No. S281858

In the Supreme Court of the State of California

IN RE DAVID L. SANDSTROM,
ON HABEAS CORPUS.

Fourth Appellate District, Division Two, Case No. E080561

San Bernardino Superior Court, Case No. WHCJS1900498

Honorable Gregory S. Tavill, Judge

RESPONDENT'S INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

In 2017, petitioner was convicted of oral copulation or penetration of a child under age 10 and three counts of committing a lewd act on a child under age 14 after using a weekend ski trip to sexually abuse the six-year-old daughter of a couple with whom petitioner and his wife had shared a 20-year friendship. He was sentenced to 27 years to life in state prison for his crimes.

Petitioner filed his most recent petition for writ of habeas corpus (petition) in this Court alleging his attorney was ineffective and instructional error. For the reasons discussed below, petitioner's claims are meritless. Therefore, there is no basis to issue an order to show cause, and the petition should be denied.

PROCEDURAL HISTORY[1]

On June 7, 2017, a San Bernardino County jury found petitioner guilty of the oral copulation or penetration of a child under age 10 (Pen. Code[2] § 288.7, subd. (b) [count 1]) and three

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[1] Respondent has separately requested that this Court take judicial notice of the records in *People v. Sandstrom*, Case No. E069503 and *People v. Sandstrom*, Case No. E080561 as they will assist this Court in resolving the issues presented by this petition. (See *In re Reno* (2012) 55 Cal.4th 428, 484 ["this court routinely consults prior proceedings irrespective of a formal request"]; Evid. Code, § 452, subd. (d).)

[2] Unless otherwise specified, all statutory references are to the Penal Code.

counts of committing a lewd act on a child under age 14. (§ 288, subd. (a) [counts 4-6].) (E069503 1 CT 250-251.)

On November 8, 2017, the trial court sentenced petitioner to 12 years plus 15 years to life in state prison as follows: 15 years to life for the oral copulation or penetration of a child under age 10 in count 1, plus the consecutive upper term of eight years for count 4, plus consecutive terms of two years each for counts 5 and 6. (E069503 2 CT 396-397.)

On May 10, 2018, counsel for petitioner filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436, and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and requesting this Court conduct an independent review of the record. (Resp. Ex. 1.)

On July 16, 2018, petitioner filed a supplemental brief in this Court raising five issues for consideration, including claims that: 1) defense counsel misadvised him during plea negotiations that he did not face a life sentence, and defendant would not have pled guilty had he known he was facing a life sentence if he went to trial; and 2) that defense counsel pressured defendant not to testify on his own behalf. (Resp. Ex. 2.)

In an unpublished opinion filed September 25, 2018, this Court affirmed the judgment. (*People v. Sandstrom* (September 25, 2018, E069503) [nonpub. opn.]; Resp. Exh. 3.) This Court declined to address the two aforementioned claims of ineffective assistance of counsel, indicating that because these issues require

review of matters outside the record, they are better raised on habeas corpus. (Resp. Ex. 3 at AGO-000113-00114.)

On December 12, 2018, the Supreme Court denied petitioner's petition for review. (Case No. S252268; Resp. Exh. 4.)

On December 6, 2019, petitioner filed a habeas petition in the superior court in case no. WHCJS1900498, raising three claims of ineffective assistance of counsel, including claims that he was given erroneous advice about the law and did not make an informed decision when he rejected a plea offer (claim 1), that counsel threatened to abandon him if he chose to exercise his right to testify (claim 3.). Additionally, claim 4 of the petition asserted it was error for the court to instruct the jury with CALCRIM No. 207 indicating that proof need not show the actual time or date of the offense. (Resp. Exh. 5.)

On January 29, 2020, the Superior Court denied claims 2 and 4, but invited respondent to file an informal response as to claims 1 and 3 of the petition. (Resp. Exh. 6.)

On March 10, 2020, the District Attorney filed an informal response to the petition. (Resp. Exh. 7.)

On March 20, 2020, petitioner filed a reply to the informal response. (Resp. Exh. 8.)

On April 16, 2020, the superior court denied claim no. 3 of the petition. The superior court issued an order to show cause regarding claim no. 1. (Resp. Exh. 9.)

On July 13, 2020, the District Attorney filed a Return to the petition. (Resp. Exh. 10)

On October 19, 2022, after an evidentiary hearing, the superior court denied the petition. (Resp. Ex. 12.)

On January 24, 2023, petitioner filed a habeas petition in the Court of Appeal in case no. E080561. (Resp. Ex. 13.)

On June 7, 2023, respondent filed an informal response addressing claims one and two of the petition raising claims of ineffective assistance of counsel as directed by the Court of Appeal. (Resp. Ex. 14.)

On June 26, 2023, petitioner filed a reply to the informal response. (Resp. Ex. 15.)

On July 17, 2023, the petition was denied. (Resp. Ex. 16.)

On September 18, 2023, petitioner filed the instant petition.

On January 30, 2024, this Court ordered responded to file an informal response on the merits.

STATEMENT OF FACTS[3]

> John and Mary Doe had been friends with defendant and his wife Carol for 20 years and were part of an extended group of friends. Defendant and Carol did not have children. John and Mary had two children, a daughter Jane born in 2007 and a son born in 1999. Jane enjoyed hanging out with defendant and Carol. Jane thought defendant was fun and considered him a friend. John and Mary thought it was great that Jane and defendant had so much fun together. In their view, defendant was like a "big goofy older brother" to Jane.

[3] The statement of facts are taken from the unpublished opinion in case no. E069503. (*People v. Sandstrom*, 2018 Cal. App. Unpub. LEXIS 6525, footnotes omitted; Resp. Exh. 3.)

In the summer of 2013 or 2014, Mary, Jane, her brother, defendant, and two other kids took a trip to a local amusement park. Jane did not want to leave when the others left, so she and defendant stayed in the park later and defendant drove Jane home. After Jane had returned home, she told John that defendant had let her sit on his lap and drive his car. John was not upset about this but mentioned to defendant the next time he saw him that it had been a bad idea to let Jane drive a car. Mary testified that Jane told her about this maybe a few days after it happened, and that she did not really believe defendant had taught Jane to drive. The next time Mary saw defendant, she spoke to him about allowing a child to drive a car.

Two years later, in August of 2015, John was driving Jane and her brother in his car. He mentioned that he was tired and wished he didn't have to drive all the way home. Jane reminded John that she could drive home because defendant had taught her to drive. Jane then added that defendant had said he would teach her to drive only if she took off her shirt and let him take pictures of her. John told Jane they would discuss it later when they got home. John told Mary what Jane had told him, and they spoke with Jane together. Jane told them defendant had showed her pictures of naked ladies on his phone. Jane also told them that one time when they were all together at a cabin in Big Bear, Jane had gone by or into defendant's room when he was partially clothed. Jane thought it was a game at the time. She said defendant had showed her his penis, picked her up and put her on the bed, touched her private area and had her touch his. After Jane made these initial revelations, John and Mary made a point of not asking Jane a lot of questions because they did not want it to appear that they had "coached" her.

John and Mary made an appointment with a psychologist, who determined after speaking with Jane that they should report the incidents to law enforcement. They called the Los Angeles Police

Department and made an appointment with a detective. After speaking with Jane and Mary separately, the detective determined the San Bernardino County Sheriff's Department should investigate the Big Bear incidents. During this investigation, Jane underwent a forensic interview with the Children's Assessment Center that was videotaped and later played for the jury. Jane was clear during the interview that at the cabin, defendant touched her inside her private area the first time, but "just touched it from the outside" a second time. Jane told the interviewer that the first time she went to defendant's room in the morning, and the second time he went to her room. As is relevant to the issues defendant raises in his supplemental brief, Jane told the interviewer that during the amusement park incident defendant took pictures of her boobs and vagina, showed them to her and then masturbated in front of her. However, she did not tell the interviewer that she and defendant touched each other.

Sheriff's Department detective arranged for, and assisted Mary in making, a pretext call to defendant in the detective's presence. The call was recorded and later played for the jury. During the 40-minute call, defendant often denied having abused Jane at all, but in between the denials did admit the following: "In the cabin, she laid down on the bed and I touched her—I can't believe that I would do that." "[I]f I touched her, I never, I never, ever—there's no way I would penetrated. I'm sorry, not with a finger, not with a tool, not with anything, . . ." "[Mary]: "So maybe you touched her vagina, but you didn't penetrate. Is that what you're saying? I mean . . . . [Defendant]: That's what I'm saying." "She was flashing me and I kissed her on the cheek, and she flashed me again, and I kissed her on her side, on her hip." "This whole thing lasted two or three minutes and then I went and talked to Carol about it, and Carol and I decided that no more do I get to take them to [an amusement park] and stuff." "It was like dinner time. Cause I went downstairs to change and came right back up. We were, this whole thing was

two or three minutes." "She pulled her pants all the way down, and I didn't pull em back up, I said, 'You need to pull those up.' That's all I said. Oh. That's when I—I tossed her on the bed. I picked her up and put her on the bed. So she was laying on the bed, you're right, and her pants were down. And I kissed her on the side." "I kissed her on the side of it on her hip . . . ." "[Mary]: If you didn't touch her with your hand, what did you touch her with? [Defendant]: I had to have kissed her, which is probably worse." "[A]nd she goes 'Don't look' and pulled her pants down again, and I picked her up and I put her on the bed and I kissed her on the side of the hip . . . ." "I did not do it with my hand. It had to be with my mouth . . . ." "I promise you I never touched her vagina in the cabin. The most I would have done is kissed next to it." "I'm thinking at the most, I would have probably put my thumb above it, but I never would have touched it." "She wasn't downstairs when I went downstairs. I went downstairs to change. She came back five minutes later."

Regarding the incident after the amusement park, defendant said the following during the pretext call: "[Defendant]: And I said, 'Take off your shirt and keep driving the car' and I don't know what I was thinking. [Mary]: And why did you pull your pants down? [Defendant]: Because I guess then I was aroused. I'm sorry. This is when I go to prison . . .I flashed her . . . . [¶] I showed her my thing. I did, you're right."

On May 25, 2017, the People filed a first amended information charging defendant in counts 1 and 3 of oral copulation or penetration with a child under age 10 (Pen. Code,§ 288.7, subd. (b)) and in counts 2, 4, 5, and 6 of committing a lewd act on a child under age 14 (§ 288, subd. (a)). Count 2 was an alternative charge to count 1. Count 4 was an alternative charge to count 3. Each of the counts was alleged to have taken place "on or about January 10, 2014 to January 12, 2014." The crimes charged are limited to those alleged to have taken place in that time span at the cabin in Big Bear.

The court allowed evidence regarding the earlier incident near the amusement park under Evidence Code section 1108.

Jane was six years old when each of the incidents occurred, eight when she disclosed them, and 10 when she testified at trial in June of 2017.

Jane testified at trial that, when she was with defendant in his car after they stayed late at the amusement park, defendant told her that before they could go home they had to touch each other's private parts. Defendant told her he would not take her home until she pulled down her pants. Jane touched defendant's private parts with her hand, and he touched her private parts with his hands. Defendant took pictures of Jane and showed her pictures of ladies' boobs and private parts. Then defendant was "pulling his thing and then a bunch of yucky white stuff came out." They pulled their pants back up, switched places so defendant was in the driver's seat, then went to a fast food restaurant to get a treat. At the time, Jane did not think there was anything wrong with what she and defendant had done, because she trusted defendant. Jane was excited that she had learned to drive.

Jane testified on direct examination that one year in January her family had gone skiing with defendant and his wife and stayed in a cabin in Big Bear. Jane and defendant touched each other's privates "in the mornings" in a downstairs bedroom while everyone else was upstairs. Jane stated this is something she and defendant had done before and described it as, "One of us would go into someone's room. We'd ask if we wanted to do the thing, touch—touching each other's things. We'd pull down our pajama pants or pants, and then we would touch each other's." Jane described this as having happened after the incident in defendant's car near the amusement park, because when defendant asked at the cabin to do "the thing," they both understood it was the same thing they had done in defendant's car after the amusement park. The first time in the cabin, they

stopped and went upstairs because they were called to breakfast. Jane stated that they did it again the next day. She testified that both times defendant initiated the touching, they touched each other in a downstairs bedroom after pulling down their pants, and they stopped because they were called up to breakfast. Jane was not sure what time of day either incident happened. Jane stated the only times she and defendant touched each other was after the amusement park and during the weekend at the cabin. On cross-examination, Jane testified that the first incident at the cabin happened in the downstairs bedroom she shared with her brother. She woke up when defendant came into her room in the morning and they did the thing. Jane's brother was not in the room. On cross-examination Jane testified that the second time she went into defendant's bedroom.

Mary testified at trial regarding the Big Bear incidents that defendant had to be at work with the ski patrol at 7:00 a.m. both mornings of the ski trip, and Mary did not remember having to call Jane upstairs to have breakfast.

The defense put on a witness who testified that defendant signed in to the ski patrol at 7:00 a.m. on January 11 and 12, 2014. Defendant's wife, Carol, testified that she shared a bedroom downstairs with defendant on that weekend, and that Jane and her brother shared the other downstairs bedroom. Defendant got up earlier than Carol did on both days, about 4:30 or 5:00 a.m. and left to perform his ski patrol duties. On Saturday morning Carol went upstairs around 8:00 a.m. John, Jane and her brother had already left to ski for the day. That pattern repeated itself on Sunday morning, except Jane's brother did not go skiing. On Saturday afternoon, defendant returned from the ski slopes after Jane and her family did. Defendant went downstairs to change. He then came upstairs and prepared dinner. Jane was upstairs when defendant came upstairs. Defendant's wife did not recall whether Jane went downstairs while defendant

> was downstairs. On Sunday afternoon after skiing, defendant and his wife packed up and went home.

(*People v. Sandstrom* (September 25, 2018, E069503) [nonpub. opn.]; Resp. Exh. 3 at AGO-000105-000111.)

STANDARD OF REVIEW

An informal response is designed to perform a "screening function" and assist this Court in its determination of whether any of petitioner's claims for habeas relief are procedurally barred or state a prima facie basis for relief. (*People v. Romero* (1994) 8 Cal.4th 728, 737, 742.) Unless the petition states a prima facie case, that is, presents at least one claim that is not procedurally barred and is accompanied by supporting factual allegations which, if true, would entitle petitioner to relief under existing law, this Court must summarily deny the petition. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475; *People v. Romero, supra*, 8 Cal.4th at p. 737; *In re Clark* (1993) 5 Cal.4th 750, 781.) "If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an [order to show cause]." (*People v. Duvall, supra*, 9 Cal.4th at p. 475.)

Petitioner thus bears "a heavy burden" to plead sufficient grounds for relief. (*People v. Duvall, supra*, 9 Cal.4th at p. 474; *In re Visciotti* (1996) 14 Cal.4th 325, 351.) To satisfy this burden, he is required to plead with particularity the facts supporting each claim and provide reasonably available documentary evidence, such as affidavits or declarations. (*People v. Duvall, supra*, 9 Cal.4th at p. 474.) He "must set forth specific facts which, if true, would require issuance of the writ," and a petition

that fails in this regard must be summarily denied for failure to state a prima facie case for relief. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258.) Conclusory or speculative allegations are insufficient. (*Ibid.*; *People v. Duvall, supra*, 9 Cal.4th at p. 474.) A petition is judged on the factual allegations contained within it, without reference to the possibility of supplementing the claims with facts to be developed later. (*In re Clark, supra*, 5 Cal.4th at p. 781, fn. 16.)

Respondent is not required to file any documentary evidence, affidavits, or declarations with an informal response. (See *In re Robbins, supra,* 18 Cal.4th at p. 798, fn. 20.) The writ may not be granted until an order to show cause has issued and respondent has been ordered to file a formal return. (*People v. Duvall*, *supra*, 9 Cal.4th at pp. 475-476; *People v. Romero, supra,* 8 Cal.4th at pp. 740-741.) It is only after a formal return has been ordered that the burden shifts to respondent to allege "facts tending to establish the legality of the challenged detention." (*People v. Duvall*, *supra*, 9 Cal.4th at p. 476; *People v. Romero*, *supra*, 8 Cal.4th at pp. 738-739.)

"Where, as here, the superior court has denied habeas corpus relief after an evidentiary hearing (viz., the hearing held on the order to show cause ordered in response to petitioner's first habeas corpus petition) and a new petition for habeas corpus is thereafter presented to an appellate court based upon the transcript of the evidentiary proceedings conducted in the superior court, 'the appellate court is not bound by the factual determinations [made below] but, rather, independently

evaluates the evidence and makes its own factual determinations.'" (*In re Resendiz* (2001) 25 Cal.4th 230, 249.) "While our review of the record is independent and 'we may reach a different conclusion on an independent examination of the evidence . . . even where the evidence is conflicting' [citation], any factual determinations made below 'are entitled to great weight . . . when supported by the record, particularly with respect to questions of or depending upon the credibility of witnesses the [superior court] heard and observed.'" [Citations.] On the other hand, if 'our difference of opinion with the lower court . . . is not based on the credibility of live testimony, such deference is inappropriate.'" (*Ibid.*)

ARGUMENT

I. THE SECOND AND THIRD CLAIMS OF THE PETITION ARE UNTIMELY

Claims in a habeas petition must be timely filed. (*In re Robbins* (1998) 18 Cal.4th 770, 778.) Unjustified delay in presenting habeas claims bars consideration of the merits of a petition. (*In re Clark*, *supra*, 5 Cal.4th at p. 759; *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1; *In re Swain* (1949) 34 Cal.2d 300, 302.) It is well established that "a habeas corpus petition is not entitled to a presumption of timeliness if it is filed more than 90 days after the final due date for the filing of appellant's reply brief on the direct appeal. In such a case, to avoid the bar of untimeliness with respect to each claim, the petitioner has the burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness." (*Robbins*, at p. 780.)

Petitioner cannot show an absence of a substantial delay. The absence of substantial delay must be alleged "with specificity, facts showing when information offered in support of the claim was obtained, and that the information was neither known, nor reasonably should have been known, at any earlier time . . . ." (*In re Gallego* (1998) 18 Cal.4th 825, 833; see also *In re Robbins*, *supra*, 18 Cal.4th at pp. 780, 787-788, & fn. 10.) Delay in seeking habeas relief is measured from the time a petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. (*Robbins*, at pp. 780, 787.)

Petitioner's second claim arises from allegations that trial counsel was ineffective in failing to allow petitioner to testify on his own behalf. This claim was denied by the trial court on April 16, 2020. (Resp. Exh. 9.) Petitioner, however, inexplicably delayed nearly three years before re-raising this claim when he filed his petition in the Court of Appeal in January 2023.

Similarly, petitioner's third claim arises from allegations that the trial court erred in instructing the jury with CALCRIM No. 207. This claim, however, was denied by the trial court on January 29, 2020. (Resp. Exh. 6.) Again, petitioner, inexplicably delayed nearly three years before re-raising this claim when he filed his petition in the Court of Appeal in January 2023. Respondent submits that this constitutes a substantial delay.

Second, petitioner cannot show good cause for the delay. His petition is devoid of any information that explains why he waited

nearly three years to present this claim to this Court. Thus, petitioner has not shown good cause for any delay.

Third, petitioner's claims do not fall within an exception to the timeliness bar.

> *Clark*, *supra*, 5 Cal.4th at pages 797-798, recognized four exceptions to the bar of untimeliness: "(1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [or] (4) that the petitioner was convicted or sentenced under an invalid statute."

(*In re Robbins*, *supra*, 18 Cal.4th at p. 811.)

None of the timeliness exceptions apply to petitioner. He is not the victim of a trial that was fundamentally unfair. He does not allege that he is actually innocent of the crimes for which he was convicted. The death penalty was not imposed upon him, and he was not convicted or sentenced under a statute that was constitutionally invalid.

Petitioner does not establish an absence of a substantial delay, good cause for the substantial delay, or any exception to the timeliness bar. Therefore, claims no. 2 and 3 of petitioner's petition are untimely filed and should be denied on that ground.

II. CLAIM NUMBER THREE SHOULD HAVE BEEN RAISED ON DIRECT APPEAL AND IS BARRED ON HABEAS BY *DIXON*

Petitioner's claim regarding the trial court's error in instructing the jury with CALCRIM No. 207 should have been raised on direct appeal. Because it was not, the claim is barred. "The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." (*In re Dixon* (1953) 41 Cal.2d 756, 759.) The *Dixon* rule is subject to four exceptions: fundamental constitutional error, lack of fundamental jurisdiction, judicial act in excess of jurisdiction, or change in the law. (See *In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34, citing *In re Harris* (1993) 5 Cal.4th 813, 825, fn. 3 & 829-841.)

Petitioner's claim regarding the trial court's error in instructing the jury with CALCRIM No. 207 should have been raised on direct appeal. This claim was raised in petitioner's habeas petition filed in the trial court. (Resp. Exh. 5.) The superior court denied the petition with citation to *Dixon* as follows:

> Claim no. 4 is also denied as an improper use of the writ of habeas corpus. Any potential issue related to instruction 207 should have been raised on appeal but was not. Petitioner has failed to alleged facts establishing an exception to the rule barring habeas consideration of a claim that could have been raised on appeal. (*In re Dixon* (1953) 41 Cal.2d 756, 759 ["The general rule is that habeas corpus cannot serve as a

> substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction."]; *In re Reno* (2012) 55 Cal 4th 428, 491*; In re Harris* (1993) 5 Cal.4th 813, 825-826; *In re Smith* (1911) 161 Cal. 208.)

(Resp. Exh. 6 at AGO-000187.) This Court should likewise deny this claim. Under the general rule of *Dixon*, petitioner's failure to raise claim no. 3 on direct appeal would bar him from raising it on habeas.

III. PETITIONER HAS FAILED TO STATE A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO CLAIM NUMBERS ONE AND TWO

Petitioner raises two claims of ineffective assistance of counsel in his petition: (1) trial counsel was ineffective because he gave inaccurate advice about the law during plea negotiations, which caused him to reject a plea offer of 12 years; and (2) trial counsel was ineffective because he threatened to abandon petitioner if he informed the court that he was going to testify on his own behalf. (Pet. at 4 [claim no. 1]; [claim no. 2].) Because petitioner fails to make a prima facie case for relief, these claims should be denied.

A. Applicable law

The burden of proving a claim of ineffective assistance of counsel is on the petitioner. (*People v. Cox* (1991) 53 Cal.3d 618, 655.) To demonstrate ineffectiveness, the petitioner must show that: (1) counsel's performance was deficient, i.e., it fell below an objective standard of reasonableness under prevailing

professional norms, and (2) counsel's performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 ("*Strickland*"); *In re Jones* (1996) 13 Cal.4th 552, 561; *In re Cordero* (1988) 46 Cal.3d 161, 180.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland, supra*, 466 U.S. at p. 697.)

Strickland recognized that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant." (466 U.S. at p. 689.) "Rare are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach." (*Harrington v. Richter* (2011) 562 U.S. 86, 106 [counsel not ineffective for not consulting a blood expert].)

"'[T]he wholly unremarkable fact [is] that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel.'" (*Dyer v. Calderon* (9th Cir. 1997) 122 F.2d 730, 733.)

B. Petitioner has not established that trial counsel's performance was deficient

Petitioner contends (1) trial counsel was ineffective because he gave inaccurate advice about the law during plea negotiations, which caused him to reject a plea offer of 12 years; and (2) trial counsel was ineffective because he threatened to abandon petitioner if he informed the court that he was going to testify on his own behalf.

1. Inaccurate advice during plea negotiations

As to his first claim, petitioner fails to demonstrate his counsel was ineffective for providing allegedly inaccurate advice during plea negations.

a. Relevant Background

Relevant here, petitioner was charged in counts 1 and 2 with oral copulation or penetration of a child under age 10 under section 288.7, subdivision (b), which provides: "Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life."

Section 289 defines "Sexual penetration" as "the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1).)

As previously noted, petitioner was found guilty of the oral copulation or penetration of a child under age 10 (§ 288.7, subd. (b)) and three counts of committing a lewd act on a child under age 14 (§ 288, subd. (a)) and was sentenced to 12 years plus 15 years to life in state prison, which comprised, in part, of a 15-year-to-life term for the oral copulation or penetration of a child under age 10.

Petitioner filed a habeas petition in the superior court raising the same claim here, that he was given erroneous advice about the law and did not make an informed decision when he rejected a plea offer. (Resp. Exh. 5) After an order to show cause was issued, an evidentiary hearing was held. (Resp. Exh. 11.)

At the hearing, petitioner testified he was represented at trial by Franklin Adler and Davida Rosenthal. (Resp. Exh. 11 at AGO-000311-312.) He indicated his attorneys informed him of the charges, and he was provided with a copy of the felony complaint. (Resp. Exh. 11 at AGO-000314.) Petitioner claimed he did not receive a copy of the information following the preliminary hearing. (Resp. Exh. 11 at AGO-000314.) Petitioner discussed the charges with counsel and was told he was facing a life sentence if convicted. (Resp. Exh. 11 at AGO-000315.) Before the preliminary hearing, he discussed the elements of the charges with counsel. (Resp. Exh. 11 at AGO-000316.) Petitioner claimed Mr. Adler read him the "force, duress, violence, or threats" language from the Penal Code regarding section 289, and showed him the police report indicating there was no violence or penetration. (Resp. Exh. 11 at AGO-000316.) According to

petitioner, Mr. Adler told him that because there was no evidence of penetration or force or fear, there was no evidence to convict him of violating section 288.7, subdivision (b). (Resp. Exh. 11 at AGO-000317-318.)

Petitioner testified that he believed the maximum sentence he could receive was 12 years so he rejected a 12-year settlement offer. (Resp. Exh. 11 at AGO-000318.) He believed the maximum he could receive was 12 years, notwithstanding he was facing a life term, because both his attorneys "made it very clear that they would have to prove force, duress, violence and threats and also penetration, and there was every (sic) no evidence of such."[4] (Resp. Exh. 11 at AGO-000318-319.) While his attorneys did not guarantee he would not be convicted, they told him that there was no evidence to support the section 288.7 charge. (Resp. Exh. 11 at AGO-000319.)

Petitioner testified that before the preliminary hearing, he countered the prosecution's 12-year offer with a three-year offer. (Resp. Exh. 11 at AGO-000320.) His attorneys told him that offer was rejected. (Resp. Exh. 11 at AGO-000321.)

According to petitioner, he was not shown the relevant CACRIM instructions until "days before trial." (Resp. Exh. 11 at AGO-000322.) Before that, he had only been shown the Penal

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[4] Penal Code section 289, subdivision (a)(1)(A) provides: "Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years."

Code. (Resp. Exh. 11 at AGO-000322.) He repeated his claim that he was told the prosecution did not have enough evidence to convict him of violating section 288.7, subdivision (b), and he "had zero worry that [he] would be convicted" of that crime. (Resp. Exh. 11 at AGO-000323-324.) He claimed he was told that crime required the prosecution to prove force, duress, violence, and threats. (Resp. Exh. 11 at AGO-000324.) Because of these discussions, which occurred prior to the preliminary hearing, he turned down the prosecution's 12-year offer. (Resp. Exh. 11 at AGO-000325.) He claimed that had he known the true elements of the crime, he would have accepted the prosecution's 12-year offer. (Resp. Exh. 11 at AGO-000326.) As far as he knows, the prosecution offer of 12 years never changed. (Resp. Exh. 11 at AGO-000327-328.)

On cross-examination, petitioner testified that he asked his attorneys if he was facing 15 years to life in prison and was told that there was no evidence to support that charge because there was no evidence of force, duress, violence, threats, or penetration. (Resp. Exh. 11 at AGO-000333-335.) His attorneys never told him that he could not be convicted, but they said there was no evidence to support a conviction. (Resp. Exh. 11 at AGO-000335.) Petitioner indicated he did not understand the ramifications of what was happening at his preliminary hearing. (Resp. Exh. 11 at AGO-000336.) After he heard the testimony, he understood the allegations against him. (Resp. Exh. 11 at AGO-000337-338.)

Petitioner claimed he only read the Penal Code sections and was never shown the relevant CALCRIMs. (Resp. Exh. 11 at

AGO-000340.) Shortly before the end of his trial, after the prosecution rested, Adler told him that force, duress, violence, or threats was not required, and he apologized. (Resp. Exh. 11 at AGO-000341.) Counsel told him that he had "an iron-clad alibi," and the jury would not find him guilty of the section 288.7 charges. (Resp. Exh. 11 at AGO-000341-342.)

On redirect examination, petitioner claimed that Adler never told him to accept the 12-year deal. (Resp. Exh. 11 at pp. AGO-000349-350, 357.) He claimed that when he finally learned that force or violence were not elements of the charged crime, it was too late to try to settle the case. (Resp. Exh. 11 at AGO-000353.) He repeated that he was told that there was no evidence to support a conviction of section 288.7, subdivision (b), which is what he relied on to reject the plea offer. (Resp. Exh. 11 at AGO-000355-356.)

One of petitioner's attorneys, Davida Rosenthal, testified she was present during discussions of the elements of the crime, and petitioner was "absolutely" aware he faced a life sentence. (Resp. Exh. 11 at AGO-000367.) She recalled that petitioner was offered a 12-year deal by the prosecution, and the defense countered with a three-year deal after discussions with petitioner and Adler. (Resp. Exh. 11 at AGO-000369-371.) Although petitioner maintained his innocence, they discussed the consequences of the section 288.7, subdivision (b) counts. (Resp. Exh. 11 at AGO-000371.) She was not present for any discussion regarding insufficient evidence to conviction him of a violation of section 288.7, subdivision (b). (Resp. Exh. 11 at AGO-000372-374.) The

elements of the crime were discussed with petitioner. (Resp. Exh. 11 at AGO-000373.) Rosenthal never told petitioner that because there was no force or violence, he could not be convicted of violating section 288.7, subdivision (b). (Resp. Exh. 11 at AGO-000374, 388.) She was not present if Adler told petitioner that force, violence, and penetration were required elements. (Resp. Exh. 11 at AGO-000378, 380.) Counsel indicated that they told petitioner that the 12-year offer was something he should "strongly consider." (Resp. Exh. 11 at pp. AGO-000375.) However, petitioner continued to maintain his innocence and wished to go to trial. (Resp. Exh. 11 at AGO-000375.) Counsel had concerns about the strength of the case, but petitioner maintained his innocence. (Resp. Exh. 11 at AGO-000381, 384.) Had there been a 14-to-16-year offer, she would have urged petitioner to take it. (Resp. Exh. 11 at AGO-000385.)

Lastly, petitioner's counsel Franklin Adler, who resigned from the State Bar with disciplinary charges pending (Resp. Exh. 11 at AGO-000411), testified that he and petitioner discussed the elements of section 288.7, subdivision (b) before the preliminary hearing. (Resp. Exh. 11 at AGO-000394-395, 419.) When meeting with petitioner, he always had the Penal Code and had the jury instructions on many occasions. (Resp. Exh. 11 at AGO-000395, 423-424.) Adler testified he did not tell petitioner that section 288.7, subdivision (b) required proof of force, fear, or duress. (Resp. Exh. 11 at AGO-000396, 419.) He read petitioner the jury instruction out of the book. (Resp. Exh. 11 at AGO-000397.) He never told petitioner there was no evidence to

sustain a conviction for violating section 288.7, subdivision (b). (Resp. Exh. 11 at AGO-000419.) Adler believed the prosecution offer to settle the case was for 12 years, and it occurred the last appearance date before the trial began. (Resp. Exh. 11 AGO-000399-400, 424.) Petitioner indicated he wanted to reject the offer. (Resp. Exh. 11 at AGO-000400.) He wanted to prove his innocence. (Resp. Exh. 11 at AGO-000401.) He urged petitioner to take the 12-year offer, which he thought was "a fantastic way out" because petitioner was facing a life sentence, which the two discussed. (Resp. Exh. 11 at AGO-000403-404.) Petitioner adamantly maintained his innocence. (Resp. Exh. 11 at AGO-000409.)

b. Petitioner fails to make a prima facie case of ineffective assistance counsel as to claim no. 1

In claim no. 1, petitioner specifically contends that counsel erroneously told him that a violation of section 288.7, subdivision (b) required proof that the oral copulation or penetration occurred as a result of force, duress, menace, or fear of immediate and unlawful bodily injury. (Pet at pp. 7-8.) Thus, according to petitioner, because there was no evidence of force, duress, menace, or fear of immediate and unlawful bodily injury, he was certain he would avoid conviction on these charges, and therefore he rejected the prosecution's 12-year plea offer. (Pet at pp. 7-8.) As will be demonstrated, petitioner fails to make a prima facie showing in ineffective assistance of counsel.

Like ordinary claims of ineffective assistance of counsel, in order to establish a meritorious claim of ineffective assistance in

the context of a defendant's rejection of a proffered plea bargain, the defendant must show that counsel's representation was deficient, and that counsel's deficient performance subjected the defendant to prejudice. (*In re Alvernaz* (1992) 2 Cal.4th 924, 935; see also *Strickland, supra*, 466 U.S. at pp. 687-696.) "[D]eficient performance[] is established if the record demonstrates that counsel's performance fell below an objective standard of reasonableness under the prevailing norms of practice." (*Alvernaz, supra*, 2 Cal.4th at p. 937.)

"[T]o establish prejudice, a defendant must prove there is a reasonable probability that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." (*Alvernaz*, *supra*, 2 Cal.4th at pp. 937, 940-941.) "In determining whether a defendant, with effective assistance, would have accepted the offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." (*Alvernaz, supra*, 2 Cal.4th at p. 938.)

Here, the record indicates that petitioner was well-aware of the fact he faced a potential life sentence based on the charge crimes. Petitioner testified that counsel told petitioner the charges he faced and that he faced a life sentence if convicted.

(Resp. Exh 11 at AGO-000315.) His attorneys confirmed in their testimony that petitioner was "absolutely" aware he faced a life sentence. (Resp. Exh. 11 at AGO-000367.) Petitioner admitted he read the Penal Code and thus was familiar with the specifics of section 288.7, subdivision (b), a violation of which results in "punished by imprisonment in the state prison for a term of 15 years to life." (Resp. Exh. 11 at AGO-000322, 349.) As the superior court correctly determined, "there was no ambiguity about what Petitioner was accused of – both legally and factually – and he was fully informed." (Resp. Exh 11 at AGO-000318.)

Further, contrary to petitioner's claims, the evidence was conflicting as to whether petitioner was told by counsel that the prosecution was required to prove "force, duress, violence, and threats" before he could be convicted of violating section 288.7, subdivision (b). Respondent acknowledges that the trial court accepted petitioner's claim that the new trial motion and the sentencing memorandum counsel filed following trial "constitute circumstantial and corroborating evidence that Mr. Adler may have been misinformed regarding the meaning of the "as defined in section 289" language from subdivision (b) of section 288.7." (Resp. Exh. 11 at AGO-000325; see E069503 CT 309 [new trial motion], 322 [sentencing memorandum].) Further, respondent observes that in his declaration attached to the prosecution's return, Adler stated:

> I recall briefly discussing the elements of Penal Code Section 288.7(b) with [Petitioner] and stating that I believed the alibi evidence we had brought forth was not challenged in the least and, even if the jury did not "buy" our alibi, that the testimony of the child did not

> establish any evidence of force allegedly employed by [petitioner]; the child evidenced no "duress" because she either initiated or readily participated in alleged sexual events; there was no evidence that [petitioner] "menaced" the child nor was there evidence that he "intimidated" her.

(Resp. Exh. 10 at AGO-000269, ¶ 9.) Nevertheless, counsel did not request that the jury be instructed with CALCRIM No. 1045 regarding sexual penetration by force, fear or threats, suggesting counsel did not believe these were, in fact, required elements for the prosecution to prove. (See E069503 3 RT 477-484 [discussion of jury instructions].)

The evidence further shows that co-counsel Rosenthal testified that the elements of section 288.7, subdivision (b) were discussed with petitioner. (Resp. Exh. 11 AGO-000373.) Rosenthal testified that he never told petitioner that because there was no force or violence, he could not be convicted of violating section 288.7, subdivision (b). (Resp. Exh. 11 at AGO-000374, 388.) Additionally, Adler specifically testified that he discussed the elements of the crime with petitioner, and he did not inform petitioner that a violation of section 288.7, subdivision (b) required proof of force, fear or duress. (Resp. Exh. 11 at AGO-000396, 419.) Instead, he read petitioner the jury instruction[5]

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[5] The jury was instructed with CALCRIM No. 1128 which provided:

> The defendant is charged in Counts 1 and 3 with engaging in oral copulation or sexual penetration with a child 10 years of age or younger in violation of Penal

(continued…)

concerning a violation of section 288.7, subdivision (b) and read

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(…continued)

> Code section 288.7(b). To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant engaged in an act of oral copulation or sexual penetration with Jane Doe;
>
> 2. When the defendant did so, Jane Doe was 10 years of age or younger;
>
> 3. At the time of the act, the defendant was at least 18 years old.
>
> *Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.
>
> *Sexual penetration* means penetration, however slight, of the genital or anal opening of the other person or causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening or causing the other person to penetrate, however slightly, his or her own genital or anal opening by any foreign object, substance, instrument, device, or any unknown object for the purpose of sexual abuse, arousal, or gratification.
>
> Penetration of genital opening refers to penetration of labia majora not vagina.
>
> An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.
>
> A *foreign object*, substance, instrument, or device includes any part of the body except a sexual organ.

(E069503 1 CT 222.)

petitioner from the Penal Code, neither of which indicate that the prosecution was required to prove "force, duress, violence, and threats." (Resp. Exh. 11 at AGO-000395, 397, 423-424.) Thus while the evidence does suggest that Adler may have incorrectly believed that force, violence, duress, menace, and fear of unlawful bodily injury were elements of the charge, and he may have conveyed this belief to petitioner, there is no evidence, other than petitioner's self-serving statements, that this had any import on his decision to decline the prosecution's 12-year plea offer.

But in any event, petitioner's claim fails because petitioner has failed to demonstrate prejudice. As noted, this Court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed. (*Strickland, supra*, at p. 697.) Thus even assuming counsel told his client that the section 288.7, subdivision (b) charges required the prosecution to prove force, duress, violence or threats, petitioner has failed to prove there is a reasonable probability that, but for counsel's deficient performance, he would have accepted the proffered plea bargain. (*Alvernaz*, *supra*, 2 Cal.4th at pp. 937, 940-941.) The record shows that petitioner promptly rejected the prosecution's 12-year deal because he wanted to prove his innocence. (Resp. Exh. 11 at AGO-000381, 384, 400-401.) Defense counsel urged petitioner to take the 12-year offer, which he thought was "a fantastic way out" because petitioner was facing a life sentence, which the two

discussed. (Resp. Exh. 11 at AGO-000403-404.) However, petitioner adamantly maintained his innocence. (Resp. Exh. 11 at AGO-000409.) Counsel stated that he "strongly" advised petitioner to accept the offer, but petitioner "rejected [his] entreaty and the case went to trial." (Resp. Exh. 10 at AGO-000273, ¶ 12.)

Moreover, even crediting petitioner's testimony that before the end of this trial, Adler told him that force, duress, violence or threats was not required to prove the section 288.7, subdivision (b) charges (Resp. Exh. 11 at AGO-000341) there is no evidence that at that time, petitioner requested that his counsel reopen plea negotiations. Thus, the trial court correctly observed that "[t]he evidence establishes that Petitioner was never willing to accept a reasonable settlement of the case," believing that he "had an iron-clad alibi." (Pet Exh. 12 at AGO-000448.)

Although petitioner maintains he would have accepted a 12-year plea deal had he known the prosecution was not required to prove force, duress, violence or threats regarding the section 288.7, subdivision (b) charges, "[a] defendant's self-serving statement – after trial, conviction, and sentence - - that with competent advice he or should *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence." (*Alvernaz, supra*, 2 Cal. 4th at p. 938, italics in original.) "It is all too tempting for a defendant to second-guess counsel's assistance

after conviction or adverse sentence…" (*Strickland, supra*, 466 U.S. at p. 689.)

As the trial court aptly concluded,

> Petitioner did ***not*** have a "misconception as to the very nature of the proceeding and possible consequences." (*Alvernaz*, 2 Cal.4th 936, quoting *Beckham v. Wainwright* (5th Cir. 1981) 639 F.2d 262, 267.) Petitioner has failed to establish that he "received constitutionally inadequate representation by counsel" or that counsel's representation fell "below an objective standard of reasonableness under prevailing professional norms." (*Alvernaz*, 2 Cal.4th at 936.) The advice Petitioner received was "within the range of competence demanded of attorneys in criminal cases." (*Id.* at 937, quoting *McMann v. Richardson* (1970) 397 U.S. 759, 771.) Petitioner knew what the offer was, he understood the strength of the prosecution's case, and he was fully informed about what could happen if he lost at trial. Counsel urged Petitioner to take the offer, but Petitioner decided to take his chances with the jury based on the alibi defense. The evidence confirms that the matters complained about concerning counsel did not subject Petitioner to any prejudice. (*Alvernaz*, 2 Ca1.4th at 937.)

(Resp. Exh. 12 at AGO-000451-452.)

Because petitioner has failed to prove there is a reasonable probability that, but for counsel's deficient performance, he would have accepted the proffered plea bargain, petitioner has failed to demonstrate prejudice. The petition should be denied as to claim no. 1.

2. Testifying on his own behalf

In claim no. 2, petitioner asserts his trial counsel was ineffective because he allegedly threatened to abandon him if he chose to take the stand and testify on his own behalf. (Pet. at pp

10-11.) Even if petitioner's claim no. 2 is considered timely, it should be rejected because he fails to state a prima facie case for relief as petitioner again has failed to establish counsel was ineffective.

"A defendant in a criminal case has the right to testify in his or her own behalf. [Citations.] The defendant may exercise the right to testify over the objection of, and contrary to the advice of, defense counsel [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332.) "With respect to defendant's asserted desire to testify at trial, we are guided by well settled rules: '"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." [Citation.] The defendant's "absolute right not to be called as a witness and not to testify" arises from the Fifth Amendment to the United States Constitution and article I, section 15 of the California Constitution. [Citation.] Although tactical decisions at trial are generally counsel's responsibility, the decision whether to testify, a question of fundamental importance, is made by the defendant after consultation with counsel. [Citations.]'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1198.)

Here, the record demonstrates that prior to trial, the trial court told petitioner he had "an absolute right to testify in this case," and nobody, including his attorney, could prevent him from doing so. (E069503 1 RT 21-22.) Later, after the prosecution presented their case-in-chief, the trial court again told petitioner he had "an absolute right to testify in this case" and that "[no one could stop [him] from testifying." (E069503 2 RT 406.) Petitioner

indicated he understood this and stated, "As of now, I'm not testifying." (E069503 2 RT 406.) The trial court then found that petitioner made "an informed, knowing, and intelligent decision to reserve his right not to testify." (E069503 2 RT 407.)

The record further demonstrates that in a post-trial letter to petitioner attached to petitioner's superior court habeas petition, petitioner's counsel Adler indicated that he had strong beliefs that petitioner should not testify, and he anticipated "immense problems" with petitioner's possible testimony. (Resp. Exh. 5 at AGO-000165-166.) He explained that he "had good reason to believe that if the jurors had any doubt as to [petitioner's] guilt at the start of [his] testimony, those doubts would have been washed away," which was why he "objected as strenuously as [he] did" to petitioner testifying. (Resp. Exh. 5 at AGO-000166.) Adler then admitted that "as a device to get [petitioner] to change [his] mind about testifying, [he] threatened to abandon [petitioner], knowing full well that the judge would not permit [him] to evade [his] obligation to defend" petitioner. (Resp. Exh. 5 at AGO-000166.) He indicated that he "held no 'gun to [petitioner's] head' but [he] wanted to speak as strongly as possible to prevent [petitioner] from committing 'hari kari' on the witness stand." (Resp. Exh. 5 at AGO-000166.) Counsel further explained,

> I say this because I've seen how you react under extreme pressure. When the mother had you on the pre-text telephone call, instead of hanging up during the more than 20 times she accused you of molesting her daughter, you volunteered that you had masturbated in your car at Magic Mountain. The pressure of a pre-text

> call is nothing compared to the pressure of testifying in person in front of twelve jurors plus alternates - who want to convict and who are looking for the slightest excuse to convict when the state of the evidence prior to your potential testimony might have favored not guilty votes. I shudder to think how quickly they might have convicted you after your testimony.

(Resp. Exh. 5 at AGO-000166.)

Thus, it appears that counsel's admitted that he threatened to abandon petitioner should petitioner exercise his right to testify on his own behalf. An attorney cannot threaten to withdraw during a trial in order to coerce a defendant to relinquish his fundamental right to testify. (See *Nichols v. Butler* (1992) 953 F. 2d 1550, 1553 (11th Cir.).)

Nevertheless, as previously noted, where an ineffective assistance claim can be resolved solely on lack of prejudice, it is unnecessary to determine whether counsel's performance was objectively deficient. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.) Here, it is not reasonably probability that, but for counsel's failings, the result would have been more favorable to petitioner. (*Strickland, supra,* 466 U.S. at p. 687.)

Moreover, the denial of the right to testify is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18. (*People v. Allen* (2008) 44 Cal.4th 843, 848, 871-872; *People v. Johnson* (1998) 62 Cal.App.4th 608, 634-636.) Under *Chapman*, the denial of a defendant's right to testify is harmless error if it can be shown beyond a reasonable doubt that the error did not contribute to the guilty verdict. (*Johnson, supra,* 62 Cal.App.4th at p. 635.) The exclusion of a defendant's testimony

is harmless if the facts to which the defendant offered to testify would not have affected the verdict. (*People v. Allen* (2008) 44 Cal.4th 843, 872.)

Here, as petitioner's counsel recognized, placing petitioner on the witness stand would have subjected him to extensive cross-examination regarding his admissions that he masturbated in front of Doe in the Magic Mountain incident and that he touched and kissed Doe in Big Bear. As detailed by the court, during the pretext call, petitioner admitted the following:

> "In the cabin, she laid down on the bed and I touched her—I can't believe that I would do that." "[I]f I touched her, I never, I never, ever—there's no way I would penetrated. I'm sorry, not with a finger, not with a tool, not with anything, . . ." "[Mary]: "So maybe you touched her vagina, but you didn't penetrate. Is that what you're saying? I mean . . . . [Defendant]: That's what I'm saying." "She was flashing me and I kissed her on the cheek, and she flashed me again, and I kissed her on her side, on her hip." "This whole thing lasted two or three minutes and then I went and talked to Carol about it, and Carol and I decided that no more do I get to take them to [an amusement park] and stuff." "It was like dinner time. Cause I went downstairs to change and came right back up. We were, this whole thing was two or three minutes." "She pulled her pants all the way down, and I didn't pull em back up, I said, 'You need to pull those up.' That's all I said. Oh. That's when I—I tossed her on the bed. I picked her up and put her on the bed. So she was laying on the bed, you're right, and her pants were down. And I kissed her on the side." "I kissed her on the side of it on her hip . . . ." "[Mary]: If you didn't touch her with your hand, what did you touch her with? [Defendant]: I had to have kissed her, which is probably worse." "[A]nd she goes 'Don't look' and pulled her pants down again, and I picked her up and I put her on the bed and I kissed her on the side of the

> hip . . . .” “I did not do it with my hand. It had to be with my mouth . . . .” “I promise you I never touched her vagina in the cabin. The most I would have done is kissed next to it.” “I'm thinking at the most, I would have probably put my thumb above it, but I never would have touched it.” “She wasn't downstairs when I went downstairs. I went downstairs to change. She came back five minutes later.”
>
> Regarding the incident after the amusement park, defendant said the following during the pretext call: “[Defendant]: And I said, 'Take off your shirt and keep driving the car' and I don't know what I was thinking. [Mary]: And why did you pull your pants down? [Defendant]: Because I guess then I was aroused. I'm sorry. This is when I go to prison . . .I flashed her . . . . [¶] I showed her my thing. I did, you're right.”

(Resp. Exh. 3 at AGO-0000107-108.)

Moreover, in finding petitioner guilty of the charged crimes, the record clearly demonstrates that the jury did not believe petitioner's alibi defense. As the trial court rightly observed in denying this claim in petitioner's habeas petitioner before that court, “Petitioner was not prejudiced by this tactical decision. There were several aspects of the prosecution's case that could not be explained by Petitioner; having Petitioner testify would only have made the case stronger for the prosecution. If the Petitioner had testified, it would not have improved his chances with the jury. In other words, it is not “reasonably likely” that the outcome of Petitioner's trial would have been different if he testified.” (Resp. Exh. 9 at AGO-000228.) Further, in determining that there was no denial of petitioner's constitutional right to testify, the trial court held that any potential claim of error was harmless beyond a reasonable doubt:

> As explained in counsel's letter, there were "two immense problems with [his] possible testimony." There was no practical way to explain "masturbating in front of the child in the care at Magic Mountain," or Petitioner's admitted "picking the nearly nude child up, hurling her onto the bed and kissing her hip." This Court concludes that any hypothetical error related to the Petitioner not testifying was harmless beyond a reasonable doubt.

(Resp. Exh 9 at AGO-000233.)

Petitioner has not demonstrated a reasonable probability of a different outcome even had trial counsel allowed petitioner to testify in his own defense at trial. Claim number 2 of the petition should be denied.

IV. PETITIONER HAS FAILED TO STATE A PRIMA FACIE CASE WITH REGARD TO CLAIM NUMBER THREE

In claim number 3 of the petition, petitioner asserts that the trial court erred in instructing the jury with CALCRIM No. 207 which provides that the prosecution is not required to prove the actual date of the crimes. (Pet. at pp. 14-16, 19-20.) He additionally claims his counsel was ineffective for failing to request the jury be instructed with CALCRIM No. 3400 regarding the alibi defense. (Pet. at pp. 16-17, 20.)

Here, the amended information filed against petitioner alleged that the crimes in counts 1 through 6 were committed "On or about January 10, 2014 through January 12, 2014." (E069503 1 CT 151-158.) At trial, it was undisputed that petitioner and his wife were in Big Bear with the victim and her family during that time frame. Pursuant to CALCRIM No. 207 [Proof Need Not Show Actual Date], the jury was instructed a

follows: "It is alleged that the crimes charged occurred between January 10, 2014 and January 12, 2014. The People are not required to prove that the crime or crimes took place exactly in that time frame but only that it happened reasonably close to that time frame." (E069503 1 CT 195)

"CALCRIM No. 207 accurately states the general rule that when a crime is alleged to have occurred 'on or about' a certain date, it is not necessary for the prosecution to prove the offense was committed on that precise date, but only that it happened reasonably close to that date. (§ 955; *People v. Richardson* (2008) 43 Cal.4th 959, 1027; *People v. Jennings* (1991) 53 Cal.3d 334, 358-359." (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1304)

"[T]here is no authority for the proposition that when a defendant offers a partial alibi, the witness must specify that the crime occurred outside the period covered by the alibi." (*People v. Fortanel* (1990) 222 Cal.App.3d 1641.) "It is only 'when the prosecution's proof establishes the offense occurred on a particular day to the exclusion of other dates, and when the defense is alibi (or lack of opportunity), [that] it is improper to give the jury an instruction using the 'on or about' language." (*Rojas*, at p. 1304, quoting *Jennings, supra*, 53 Cal.3d at pp. 358-359.)

Here, although petitioner offered an alibi defense for the mornings of January 11 and January 12, 2014, the prosecution presented evidence that the crimes occurred outside those times. Namely, petitioner's own statement during the pretext phone call in which he indicated he touched the victim in the Big Bear cabin

during "dinner time." Consequently, the jury was properly instructed with CALCRIM No. 207.

In any event, any error in providing the instruction was harmless. Petitioner's alibi defense was presented to the jury. Petitioner was able to argue to the jury that he was not present during the times the victim said the crimes occurred. With the Big Bear Ski Resort manager's testimony, the jury was allowed to consider two daily sign-in sheets for January 11 and 12, 2014. Nonetheless, the jury rejected appellant's defense and concluded the crimes were committed by petitioner in Big Bear that weekend demonstrating that the jury believed the victim regardless of the time discrepancy revealed by the evidence. Petitioner's own words in the pretext phone call established that he touched the victim during "dinner time."

Petitioner further contends that his trial counsel should have requested the court give CALCRIM No. 3400, which informs the jury that "The defendant does not need to prove [he] was elsewhere at the time of the crime. [¶] If you have a reasonable doubt about whether the defendant was present when the crime was committed, you must find [him] not guilty."

However, even if the court would have been required to give the alibi instruction had counsel requested it, where the jury is given general instructions regarding reasonable doubt and the burden of proof, the failure to give an alibi instruction does not prejudice a defendant. This Court addressed this point in *People v. Freeman* (1978) 22 Cal.3d 434, (*Freeman*), and *People v. Alcala* (1992) 4 Cal.4th 742, (*Alcala*).

In *Freeman*, this Court concluded that trial courts do not have a sua sponte duty to give CALJIC No. 4.50, the equivalent of CALCRIM No. 3400, when an alibi defense is raised. (*Freeman, supra*, 22 Cal.3d at p. 437.) This Court noted that, in that case, the jury was instructed on the reasonable doubt standard of proof. (*Id.* at p. 438.) This Court concluded "[i]t would have been redundant to have required an additional instruction which directed the jury to acquit if a reasonable doubt existed regarding defendant's presence during the crime. . . . [N]o juror could possibly be misled by the failure to instruct on the significance of defendant's alibi defense. [Citation.]" (Ibid.)

In *Alcala*, this Court revisited the issue and again found there was no sua sponte duty to give an alibi instruction. (*Alcala, supra*, 4 Cal.4th at pp. 803-804.) This Court stated "[f]or the purpose of instructing with respect to an alibi defense, it is sufficient that the jury be instructed generally to consider all the evidence, and to acquit the defendant in the event it entertains a reasonable doubt regarding his or her guilt. [Citation.]" (*Id.* at p. 804) The defendant also argued he was denied effective assistance of counsel by his attorney's failure to request an alibi instruction. (*Ibid.*) The court rejected the contention, holding "[i]n light of our determination that the instructions given adequately apprised the jury of all relevant legal principles, any failure by counsel clearly was not prejudicial." (*Id.* at pp. 804-805.)

Here, the jury was instructed to acquit the petitioner in the event it entertained a reasonable doubt regarding his guilt

(CALCRIM Nos. 103, 220; E069503 1 CT 186, 197.) The court also gave an instruction on circumstantial evidence (CALCRIM No. 224; E069503 1 CT 201), which reminded the jury, "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt." Similarly, the court gave CALCRIM No. 359 (Corpus Delicti) which again instructed the jury, "You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." (E069503 1 CT 217.)

The trial court's instructions were sufficient to inform the jury that the prosecution bore the burden of establishing defendant's guilt beyond a reasonable doubt and that petitioner should be acquitted if the jury harbored a reasonable doubt. As the jury was adequately instructed on the burden of proof, trial counsel's failure to request an alibi instruction was not prejudicial and he was not deprived of the effective assistance of counsel. (*Freeman, supra*, 22 Cal.3d at p. 438; *Alcala, supra*, 4 Cal.4th at pp. 804-805.) The lack of prejudice is underscored by the extensive evidence of petitioner's guilt, including his admission during the pretext phone call. Accordingly, petitioner has not established a prima facia claim of ineffective assistance of counsel based on the lack of an alibi instruction.

Petitioner has failed to present a prima facie claim for relief regarding his claim the trial court erred by instructing the jury with CALCRIM No. 207 and his claim his attorney was

ineffective for failing to request CALCRIM No. 3400. Claim number 3 of the petition should also be denied.

CONCLUSION

Accordingly, respondent respectfully requests that this Court decline to issue an order to show cause and deny the petition for a writ of habeas corpus.

Respectfully submitted,

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March 7, 2024

CERTIFICATE OF COMPLIANCE

I certify that the attached **INFORMAL RESPONSE** uses a 13 point Century Schoolbook font and contains **11138** words.

ROB BONTA
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S/ Andrew Mestman
ANDREW MESTMAN
Deputy Attorney General
Attorneys for Respondent

March 7, 2024
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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **In re Sandstrom**
Case No.: **S281858**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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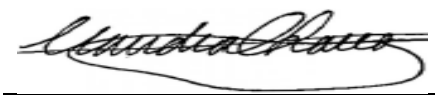
Ione, CA 95640

The Honorable Gregory Tavill
San Bernardino Justice Center
247 W. Third Street
Department S20
San Bernardino, CA. 92415

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on March 7, 2024, at San Diego, California.

Claudia Chavez
Declarant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STATE OF CALIFORNIA
Supreme Court of California

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3/7/2024

Date

/s/Claudia Chavez

Signature

Mestman, Andrew (203009)

Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

Law Firm