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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Alfred Copeland,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.  
14

No. CV-13-02278-PHX-JJT

**ORDER**

15 At issue is whether Petitioner has sufficiently established his actual innocence of  
16 Counts 3 and 6 of the Indictment—which correspond to Grounds 1 and 2 of his Habeas  
17 Corpus Petition. Grounds 1 and 2 allege ineffective assistance of trial counsel (IAC)  
18 relating to Counts 3 and 6. However, Petitioner’s IAC claims are defaulted and barred  
19 unless the Court concludes that Petitioner has shown his actual innocence of Counts 3 and  
20 6. For the following reasons, the Court concludes that he has not.

21 **I. BACKGROUND**

22 In June 2015, Judge Rosenblatt ordered an evidentiary hearing in this matter to  
23 determine whether Petitioner could sufficiently establish his innocence of Counts 3 and 6  
24 to pass through the Schlup “gateway” and receive substantive consideration of his IAC  
25 claims. (Doc. 28.) Schlup v. Delo, 513 U.S. 298 (1995). On January 23, 2020, this Court  
26 vacated the evidentiary hearing upon the Parties’ joint request and ordered simultaneous  
27 briefing on whether Petitioner has met his burden of proving actual innocence under  
28 Schlup. (Doc. 143.)

1           The Court has reviewed the Parties’ briefs and all of the evidence. It sets forth the  
2 relevant factual and procedural history below.

3           **A.     Petitioner’s Trial**

4           In 2002, a jury convicted Petitioner of 11 counts of sexual misconduct, including  
5 Count 3 (sexual conduct with a minor) and Count 6 (incest). (Doc. 15–4 at 140–43.) LP,  
6 Petitioner’s granddaughter, was the victim of Count 3, and DP, Petitioner’s daughter, was  
7 the victim of Count 6.<sup>1</sup> Specifically, Count 3 charged Petitioner with intentionally or  
8 knowingly engaging in sexual intercourse or oral sexual contact with LP while she was  
9 under 15 years old between February 1, 2001 and August 24, 2001. (Doc. 1 at 17–18.)  
10 Count 6 charged Petitioner with committing incest with DP between January 1, 2001 and  
11 August 24, 2001. (Doc. 1 at 18–19.)

12           Various witnesses testified against Petitioner and described his charged and  
13 uncharged sexual conduct over the span of decades. Several members of his family  
14 testified, including LP, DP, Tracy Beauchamp (Petitioner’s daughter), Carla Grant  
15 (Petitioner’s stepdaughter), Kathy Underwood (Petitioner’s stepdaughter), Ernest  
16 Copeland (Petitioner’s son), and KC (Petitioner’s grandson). (Doc. 15–2, 15–3, 15–4.)  
17 Other witnesses testified for the State, including child forensic interviewer Wendy Dutton,  
18 pediatrician Dr. Catherine Coffman, and Phoenix Police Detective Jerry Barker.  
19 (Doc. 15-2, 15–4.)

20           **1.     Trial Evidence proving Count 3.**

21           LP testified that she did not remember or did not know the answer to several  
22 questions regarding Petitioner. She never specifically testified that Petitioner had sexual  
23 intercourse or oral sexual contact with her. (Doc. 15–2 at 139, 146–47). However, LP  
24 testified that Petitioner touched her on her “private.” (Doc. 15–2 at 135.) Specifically, LP  
25 testified that Petitioner touched her in the living room while she was sleeping. (Doc. 15–2  
26 at 137.) She testified there were no other times that Petitioner touched her on her private.

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28           <sup>1</sup> Count 6 corresponds to Petitioner’s IAC claim in Ground 1 of his habeas petition.  
(Doc. 28 at 10.) Count 3 corresponds to his IAC claim in Ground 2. (Doc. 28 at 13.)

1 (Doc. 15–2 at 138.) LP also testified that Petitioner pinched her chest but could not  
2 remember if anything ever happened to the inside of her private. (Doc. 15–2 at 140.)  
3 Finally, she testified that she was afraid of Petitioner but was not afraid of other family  
4 members, and that other family members had not done anything to her private areas but  
5 she was unsure whether Petitioner had. (Doc. 15–2 at 144–46.)

6 LP did not remember her interviews with forensic interviewer Wendy Dutton, but  
7 Dutton testified at trial regarding those interviews. (Doc. 15–2 at 159.) LP did not disclose  
8 abuse during the first interview, but she did so disclose during the second interview six  
9 months later. (Doc. 15–2 at 175.) During the second interview LP described various acts  
10 by Petitioner, including: (1) touching her in places he was not supposed to, (2) locking her  
11 in his room, (3) touching her “fish,” (4) hurting and pinching her, (5) touching her under  
12 her clothes, and (6) touching her in DP’s room. (Doc. 107, Ex. F; Doc. 112.) This interview  
13 was played for the jury at trial. (Doc. 15–2 at 177.)

14 Dr. Coffman, a pediatrician who specializes in child abuse evaluations, testified  
15 regarding her August 30, 2001 evaluation of LP. (Doc. 15–3 at 4.) Dr. Coffman testified  
16 that LP’s hymen was abnormal and the missing and narrowed hymenal tissue indicated that  
17 LP’s vaginal canal had been repeatedly penetrated. (Doc. 15–3 at 13–20.) These findings  
18 were consistent with sexual abuse. (Doc. 15–3 at 20.) Dr. Coffman also rejected the  
19 possibility that LP’s abnormal hymen was caused by an accidental injury. (Doc. 15–3 at  
20 17–19.)

21 KC and Cathy Underwood both testified about an incident where LP went missing  
22 from home for some amount of time. (Doc. 15–2 at 102, Doc. 15–3 at 83.) KC testified that  
23 two weeks before Petitioner was arrested, LP could not be located after school and  
24 members of the family went looking for her. (Doc. 15–2 at 102–05.) They called her name  
25 throughout the house but could not find her for 30 minutes according to KC. KC found her  
26 in Petitioner’s bedroom after he knocked on Petitioner’s bedroom door and called his name  
27 repeatedly. It took Petitioner five minutes to open the door, and when he did KC saw LP  
28 laying on his bed staring at the ceiling. Cathy Underwood described the incident similarly,

1 except she testified that they looked for LP for over two hours and when Petitioner opened  
2 the door he was in his underwear. (Doc. 15-2 at 85-87.)

3 **2. Trial evidence proving Count 6.**

4 DP testified that she had sex with Petitioner during the Summer of 2001. (Doc. 15-  
5 3 at 122.) She also testified that they first had sex when DP was 13 years old and that her  
6 first sexual encounter with Petitioner was when she was five years old, but he blamed the  
7 encounter on her. (Doc. 15-3 at 114, 116-17.) She had previously accused Petitioner of  
8 sexual misconduct in the 1970's but recanted after being pressured by her mother and  
9 grandmother. (Doc. 15-3 at 120-21.)

10 DP was the only witness who testified that she had sex with Petitioner during the  
11 relevant period. However, other witnesses testified about uncharged sexual activity they  
12 witnessed between DP and Petitioner. KC testified that DP told him Petitioner had  
13 molested DP since adolescence. (Doc. 15-2 at 92-93.) Carla Grant described sexual acts  
14 Petitioner made her participate in with DP and Petitioner. (Doc. 15-3 at 32-35.) Cathy  
15 Underwood testified that she witnessed Petitioner sexually touch DP and that Petitioner  
16 told her that he had sex with DP. (Doc. 15-3 at 77-78.) Tracy Beauchamp testified that  
17 Petitioner told her that he impregnated DP when she was 19 and made her have an abortion.  
18 (Doc. 15-4 at 16.)

19 The trial court's instructions allowed the jurors to consider circumstantial evidence  
20 in deciding the case. (Doc. 15-4 at 61-63.) Jurors could also consider whether Petitioner  
21 had a character trait that predisposed him to commit the charged crimes if they determined  
22 by clear and convincing evidence that he committed other uncharged illicit sexual acts.  
23 (Doc. 15-4 at 63-64.) Nevertheless, the jury could not convict Petitioner simply because  
24 of his character or because he committed prior illicit sexual acts. (Doc. 15-4 at 64.) Finally,  
25 the trial court instructed the jurors to decide each count separately. (Doc. 15-4 at 63.)

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1           **B.     DP's and LP's recantations.**

2                   **1.     The 2009 Letters**

3           Petitioner attached to his habeas petition notarized letters signed by DP and LP in  
4 2009 that recanted their trial testimony, alleged coercion and coaching of their testimony  
5 by the State, and offered an alternative cause for LP's abnormal hymen. (Doc. 1 at 28,  
6 Doc. 1-1 at 3.) LP's letter was signed on June 5, 2009 (LP Letter 1). (Doc. 1-1 at 3.) DP's  
7 letter was signed on August 7, 2009 (DP Letter 1). (Doc. 1 at 28.) LP claimed that she  
8 testified against Petitioner because she had been taken away from her family, and that a  
9 severe yeast infection and attendant scratching likely caused her abnormal hymen. (Doc.  
10 1-1 at 3.) DP claimed that the incest charge was false and that the State coerced her  
11 testimony against Petitioner by threatening her with prison time and losing LP. (Doc. 1 at  
12 28.) LP reaffirmed her first letter in a second letter dated June 19, 2009 (LP Letter 2) and  
13 added that her recantation was not the product of coercion or influence. (Doc. 1-1 at 4.)

14                   **2.     The 2015 Letters**

15           After Magistrate Judge James Metcalf issued a Report and Recommendation to  
16 dismiss Petitioner's habeas petition in 2015, Petitioner submitted additional letters  
17 purportedly authored by LP and DP. (Doc. 23, 24, 26.) LP's letter was signed on March 18,  
18 2015 (LP Letter 3). (Doc. 26.) DP's letter was signed on February 5, 2015 (DP Letter 2).  
19 (Doc. 23.) These letters generally recanted LP's and DP's trial testimony, and LP  
20 specifically claimed that her aunts, her brother, and the prosecutor told her she had to  
21 accuse Petitioner. However, these letters were not notarized.

22           Petitioner submitted additional letters in 2015 signed by LP and DP. LP's letter was  
23 signed on August 28, 2015 (LP Letter 4). (Doc. 60-2 at 2-3.) DP's letter is unsigned, but  
24 it was notarized in 2018 and filings indicate it was drafted in 2015 (DP Letter 3). (Doc. 60-  
25 1 at 3.) DP's letter disputes that Petitioner groped LP under her clothes or hurt her, and  
26 asserts this claim was made up by the prosecutor. (Doc. 60-1 at 3.) The letter further states  
27 that the incident when LP was missing and found in Petitioner's room did not happen.

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1 (Doc. 60–1 at 3–4.) LP’s letter recants her testimony and claims she was coached to  
2 incriminate Petitioner. (Doc. 60–2 at 3.)

### 3 **3. DP’s 2015 Telephonic Interview**

4 On September 21, 2015, DP participated in a telephonic interview with counsel for  
5 Petitioner and Respondents. (Doc. 148.) During the interview DP stated that there was  
6 never any sexual contact between her and Petitioner and that she was coerced by the  
7 prosecutor to testify that there was. (Doc. 148 at 9–10.) She also stated that she understood  
8 she could be charged with perjury for recanting her testimony if she testified consistent  
9 with her recantation. (Doc. 148 at 10.) She claimed that she drafted some of the recantation  
10 letters authored by her and LP despite the inconsistent handwriting across the letters.  
11 (Doc. 148 at 6.)

12 Specifically, DP claimed that she was threatened with going to prison for 25 years  
13 unless she inculpated Petitioner. (Doc. 148 at 11.) . She also described an incident where  
14 she took LP to an emergency clinic because LP had a yeast infection and scratched herself  
15 and caused herself to bleed. (Doc. 148 at 15–16.) However, she did not have any medical  
16 records to corroborate the event. (Doc. 148 at 15–16.) Respondent’s counsel asked DP  
17 questions regarding the timing of her recantations and the circumstances surrounding DP’s  
18 trial testimony and the alleged coercion. DP claims she wrote Petitioner one month after  
19 trial explaining why she erroneously accused him. (Doc. 148 at 23–25.) She also claims  
20 she waited years to officially recant because there was no longer a risk of her losing her  
21 children. (Doc. 148 at 26.) Finally, DP stated that she would likely be unable to attend a  
22 live hearing or deposition because of financial hardship. (Doc. 148 at 48.)

### 23 **4. LP’s 2019 Deposition**

24 LP appeared for a deposition on September 13, 2019. (Doc. 152.) LP admitted to an  
25 incomplete recollection of everything that happened during the time period surrounding  
26 Petitioner’s trial. (Doc. 152 at 73.) However, she testified unequivocally that Petitioner did  
27 not touch her sexually and that she would remember if he did. (Doc. 152 at 16.) She also  
28 testified that she testified untruthfully at trial and did so because she was coached by the

1 prosecutor and was told that her testimony was the only way she could return home after  
2 she was taken from her parents' custody. (Doc. 152 at 18–19.) Furthermore, she claimed  
3 that she had a history of yeast infections and previously had scratched herself until she  
4 bled. (Doc. 152 at 34.) She could not say whether the infections caused her abnormal  
5 hymen, but she stated that DP took her to an emergency clinic in August 2001 for treatment.  
6 (Doc. 152 at 35.) Finally, she adopted the recantations in the letters submitted by Petitioner  
7 but claimed that Petitioner drafted LP Letters 1, 2, and 4, and that Petitioner or DP drafted  
8 LP Letter 3.

## 9 **II. LEGAL STANDARDS**

10 A habeas court can reach a petitioner's procedurally defaulted or barred substantive  
11 claim if the petitioner passes through the *Schlup* actual innocence gateway. *Schlup*, 513  
12 U.S. at 314–15. This occurs when the petitioner provides evidence of his “innocence so  
13 strong that a court cannot have confidence in the outcome of the trial unless the court is  
14 also satisfied that the trial was free of nonharmless constitutional error.” *Schlup*, 513 U.S.  
15 at 316. The gateway is not itself substantive relief; it provides only a path to consideration  
16 of an otherwise barred claim for substantive relief. The gateway exists to prevent “a  
17 fundamental miscarriage of justice.” *Id.* at 314–15. Tenable actual innocence claims are  
18 rare. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

19 To pass through the gateway to a merits review, a petitioner must provide new and  
20 reliable evidence that makes it more likely than not that no reasonable juror would have  
21 found him guilty at trial. *Schlup*, 513 U.S. at 329. The Court must first determine whether  
22 the petitioner has offered evidence that is both new and reliable. Then the Court must  
23 evaluate whether no reasonable and properly instructed juror would have convicted the  
24 petitioner considering all the evidence, new and old. Thus the Court makes a probabilistic  
25 determination about what a reasonable juror would do if she considered all of the evidence  
26 supporting and undermining a petitioner's guilt on a given count. If no reasonable juror  
27 would convict, then the petitioner passes through *Schlup's* gateway. The Court is not bound  
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1 by the evidentiary rules of admissibility and may consider evidence that was available,  
2 unavailable, or excluded at trial. *Id.* at 327–28.

### 3 **III. ANALYSIS**

4 Petitioner and Respondents focus their arguments at different points along *Schlup*'s  
5 actual innocence standard. Petitioner essentially assumes that the recantations constitute  
6 “new and reliable” evidence of his innocence on Counts 3 and 6, and therefore primarily  
7 focuses on whether a reasonable juror would have convicted him in light of that evidence.  
8 (Doc. 144, Pet. Br. 4–11.) Petitioner claims that the trial evidence on Counts 3 and 6 was  
9 thin, and consequently, the recantations undermine the already thin evidence such that no  
10 reasonable juror would have convicted him of those counts.

11 Respondents assert that the Court need not consider whether a reasonable juror  
12 would have convicted Petitioner of those counts because Petitioner has not provided  
13 “reliable” evidence of his innocence. (Doc. 146, Resp. Br. at 22.) Respondents base this  
14 argument on various circumstantial irregularities, which they claim undermine the  
15 creditability of the recantations. (Resp. Br. at 22–30.) For example, Respondents highlight  
16 that the written recantations were not made under oath, were made by Petitioner’s family  
17 members, were created several years after Petitioner’s trial, and, in some cases, appear to  
18 be written by Petitioner himself. (Resp. Br. at 22–30.) See *Jones v. Taylor*, 763 F.3d 1242,  
19 1249 (9th Cir. 2014) (finding that the reliability of a recantation can be affected by its  
20 timing or the witness’s relation to the accused). Nevertheless, Respondents assert in the  
21 alternative that even if the recantations are “new and reliable,” a reasonable juror would  
22 still convict Petitioner on both counts. (Resp. Br. at 30.)

23 Notwithstanding the circumstantial peculiarities of the recantations that  
24 Respondents identify, the Court concludes that the recantations are “new and reliable”  
25 evidence of Petitioner’s innocence on Counts 3 and 6. The written recantations of DP and  
26 LP, DP’s telephonic interview, and LP’s deposition are all new and contain sufficient  
27 indicia of reliability to constitute “new and reliable” evidence.<sup>2</sup> Nevertheless, the Court

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28 <sup>2</sup> Though DP did not appear for a deposition, the Court still considers her telephonic



1 considers the irregularities noted by Respondent in its analysis of whether a reasonable  
2 juror would convict Petitioner.

3       Though Petitioner provides new and reliable evidence of his innocence, the Court  
4 still concludes that a reasonable and properly informed juror with all the evidence would  
5 find him guilty of Counts 3 and 6. The recantations implicate the credibility of DP and LP,  
6 but the juror would still likely conclude that the collective truth of all of their statements  
7 was that they were sexually assaulted by Petitioner consistent with the allegations of  
8 Counts 3 and 6. Furthermore, their victim testimony was not the sole evidence of those  
9 counts, so the evidence at trial was not as thin as Petitioner asserts.

10       **A. A reasonable juror considering all the available evidence would convict**  
11       **Petitioner of Count 3.**

12       To evaluate Petitioner’s actual innocence claim on Count 3, the Court must weigh  
13 all of the evidence and determine whether a reasonable juror would convict Petitioner. LP’s  
14 four letters and her deposition testimony do not substantially undermine the evidence  
15 available at trial, so the Court cannot conclude that a reasonable juror would not convict  
16 Petitioner on Count 3. The Court reaches this conclusion for four reasons. First, LP’s  
17 recantations do not necessarily contradict her trial testimony. Second, her recantations  
18 contradict established facts at trial and her memory is admittedly incomplete. Third, a  
19 reasonable juror considering all of the evidence would still believe LP’s accusations rather  
20 than her recantations. Fourth, other witness testimony at trial proved Count 3.

21       **1. LP’s testimony regarding her yeast infections does not necessarily**  
22       **undermine Petitioner’s guilt of Count 3.**

23       In her recantations, LP provided an alternate theory regarding her abnormal  
24 hymen—severe yeast infections that caused her to scratch herself until she bled. (Doc. 152.

25 \_\_\_\_\_  
26 interview because Schlup instructs the habeas court to consider all available evidence.  
27 Schlup, 513 U.S. at 327–28. Whether the interview constitutes “new and reliable” evidence  
28 evidentiary hearing. (Doc. 139.) Nevertheless, in evaluating the weight of DP’s interview,  
the Court will consider her failure to appear for a deposition, her explanation that her  
absence was due to financial inability, and the opportunity of counsel for the parties to  
examine her telephonically.

1 at 34–36.) These yeast infections occurred throughout LP’s childhood before the alleged  
2 conduct underlying Count 3. (Doc. 152. at 34–36.) DP referenced the yeast infections  
3 during her interview with a police office before trial, although she claimed they only  
4 occurred when LP was a baby. (Doc. 60–2 at 5.)

5 However, LP testified that she did not know whether her yeast infections and  
6 scratching caused her abnormal hymen. (Doc. 152. at 35.) Thus the hypothetical reasonable  
7 juror would not hear definitive testimony that LP’s abnormal hymen was caused by yeast  
8 infections. Instead, a juror would only be presented with conjecture that could raise an  
9 inkling of doubt about the cause of LP’s abnormal hymen.

10 Furthermore, this competing cause does not square with the rest of the evidence.  
11 During a police interview, DP stated that the yeast infections only occurred while LP was  
12 a baby. (Doc. 60–2 at 5.) This aligns with DP’s trial testimony that LP had a rash that did  
13 not require medical attention. (Doc. 15–3 at 130.) Although Petitioner’s trial counsel  
14 elicited that LP could not remember all of her injuries, this fact does not provide definitive  
15 proof that Petitioner did not sexually assaulted her. After all, the jury heard this fact at trial  
16 and still convicted Petitioner. (Doc. 15–2 at 155.)

17 Even if LP had yeast infections, the available medical evidence does not prove that  
18 they caused her abnormal hymen. Dr. Coffman testified that the damage to LP’s hymen  
19 was caused by trauma i.e., penetration. (Doc. 15–3 at 16.) She testified that it was consistent  
20 with abuse and not associated with fondling. (Doc. 15–3 at 20.) She did not testify that it  
21 could be caused by scratching or a yeast infection. Thus, even if a reasonable juror was  
22 presented with evidence of LP’s yeast infections and scratching, the medical evidence still  
23 indicates that her damaged hymen was caused by trauma.

24 Finally, LP’s yeast infections are unsubstantiated. During her phone interview, DP  
25 stated that she did not have any medical records to substantiate the claims related to the  
26 yeast infections. (Doc. 148 at 15–16) And although LP recalls going to a clinic for yeast  
27 infections, she could not remember where she was treated. (Doc. 152 at 34.)

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1           Ultimately, even if LP did have yeast infections and scratched herself aggressively,  
2 a juror could still find that fact consistent with Petitioner sexually assaulting LP. Indeed,  
3 the weight of the evidence indicates that a reasonable juror would find that LP’s history of  
4 yeast infections does not undermine Petitioner’s guilt.

5           **2. LP’s independent memory of the events surrounding Count 3**  
6           **undermines her recantations because it is incomplete and**  
7           **contradicts facts established at trial.**

8           LP unequivocally recanted her trial testimony stating that Petitioner did not touch  
9 her, and if he had, she would remember it. (Doc. 152 at 16.) Furthermore, she testified that  
10 she lied at trial because she was coached by the State and was told that it was the only way  
11 she would return to her family after being removed from her parents’ custody. (Doc. 152  
12 at 18–19) However, LP admits that she does not independently remember the events  
13 surrounding Count 3, remembers nothing about her childhood, and allowed the recantations  
14 to be drafted for her because of her lack of memory. (Doc. 152 at 40, 73.) Significantly, LP  
15 acknowledged that her memory was better at trial than it is now. (Doc. 152 at 74.)

16           LP’s memory undermines her recantations more than it does her trial testimony. LP  
17 admits to having very little memory regarding the events surrounding Count 3. And her  
18 requests that DP or Petitioner draft her statements because of her lack of memory casts  
19 doubt that her recantations truly reflect her recollection. Indeed, it is unclear whether LP  
20 has any recollection. Thus, her spotty memory highlights the problems inherent with  
21 recantations. See Jones, 763 F.3d at 1249 (“As a general matter, [r]ecantation testimony is  
22 properly viewed with great suspicion.”)

23           Additionally, LP’s recantations contradict established facts at trial. During her  
24 deposition she testified that she was not returned home until months after trial. (Doc. 152  
25 at 53.) However, at trial LP and DP testified that she had already been returned home by  
26 the time of trial. (Doc. 5–2 at 130, Doc. 5–3 at 98.) This fact does not necessarily prove  
27 that LP’s testimony was not coerced because she could still have believed (or been told)  
28 she would be removed from her home again if she did not accuse Petitioner. Still, it  
undermines her recantation because her memory of this fact is untrue. Similarly, LP also

1 testified at trial that no one coerced or coached her testimony, although her recantations  
2 directly contradict that testimony. (Doc. 15–2 at 157.) And while she did not recall any  
3 abuse during her first interview with Wendy Dutton, which favors Petitioner, there was  
4 testimony at trial by Dutton regarding possible dissociation from abuse. (Doc. 15–2 at 169–  
5 170.)

6 Ultimately the evidence points in either direction. LP’s recantation asserts that she  
7 was coerced into testifying, but her memory was admittedly better on the day of trial than  
8 it is now. Although LP has maintained her recantations for over ten years, she could not  
9 remember the details of her coercion without assistance from DP and Petitioner, and she  
10 did not assert them for several years after trial. See *Allen v. Woodford*, 395 F.3d 979, 994  
11 (9th Cir. 2005). Thus a reasonable juror would likely conclude that Petitioner is guilty of  
12 Count 3 based on LP’s memory.

13 **3. LP’s demeanor and exculpation of other family members**  
14 **inculpates Petitioner.**

15 The trial court instructed the jurors that when deciding the credibility of a witness  
16 the jurors could consider: “the manner of the witness while testifying; whether the witness  
17 seemed to have an accurate memory; whether the witness had some interest in how the case  
18 should be decided; whether the witness appeared to have any motive, bias, or prejudice  
19 which might affect the reliability of what the witness said; [and] whether the witness made  
20 any inconsistent statements before the trial or during the trial.” (Doc. 15–4 at 60.)  
21 Importantly, the jurors were not required to disregard a witness’s testimony if it was  
22 contradicted by another witness’s testimony or the witness’s own testimony. Instead, the  
23 jurors were instructed to “consider each witness’s testimony in light of all the other  
24 evidence in the case.” (Doc. 15–4 at 60–61.) Finally, although the jurors were instructed to  
25 consider each count separately, they were also permitted to consider circumstantial  
26 evidence, and if they concluded that certain uncharged acts were proven, they could  
27 consider whether Petitioner has a character trait that gives him a propensity for committing  
28 unlawful sexual conduct.

1           At trial, LP was asked whether various family members had hurt her, whether they  
2 had put anything in her private, and whether she was afraid of them. With respect to each  
3 family member—her mother, father, brothers, and uncle—LP testified that she was not  
4 afraid of them, they had not touched her private, and they had not hurt her. (Doc. 15–2 at  
5 144–46.)

6           When the prosecutor asked LP about Petitioner, her answers changed. She testified  
7 that she did not like Petitioner, she was afraid of him, and that she did not know if he  
8 touched her private or put anything inside of her. (Doc. 15–2 at 144–46.) She did not testify  
9 that Petitioner penetrated her, and she did not know why she was afraid of him. Instead,  
10 LP’s only trial testimony directly proving sexual conduct by Petitioner was her testimony  
11 that he touched her private area when she was in the living room and that Petitioner pinched  
12 her chest. But the living room incident was not the subject of Count 3 and neither was the  
13 alleged pinching.

14           Still, the jury instructions reveal that a properly instructed juror need not weigh LP’s  
15 trial testimony and her recantations in a vacuum. A reasonable, properly instructed juror  
16 could also consider the juxtaposition between LP’s exculpation of her other family  
17 members with her failure to exculpate Petitioner. Though she did not outright testify that  
18 Petitioner penetrated her, she testified that he committed sexual misconduct against her.  
19 Additionally, in contrast to her definitive exculpation of her other family members, LP did  
20 not say that Petitioner did not penetrate her. This juxtaposition would allow a reasonable  
21 juror to conclude that LP’s accusations against Petitioner were true, and that more serious  
22 conduct than she specifically testified to, in fact, occurred.<sup>3</sup> Indeed, her interview with  
23 Wendy Dutton that was played for the jury presented greater claims of abuse than LP  
24 testified to at trial.

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27           <sup>3</sup> The Court notes that LP testified specifically that she was not testifying “I don’t  
28 remember” because she did not want to talk about the subject matter of certain questions.  
(Doc. 15-2 at 140.) Still a juror would also have to consider LP’s admitted nervousness,  
her fear that Petitioner would hurt her, and the relative ease with which she talked about  
other family members.

1 Furthermore, a juror would also be allowed to consider LP's alleged fear of  
2 Petitioner. Based on other circumstantial evidence presented at trial, including testimony  
3 regarding uncharged sexual misconduct by Petitioner, a juror could conclude that similar  
4 conduct formed a basis for LP's fear of Petitioner. Then a juror could conclude that LP  
5 might be afraid to confront Petitioner not only because she was testifying in court at nine  
6 years old, but also because he had sexually assaulted her.<sup>4</sup>

7 **4. Other witnesses' testimony, the forensic interview video, and Petitioner's**  
8 **propensity to commit the charged sexual conduct prove Count 3.**

9 KC and Cathy Underwood testified about an incident where LP went missing from  
10 her home after school. (Doc. 15-2 at 102-05, Doc. 15-3 at 83-84.) The family searched  
11 for LP in and nearby the house but could not find her. KC and Underwood differed on the  
12 length of time they searched for LP, but she was missing between half an hour and two and  
13 a half hours. During the search, KC knocked on Petitioner's bedroom door a few times. He  
14 did not answer for a couple of minutes and then asked, "What do you want?" (Doc. 15-2  
15 at 102-05.) Petitioner did not open the door for several minutes, and when he did, he was  
16 in his underwear, according to Underwood but not KC. LP was laying in his bed on her  
17 back staring at the ceiling. This incident was essentially unrefuted at trial.

18 A reasonable juror would consider this testimony circumstantial evidence of  
19 Petitioner's guilt of Count 3. The evidence about this incident basically points in only one  
20 direction. Although DP claims that the incident did not occur because she claims Petitioner  
21 was working that day and his bedroom was always locked during the day, her refutation is  
22 incredible. (Doc. 60-1 at 3-4.) She lacks first-hand knowledge of the incident and her  
23 refutation is based on habit evidence about what Petitioner usually did. Moreover, her  
24 claims do not specifically refute the events since Petitioner's door could have been locked  
25 during the incident while he was in the room with LP. Ultimately, because Petitioner had

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26  
27 <sup>4</sup> The Court also notes that the substance of the testimony LP claims the State  
28 coached her to give—that Petitioner touched her private—does not match the charged  
conduct of Count 3. (Doc 1 at 17-18.) Therefore, the State needed more than LP's  
testimony to convict Petitioner on that count. The hypothetical diminution in the credibility  
of her testimony based on the recantations is not necessarily fatal to proving that count.

1 the opportunity to commit the acts underlying Count 3, the incident provides circumstantial  
2 evidence that he did commit those acts.

3 Other acts evidence also prove that Petitioner has a character that predisposed him  
4 to commit the acts underlying Count 3. Extensive evidence was produced at trial of  
5 Petitioner's uncharged sexual acts with DP, Carla Grant, Kathy Underwood, and Tracy  
6 Beauchamp during their adolescences. (Doc. 15-3 at 34, 43, 69-70, 79; Doc. 15-4 at 16-  
7 17.) The Court can consider what a properly instructed juror would conclude about this  
8 evidence and the recantations. At trial, a juror would consider this evidence and determine  
9 that Petitioner "had a character trait that predisposed him to commit the crimes charged."  
10 (Doc. 15-4 at 63-64.)

11 The Court concludes that a reasonable and properly instructed juror would conclude  
12 that Petitioner committed the uncharged sexual conduct and had a propensity for such  
13 conduct. A reasonable juror would further conclude that Petitioner's propensity would be  
14 circumstantial evidence of his guilt of Count 3. The recantations do not seriously  
15 undermine the testimony regarding the uncharged sexual conduct, nor do they counteract  
16 the likelihood that a reasonable juror would conclude that Petitioner has a character trait  
17 that gives him a propensity for committing the charged conduct. Instead the recantations  
18 focus on explaining the motivations behind the testimony of DP and LP, but they do not  
19 implicate the motivations of other witnesses testifying against Petitioner.

20 Finally, LP's trial testimony was not the only evidence the jury heard or saw in  
21 which LP accused Petitioner. Her second forensic interview with Wendy Dutton was also  
22 played for the jury. (Doc. 15-2 at 177.) During the interview, LP recounted that Petitioner  
23 touched her in places he was not supposed to, including her private parts. (Doc. 107, Ex. F;  
24 Doc. 112.) She stated that it hurt, that he did it more than once under her clothes, and that  
25 at he locked her in his room. (Doc. 107, Ex. F; Doc. 112.) She also stated that Petitioner  
26 touched her in DP's room. (Doc. 107, Ex. F; Doc. 112.) The jurors were also able to view  
27 LP scribbling furiously while describing Petitioner's conduct, and a reasonable juror would  
28 conclude that she was nervous during the interview. Although there are competing

1 explanations for why she could be nervous, the weight of the evidence points to her being  
2 afraid of Petitioner because of what he did to her.

3 Consequently, a reasonable and properly instructed juror considering all of the  
4 evidence, including the recantations, would conclude that Petitioner is guilty of Count 3.  
5 Accordingly, Petitioner cannot pass through the Schlup gateway and receive consideration  
6 of his IAC claim on that count.

7 **B. A reasonable juror considering all the evidence would convict Petitioner**  
8 **of Count 6.**

9 Though the evidence proving Count 6 was possibly more limited than the evidence  
10 proving Count 3, the weight of the evidence still supports the Court's conclusion that a  
11 reasonable juror would convict Petitioner of Count 6. There was no direct evidence of  
12 Count 3; there was no witness that testified they saw Petitioner sexually assault LP.  
13 Conversely, there was direct evidence of Count 6 because DP testified that she had sex  
14 with Petitioner during the relevant time period. (Doc. 15-3 at 122.) DP recanted this  
15 testimony but her history of recantation, the testimony of other witnesses, and established  
16 facts that contradict her recantations indicate that her accusations rather than her  
17 recantations are true.

18 **1. DP's previous recantation and her uncooperativeness with the**  
19 **investigation of Petitioner indicate that her accusations against**  
20 **Petitioner are true.**

21 DP testified at trial that she previously recanted accusations of sexual abuse by  
22 Petitioner in the 1970s. (15-3 at 120-21.) DP testified at trial that Petitioner first had sex  
23 with her when she was 13 years old and also sexually abused her in other ways. (Doc. 15-  
24 3 at 119.) Nevertheless, after she was removed from her home and talked to her mother  
25 and grandmother, she changed her statement to police and recanted the abuse allegations  
26 against Petitioner. She never accused Petitioner again because she was afraid. (Doc. 15-3  
27 at 122.)

28 Undeniably, DP's testimony required the jury to sort through seemingly  
contradictory facts to evaluate her credibility. Her recantation via her letters and telephonic



1 interview complicate that task. The crux of her recantation is that she was threatened with  
2 prison and the loss of her child if she did not accuse Petitioner. Moreover, DP testified at  
3 trial that she was not cooperative in the investigation of Petitioner at the outset. Her  
4 explanation at trial for being uncooperative was that she was concerned that the accusations  
5 against Petitioner would not be taken seriously like when she was younger. Thus LP  
6 provides competing explanations for why she eventually cooperated with the investigation  
7 and prosecution of Petitioner. At trial it was that she saw that the investigation was being  
8 taken seriously and that Petitioner had gotten away with abuse for too long. Now it is that  
9 she was coerced.

10       Ultimately, it would be very difficult for a juror to perfectly square DP's motivations  
11 for changing her story at different times. DP now claims that there has never been sexual  
12 activity between her and Petitioner. This recantation contradicts her accusations in the  
13 1970's against Petitioner and her reason for recanting then—fear and coercion.  
14 Furthermore, her present recantation implies that her initial lack of cooperation with  
15 investigators was because Petitioner, in fact, had done nothing wrong.

16       But in light of all of the other evidence, it is DP's present recantation that a  
17 reasonable juror considering all the evidence would conclude is false. Consistent with her  
18 trial testimony, a juror would conclude that DP recanted when she was younger because  
19 she was pressured and was afraid of being away from her family. A juror would also  
20 conclude that DP was initially uncooperative with the investigation of Petitioner because  
21 she was embarrassed about her sexual activity as an adult with Petitioner and she was afraid  
22 of the consequences of accusing him. (Doc. 15–3 at 125.)

23       Finally, in light of her testimony that Petitioner was intimidating and manipulative,  
24 DP's present recantations would be looked at with suspicion. (Doc. 15–3 at 108.) This is  
25 especially true in light of the fact that she did not recant for several years after Petitioner's  
26 trial, and first recanted only two weeks after visiting him in prison for the first time.<sup>5</sup>

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27  
28       <sup>5</sup> DP initially could not explain the delay during her telephonic interview, but eventually claimed that it was because she no longer lived with her children, and thus there was no longer a risk of losing them.

1 (Doc 148 at 29.) Additionally, a reasonable juror would conclude that Petitioner would be  
2 uniquely able to influence DP because there is evidence that his sexual abuse of her began  
3 when she was five years old and it continued through adulthood, and she continues to write  
4 him letters every day.<sup>6</sup> A reasonable juror would also need to weigh DP's credibility in  
5 light of her unwillingness to appear for a deposition. During her phone interview, she stated  
6 that she understood she could be charged with perjury because of her recantations, so it is  
7 noteworthy that she, in fact, has not recanted under oath or subjected herself to cross-  
8 examination.<sup>7</sup>

9 **2. Other witnesses provided circumstantial evidence proving Count 6.**

10 DP was not the only testifying witness at trial regarding sexual activity between  
11 Petitioner and DP. Carla Grant, Kathy Underwood, and Tracy Beauchamp all testified  
12 about Petitioner's sexual abuse of DP. A reasonable juror could properly consider this  
13 evidence in determining whether Petitioner had a character trait that, in turn, would make  
14 it more likely that he committed the conduct underlying Count 6. The widespread evidence  
15 of uncharged conduct with DP and others makes it probable that a juror would find that  
16 Petitioner had a character trait that made it more likely he committed Count 6.

17 The character evidence introduced against Petitioner, some of which included  
18 evidence provided by DP herself, undermines her current recantations. Essentially, a  
19 reasonable juror would conclude that DP's present recantation contradicts Petitioner's  
20 substantial history and character for the type of sexual conduct that DP is now claiming  
21 has never happened. But because the accusatory evidence also comes from several other  
22 witnesses, a reasonable juror would conclude that DP's recantations are false and her  
23 accusations are true.

24 \_\_\_\_\_  
25 <sup>6</sup> A reasonable juror would also have to reconcile how much influence, if any,  
26 Petitioner had in the drafting the recantation letters. Especially since some of the letters are  
27 drafted in noticeably different handwriting despite DP claiming to have drafted all of them  
28 without Petitioner's input and LP claiming that Petitioner drafted some of them. Doc. 148  
at 6; Doc. 152 at 27.)

<sup>7</sup> The Court notes that DP claimed she was financially unable to appear to testify.  
(Doc. 148 at 48.)

1                                   **3. DP's recantations contradict other established facts and are**  
2                                   **unsubstantiated.**

3                   It was established at trial that LP had already been returned home by the time of  
4 trial. (Doc. 5-2 at 130, Doc. 5-3 at 98.) Therefore, DP's claim that she faced the loss of LP  
5 if she did not accuse Petitioner is undermined by the fact that she already had been returned  
6 LP. Though it is possible that DP could have been told that LP would be removed from her  
7 custody again if DP did not testify against Petitioner, this is not what DP claims happened.  
8 Instead, DP claims that LP was not returned home right after DP testified and the charges  
9 against her were dropped. (Doc. 148 at 14.) However, the charges against DP had not been  
10 dropped as of trial, yet LP was already home, so this aspect of DP's recantation is plainly  
11 contradicted. (Doc. 15-3 at 126.)

12                   Moreover, DP testified that she had not been offered any benefits in exchange for  
13 her testimony. (Doc. 15-3 at 126.) She also testified that she reached out to the State to  
14 discuss the criminal case against her before Petitioner's trial but the prosecutor refused to  
15 discuss her case with her. (Doc. 15-3 at 126.) She acknowledged that the prosecutor she  
16 now accuses of coercing her testimony had never met with her outside the presence of DP's  
17 attorney. Of course, DP's recantations contradict this and essentially assert that this  
18 testimony was a lie. Nevertheless, a reasonable juror would conclude, based on a  
19 consideration of all the evidence, that the State did not coerce DP's testimony. Moreover,  
20 DP testified at trial that she met with a detective at her own request and inculcated herself  
21 and Petitioner before she was ever arrested or charged with a crime. Therefore, the evidence  
22 indicates that she incriminated Petitioner before being charged with a crime, rather than in  
23 response to being charged with a crime. (Doc. 15-3 at 139.)

24                   Finally, there is no independent evidence that the State coerced DP's testimony.  
25 And despite DP's claim that she was threatened with serving 25 years in prison unless she  
26 testified against Petitioner, there is no evidence that she was ever charged with a crime for  
27 which the penalty could have been 25 years in prison.<sup>8</sup> Furthermore, there is no independent

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28                   <sup>8</sup> DP claims that the prosecutor threatened her with three charges to make sure she

1 proof of DP’s claim that she wrote Petitioner one month after his trial explaining why she  
2 testified falsely against him. (Doc. 148 at 23–25.) Consequently, her recantations lack  
3 proof, do not align with the rest of the evidence, and are undermined by the evidence.

4 Accordingly, the Court concludes that a reasonable juror considering all of the  
5 evidence for and against Petitioner’s guilt of Count 6, would find him guilty beyond a  
6 reasonable doubt.

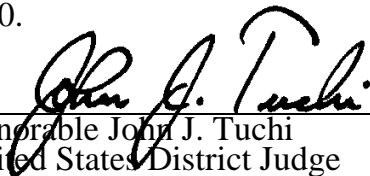
7 Therefore, Petitioner has not presented “innocence so strong that [the] Court cannot  
8 have confidence in the outcome of the trial.” See Schlup, 513 U.S. at 316. Finally, the Court  
9 concludes that it is unnecessary to reach Petitioner’s defaulted and barred claims to prevent  
10 a fundamental miscarriage of justice.

11 **IT IS THEREFORE ORDERED** that the remaining portion of Ground 1 of the  
12 Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (Doc. 1)—the claim for  
13 ineffective assistance of counsel related to Count 6 of the indictment—is **DISMISSED**.

14 **IT IS FURTHER ORDERED** that the remaining portion of Ground 2 of the  
15 Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus (Doc. 1)—the claim for  
16 ineffective assistance of counsel related to Count 3 of the indictment—is **DISMISSED**.

17 **IT IS FURTHER ORDERED** directing the Clerk of Court to close this case.

18 Dated this 27th day of March, 2020.

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21 Honorable John J. Tuchi  
22 United States District Judge  
23  
24  
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26  
27

28 \_\_\_\_\_  
got a minimum sentence of 25 years. (Doc. 48 at 42.) However, at the time of Petitioner’s  
trial DP was only being prosecuted for obstruction of justice. (Doc. 15–3 at 126.)