinson v. Lewis, 9 Cal. 5th 883, on July 20, 2020

In light of this new law governing filings in California courts, as well as pending State court habeas filings which will explore, interalia, the exceptions to procedural bars declared by the Superior Court in ruling on Petitioner's first State habeas, it must certainly be found that Respondent's motion to dismiss is extremely premature.

d. U.S. Fed. Central Dist., Local Rules 56-1 and 56-2 - It is difficult to determine the legal standard under which Respondent believes there exists a right to summary dismissal. Failure to comply with Local Rule 56-1 leaves Petitioner, and this Court, with the unfair task of creating an argument on behalf of Respondent, as to how the actual facts of this case should intertwine with the bare legal assertions presented.

For instance, Local Rule 56-1 requires Respondent to lodge a proposed statement of uncontroverted facts and conclusions of law, setting forth the material facts as to which the moving party contends there is no genuine dispute. Respondent has lodged no such proposed statement. This places Petitioner in the unfair position of filing his opposition based upon assumptions.

Local Rule 56-2 requires Petitioner to rebut Respondent's nonexistent proposed statement of uncontroverted facts and conclusions of law with a concise statement of genuine disputes, setting forth all material facts as to which it is contended there exists genuiine disputes necessary to be litigated. It would would appear that, in failing to propose that there exist any uncontroverted facts and conclusions of law, Respondent's motion to dismiss must be denied on the grounds of default. In the alternative, Petitioner proposes the below-listed statement of genuine disputes:

• Petitioner's Statement of Genuine Disputes Pursuant to L.R. 56-2

1. Additional evidence exists to support grounds two thru nine, and this will require full exhaustion of state remedies to the highest state court, pursuant to 28 USC 2254

2. Dismissal cannot be based upon an assumption of how state courts will rule. This would eliminate a petitioner's constitutional right to challenge a state court's ruling as unreasonable or inconsistent with U.S. Supreme Court law, as permitted by 28 USC 2254(d)(1) and (2).

3. As additional evidence will show, the Petitioner was denied a fundamentally fair trial via the admission of Officer Aaron Jones's testimony. A genuine dispute exists as follows:

a. Brady violation - During his testimony, Officer Jones referred to interrogation dates, of Jane, that did not match up to any of the dates on documents provided to Defendant. This denied Defendant from preparing for and rebutting this testimony, and thus denied him his right to Confrontation and Cross-examination.

b. Jane Doe's silence on several issues allowed for the presentation of perjured testimony, by Officer Jones, which went uncorrected by the prosecutor. A genuine dispute exists as to whether such perjury will be confirmed with proof of coercion, concealed by omitting portions of the recorded interrogation (also a Brady violation).

c. A genuine dispute exists as to whether the silence of Jane Doe, coupled with the deceptive and partial testimony of Officer Jones, amounted to an unconstitutionally

tainted trial.

4. Viewed in totality with the abovementioned testimony of Officer Jones, the admission of other-crimes evidence of a previous plea-bargained case of attempted pimping and pandering against a detective posing as a prostitute (as detailed in Ground One), rendered Petitioner's trial fundamentally unfair, in violation of Petitioner's Sixth Amendment right to a fair trial.

5. Any State court rulings finding that Petitioner's habeas is procedurally barred is unreasonable, and/or the rulings were not independent, adequate, and regularly followed, particularly in light of the exceptions to California procedural bar laws.

6. Cause and prejudice exist as a gateway to Federal review of Petitioner's claims under the Martinez rule.

7. Petitioner's constructively filed request for Stay and Abeyance should be granted so as to allow for the introduction of additional evidence to support Petitioner's habeas claims. (See Exhibit 5, unsigned and undated. Court has signed and dated copy.) While it can be reasoned that Petitioner would have been wise to simply exhaust State remedies prior to filing his 28 USC 2254, this premature filing cannot be understood as being a dilatory measure or one lacking diligence. Therefore, the prongs of a Rhines v. Weber test are satisfied. (544 U.S 269, 277-278 (2005).) Petitioner's Federal habeas should be stayed pending State exhaustion.

8. Whether or not the prosecutor knew of false testimony given by Officer Jones and failed to correct it is a genuine dispute.

9. Whether or not Defense's attorney's hearsay objection to the introduction of Officer Jones's testimony was sufficient to

preserve an objection to a Sixth Amendment violation is a genuine dispute.

10. Whether or not additional Brady evidence exists confirming the coercion of Jane Does testimony is a genuine dispute.

11. Whether or not it would have been futile to, after lodging a hearsay objection to Officer Jones's testimony, further append the objection with a claim of a Confrontation Clause violation is a genuine dispute.

12. Whether or not admission of purported propensity evidence served as a guise to unjustly tilt the scales of justice in favor of a sure conviction, so as to prejudicially infect Petitioner's right to a fundamentally fair trial is a genuine dispute.

CONCLUSION

WHEREFORE, Petitioner prays that this Honorable Court rule:

1. That Respondent's motion to dismiss be denied

2. That Petitioner's Application for Stay and Abeyance be granted so as to allow for the State exhaustion of habeas remedies and will allow for a more concise and inclusive presentation of Petitioner's Federal claims.

3. That Petitioner be afforded the opportunity to amend his Federal habeas petition, after exhausting his State remedies; this will allow for effective streamlining.

Executed on this 1st day of June, 2021.

Jeremiah Banks

Jeremiah Banks #BF3043
P.O. Box 2199-B5-127 low
Blythe, CA. 92226

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEREMIAH BANKS,
PETITIONER,
V.
KATHLEEN ALLISON,
RESPONDENT.

)CASE NO. EDCV21-0051-JWH(JPR)
)SUPERIOR COURT CASE NO. FSB-1404047-1
)APPLICATION FOR STAY AND ABEYANCE,
)EQUITABLE TOLLING, AND LEAVE TO AMEND
)
)

TO HONORABLE PRESIDING MAGISTRATE JUDGE IN THE ABOVE ENTITLED CASE PENDING:

Please take notice that Pro Se Petitioner, Jeremiah Banks, hereby submits Application for Stay and Abeyance, Equitable Tolling, and Leave to Amend, where "good cause" and extraordinary circumstances exists warranting Grant of such relief. The stay and abeyance procedure is appropriate only where the habeas petitioner shows: (1) "good cause" for failure to exhaust, (2) the petitioner did not "engage[] in inte ntionally dilatory litigation tactics" (Rhines v. Weber, 544 US 269, 277-78 (2005)). The SUPREME COURT has held that "a federal district court has discretion to stay [a] mixed petition to allow the petitioner to present his unexhausted claims to the state court in the first instance and then to return to federal court for review of his perfected petition" (Rhines, 544 US at 271-72).

This Application is based on this Notice, Federal Habeas Petition (unexhausted), Memorandum of Points and Authorities, and all Affidavits relating to this matter.

Date: 2/1/21

Respectfully Submitted,

MEMORANDUM OF POINTS AND AUTHORITIES

Good Cause exists to grant relief of stay and abeyance, so as to allow Petitioner to exhaust claims up through the Court of Appeal and into the California Supreme Court, where appointed Appellate Counsel affirmatively abandoned his client by not informing him that California Supreme Court denied Petition for Review and forwarding direct appeal record nine months after denial, without notice, instruction, or comment. (see, Rhines ,supra). There, Appellate Counsel, Alan Yockleson, failed to notify Petitioner of California Supreme Court's denial of Petition for Review, dated "NOV 20 2019", where Petitioner did not receive notice from that Court. (see, "Legal In" legal mail log, dated 11/24/2020, for 2019-2020 years). Further, appellate counsel failed to forward the direct appeal record until nine months after the denial, on "6/16/20," and did so without any correspondence, notice, or counseling, as to AEDPA time constraints starting, how long Petitioner had to exhaust his claims in state court, or his option to file certiorari in the UNITED STATES SUPREME COURT, should he choose to do so. Petitioner was effectively denied his right to affective assistance of appellate counsel, under all subjective facts. (see, Foley v. Biter, 793 F.3d 998, 1002-04 (9th Cir. 2015)(holding that counsel's failure to communicate, which included discarded petitioner's unanswered letters, severed the principal-client relationship and "clearly constituted abandonment");Gibbs v. Legrand, 767 F.3d 879, 886-88 (9th Cir. 2014)(holding that counsel's failure to notify petitioner of state supreme court's denial of his claim for post-conviction relief "constituted abandonment")). Not only did appellate counsel abandon Petitioner, but he also failed to correspond or communicate throughout the direct appeal process, as demonstrated by "Legal Out," outgoing legal mail on dates: 3/8/2019; 1/22/2020; and 7/3/2020 (see, "Legal Out", outgoing

legal mail, dated: 11/24/2020, on dates: 3/8/2019; 1/22/2020; and 7/3/2020). When compared to "Legal In," of incoming legal mail for corresponding periods there are no responses. Petitioner should not be forced to bear the cost of an attorney "who is not operating as his agent in any meaningful sense of that word" (Holland v. Florida, 560 US 631, 659 (2010)).

Petitioner is currently incarcerated at Ironwood State Prison, where he requested both, the "Legal In" and "legal Out" legal logs for the years 2019-2020. The relevance of this legal mail log demonstrates Petitioner did not receive notice of denial from California Supreme Court at time of denial The log also shows that only communication(s) between attorney and client were for purposes of transmitting Petition for Review ("Legal In," at date "10/22/2019"), which corresponds with Proof of Service to this fact (see, Proof of Service on Petition for Review, dated: "October 16, 2019"). The last communication ("Legal In," at "6/16/2020"), was the unceremonious forwarding of the direct appeal record nine months after state supreme court denial that did not include denial, instruction, or any other communication (compare, "Legal In," at dates "6/16/2020;" to Legal Postage and date of "06/15/20"). These facts also prove abandonment.

After receiving the direct appeal record on June 16, 2020, without notice, counseling, or instruction, from appellate counsel- while taking into consideration previous attempts to communicate with counsel (that were unsuccessful), Petitioner contacted California Supreme Court himself to inquire on the outcome of Petition for Review (see, Informal Letter dated July 2, 2020, received "JUl 6 2020"), where the California Supreme Court forwarded Petitioner a copy of the denial order (see, California Supreme Court, denial order, dated "NOV 20 2019"). But it not for Petitioner

exercising proactivity, he would not be aware of nor had the opportunity to begin exhaustion of additional claims in the state courts.

Petitioner has submitted habeas petition to the superior court raising cognizable claims: Illegal Commitment; Perjured hearsay testimony; ineffective assistance of counsel; prosecutorial misconduct; failure to adjudicate motion to set aside information; Brady violation; and prejudicial impact of perjured evidence, which is pending submission into the Court of Appeal. However, due to COVID-19, outbreaks here at Ironwood State Prison, and the affect modified programming has had on Petitioner's law library access, it is reasonably believed that additional consideration should be given towards these circumstances beyond Petitioner's control. (see, Modification Order(s))

Conversely, the nine month delay of AEDPA time for filing an habeas petition in state court is attributable towards appellate counsel's ineffectiveness and abandonment of his client, where absent such delay and abandonment, it is reasonably possible that Petitioner would have exhausted his claims in a timely manner before submitting them for federal review.

Adding to the delay was Superior Court's incomplete denial order, where Petitioner had to contact the Superior Court (see, Informal Letter, dated October 23, 2020, received "OCT 26 2020"), which resulted in a subsequent and complete denial order thereafter (see, both, "Legal In" at dates: 9/25/2020 (notice of receipt of habeas petition); 10/21/2020 (incomplete denial order); and 11/9/2020 (complete denial order); compared to "Legal Out" at dates: 9/18/2020 (submission of habeas petition); and 10/23/2020 (notice of incomplete denial order)). The incomplete order caused a delay of approximately (18) eighteen days, attributal to the Superior Court. This delay is also shown to have contributed to, however slightly, the

need for stay and abeyance and equitable tolling, due to circumstances beyond Petitioner's control.

The NINTH CIRCUIT has held that a stay and abeyance procedure is available when a petition is fully unexhausted, extending application of the Rhines ruling beyond mixed petitions (Mena v. Long, 813 F.3d 907, 910 (9th Cir. 2016)(nothing eliminates general authority to grant stay)). A federal court may not "adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims"(Rhines v. Weber, 544 US 269, 273 (2005)(citing Rose v. Lundy, 455 US 509, 518-19 (1982)). Under equitable tolling, the determination of whether to apply the equitable tolling doctrine is highly fact specific, and the petitioner "bears the burden of showing that equitable tolling is appropriate"(Espinoza-Matthews v. Ca., 432 F.3d 1021, 1026 (9th Cir. 2005)(quoting Gaston v. Palmer , 417 F.3d 1030, 1034 (9th Cir. 2005)). In order to meet this burden, petitioner must show both that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way (see, Rasberry v. Garcia, 448 F.3d 1150, 1153 (9th Cir. 2006)(citing Pace v. Guglielmo, 554 US 408, 418 (2005)).

Although simple negligence of an attorney that causes a client to miss the filing deadline will not merit the application of equitable tolling (see, Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001)), where the attorney's misconduct is "sufficiently egregious, it may constitute an extraordinary circumstance" warranting tolling AEDPA's limitations period (Spitsyn v. Moore, 345 F.3d 796, 800 (9th Cir. 2003);see also, Baldayaque v. U.S., 338 F.3d 145, 152-53 (2d Cir. 2003)(holding that "sufficiently egregious" attorney misconduct such as failing to abide by client's request

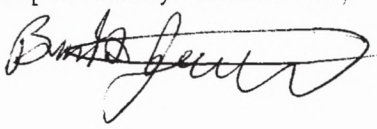
to file motion might constitute extraordinary circumstances)). Petitioner has demonstrated that actual and/or potential abandonment to support an extraordinary circumstance, as well as, his submission of habeas petition into the superior court to show his diligence, where subsequently the fact and existence of COVID-19 has caused substantial inconvenience due to modification of programming limiting petitioner's law library access. (see, Modification Order(s)).

Wherefore, Petitioner requests that Application for Stay and Abeyance, Equitable Tolling, and Leave to File an Amended Petition be GRANTED.

I declare under the penalty of perjury that the foregoing is true and correct.

Date: 2/1/21

Respectfully Submitted,



DECLARATION OF JEREMIAH BANKS

I, Jerermiah Banks hereby declare the following:

1. I am the Defendant in case FSB-1404047-1 in the Superior Court;

2. I was the Appellant on Direct Appeal in case D075934, in the Court of Appeal, where the judgment was affirmed;

3. I am also the Petitioner on Petition for Review in the California Supreme Court, case S258589, denied;

4. On September 21, 2020, I filed Petition for Writ of Habeas Corpus for collateral challenge to conviction raising various grounds for relief;

5. On October 8, 2020, the Habeas Court summarily denied the petition under allegation that the petition failed to state a prima facie claim for habeas relief and was procedurally barred;

6. However, the denial Order issued was incomplete and missing page 3 of the Order, where I contacted the Court Clerk and informed them of the incomplete Order, resulting in a complete Order being issued;

7. Prior to filing collateral attack petition, I recieved Direct Appeal record from appointed counsel that was without any accompanying letter, instruction, notice, or California Supreme Court denial order, on June 16, 2020;

8. I then contacted appointed counsel and California Supreme Court to inquire about Petition for Review, where I did not receive response from counsel, but did receive a denial order from the Court;

9. The denial order from California Supreme Court on Petition for Review was dated November 20, 2020, where I did not receive notice from that Court, nor from appointed counsel, and where counsel unreasonably waited approximately nine months to forward appellate record from date of denial;

10. I reasonably believe that appointed counsel's failure to give me notice of denied petition for review constitutes abandonment, especially when taking into consideration the additional fact that counsel intentionally withheld Direct Appeal record from me that was needed to raise any claims on collateral attack petition;

11. Conversely, the COVID-19 pandemic has directly affected everyone's way of life and existence, where here at Ironwood State Prison, modification order(s) have been inplemented, due to CORONA VIRUS outbreaks of both, staff, and inmates;

12. Due to CORONAVIRUS, MY LAW LIBRARY ACCESS- needed to conduct research, make copies, and obtain postage materials, has been directly affected, where this circumstance (beyond my control), warrants that consideration should be further given on application for stay and abeyance;

DECLARATION OF JEREMIAH BANKS

13. Stay and Abeyance is necessary to exhaust claims through to the California Supreme Court, where currently claims are pending submission into the Court of Appeal;

14. I anticipate that state habeas petition will be submitted into the Court of Appeal by February, and possibly be exhausted through the California Supreme Court, by potentially June or July;

15. The circumstance described (above), affirmatively present extraordinary circumstances beyond my control, where appointed counsel's abandonment, coupled with COVID-19, have created a situation, in which stay and abeyance was created for, and where I reasonably believe that I am entitled to a favorable disposition.

I declare under the penalty of perjury that the foregoing is true and correct.

Date: 2/1/21

Respectfully Submitted,

[signature]

Jeremiah Banks #BF3043
P.O. Box 2199-B5-127 low
Blythe, CA. 92226

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

5:21-CV-00051-JWH-JPR

JEREMIAH BANKS,
PETITIONER,
V.
KATHLEEN ALLISON,
RESPONDENT.

)CASE NO.
)SUPERIOR COURT CASE NO. FSB-1404047-1
)APPLICATION FOR STAY AND ABEYANCE,
)EQUITABLE TOLLING, AND LEAVE TO AMEND

TO HONORABLE PRESIDING MAGISTRATE JUDGE IN THE ABOVE ENTITLED CASE PENDING:

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Wherefore, Petitioner requests that Application for Stay and Abeyance, Equitable Tolling, and Leave to File an Amended Petition be GRANTED.

I declare under the penalty of perjury that the foregoing is true and correct.

Date: 1/5/21

Respectfully Submitted,

Mr. Jeremiah Banks
NAME

BF3043
PRISON IDENTIFICATION/BOOKING NO.

P.O. Box 2199-B5-128 low
ADDRESS OR PLACE OF CONFINEMENT

Blythe, CA. 92226

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his name, address, telephone and facsimile numbers, and e-mail address.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JEREMIAH BANKS

FULL NAME (*Include name under which you were convicted*)

Petitioner,

v.

KATHLEEN ALLISON

NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER

Respondent.

CASE NUMBER:

CV 5:21-CV-00051-JWH-JPR
To be supplied by the Clerk of the United States District Court

☐ _____ AMENDED

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY
28 U.S.C. § 2254

PLACE/COUNTY OF CONVICTION SAN BERNARDINO

PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT (*List by case number*)

CV _____

CV _____

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.
2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge the judgment entered by a different California state court, you must file a separate petition.
3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum.
5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
6. You must pay a fee of $5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds $25.00, you must pay the filing fee.
7. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the Central District of California
United States Courthouse
ATTN: Intake/Docket Section
312 North Spring Street
Los Angeles, California 90012

PLEASE COMPLETE THE FOLLOWING: (*Check appropriate number*)

This petition concerns:

1. ☒ a conviction and/or sentence.
2. ☐ prison discipline.
3. ☐ a parole problem.
4. ☐ other.

PETITION

1. Venue
   a. Place of detention IRONWOOD STATE PRISON
   b. Place of conviction and sentence SUPERIOR COURT; 30 years to life

2. Conviction on which the petition is based *(a separate petition must be filed for each conviction being attacked).*
   a. Nature of offenses involved *(include all counts)*: COMMERCIAL SEX ACTS; PIMPING AND PANDERING; OF MINOR
   b. Penal or other code section or sections: §§ 236.1(c)(2)(f); 266(H)(B)(2); 266(I)(B)(2)
   c. Case number: FSB-1404047-1
   d. Date of conviction: 12/13/17
   e. Date of sentence: 1/11/18
   f. Length of sentence on each count: 30 years to life
   g. Plea *(check one)*:
      ☒ Not guilty
      ☐ Guilty
      ☐ Nolo contendere
   h. Kind of trial *(check one)*:
      ☒ Jury
      ☐ Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? ☒ Yes ☐ No
   If so, give the following information for your appeal *(and attach a copy of the Court of Appeal decision if available)*:
   a. Case number: D075934
   b. Grounds raised *(list each)*:
      (1) Abuse of Discretion in admitting prior conviction of pandering
      (2) Improper admission of Jane Doe's prior statement

(3) Trial Court error in not finding discoverable Pitchess evidence

(4) The admission of case-specific hearsay was a violation of Confrontation Claus

(5) The Court improperly imposed concurrent sentences on counts two and three

(6)

c. Date of decision: 9/11/19

d. Result Affirmed

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? ☒ Yes ☐ No

If so give the following information *(and attach copies of the Petition for Review and the Supreme Court ruling if available)*:

a. Case number: S258589

b. Grounds raised *(list each)*:

(1) (Same issues as raised in Court of Appeal)

(2)

(3)

(4)

(5)

(6)

c. Date of decision: "NOV 29 2019"

d. Result Denied

5. If you did not appeal:

a. State your reasons

b. Did you seek permission to file a late appeal? ☐ Yes ☐ No

6. Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?

☒ Yes ☐ No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: Superior Court

(2) Case number: WHCJS2000506

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: 9/21/20

(4) Grounds raised *(list each)*:

(a) Illegal Commitment: Perjured Testimony introduced into Preliminary

(b) Ineffective Assistance of Counsel

(c) Prosecutorial Misconduct

(d) Failure to adjudicate Motion to set aside information

(e) Brady Violation

(f)

(5) Date of decision: "OCT 08 2020"

(6) Result Denied

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

b. (1) Name of court:

(2) Case number:

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*:

(4) Grounds raised *(list each)*:

(a)

(b)

(c)

(d)

(e)

(f)

(5) Date of decision:

(6) Result

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

c. (1) Name of court:

(2) Case number:

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*:

(4) Grounds raised *(list each)*:

(a)

(b)

(c)

(d)

(e)

(f)

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

7. Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

_____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

8. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

CAUTION: *Exhaustion Requirement*: In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

a. Ground one: Erroneous Admission of Prior Acts Evidence under EV C §1109 was Prejudicial; violating Petition's right to Due Process under the 14th Amend.

(1) Supporting FACTS: Prosecution used evidence of previous conviction for attempted pandering, to compare that conduct to current case, where there is more than an "abstract posiibility" that the erroneously admitted evidence contributed to conviction

_____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

b. Ground two: Inadmissible Hearsay Evidence admitted against the Defendant where witness testified; violation of the 6th Amend. Exception on Hearsay

(1) Supporting FACTS: hearsay statements were admitted into trial despite witness testimony, where hearsay testimony was testimonial and violates the

Confrontation Clause's exceptions; extensive hearsay evidence erroneously admitted prejudiced the Defendant

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

c. Ground three: Illegal Commitment: Perjured Hearsay Testimony evidence was used intentionally at Preliminary Hearing constituting insufficient evident

(1) Supporting FACTS: Law Enforcement Officer's hearsay testimony was perjured testimony as to extrajudicial statements made by Jane Doe, where transcripts of custodial interrogation prove fact and existence of perjurious testimony; Defendant was prejudiced by fact of perjured hearsay testimony entered into evidence as that of what Jane Doe stated, which was then used at trial

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☒ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☒ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

d. Ground four: Ineffective Assistance of Counsel; retained counsel failed to investigate or prepare defense; appointed counsel failed to defend

(1) Supporting FACTS: Retained counsel failed to investigate potential meritorious defense or establish impeachment evidence of sole Prosecution witness' perjured hearsay testimony, which also presented impeachment evidence and rebuttal against statements made by Jane Doe; counsel failed to defend against allegations at preliminary hearing as a result

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☒ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☒ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

e. Ground five: Prosecutorial Misconduct; Knew or either reasonably should have known that sole prosecutorial witness at preliminary hearing testified perjuriously

(1) Supporting FACTS: Prosecutor must establish certain prerequisites such as the constitutionality of the proffered evidence before entering it into preliminary examination; however, the prosecution failed to do so, and thereby allowed the witness to enter false, misleading, and/or mischaracterizations into the court record and evidence, thereby violating Due Process

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☐ Yes ☒ No

f. Ground six: Failure to Adjudicate Motion to set aside information relating to Preliminary Hearing
(1) Supporting Facts: Trial Court was aware of but failed and/or refused to adjudicate motion, which potentially could have given Defendant relief, where proof that prosecution's witness's perjured hearsay evidence, coupled with failure to produce exculpatory evidence of Jane Doe's step-mother's interview, contributed to unfair trial and conviction
(2) Did you raise the claim on direct appeal to the California Court of Appeal [ ]yes [X]no
(3) Did you raise the claim in a Petition for Review in the California Supreme Court [ ]yes [X]no
(4) Did you raise the claim in a habeas petition in the CA. Supreme Court [ ]yes [X]no

g. Ground seven: Brady Violation; failure of the prosecution to produce exculpatory evidence at preliminary hearing or trial trial
(1) Supporting Facts: Prosecution failed to produce exculpatory evidence of Jane Doe's step-mother's interview, at either prliminary hearing or trial; Prosecution also failed to produce discovery of subsequent custodial interrogation(s) from dates: 8/4/14; 8/6/14; and 8/12/14, though the most damaging hearsay testimony came directly from those dates; no faith or corroboration in hearsay evidence
(2) Did you raise the claim on direct appeal to the CA Court of Appeal [ ]yes [X]no
(3) Did you raise the claim in a Petition for Review to the CA Supremn Court [ ]yes [X]no
(4) Did you raise the claim in a habeas petition in the CA. Supreme Court [ ]yes [X]no

h. Ground eight: IAC of Appellate Counsel on Diect Appeal and Petition for Review counsel abandoned his client without notice counsel
(1) Supporting Facts: Appellate Counsel failed to investigate appellate record, communicate with client, or discover relevant issue of filed but unadjudicated Motion to set aside information in appeal record, which would have led to other issue(s) of perjured testimony, IAC of retained counsel and appointed counsel, prosecutor misconduct, and Brady violation.
(2) Did you raise the claim on direct appeal to the CA Court of Appeal [ ]yes [X]no
(3) Did you raise the claim in a Petition for Review to the CA Supreme Court [ ]yes [X]no
(4) Did you raise the claim in a habeas petition in the CA Supreme Court [ ]yes [X]no

i. Ground nine: Prejudicial Component from Perjured hearsay testimony and Brady violation(s)
(1) Supporting Facts: Prejudicial effect of perjured hearsay testimony allowed perjured evidence of Jane Doe's alleged statement(s) to be entered as proof of statements made to police officer, which was subsequently used as Jane Doe's actual statements; withholding of step-mother's interview and Jane Doe's "other" custodial interrogation(s) referred to at prelim denied Defendant impeachment evidence and Confrontation rights based on that evidence.
(2) Did you raise the claim on direct appeal to the CA Supreme Court [ ]yes [X]no
(3) Did you raise the claim in a Petition for Review to the CA SUP CT [ ]yes [X]no
(4) Did you raise the claim in a habeas petition in the CA Supreme Court [ ]yes [X]no

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☐ Yes ☒ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☐ Yes ☒ No

9. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: submitted Habeas to Superior Court, where it was denied, in process of controverting denial issues for submission to Court of Appeal, and subsequently CA Supremem Court.

10. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction?

☐ Yes ☒ No

If so, give the following information for each such petition *(use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available)*:

a. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

b. (1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

_____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

11. Do you have any petitions now pending (i.e., filed but not yet decided) in any state or federal court with respect to this judgment of conviction? ☐ Yes ☒ No

If so, give the following information *(and attach a copy of the petition if available)*:

(1) Name of court: _____

(2) Case number: _____

(3) Date filed *(or if mailed, the date the petition was turned over to the prison authorities for mailing)*: _____

(4) Grounds raised *(list each)*:

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

12. Are you presently represented by counsel? ☐ Yes ☒ No

If so, provide name, address and telephone number: _____

_____

_____

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

none.
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 1/5/21
Date

Brent Jeremy
Signature of Petitioner

DECLARATION OF JEREMIAH BANKS

I, Jeremiah Banks hereby declare the following:

1. I am the defendant in case FSB-1404047;

2. I was covicted after jury trial of Pen C §§236.1(C)(2)-F; 266(H)(B)(2); and 266(I)(B)(2), on 12/13/17;

3. I am serving an indeterminate sentence for crime(s) I did not commit and am innocent of;

4. Retained counsel, Kory Mathewson, failed to properly investigate Jane Doe's hearsay statements at, either initial custodial interrogation on 8/1/14, nor subsequent custodial interrogation(s) on dates: 8/4/14; 8/6/14; or 8/12/14, resulting in counsel's deficient performance at preliminary hearing and inability to present an affirmative defense;

5. But for counsel's deficient performance at preliminary hearing, based on his failure to investigate, it is reasonably possible that a more favorable outcome could have occurred;

6. Counsel's failure to investigate is the proximate cause of counsel's inability to present an affirmative defense at preliminary hearing, where counsel's failure to discover inconsistencies, misrepresentations, and flat out falsehoods, between Jane Does actual statements and Officer Aaron Jones' hearsay testimony- as to those statements, was insufficient inadmissible evidence;

7. Counsel's failure to investigate also resulted in his deficient performance in submitting prosecution's case to proper adversarial testing in the form of making sure that prosecution established Miranda warnings and valid waivers for each subsequent custodial interrogation;

8. The result of counsel's failure to investigate and deficient performance at preliminary hearing allowed otherwise inadmissible and constitutionally insufficient evidence to be introduced into preliminary hearing, used to find sufficient probable cause to bound the defendant over for trial;

9. Prosecutor, Tamara Ross, knew or reasonably should have known that she had a duty to investigate and correct false, misleading, and perjurious evidence offered as hearsay by Off. Jones;

10. Prosecutor Ross failed to establish the constitutionality of the hearsay testimony from Off. Jones extracted from any of the subsequent custodial interrogation(s), going further in failing to produce discovery of said interrogation(s), where that evidence was referred to, but went uncorroborated, so as to mix inadmissible constitutionally insufficient evidence into hearsay testimony of initial custodial interrogation;

11. There does not exist any proof or existence of subsequent custodial interrogation(s), nor proof of Miranda warning(s) or valid waiver(s), to corroborate these events, outside of Off. Jones' perjured report;

DECLARATION OF JEREMIAH BANKS

12. The magistrate unknowingly assessed the sufficiency probable cause determination to bound the defendant over for trial on constitutionally inadmissible and insufficient evidence that was perjuriously entered into evidence through hearsay testimony;

13. I was unable to submit a motion to set aside the information at arraignment, where I was unaware of the issues contained in this petition and motion to set aside information, as well as never had the opportunity to submit said motion, due to retain counsel relieving himself from the defense, the appointment of conflict of interest Public Defender's office, and subsequent appointment of Islander Defenders, who continued for discovery, familiarization of case, and other trial obligations;

14. When I did become aware of my rights being violated and fact that the prosecution was attempting to construct a case through lies, deception, and misrepresentation of facts, I handwrote and submitted motion to set aside the information on 1/6/17;

15. The preliminary hearing resulted in an illegal commitment rendering all subsequent proceedings void and moot, where illegality is jurisdictional;

I declare under the penalty of perjury that the foregoing is true and correct.

Date: 1/5/21

Respectfully Submitted,

DECLARANT