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

9 Joel K. Barr,

10 Petitioner,

11 v.

12 Charles Ryan, et al.,

13 Respondents.  
14

No. CV-14-08060-PCT-GMS (ESW)

**ORDER**

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16 On December 22, 2015, the Court ruled on a number of pending motions. (Doc.  
17 83). Petitioner has filed a Motion for Reconsideration (Doc. 84) requesting that the Court  
18 reconsider the portions of the Order that (i) denied Petitioner’s “Motion for [Further]  
19 Expansion of the Record (Third Request)” (Doc. 62) and (ii) granted Respondents’  
20 “Motion to Strike Proposed Interrogatories” (Doc. 58).<sup>1</sup> For the reasons discussed below,  
21 the Motion for Reconsideration (Doc. 84) is denied.

22 **DISCUSSION**

23 Motions for reconsideration are disfavored and are not the appropriate mechanism  
24 by which parties make new arguments or ask the Court to rethink that through which it  
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26 <sup>1</sup> In his Motion (Doc. 84 at 5), Petitioner states that he did not receive Doc. 81,  
27 which is referenced in the Court’s Order. (Doc. 83 at 12, 15). Doc. 81 contains Exhibits  
28 B-ZZ to Respondents’ Answer (Doc. 34) that Respondents electronically filed in  
accordance with the Court’s December 17, 2014 Order (Doc. 80). The certificate of  
service in Respondents’ Answer (Doc. 34 at 215) indicates that on April 2, 2015,  
Respondents served the Answer on Petitioner by mail.

1 has already thought. *See N.W. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918,  
2 925–26 (9th Cir.1988); *United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D.Ariz.  
3 1998); *Defenders of Wildlife v. Browner*, 909 F.Supp. 1342, 1351 (D. Ariz. 1995);  
4 *Carroll v. Nakatani*, 342 F.3d 934, 945 (9<sup>th</sup> Cir. 2003) (motions for reconsideration  
5 should be granted only in rare circumstances). “Reconsideration is appropriate if the  
6 district court (1) is presented with newly discovered evidence, (2) committed clear error  
7 or the initial decision was manifestly unjust, or (3) if there is an intervening change in  
8 controlling law.” *School Dist. No. 1J, Multnomah County v. AC and S, Inc.*, 5 F.3d  
9 1255, 1263 (9th Cir. 1993); *see also* LRCiv 7.2(g)(1) (“The Court will ordinarily deny a  
10 motion for reconsideration of an Order absent a showing of manifest error or a showing  
11 of new facts or legal authority that could not have been brought to its attention earlier  
12 with reasonable diligence.”).

13 **A. Order Denying Petitioner’s “Motion for [Further] Expansion of the**  
14 **Record (Third Request)” (Doc. 62)**

15 Petitioner’s “Motion for [Further] Expansion of the Record (Third Request)”  
16 (Doc. 62) requested that the Court expand the record to include four documents attached  
17 to the Motion. In his Motion for Reconsideration (Doc. 84 at 3), Petitioner points out that  
18 the Court’s Order (Doc. 83) explicitly discusses its reasons for denying the “Motion for  
19 [Further] Expansion” as to Attachment Nos. 1, 2, and 4, but does not discuss its reasons  
20 for denying the Motion as to Attachment No. 3.<sup>2</sup> The Court’s Order (Doc. 83 at 16),  
21 however, denied Petitioner’s “Motion for [Further] Expansion of the Record (Third  
22 Request)” in its entirety. Therefore, Petitioner’s request for a ruling on Attachment No. 3

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24 <sup>2</sup> Petitioner seeks to expand the record to include the State’s Exhibit #3 from  
25 Petitioner’s preliminary hearing, which was not admitted into evidence at the time of the  
26 hearing. Exhibit #3 lists 315 “cookies” stored on Petitioner’s computer from October 27,  
27 2001 through January 8, 2003. (“A cookie is usually a small text file that can be put on  
28 [a] computer by a web site.” (Doc. 81-3 at 40)). In support of his “Motion for [Further]  
Expansion of the Record” (Doc. 62), Petitioner states that (i) Petitioner’s phone was not  
in service until July 25, 2002 as reflected in the phone bill located in Attachment No. 4 to  
the Motion (Doc. 62) and (ii) a history of accessed links can be created by opening emails  
“unsuspectedly.” (Doc. 62 at 4; Doc. 62-6 at 2-7; Doc. 62-7 at 1-5). Petitioner fails to  
meet his burden of proof.

1 is denied as moot. (Doc. 84 at 3). To the extent Petitioner seeks a reconsideration of the  
2 Court’s denial of Petitioner’s Motion (Doc. 62) as to Attachment No. 3, the request is  
3 denied because Petitioner has not shown “manifest error” or presented “new facts or legal  
4 authority that could not have been brought to [the Court’s] attention earlier with  
5 reasonable diligence” that would change the Court’s ruling. *See* LRCiv 7.2(g)(1).

6 Petitioner also asks the Court to reconsider its denial of Petitioner’s request to  
7 expand the record to include Attachment No. 2 to Petitioner’s “Motion for [Further]  
8 Expansion of the Record (Third Request)” (Doc. 62). Attachment No. 2 is a document  
9 purported to be one of the State’s exhibits from Petitioner’s preliminary hearing, which  
10 was not admitted into evidence at the preliminary hearing. In his Motion for  
11 Reconsideration, Petitioner states that:

12 The point I failed to make clear, then, is this: Of the  
13 entire list of URL web addresses which comprise  
14 “Attachment #2,” none of its web addresses match any of the  
15 web addresses of the charged images. This fact is  
16 tremendously significant in proving my innocence because if  
17 I, or anyone, had used the seized computer to visit the  
18 websites of the charged images, those websites of the charged  
19 images (Exhibit ZZZ, p. 247-263) would also appear in  
20 “Attachment #2 because “Attachment #2” is the State’s  
21 Exhibit purporting to show all of the “suspicious” websites  
22 visited using the seized computer since 8/15/2000.

19 (Doc. 84 at 4) (emphasis in original).

20 However, the 121 charged images are not visited websites, but are image files  
21 created on Petitioner’s computer. (Doc. 41-1 at 201-276). The descriptions of the 121  
22 charged images detail the drive path specifications, which indicate the location of the file  
23 on Petitioner’s computer. (*Id.*; Doc. 34-2 at 36-62). Some of the images underlying  
24 Counts 4-124 contain superimposed text. For instance, superimposed on the image  
25 underlying Count 124 is the text “Masturbation Lolitas Series. Real Little Lolitas Porno.  
26 Full-Length Video Clips. Lesbian Lolitas, Girls-Lolitas Pictures,  
27 www.betterlolitas.com.” (Doc. 41-1 at 276). Contrary to Petitioner’s assertion in his  
28 Reply (Doc. 75-1 at 6-7), the description does not state that the image was downloaded

1 from www.betterlolitas.com. Nor do the descriptions of any other image state that the  
2 image was downloaded from a particular website. Further, computer forensic analyst  
3 Joann Kennedy did not testify that any image was downloaded from a particular website.  
4 (Doc. 81-3 at 7-251; Doc. 41-1 at 168-276). Ms. Kennedy only opined that there is a  
5 correlation between the images created on Petitioner's computer and the internet history  
6 on Petitioner's computer. (Doc. 81-3 at 68). Moreover, Ms. Kennedy explained that the  
7 extracted list of visited websites may not be complete because some of the internet  
8 history may have been overwritten or deleted. (*Id.* at 49-50, 54). Therefore, Petitioner's  
9 argument above that Attachment No. 2 is significant in proving Petitioner's alleged  
10 innocence is without merit. Construing the argument liberally, however, it is possible  
11 that Petitioner intended to reiterate the following argument made in his "Reply to  
12 Respondent's Response to Petitioner's Third Motion to Expand the Record" (Doc. 75):

13 I have not yet found a precise correspondence between any of  
14 the charged images (Exhibit ZZZ, p. 247-262) and the  
15 websites of "Attachment #2." Instead, I find more and more  
evidence of fraud.

16 For example: Beginning with the very First Charged  
17 Images (*id.*, p. 247, #1), the State alleges that those images  
18 were created at 11:08:50 PM, and were exited (Last Written)  
19 at 11:09:02 PM on December 23, 2002.

20 However, according to Joann Kennedy's URL list  
21 ("Attachment #2") no website was visited that night, by that  
22 computer until 11:10:35 PM. In other words it was  
impossible to have downloaded those Charged Images when  
she said they were created. Because, in order to do so, the  
images would have had to be downloaded before the website  
that purportedly contained them had been visited!

23 (Doc. 75-1 at 4).

24 Again, Ms. Kennedy did not testify that the images were downloaded from a  
25 particular website. (Doc. 81-3 at 7-251; Doc. 41-1 at 168-276). Ms. Kennedy testified  
26 that the extracted internet history may not be complete and that there is just a correlation  
27 between the images created on Petitioner's computer and the internet history. (Doc. 81-3  
28 at 49-50, 54, 68).

1 Finally, Petitioner reiterates the argument made in his Reply (Doc. 75) that  
2 Attachment No. 2 “contains evidence” that Ms. Kennedy “inserted false date/time  
3 information” into the document “to make it appear that someone had used the seized  
4 computer on 12/29/02 to visit suspicious websites.” (Doc. 84 at 5). Petitioner’s Reply  
5 asserts that:

6 Apparently, in [Joann Kennedy’s] attempt to make it  
7 appear that other websites had also been visited that day,  
8 Joann Kennedy changed the computer’s clock from 9:39 AM  
9 to the time of 12:02:00 AM ([Attachment #2, p.7 of 16] URL  
10 #235) and proceeded to click on sixteen additional websites  
11 (*id.* URL # 235-250).

12 Please note that by doing so she caused URL 234,  
13 which has a time of 09:39:11 AM to appear to have been  
14 visited before URL 235, which has a time of 12:02:04 AM.

15 9:39:11 AM on 12/29/2002 (URL #234) should be  
16 shown to occur AFTER 12:02:04 AM on 12/29/2002. Instead  
17 Joann Kennedy has created an impossible situation in which  
18 URL’s 235-250 have occurred . . . BEFORE URL #235. This  
19 is further proof that “Attachment #2” was fraudulently  
20 created by Joann Kennedy to assist the State in winning the  
21 wrongful conviction of a man who is actually innocent.

22 (Doc. 75 at 23-24) (emphasis in original).

23 There is no foundational evidence of how Attachment No. 2 was prepared or how  
24 the data was sorted. The data in Attachment No. 2 is sorted by earliest date to latest date,  
25 then by earliest time to latest time. Attachment No. 2 does not show that Ms. Kennedy or  
26 anyone else falsified data and is irrelevant to Petitioner’s attempt to overcome  
27 Respondent’s affirmative defenses. The Court affirms its denial of Petitioner’s “Motion  
28 for [Further] Expansion of the Record (Third Request)” (Doc. 62).

**B. Order Granting Respondents’ “Motion to Strike Proposed Interrogatories” (Doc. 58)**

The Court’s Order (Doc. 83) granted Respondents’ “Motion to Strike Proposed Interrogatories” (Doc. 58). Petitioner takes issue with the Court’s statement that “even if Petitioner’s recollection of the precise events on December 29, 2002 is correct,

1 Petitioner has failed to show that no reasonable juror would find that ‘on or about’  
2 December 29, 2002, Petitioner committed the crimes of child molestation and  
3 furnishing harmful items to minors.’” (Doc. 83 at 5). Petitioner argues that due in part  
4 to an alibi defense presented at his trial, “it was incumbent upon the State to prove that  
5 [the victim’s] allegations of molestation and exposure to pornography did occur on  
6 ‘Sunday, December 29, four days after Christmas.’” (Doc. 84 at 8) (emphasis in  
7 original). Petitioner’s contention reiterates the claim made in Ground Thirteen of the  
8 First Amended Petition (Doc. 8 at 36-37; Doc. 8-9 at 19-22). Ground Thirteen alleges  
9 that the trial court erred in instructing the jury that any reasonable date near the date of  
10 December 29, 2002 was sufficient to find Petitioner guilty on Counts 1 and 2. (*Id.*).  
11 For the reasons discussed below, Petitioner’s apparent attempt to intertwine the merits  
12 of Petitioner’s Ground Thirteen<sup>3</sup> with Petitioner’s request to propound the proposed  
13 interrogatories is not well taken.

14 In his Motion (Doc. 84 at 5-7), Petitioner clarifies that he is not seeking to  
15 propound the proposed interrogatories to support a freestanding actual innocence claim,  
16 but rather to support his *Schlup* claim.<sup>4</sup> Petitioner also clarifies that his proposed  
17 interrogatories are not designed to elicit a recantation of the trial testimony of the victim  
18 and the victim’s mother. (Doc. 84 at 12). Instead, Petitioner states that the “truthful  
19 answers” to the proposed interrogatories “will simply provide evidence” from the  
20 victim and the victim’s mother that Petitioner “cannot possibly be the person who  
21 molested [the victim] and forced her to watch pornography on that very specific date of  
22 ‘Sunday, December 29, four days after Christmas.’” (*Id.* at 13). The jury, however, did

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23 <sup>3</sup> Respondents argue that Ground Thirteen is procedurally defaulted. (Doc. 34 at  
24 46). If the Court rejects Respondents’ asserted procedural defense, it will direct  
25 Respondents to file a response regarding the merits of Petitioner’s claim.

26 <sup>4</sup> As stated in the Court’s Order (Doc. 83 at 3), a petitioner attempting to pass  
27 through the *Schlup* gateway must establish his or her factual innocence of the crime(s) for  
28 which he or she was convicted. See *Bousley v. U.S.*, 523 U.S. 614, 623 (1998); *Jaramillo*  
*v. Stewart*, 340 F.3d 877, 882 (9th Cir. 2003). It is not enough to establish legal  
insufficiency. *Id.*

1 not convict Petitioner on Count 2 and the lesser included offense of Count 1 for acts that  
2 were committed on the precise date of December 29, 2002. Instead, the jury convicted  
3 Petitioner on those counts for acts that occurred “on or about” December 29, 2002. It is  
4 thus possible that the jury may have accepted Petitioner’s alibi defense that he could not  
5 have committed the acts on December 29, 2002, but instead found that Petitioner  
6 committed the acts on a date “reasonably near” December 29, 2002. *See State v. Davis*,  
7 79 P.3d 64, 78 (Ariz. 2003) (rejecting defendant’s argument that because the State was  
8 not required to prove the specific commission date for his sexual misconduct with a  
9 minor conviction, he was effectively prevented from presenting an alibi defense; and  
10 stating that “the jury either rejected Davis’s alibi defense outright or concluded that,  
11 although he may have been at work on [January] 29th, he nevertheless had a sexual  
12 encounter with [the victim] ‘on or about’ January 29th”). Any new evidence indicating  
13 that it would have been impossible for Petitioner to commit the offenses on December  
14 29, 2002 would not establish that Petitioner is factually innocent of Petitioner’s  
15 convictions. Accordingly, the Court’s affirms its Order granting Respondents’ “Motion  
16 to Strike Proposed Interrogatories” (Doc. 58).

17 **CONCLUSION**

18 For the reasons discussed above, Petitioner has failed to present newly discovered  
19 evidence. Petitioner has failed to demonstrate that the Court committed clear error, or  
20 that the Court’s decision was manifestly unjust. There has been no intervening change  
21 in controlling law. Therefore,

22 **IT IS ORDERED** denying Petitioner’s “Motion for Reconsideration” (Doc. 84).  
23 The Court’s December 22, 2015 Order (Doc. 83) is affirmed.

24 Dated this 13th day of January, 2016.

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28 Eileen S. Willett  
United States Magistrate Judge