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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

RUBEN HERRERA,	)	Case No. CV 17-5874-CJC (JPR)
	)	
Petitioner,	)	
	)	ORDER ACCEPTING FINDINGS AND
v.	)	RECOMMENDATIONS OF U.S.
	)	MAGISTRATE JUDGE
SECRETARY OF CORRECTIONS,	)	
	)	
Respondent.	)	

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The Court has reviewed the Petition and First Amended Petition, records on file, and Report and Recommendation of U.S. Magistrate Judge. See 28 U.S.C. § 636. On June 7, 2018, Petitioner filed objections, in which he mostly repeats arguments and attaches exhibits already considered in prior filings.<sup>1</sup> Some attachments, however, appear never to have been submitted to the state court and thus cannot be considered here. (See, e.g.,

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<sup>1</sup> On April 9, 2018, the Court received notice from Petitioner that he had recently filed a habeas petition in the state supreme court. See also Cal. App. Cts. Case Info., <https://appellatecases.courtinfo.ca.gov/> (search case no. S248049) (filed Apr. 4, 2018; signed Mar. 30, 2018) (last visited July 6, 2018). Because that petition was filed well after the AEDPA limitation period had expired, he is entitled to no statutory (or equitable) tolling for it. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir. 2003).

1 Objs., pt. 10 at 19 (photograph), 35 (attorney authorization, in  
2 Spanish, signed by Petitioner),<sup>2</sup> 40-43 & 45 (correspondence from  
3 California Innocence Project));<sup>3</sup> see Cullen v. Pinholster, 563  
4 U.S. 170, 181-82 (2011). Plaintiff's other arguments and  
5 evidence were thoroughly addressed and rejected in the R. & R.,  
6 but some require brief discussion.

7 Petitioner suggests that the untimeliness of his Petition  
8 should be overlooked because he is "actual [sic] innocent" of  
9 victim Valeria H.'s "false allegations." (See Objs. at 101.)  
10 Her testimony would supposedly have been "discredit[ed]" by such  
11 "newly discovered" evidence as the "excluded" testimony of  
12 Petitioner's son (see, e.g., id. at 35-36, 40, 78, 82, 97) and  
13 pictures showing that she and Petitioner – her father – were  
14 "close" (see, e.g., id. at 52-53, 85, 86, 95-96). As discussed  
15 in the R. & R., most of this evidence is not actually new. (See  
16 R. & R. at 29-39.)

17 Moreover, the standard for an actual-innocence claim is  
18 strict: actual innocence means "factual innocence" as opposed to  
19 "mere legal insufficiency," and a petitioner must show that it is  
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21 <sup>2</sup> In his earlier pleadings, Petitioner argued that he  
22 deserved tolling because he was "ignorant . . . of the English  
23 language." (Opp'n at 46.) The Magistrate Judge rejected the  
24 argument because he had regularly demonstrated proficiency in  
25 English, given his many handwritten, English-language filings and  
26 letters. (R. & R. at 16-19.) In his objections, he admits in  
passing to having personally written the September 10, 2015  
English-language letter to the California Supreme Court. (Objs.  
at 5.)

27 <sup>3</sup> The Court uses the pagination generated by its Case  
28 Management/Electronic Case Filing system for documents not  
consecutively paginated.

1 "more likely than not that no reasonable juror would have  
2 convicted him" in light of the "new evidence." See Bousley v.  
3 United States, 523 U.S. 614, 623 (1998); Schlup v. Delo, 513 U.S.  
4 298, 321 (1995). Petitioner here claims that his son, an alleged  
5 "eyewitness" (Objs. at 35), would contradict Valeria H.'s  
6 testimony (id. at 97), but he fails to present a declaration or  
7 other evidence indicating how his son's testimony would refute  
8 the crimes he was convicted of or show that he was actually  
9 innocent. Even if such a declaration had been submitted,  
10 Petitioner's failure to present it to the state court would  
11 prevent the Court from considering it here. See Pinholster, 563  
12 U.S. at 181-82.

13 At best, the son's purported proposed testimony – and  
14 apparently some family photographs – would have supported  
15 Petitioner's "character" and undermined Valeria H.'s (see id. at  
16 35, 40, 52-53 78), but such evidence falls far short of the  
17 Schlup standard. See Bibbs v. Pfeiffer, No. CV 15-2365 PA (AFM),  
18 2015 WL 10354777, at \*8 (C.D. Cal. Dec. 11, 2015) (dismissing  
19 petition as untimely and rejecting actual-innocence claim in part  
20 because witness's allegedly "false accusation" was at best  
21 impeached by "new evidence," not "refuted"), accepted by 2016 WL  
22 738271 (C.D. Cal. Feb. 23, 2016). Furthermore, Petitioner  
23 presents no evidence regarding his trial counsel's strategy for  
24 not calling his son to testify; even assuming he was willing and  
25 competent to do so, she could have reasonably believed that his  
26 testimony, as a minor who loved his dad, would not carry much  
27 weight. See Gentry v. Sinclair, 705 F.3d 884, 899-900 (9th Cir.  
28 2013) (as amended) (upholding reasonableness of trial counsel's

1 failure to obtain witness when petitioner presented no relevant  
2 affidavits explaining that decision and it was possible witness  
3 would not have been "useful to the defense" or that "counsel [may  
4 have been] concerned about opening the door to damaging  
5 rebuttal").

6 In any event, as discussed in the R. & R. (see R. & R. at  
7 34-37), the jury considered substantial evidence discrediting  
8 Valeria H. and still convicted Petitioner; he thus fails to show  
9 that it is more likely than not that no reasonable juror would  
10 have convicted him in light of the "newly discovered" evidence.  
11 See Bolin v. Grounds, No. SACV 11-00256 PSG (SS), 2011 WL  
12 1692149, at \*9 (C.D. Cal. Apr. 15, 2011) (rejecting actual-  
13 innocence claim because petitioner "failed to submit any new  
14 evidence demonstrating his factual innocence"; he "merely  
15 assert[ed] that his trial was 'contaminated' with false evidence  
16 'manufactured by the prosecution'" (citation omitted), accepted  
17 by 2011 WL 1672033 (C.D. Cal. May 4, 2011).<sup>4</sup>

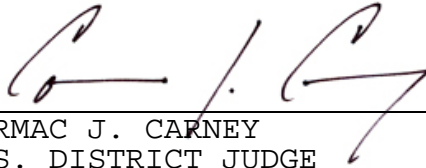
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19 <sup>4</sup> Petitioner raises other claims and evidence, all of which  
20 were presented in earlier pleadings: his "28" character witnesses  
21 (see Objs. at 12, 34, 37, 39), the "false" testimony of Valeria  
22 H.'s husband (see id. at 14, 54, 64, 71, 84-85), and the fact  
23 that victim Rosa M. was menstruating at the time of the sexual  
24 abuse (see id. at 24, 61-63). They, like the claims and evidence  
25 discussed above, are conclusory or were already presented at  
26 trial. See Newman v. Warden, No. CV 16-04198 BRO (RAO), 2016 WL  
27 7052025, at \*1 (C.D. Cal. Dec. 5, 2016) (rejecting actual-  
28 innocence claim when petitioner identified two uncalled witnesses  
but failed to "describe what their testimony would have been had  
they testified, why the witnesses [were] reliable, or how their  
testimony would necessarily show that, in light of this new  
evidence, no reasonable juror would have convicted him"); George  
v. Allison, No. CV 11-5730-SJO (PLA), 2011 WL 7111912, at \*7  
(C.D. Cal. Dec. 14, 2011) (rejecting actual-innocence claim when  
petitioner's arguments "concern[ed] witness testimony and other

1           Having reviewed de novo those portions of the R. & R. to  
2 which Petitioner objects, the Court accepts the Magistrate  
3 Judge's findings and recommendations.

4           IT IS THEREFORE ORDERED that Judgment be entered denying the  
5 Petition and FAP as untimely, denying Petitioner's stay motion as  
6 moot, and dismissing this action with prejudice.

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8 DATED: July 12, 2018

  
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CORMAC J. CARNEY  
U.S. DISTRICT JUDGE

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27 evidence that was presented to the jury" and "none of the  
28 assertions exonerate[d] him or prove[d] that a different  
individual committed the crimes for which he was convicted"),  
accepted by 2012 WL 261191 (C.D. Cal. Jan. 27, 2012).