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

ROBERT ELMER BARBER,

Petitioner,

No. CIV S-04-1844 MCE EFB P

vs.

WARDEN OF THE SUBSTANCE
ABUSE TREATMENT FACILITY,

Respondent.¹

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding *in propria persona* with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He challenges a 2001 judgment of conviction entered against him in the Shasta County Superior Court on numerous counts of lewd and lascivious acts with minors. He seeks relief on the grounds that: (1) his prosecution violated his federal constitutional rights because it was “time barred;” (2) the trial court violated his right to due process when it failed to submit alternative verdicts to the jury; (3) the trial court violated the Ex Post Facto Clause and petitioner’s right to due process when it admitted evidence of prior

¹ Previously named as respondent was McGregor William Scott. The court now substitutes in the correct respondent, the Warden of the Substance Abuse Treatment Facility at the California State Prison-Corcoran, where petitioner is presently incarcerated. “A petitioner for habeas corpus relief must name the state officer having custody of him or her as the respondent to the petition.” *Stanley v. California Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994) (citing Rule 2(a), 28 U.S.C. foll. § 2254).

1 uncharged acts of sexual offenses; (4) his conviction with respect to two victims was not
2 supported by sufficient evidence; (5) he received ineffective assistance of appellate counsel; and
3 (6) his trial counsel rendered ineffective assistance when he failed to object to the prosecutor's
4 use of false testimony, failed to cross-examine witnesses or call favorable witnesses, and failed
5 to ensure that the jury instructions were "proper." Upon careful consideration of the record and
6 the applicable law, the undersigned recommends that petitioner's application for habeas corpus
7 relief be denied.

8 **I. Procedural and Factual Background**

9 In its unpublished opinion affirming petitioner's judgment of conviction on appeal², the
10 California Court of Appeal for the Third Appellate District provided the following factual
11 summary:

12 The prosecution alleged defendant molested S.W., B.M., D.H., and
13 M.O. between 1990 and 1996. We summarize the facts
14 surrounding the alleged acts of sexual abuse where necessary to
15 our discussion of sufficiency of the evidence.

16 The molestations came to light over a period of more than a year.
17 Toward the end of 1996, B.M. told his girlfriend and mother what
18 defendant had done to him. They reported the matter to the Shasta
19 County Sheriff on December 17, 1996. Deputy Leonard Felter, a
20 sex crimes investigator, talked with defendant on the telephone on
21 January 6, 1997. Felter arranged to meet with him the next day,
22 but defendant did not show up. Instead, he borrowed a truck from
23 a friend on the pretext of visiting a sick friend in the Bay Area and
24 fled to Mexico. Defendant telephoned Deputy Felter on January
25 16, 1997, and confirmed that he was in Mexico.

26 The district attorney filed a criminal complaint against defendant
on January 24, 1997, for unlawful acts involving B.M. and D.H. in
case No. 97-533. An arrest warrant issued. The complaint was
later amended on April 1, 1997, to add a count involving the
molestation of M.O.

In December 1997, S.W. and his girlfriend contacted the Shasta
County Sheriff about the sexual abuse of S.W. by defendant. The
district attorney filed a criminal complaint on December 19, 1997,

² Notice of Lodging Documents on October 24, 2005, Resp.'s Lodg. Doc. 10 (hereinafter
Opinion).

1 in case No. 97-9186. The complaint alleged five counts of sexual
2 molestation involving S.W.³ An arrest warrant issued the same
3 date.

3 In July 2000, Arizona investigators found defendant in Mexico,
4 where he had been living under an assumed name. Investigators
5 discovered defendant's true identity through fingerprint analysis.
6 Thereafter, defendant was arrested and returned to the United
7 States with the assistance of Mexican authorities.

6 The district attorney filed an amended, consolidated
7 complaint-deemed-information on November 16, 2000. The
8 information included allegations involving all four victims, and
9 increased the number of counts relating to S.W. Jury trial began
10 on January 9, 2001.

9 On January 26, 2001, petitioner was convicted on all counts. Lodg. Doc. 1; Clerk's
10 Transcript on Appeal (hereinafter CT), at 260-95. On March 8, 2001, petitioner was sentenced
11 to 73 years in state prison. CT at 342-49, 352-55.

12 Petitioner appealed from his conviction to the California Court of Appeal for the Third
13 Appellate District, claiming that: (1) there was insufficient evidence to sustain his convictions on
14 counts 1 through 23, count 31, and count 32; (2) there was insufficient evidence to show the
15 offenses charged in counts 1 through 23 and count 32 occurred within the applicable statute of
16 limitations; (3) alternatively, counts 1 through 23 and count 32 should be remanded to the trial
17 court for a hearing to determine whether they were time-barred; (4) the trial court erred in
18 instructing the jury on the statute of limitations; (5) the trial court erred in failing to submit count
19 1 and counts 2 through 11 to the jury in the alternative; and (6) application of Cal. Evidence
20 Code § 1108 to counts 1 through 27 and count 32 violated the prohibition against ex post facto
21 laws. Lodg. Doc. 10, at 2. On November 27, 2002, petitioner's judgment of conviction was
22 affirmed as to 28 counts and reversed as to 4 counts (1, 12, 13, and 32). *Id.*

23
24 ³ The complaint alleged two counts of lewd or lascivious acts with a child under 14 (§
25 288, subd. (a)), two counts of oral copulation with a person under 16 (§ 288a, subd. (b)(2)), one
26 count of possession of a firearm by a felon (§ 12021, subd. (a)(1)), and one count of distributing
or exhibiting harmful material to a minor. (§ 313.1.)

1 On December 2, 2002, petitioner filed a petition for rehearing in the California Court of
2 Appeal. Lodg. Doc. 11. That petition was summarily denied by order dated December 19, 2002.
3 Lodg. Doc. 12. On December 27, 2002, petitioner filed a petition for review in the California
4 Supreme Court. Lodg. Doc. 13. That petition was summarily denied by order dated February
5 11, 2003. Lodg. Doc. 14.

6 On August 26, 2002, petitioner filed a petition for writ of habeas corpus in the Shasta
7 County Superior Court, claiming that he received ineffective assistance of trial and appellate
8 counsel. Lodg. Doc. 15. That petition was denied on August 28, 2002, on the grounds that
9 petitioner had named the wrong respondent. Lodg. Doc. 16. On September 9, 2002, petitioner
10 filed a document entitled "Traverse" in the Shasta County Superior Court. Lodg. Doc. 17. The
11 Superior Court ordered that the traverse be "marked received but not filed." Lodg. Doc. 18.

12 On October 24, 2002, petitioner filed a petition for writ of habeas corpus in the California
13 Court of Appeal, claiming, among other things, that he received ineffective assistance of trial
14 and appellate counsel. Lodg. Doc. 19. That petition was summarily denied by order filed
15 November 14, 2002. Lodg. Doc. 20. On July 31, 2003, petitioner filed a petition for writ of
16 habeas corpus in the California Supreme Court, also raising claims of ineffective assistance of
17 trial and appellate counsel. Lodg. Doc. 21. That petition was summarily denied by order dated
18 May 12, 2004. Lodg. Doc. 22.

19 On December 6, 2004, petitioner filed his federal habeas petition in this court.
20 Respondent filed an answer on October 24, 2005. Petitioner filed a traverse on February 24,
21 2006.

22 **II. Analysis**

23 **A. Standards for a Writ of Habeas Corpus**

24 Federal habeas corpus relief is not available for any claim decided on the merits in state
25 court proceedings unless the state court's adjudication of the claim:

26 ///

1 (1) resulted in a decision that was contrary to, or involved an
2 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

3 (2) resulted in a decision that was based on an unreasonable
4 determination of the facts in light of the evidence presented in the
State court proceeding.

5 28 U.S.C. § 2254(d).

6 Under section 2254(d)(1), a state court decision is “contrary to” clearly established
7 United States Supreme Court precedents “if it ‘applies a rule that contradicts the governing law
8 set forth in [Supreme Court] cases’, or if it ‘confronts a set of facts that are materially
9 indistinguishable from a decision’” of the Supreme Court and nevertheless arrives at a different
10 result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406
11 (2000)).

12 Under the “unreasonable application” clause of section 2254(d)(1), a federal habeas
13 court may grant the writ if the state court identifies the correct governing legal principle from the
14 Supreme Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s
15 case. *Williams*, 529 U.S. at 413. A federal habeas court “may not issue the writ simply because
16 that court concludes in its independent judgment that the relevant state-court decision applied
17 clearly established federal law erroneously or incorrectly. Rather, that application must also be
18 unreasonable.” *Id.* at 412; *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (it is “not
19 enough that a federal habeas court, in its independent review of the legal question, is left with a
20 ‘firm conviction’ that the state court was ‘erroneous.’”)

21 The court looks to the last reasoned state court decision as the basis for the state court
22 judgment. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court reaches a
23 decision on the merits but provides no reasoning to support its conclusion, a federal
24 habeas court independently reviews the record to determine whether habeas corpus relief is
25 available under section 2254(d). *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

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1 **B. Petitioner’s Claims**

2 **1. Prosecution Barred by State Statute of Limitations**

3 In his first claim, petitioner argues that his prosecution violated the Double Jeopardy
4 Clause and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution
5 because some of the charges against him were filed after the state statute of limitations had
6 expired. Pet. at 5, 8. Petitioner explained this claim more fully in his petition for writ of habeas
7 corpus filed in the California Supreme Court: “Does Penal Code section 803(b), which tolls the
8 statute of limitations when prosecution against the same defendant for the ‘same conduct’ is
9 pending, embrace only crimes committed in the same transaction of events as the charges
10 pending, or does it embrace also the ‘same type’ of crimes, so that, for example, sexual abuse on
11 a minor may be deemed the ‘same conduct’ although these acts, clearly and distinctly separated
12 in time, place and occasion, are not part of the same transaction of events as the pending
13 crimes?” Lodg. Doc. 13 at 1-2. Petitioner further explained:

14 Appellant’s arguments [on direct appeal] were predicated on a
15 commencement date for the prosecution with the filing of the
16 information on November 16, 2000. In sum appellant argued [on
17 direct appeal] that, even taking into account a sojourn in Mexico . .
18 . which may (or may not) have tolled the statute of limitations for
19 as much as three years (§803(d)) (footnote omitted), some of the
20 counts (1, 5-11) were still barred as a matter of law, while some
21 *may* have been barred. In the case of these latter, the jury could
22 not determine the factual matter correctly because the trial court
23 instructed them erroneously that the prosecution, as a matter of
24 law, commenced, not with the filing of the information but with
25 the issuance of an arrest warrant on December 19, 1997. (citation
26 omitted.)

21 The court of appeal agreed with the trial court. The warrant,
22 although not issued for the exact same crimes charged, was issued
23 for the “same conduct.” Therefore, prosecution was “pending,”
24 within the meaning of Section 803(b), which tolled the statute of
25 limitations. (citation omitted.) As will be seen, however, the court
26 of appeal’s interpretation of “same conduct” is problematical
because the crimes eventually charged consisted in conduct that
was completely separate in time, place, and occasion from the
conduct described in the warrant, and such an expansive
interpretation of the meaning of “same conduct” is not well
supported by the statute or the rules of statutory interpretation.

1 *Id.* at 3-4.⁴

2 Citing only state law, the California Court of Appeal rejected these challenges to
3 petitioner's conviction on statute of limitations grounds, reasoning as follows:

4 **B. Statute of Limitations:**

5 "Because the statute of limitations is jurisdictional and need not be
6 specially pleaded as a defense, the defendant's plea of not guilty
7 raises the issue. The burden is then on the prosecution to prove, by
8 a preponderance of the evidence, that the ... information or
9 complaint [was] filed within the prescribed period after
10 commission of the offense." (1 Witkin & Epstein, Cal.Criminal
11 Law (3d ed. 2000) Defenses, § 218, p. 581.)

12 The statute of limitations for violations of section 288.5 is six
13 years from the date the crime was committed. (§§ 288.5, 800.)
14 For a continuous course-of-conduct crime such as section 288.5
15 (*Vasquez, supra*, 51 Cal.App.4th at p. 1285, 59 Cal.Rptr.2d 389),
16 the crime is complete when the course of conduct ends. (*Wright v.*
17 *Superior Court* (1997) 15 Cal.4th 521, 525, 63 Cal.Rptr.2d 322,
18 936 P.2d 101; *see also People v. Zamora* (1976) 18 Cal.3d 538,
19 548, 134 Cal.Rptr. 784, 557 P.2d 75 (*Zamora*)). The limitations
20 period ceases to run when prosecution begins, that is, "when any of
21 the following occurs: [¶] (a) An indictment or information is filed.
22 [¶] ... [¶] (d) An arrest warrant or bench warrant is issued, provided
23 the warrant names or describes the defendant with the same degree
24 of particularity required for an indictment, information, or
25 complaint."⁵ (§ 804.)

17 ⁴ Respondent argues that this claim is unexhausted "unless Petitioner is trying to present
18 claims similar to those in his petition for writ of habeas corpus and/or petition for review filed in
19 the California Supreme Court." Answer at 2. In an apparent reply to this argument, petitioner
20 explains in his traverse that he has "combined direct appeal, and writ of habeas corpus claims
21 into federal writ petitions for review now before this U.S. District Court: therefore, all claims
22 have been fairly presented to the highest state court: California Supreme." Traverse at 3. The
23 undersigned concludes from this statement that petitioner intends to raise in his petition before
24 this court only those claims that were raised and exhausted in state court. Accordingly the court
25 will address all of petitioner's claims on the merits, as informed by the claims described in
26 petitioner's filings in the California Supreme Court. Claims made for the first time in the
traverse, if any, which were not contained in petitioner's filings in the California Supreme Court
will not be addressed. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (a
traverse is not the proper pleading to raise additional grounds for relief).

⁵ Section 813, subdivision (a) describes the process for issuance of an arrest warrant as
follows: "When a complaint is filed with a magistrate charging a felony originally triable in the
superior court . . . , if, and only if, the magistrate is satisfied from the complaint that the offense
complained of has been committed and that there is reasonable ground to believe that the

1 The limitations period is tolled for up to three years if the
2 defendant is out of the state. (§ 803, subd. (d).) Moreover, “[n]o
3 time during which prosecution of the same person for the same
4 conduct is pending in a court of this state is a part of a limitation of
5 time prescribed in this chapter.” (§ 803, subd. (b).) Under some
6 circumstances, the prosecution may revive allegations of child
sexual abuse after expiration of the limitations period. (§ 803,
subd. (g)(2)(A).) We construe statutes of limitation strictly in
favor of the accused. (*Zamora, supra*, 18 Cal.3d at p. 574, 134
Cal.Rptr. 784, 557 P.2d 75; *People v. Le* (2000) 82 Cal.App.4th
1352, 1357-1358, 98 Cal.Rptr.2d 874.)

7 Defendant contends the trial court erred in ruling as a matter of
8 law, and instructing the jury, that case No. 97-9186 commenced
upon issuance of the arrest warrant on December 19, 1997. He
9 argues the December 1997 arrest warrant failed to cite any
violation of section 288.5, and therefore did not commence
10 prosecution of count 1. Defendant also notes the accompanying
police report showed only that defendant molested S.W. on two
11 consecutive nights, and cannot support a charge of continuing
sexual abuse for that reason. He stated that “[a] directed finding
12 would have been appropriate, but it should have fixed the
commencement of the prosecution at November 16, 2000, when
the information was filed.”

13 There is no merit in these contentions. We conclude that the
14 violations of sections 288, subdivision (a), and 288a, subdivision
(b)(2) set forth in the December 1997 complaint and arrest warrant
15 involved the “same conduct” later alleged in count one of the
information. Under section 803, subdivision (b), the limitations
16 period on continuing sexual abuse did not continue to run between
December 19, 1997, and November 16, 2000, while “prosecution
17 of the same person for the same conduct” was pending.
Accordingly, the trial court was correct in ruling prosecution of
18 count 1 commenced in December 1997.

19 Although we find no cases directly on point, this court considered
a similar statute of limitations issue in the context of a trial court’s
20 refusal to instruct on a lesser related offense it found to be
time-barred. In *People v. Whitfield* (1993) 19 Cal.App.4th 1652,
21 24 Cal.Rptr.2d 210 (*Whitfield*), the jury convicted defendant of a
variety of sexual offenses, including forcible rape. (*Id.* at pp.
22 1654-1655, 24 Cal.Rptr.2d 210.) On appeal, defendant argued the
court erred in refusing to give requested instructions on section
23 647, subdivision (b), engaging in prostitution. (*Whitfield, supra*, at
p. 1656, 24 Cal.Rptr.2d 210.) Citing sections 803, subdivision (b),
24 and 804, subdivision (a), we narrowed the issue to “whether the

25 defendant has committed it, the magistrate shall issue a warrant for the arrest of the defendant,
26 . . .”

1 related offense of prostitution [was] based on the ‘same conduct’”
2 as the rapes charged in the information. (*Whitfield, supra*, at p.
3 1659, 24 Cal.Rptr.2d 210.)

4 We continued: “The Law Revision Commission comment to
5 section 803 states that ‘[t]he test of the “same conduct,” involving
6 as it does some flexibility of definition, states a principle that
7 should meet the reasonable needs of prosecution, while affording
8 the defendant fair protection against an enlargement of the charges
9 after running of the statute....’ [¶] Thus, where an action is
10 dismissed and refiled after the period of limitations, the prosecutor
11 may charge offenses based on the ‘same conduct’ as the dismissed
12 action because the filing of the original action tolls the statute of
13 limitations not only as to those offenses charged in the original
14 action, but also as to offenses based on the ‘same conduct.’”

(*Whitfield, supra*, 19 Cal.App.4th at p. 1659, 24 Cal.Rptr.2d 210.)

15 We also explained that “[f]ormer section 802.5 (repealed
16 Stats.1984, ch. 1270, § 1, p. 4335), the antecedent to section 803,
17 subdivision (b), provided in part: ‘... no time during which a
18 criminal action is pending is a part of any limitation of the time for
19 recommencing that criminal action in the event of a prior dismissal
20 of that action, subject to the provisions of Section 1387.’

(Stats.1981, ch. 1017, § 3, p. 3927.) In its comment to section 803,
21 subdivision (b), the Law Revision Commission explained:

22 ‘Subdivision (b) continues the substance of former Section 802.5.

23 The limitation of former Section 802.5 that permitted
24 recommencing the same “criminal action” is replaced by the
25 broader standard of prosecution of the “same conduct,” drawn
26 from Model Penal Code § 1.06(6)(b). The former law that
provided tolling only for a subsequent prosecution for the same
offense was too narrow, since the dismissal may have been based
upon a substantial variation between the previous allegations and
the proof.’” (*Whitfield, supra*, 19 Cal.App.4th at p. 1659, fn. 8, 24
Cal.Rptr.2d 210.)

19 The conduct at issue in *Whitfield* was sexual intercourse between
20 defendant and his two victims, both of whom claimed the conduct
21 was rape. (*Whitfield, supra*, 19 Cal.App.4th at pp. 1659-1660, 24
22 Cal.Rptr.2d 210.) We concluded that the filing of the information
23 tolled the one-year statute of limitations on prostitution, because
24 the prostitution offenses were based on the same conduct as the
25 rapes for which defendant was being prosecuted. (*Id.* at p. 1660,
26 24 Cal.Rptr.2d 210.) We therefore reversed three of the rape
convictions, deciding that the instructions requested by defendant
on the lesser related offense of prostitution should have been
given. (*Id.* at pp. 1660-1661, 24 Cal.Rptr.2d 210; *accord, People v.*
Greenberger (1997) 58 Cal.App.4th 298, 368-369, 68 Cal.Rptr.2d
61 [kidnapping was part of the same conduct that resulted in the
victim’s murder, and prosecution commenced with the issuance of
the arrest warrant for murder]; *see also People v. Bell* (1996) 45
Cal.App.4th 1030, 1064-1065, 53 Cal.Rptr.2d 156 [the forgery and

1 false filing were merely aspects of the rent skimming scheme, and
2 prosecution was deemed by operation of law to have commenced
3 with the issuance of the arrest warrant for the rent skimming
4 offenses].)

5 Applying the same reasoning to the case before us, we conclude
6 the trial court did not err in ruling and instructing the jury that
7 prosecution of count 1 commenced with the issuance of the arrest
8 warrant on December 19, 1997.

9 Opinion at 10-15. In sum, the state appellate court rejected petitioner’s arguments that the
10 limitations period continued to run between the issuance of the arrest warrant for the crimes
11 involving victim S.W. on December 19, 1997, and the issuance of the amended consolidated
12 complaint on November 16, 2000. The court reasoned that because the crimes involved the
13 “same conduct,” the statute of limitations was tolled during that period. Petitioner challenges
14 these conclusions by the California Court of Appeal.

15 Although petitioner cites several federal constitutional provisions in the caption of this
16 claim, his claim essentially involves the interpretation of state law. A challenge to a state court’s
17 interpretation of state law is not cognizable in a federal habeas corpus petition. *See Waddington*
18 *v. Sarausad*, ___ U.S. ___, 129 S.Ct. 823, 832 n.5 (2009) (“we have repeatedly held that ‘it is
19 not the province of a federal habeas court to reexamine state-court determinations on state-law
20 questions”); *Rivera v. Illinois*, ___ U.S. ___, 129 S.Ct. 1446, 1454 (2009) (“[A] mere error of
21 state law . . . is not a denial of due process”) (quoting *Engle v. Isaac*, 456 U.S. 107, 121, n. 21
22 (1982) and *Estelle v. McGuire*, 502 U.S. 62, 67, 72-73 (1991)); *Bradshaw v. Richey*, 546 U.S.
23 74, 76 (2005) “a state court’s interpretation of state law . . . binds a federal court sitting in federal
24 habeas”); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (federal habeas corpus relief does not lie for
25 errors of state law). A habeas petitioner may not “transform a state-law issue into a federal one”
26 merely by asserting a violation of the federal constitution. *Langford v. Day*, 110 F.3d 1380,
1389 (9th Cir. 1997). Rather, petitioner must show that the decision of the California Court of
Appeals somehow “violated the Constitution, laws, or treaties of the United States.” *Little v.*
Crawford, 449 F.3d 1075, 1083 (9th Cir. 2006) (quoting *Estelle*, 502 U.S. at 68).

1 Petitioner has cited no federal cases in support of this claim, nor has he explained how
2 the state court decision or the timing of the state charging documents violate the federal
3 constitution or a federal statute. Accordingly, he has failed to establish that the state court's
4 rejection of his statute of limitations claim was contrary to, or an unreasonable application of
5 clearly established federal law. *See Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004) ("If no
6 Supreme Court precedent creates clearly established federal law relating to the legal issue the
7 habeas petitioner raised in state court, the state court's decision cannot be contrary to or an
8 unreasonable application of clearly established federal law"). For these reasons, petitioner is not
9 entitled to relief on his claim that some of the charges against him were barred by the state
10 statute of limitations.

11 **2. Failure to Submit Alternative Verdicts to the Jury**

12 Petitioner's next claim is that the trial court violated his rights pursuant to the Sixth and
13 Fourteenth Amendments to the United States Constitution when it failed to submit alternative
14 verdict forms to the jury pursuant to Cal. Penal Code § 288.5(c) with respect to the charges
15 involving victim S.W. Pet. at 5. In his petition for review filed in the California Supreme Court,
16 petitioner described this claim as follows:

17 In the instant case, the prosecutor alleged that the violations of
18 Section 288(a) charged in counts 2 through 11 occurred on within
19 [sic] the exact . . . expanse of time as the violation of Section 288.5
20 charged in count 1. Under the terms of Section 288.5(c), appellant
21 could not be convicted of both:

22 "No other felony sex offense involving the same victim may be
23 charged in the same proceeding with a charge under this section
24 unless the other charged offense occurred outside the time period
25 charged under this section or the other offense is charged in the
26 alternative."

23 Pursuant to this subdivision, the Court of Appeal accepted
24 appellant's claim of error, but not his claim of remedy. Appellant
25 contended that because the prosecutor did not submit the case in
26 the alternative to the jury, the remedy was either remand for retrial
on all these counts, or an order to the Superior Court to vacate the
convictions leading to a greater punishment and impose the lesser.
This latter would remove any prejudice from the error. Instead, the

1 Court of Appeal, *ex cathedra*, vacated the conviction on count 1
2 and affirmed the greater sentence that remained for count 2
through 11. (citation omitted.)

3 This issue has not been resolved. In *People v. Johnson* (2002) 28
4 Cal.4th 240, this Court affirmed the plain meaning of Section
5 288.5(c) against a claim that one set of convictions may remain so
6 long as the punishment was stayed. The statute requires an
7 acquittal, and, again, this Court affirmed the plain meaning of the
statute. (*Id.* at p. 243.) The question of remedy, however, was
circumvented, because this Court vacated the convictions that
would lead to the greater sentence and sanctioned the imposition of
the lesser sentence.

8 The key to appellant's contention is that Section 288.5(c) creates
9 both a statutory and Sixth Amendment right to a trial by jury (see
10 *Turner v. Louisiana* (1965) 379 U.S. 466, 471-472), i.e., the right
11 to have a jury determine which group of counts should be found
12 for conviction and which for acquittal. A trial court or reviewing
court that chooses the counts that render a higher penalty usurp the
jury's function, unless it removes any prejudice from the statutory
and constitutional error by vacating the convictions for the counts
that render the higher penalty.

13 Pet., Ex. A-A, at 8-9. The California Court of Appeal rejected these claims, reasoning as
14 follows:

15 **C. Charging in the Alternative Under Section 288.5:**

16 Section 288.5 "imposes certain limits on the prosecution's power
17 to charge both continuous sexual abuse and specific sexual
18 offenses in the same proceeding. A defendant may be charged
19 with only one count of continuous sexual abuse unless multiple
20 victims are involved, in which case a separate count may be
21 charged for each victim." (*People v. Johnson* (2002) 28 Cal.4th
22 240, 243, 121 Cal.Rptr.2d 197, 47 P.3d 1064 (*Johnson*); § 288.5,
23 subd. (c).) Section 288.5, subdivision (c) contains the additional
24 limitation that "[n]o other felony sex offense involving the same
25 victim may be charged in the same proceeding with a charge under
26 this section unless the other charged offense occurred outside the
time period charged under this section or the other offense is
charged in the alternative" (§ 288.5, subd. (c).) In *Johnson*, a
case argued and decided while defendant's case was pending in
this court, the California Supreme Court held that given the clear
language of section 288.5, the prosecution may not obtain multiple
conviction for continuous sexual abuse and specific sexual
offenses involving the same victim over the same period of time.
(*Johnson, supra*, at p. 248; emphasis added.)

26 ///

1 In this case, there is no dispute the district attorney failed to charge
2 the offenses in count 1 and counts 2 through 11 in the alternative.
3 Following defendant's conviction on each of these counts, the
4 court stayed the 16-year sentence in count 1 pursuant to section
5 288.5, and imposed consecutive, two-year sentences, or one-third
6 the middle term, for the 10 violations of section 288, subdivision
7 (a) in counts 2 through 11.

8 Emphasizing the plain meaning of the statute, defendant insists he
9 is entitled to reversal of counts 1 through 11 because the court
10 failed to submit them to the jury in the alternative. At oral
11 argument, defendant's counsel argued we should order retrial on
12 all these counts so the jury can decide whether to convict
13 defendant on the single count of continuous sexual abuse under
14 section 288.5, or on the 10 individual counts. Alternatively, he
15 noted there would be no prejudice if we reversed defendant's
16 conviction on specific counts 2 through 11 and the 20-year
17 sentence, and affirmed his conviction in count 1 with the lower
18 sentence of 16 years. The law does not compel either remedy.

19 The harm caused by the pleading error can be cured by
20 invalidation of either the continuous sexual abuse conviction or the
21 convictions on the specific counts of sexual abuse. (*Johnson*,
22 *supra*, 28 Cal.4th at pp. 245-248, 121 Cal.Rptr.2d 197, 47 P.3d
23 1064 [affirming Court of Appeal's reversal of specific sexual
24 abuse counts]; *see People v. Alvarez* (2002) 100 Cal.App.4th 1170,
25 1177, 122 Cal.Rptr.2d 859, review den. Oct. 23, 2002 [affirming
26 the trial court's dismissal of the section 288.5 count].) The
Alvarez court considered the legislative purpose of section 288.5,
and observed that "[i]t would be anomalous if section 288.5,
adopted to prevent child molesters from evading conviction, could
be used by those molesters to circumvent multiple convictions with
more severe penalties and prior strike consequences than available
for a conviction under section 288.5." (*Alvarez, supra*, at pp.
1177-1178, 122 Cal.Rptr.2d 859.) Based on the foregoing, we
reverse defendant's conviction of continuous sexual abuse in count
1. In so doing, we affirm the trial court's election to sentence
defendant to the higher aggregate term for the specific sexual
offenses.

21 Defense counsel also suggested at oral argument that defendant
22 was entitled to the lower, 16-year sentence as a result of the district
23 attorney's pleading error. According to counsel, "[t]he defendant
24 did not come out the best he could have done." We begin by
25 noting defendant did not demur and therefore waived any defect in
26 the pleading. (*Alvarez, supra*, 100 Cal.App.4th at p. 1176, 122
Cal.Rptr.2d 859.) Moreover, the jury found defendant guilty on
each count the prosecution should have pleaded in the alternative.
In these circumstances, we perceive no miscarriage of justice in
affirming the trial court's determination defendant should serve the
most severe sentence prescribed by law. (Cal. Const., art. VI, §

1 13; *People v. Watson* (1956) 46 Cal.2d 818, 836-838, 299 P.2d
2 243.)

3 Opinion at 15-17.⁶

4 As in the claim above, this claim challenges the state court's interpretation of state law.
5 As such, it is not cognizable in this federal habeas proceeding. *Waddington*, 129 S.Ct. at 832
6 n.5; *Rivera*, 129 S.Ct. at 1454; *Bradshaw*, 546 U.S. at 76; *Lewis*, 497 U.S. at 780.⁷

7 To the extent petitioner is arguing that the state court's remedy for a violation of Cal.
8 Penal Code § 288.5 constituted a violation of *Turner v. Louisiana* (1965) 379 U.S. 466, 471-
9 472), his claim must fail. *Turner* held that a state criminal defendant had been denied the right to
10 a fair trial by an impartial jury when the two deputy sheriffs who gave key testimony leading to
11 defendant's conviction had fraternized with the jurors outside of the courtroom during the
12 performance of their duties. The court reasoned that jurors have a duty to consider only the
13 evidence which is presented to them in open court. *Id.* at 472-73. The court explained that "[i]n
14 the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that
15 the 'evidence developed' against a defendant shall come from the witness stand in a public
16 courtroom where there is full judicial protection of the defendant's right of confrontation, of
17 cross-examination, and of counsel." *Id.* *Turner* does not address the issue presented here, which
18 is whether a state appellate court can remedy a violation of Cal. Penal Code § 288.5 by striking
19

20 ⁶ As set forth above, the California Court of Appeal found that petitioner had waived a
21 challenge to "any defect in the pleading" because of his failure to "demur." *Id.* at 17.
22 Respondent argues that the state court's finding of waiver constitutes a state procedural bar
23 precluding this court from addressing the merits of this claim. Answer at 22. However, for the
24 reasons discussed below, even if this claim was not procedurally barred, it lacks merit and must
25 be denied.

26 ⁷ Respondent explains that the California Court of Appeal "reversed counts 1 and 32,
leaving Petitioner's claim viable only as to count 30." Answer at 20. He argues that, even as to
count 30, the allegations "are alleged over different time periods and Petitioner's claim is
therefore without merit." *Id.* Even assuming arguendo that an error by the district attorney or
the trial court with respect to count 30 violated Cal. Penal Code § 288.5, any challenge to this
state law error is not cognizable in a federal habeas petition.

1 counts that carry lesser penalties than the counts that are allowed to stand, as opposed to
2 remanding the matter for a jury trial. Because petitioner has not cited a United States Supreme
3 Court decision on this point, he has failed to establish that the state court’s rejection of his statute
4 of limitations claim was contrary to, or an unreasonable application of clearly established federal
5 law. *See Moses v. Payne*, 555 F.3d 742, 754 (9th Cir. 2009) (when a Supreme Court decision
6 does not “squarely address[] the issue in th[e] case” or establish a legal principle that “clearly
7 extend[s]” to a new context, “it cannot be said, under AEDPA, there is ‘clearly established’
8 Supreme Court precedent addressing the issue before us, and so we must defer to the state
9 court’s decision”); *Brewer*, 378 F.3d at 955 (“If no Supreme Court precedent creates clearly
10 established federal law relating to the legal issue the habeas petitioner raised in state court, the
11 state court’s decision cannot be contrary to or an unreasonable application of clearly established
12 federal law”). The court also notes that the jury convicted petitioner of both the individual
13 counts and the count of continuous assault on a minor. Accordingly, petitioner was not deprived
14 of a jury trial on any of these counts.

15 For all of these reasons, petitioner is not entitled to relief on this claim.⁸

16 **3. Admission of Evidence of Prior Uncharged Offenses**

17 Petitioner claims that the trial court violated his right to due process and the Ex Post
18 Facto clause when it admitted evidence of prior uncharged sexual offenses pursuant to Cal.
19 Evidence Code § 1108 to show petitioner’s propensity to commit sex offenses. Pet. at 6;

21 ⁸ In his discussion of this claim, petitioner refers to “the United States Supreme Court
22 opinion of June 25, 2004: as to, sentencing function of the trial jury.” Pet. at 9. Petitioner also
23 mentions “*Blakely* 2004” in connection with another one of his claims before this court and in
24 his traverse. Pet. at 11; Traverse at 11-12. In *Blakely v. Washington*, 542 U.S. 296, 303-04
25 (2004), the United States Supreme Court decided that a defendant in a criminal case is entitled to
26 have a jury determine beyond a reasonable doubt any fact that increases the statutory maximum
sentence, unless the fact was admitted by the defendant or was based on a prior conviction.
However, because petitioner’s conviction was final as of the date the *Blakely* decision was
issued, any argument based on this decision is foreclosed. *See Schardt v. Payne*, 414 F.3d 1025,
1036 (9th Cir. 2005) (*Blakely* does not apply retroactively to cases on collateral review in a 28
U.S.C. § 2254 habeas action).

1 Traverse at 13-22. Citing *Stogner v. California*, 539 U.S. 607 (2003), petitioner argues that the
2 evidence was unduly prejudicial and too stale to be relevant and that it relieved the prosecution
3 of its burden to prove the charges beyond a reasonable doubt. Pet. at 11. Petitioner also
4 contends that if the trial court had not admitted this evidence, he would have received a lesser
5 sentence. *Id.*

6 **a. State Court Decision**

7 The California Court of Appeal rejected these arguments, reasoning as follows:

8 **D. Evidence Code Section 1108:**

9 In pretrial motions, the prosecution sought admission of evidence
10 of uncharged acts of child sexual abuse under Evidence Code
11 section 1101, subdivision (b) to show intent and common plan or
12 scheme, and under Evidence Code section 1108 to show
13 defendant’s propensity to sexually molest children.⁹ Defense
14 counsel objected on various grounds, but did not assert Evidence
15 Code section 1108 was inapplicable on constitutional grounds. A
16 lengthy discussion ensued, during which the court engaged in a
detailed analysis of the proffered evidence under Evidence Code
section 352. The court overruled defense counsel’s objections, and
admitted evidence in the form of testimony by two additional
victims. It instructed the jury that the evidence was admitted for
the limited purpose of showing defendant “had a disposition to
commit the same or similar-type sexual offenses,” a “characteristic

17 ⁹ Evidence Code section 1101 reads, in part:

18 “(a) Except as provided in this section and in Sections 1102, 1103,
19 1108, and 1109, evidence of a person’s character or a trait of his or
20 her character (whether in the form of an opinion, evidence of
21 reputation, or evidence of specific instances of his or her conduct)
is inadmissible when offered to prove his or her conduct on a
specified occasion.

22 “(b) Nothing in this section prohibits the admission of evidence
23 that a person committed a crime ... when relevant to prove some
24 fact (such as ... intent, preparation, plan, ...) other than his or her
25 disposition to commit such an act.”

26 Evidence Code section 1108, subdivision (a) reads: “In a criminal
action in which the defendant is accused of a sexual offense,
evidence of the defendant’s commission of another sexual offense
or offenses is not made inadmissible by Section 1101, if the
evidence is not inadmissible pursuant to Section 352.”

1 method, plan or scheme in the commission of criminal acts,” and
2 “the existence of the intent which is a necessary element of the
3 crime charged, ...” Thereafter, R.R. and L.B. testified about acts of
4 child sexual abuse defendant committed on them in the late 1960's
5 and early 1970's.

6 Evidence Code section 1108 became effective on January 1, 1996
7 (*People v. Fitch* (1997) 55 Cal.App.4th 172, 185, 63 Cal.Rptr.2d
8 753 (*Fitch*)), before trial, but after defendant was alleged to have
9 committed the acts charged in the information. Defendant argues
10 we must reverse his convictions on all but four of the 32 counts,
11 including count 1, because introduction of the evidence of
12 uncharged acts under Evidence Code section 1108 constituted a
13 violation of the prohibition against ex post facto laws. He urges us
14 to reexamine our holding to the contrary in *Fitch, supra*, at pages
15 185-186, 63 Cal.Rptr.2d 753, based on the United States Supreme
16 Court’s clarification of ex post facto jurisprudence in *Carmell v.*
17 *Texas* (2000) 529 U.S. 513, 538-539 [146 L.Ed.2d 577, 597-598]
18 (*Carmell*).

19 Defense counsel failed to object at trial to the admission of the
20 uncharged acts on the ground asserted here. Accordingly, we
21 conclude he waived the issue for purposes of appeal. (Evid.Code,
22 § 353; see *People v. Pinholster* (1992) 1 Cal.4th 865, 934-935, 4
23 Cal.Rptr.2d 765, 824 P.2d 571 [defense waived any challenge to
24 admission of taped witness interview by failing to object at trial on
25 grounds it violated his state and federal constitutional rights].)

26 In any event, defendant acknowledges we held in *Fitch, supra*, 55
Cal.App.4th at page 186, 63 Cal.Rptr.2d 753, that Evidence Code
section 1108 does not violate the ex post facto clause. He
nonetheless insists *Fitch* is wrong in light of *Carmell supra*, 529
U.S. 513 [146 L.Ed.2d 577], the United States Supreme Court’s
most recent pronouncement on the ex post facto clause. We
decline to revisit our holding in *Fitch*.

In *Fitch*, we relied on the following 1925 description of the ex post
facto prohibition quoted in *Collins v. Youngblood* (1990) 497 U.S.
37, 42 [111 L.Ed.2d 30, 39] (*Collins*): “It is settled, by decisions
of this Court so well known that their citation may be dispensed
with, that any statute which punishes as a crime an act previously
committed, which was innocent when done; which makes more
burdensome the punishment for a crime, after its commission, or
which deprives one charged with crime of any defense available
according to law at the time when the act was committed, is
prohibited as ex post facto.” (*Fitch, supra*, 55 Cal.App.4th at p.
185, 63 Cal.Rptr.2d 753.) We acknowledged that the 1925 case
quoted in *Collins* omitted a fourth element included in a 1798
formulation of ex post facto law, specifically: “Every law that
alters the legal rules of evidence, and receives less, or different,
testimony, than the law required at the time of the commission of

1 the offense, in order to convict the offender.” (*Fitch, supra*, at p.
2 185, 63 Cal.Rptr.2d 753, emphasis in original.) We quoted
3 language in *Collins* that “[a]s cases subsequent to [the 1798 case]
4 make clear, this language was not intended to prohibit the
5 application of new evidentiary rules in trials for crimes committed
6 before the changes. [Citations.]’ [Citation.]” (*Fitch, supra*, at pp.
7 185-186, 63 Cal.Rptr.2d 753.)

8 In *Carmell*, the United States Supreme Court adopted the 1798 list
9 of four categories of laws that contravene ex post facto principles,
10 and concluded that an amendment to Texas law that removed a
11 corroboration requirement to convict defendant of a sexual offense
12 “unquestionably” altered the legal rules of evidence in a manner
13 prohibited by the Constitution. (*Carmell, supra*, 529 U.S. at pp.
14 522, 530, 120 S.Ct. at pp. ___, ___ [146 L.Ed.2d at pp. 588, 593].)
15 The majority noted that *Collins* had been “rather cryptic” about
16 whether the fourth category was really prohibited by ex post facto
17 principles. It rejected any suggestion that the fourth category had
18 been “cast out” of the ex post facto clause. (*Carmell, supra*, at pp.
19 537-538 [529 U.S. at pp. ___, 120 S.Ct. at pp. ___, 146 L.Ed.2d at
20 pp. 597-598].) At the same time, the majority in *Carmell*
21 recognized that “mere changes in normal rules of evidence that do
22 not change (1) ingredients of an offense, (2) ultimate facts required
23 for a finding of guilt, or (3) the quantum of evidence necessary for
24 a finding of guilt, do not contravene ex post facto principles. ([*Id.*
25 at] pp. 540-545....)” (*In re Melvin J.* (2000) 81 Cal.App.4th 742,
26 759, fn. 8, 96 Cal.Rptr.2d 917.)

The testimony about defendant’s uncharged acts admitted under
Evidence Code section 1108 does not fall into those prohibited
categories. The statute did not change the elements of the crimes
for which defendant was convicted. We explained in *Fitch* that
“[w]hile the admission of evidence of the uncharged sex offense
may have added to the evidence the jury could consider as to
defendant’s guilt, it did not lessen the prosecution’s burden to
prove his guilt beyond a reasonable doubt.” (*Fitch, supra*, 55
Cal.App.4th at pp. 182-183, 63 Cal.Rptr.2d 753.)

Opinion at 17-21.

Respondent argues that the state court’s finding of waiver constitutes a state procedural
bar precluding this court from addressing the merits of this claim. Answer at 23-26. However,
for the reasons discussed below, even if this claim were not procedurally barred, it lacks merit
and must be denied.

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1 state court’s rejection of petitioner’s due process claim is not contrary to United States Supreme
2 Court precedent.

3 Further, any error in admitting this testimony did not have “a substantial and injurious
4 effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637
5 (1993). *See also Penry v. Johnson*, 532 U.S. 782, 793-96 (2001). The record reflects that the
6 state trial judge struck an appropriate balance between petitioner’s rights and the clear intent of
7 the California legislature that evidence of prior similar acts be admitted in sexual offense
8 prosecutions. The trial court held a hearing on petitioner’s pre-trial motion to exclude evidence
9 of petitioner’s uncharged acts of sexual abuse of two children and concluded that the challenged
10 evidence was relevant, appropriate, and allowed by California law. Opinion at 17-18. Further,
11 the jury instructions did not compel the jury to draw an inference of propensity – they simply
12 allowed it. The trial court instructed the jury at the close of the evidence that if they found
13 petitioner had committed the prior sexual offenses they could, but were not required to, infer that
14 he had a disposition to commit sexual offenses. Clerk’s Transcript on Appeal (CT) at 223. The
15 jury was also instructed that if they found that petitioner had such a disposition, they could, but
16 were not required, to infer that he was likely to have committed the charged offenses. *Id.* The
17 jury was directed that if they found by a preponderance of the evidence that petitioner
18 committed prior sexual offenses, that was not sufficient by itself to prove beyond a reasonable
19 doubt that he committed the crimes charged in the information. *Id.* at 224. In addition, the jury
20 instructions as a whole correctly informed petitioner’s jury that the prosecution had the burden of
21 proving all elements of the crimes against petitioner beyond a reasonable doubt. *Id.* at 233. The
22 jury is presumed to have followed all of these instructions. *Weeks v. Angelone*, 528 U.S. 225,
23 234 (2000); *Brown v. Ornoski*, 503 F.3d 1006, 1018 (9th Cir. 2007).

24 The admission of petitioner’s prior acts of sexual misconduct did not violate any right
25 clearly established by United States Supreme Court precedent or result in prejudice under the
26 circumstances of this case. Accordingly, petitioner is not entitled to relief on his due process

1 claim.

2 **c. Ex Post Facto**

3 Petitioner also argues that the admission of prior crimes evidence pursuant to Cal.
4 Evidence Code § 1108 violated the Ex Post Facto Clause, in light of the decision of the United
5 States Supreme Court in *Carmell v. Texas*. The Ninth Circuit Court of Appeals rejected this
6 identical argument in *Schroeder v. Tilton*, 493 F.3d 1083, 1088 (9th Cir. 2007):

7 Because § 1108 did not affect the quantum of evidence sufficient
8 to convict Schroeder, the state did not violate his right to be free
9 from retroactive punishment when it allowed § 1108 evidence to
10 be presented at his trial. The decision of the California courts was
neither contrary to nor an unreasonable application of clearly
established Supreme Court law under *Carmell*.

11 *Id.* at 1088.¹⁰ Accordingly, petitioner is not entitled to relief on his ex post facto claim.

12 **4. Insufficient Evidence**

13 Petitioner next claims that the evidence was insufficient to support his conviction on the
14 claims involving S.W. (counts 1-23) and D.H. (counts 30-31.) Pet. at 6, 12-13, Ex. A-A at 12-
15 20. He argues that S.W. merely “estimated” the number of times he was with petitioner, and
16 contends that this is “erroneous” and “generic, without truthfulness.” *Id.* With respect to D.H.,
17 petitioner argues that “the only time petitioner could have been associated with [D.H.] would
18 have been in the same time frame of both counts.” Pet. at 13. *See also* Pet., Ex. A-A at 20-22.¹¹

19 **a. State Court Opinion**

20 The California Court of Appeal rejected petitioner’s claims of insufficient evidence.

21 ////

22 _____
23 ¹⁰ In *Stogner*, the case cited by petitioner in support of this claim, the Supreme Court
24 held that application of a California law permitting prosecution for sex-related child abuse within
25 one year of victim’s report to police, to offenses whose prosecution was time-barred at time of
26 law’s enactment, was unconstitutionally ex post facto. That case is not on point and does not
dictate the result here.

¹¹ The appellate court reversed counts 1, 12, and 13, involving victim S.W., on other
grounds.

1 With respect to victim C.W., the court considered petitioner’s claim as it applied to count 1 and
2 then applied the same reasoning to the remaining counts involving C.W. The court explained its
3 reasoning with respect to count 1 as follows:

4 The information charged defendant in count 1 with continuous
5 sexual abuse of S.W. in violation of section 288.5, subdivision
6 (a).¹² It alleged that three or more acts of “substantial sexual
7 conduct” occurred” on and between the 1st day of August, 1991,
8 and 29th day of November, 1993, a period of time that was not less
9 than three months in duration, ...”

10 For purposes of applying section 288.5, “substantial sexual
11 conduct” is defined as “penetration of the vagina or rectum of
12 either the victim or the offender by the penis of the other or by any
13 foreign object, oral copulation, or masturbation of either the victim
14 or the offender.” (§§ 288.5, subd. (a), 1203.066, subd. (b).)
15 Defendant challenges his conviction in count 1 on four separate
16 grounds: sufficiency of the evidence, statute of limitations, failure
17 to charge violations of section 288.5 and section 288, subdivision
18 (a) in the alternative, and violation of the prohibition against ex
19 post facto laws. The same arguments provide the basis for
20 defendant’s claims of error in other counts. For this reason, we
21 address his arguments in detail here, and apply our analysis to the
22 remaining counts as relevant.

23 **A. Sufficiency of the Evidence:**

24 An accused violates section 288.5 if he or she “(1) resided with, or
25 had recurring access to, a child under fourteen, and (2) committed
26 three or more acts of sexual molestation of the child, and (3) three

18 ¹² Section 288.5 reads, in part:

19 “(a) Any person who either resides in the same home with the
20 minor child or has recurring access to the child, who over a period
21 of time, not less than three months in duration, engages in three or
22 more acts of substantial sexual conduct with a child under the age
23 of 14 years at the time of the commission of the offense, as defined
24 in subdivision (b) of Section 1203.066, or three or more acts of
25 lewd or lascivious conduct under Section 288, with a child under
26 the age of 14 years at the time of the commission of the offense is
guilty of the offense of continuous sexual abuse of a child and
shall be punished by imprisonment in the state prison for a term of
6, 12, or 16 years.

“(b) To convict under this section the trier of fact, if a jury, need
unanimously agree only that the requisite number of acts occurred
not on which acts constitute the requisite number.”

1 or more months passed between the first and the last act of
2 molestation, regardless of whether the defendant resided with or
3 had access to the child *continuously* throughout the
4 three-or-more-month period.” (*People v. Vasquez* (1996) 51
5 Cal.App.4th 1277, 1287, 59 Cal.Rptr.2d 389 (*Vasquez*), emphasis
6 in original.) Defendant contends the prosecution failed to establish
7 that the “acts of substantial sexual conduct” occurred over a period
8 of more than three months while S.W. was under 14 years of age.

9
10 When faced with a challenge to the sufficiency of the evidence, we
11 review “the whole record in the light most favorable to the
12 judgment below to determine whether it discloses substantial
13 evidence – that is, evidence which is reasonable, credible, and of
14 solid value – such that a reasonable trier of fact could find the
15 defendant guilty beyond a reasonable doubt.” (*People v. Johnson*
16 (1980) 26 Cal.3d 557, 578, 162 Cal.Rptr. 431, 606 P.2d 738;
17 *accord, People v. Hatch* (2000) 22 Cal.4th 260, 272, 92
18 Cal.Rptr.2d 80, 991 P.2d 165.) “In reviewing sufficiency of the
19 evidence, we ... presume in support of the judgment the existence
20 of every fact the trier could reasonably deduce from the evidence.”
21 (*People v. Lewis* (1990) 50 Cal.3d 262, 277, 266 Cal.Rptr. 834,
22 786 P.2d 892.) Substantial evidence includes circumstantial
23 evidence and reasonable inferences flowing from that evidence.
24 (*In re James D.* (1981) 116 Cal.App.3d 810, 813, 172 Cal.Rptr.
25 321; *see In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999, 279
26 Cal.Rptr. 236.)

The record reveals that a friend introduced S.W. to defendant when
S.W. was “about” 13 years old and in the sixth grade. S.W. and
other kids did odd jobs for defendant. When defendant took S.W.
on fishing and camping trips in his motor home, they watched
“porno flicks” on the television. The first touching occurred on the
third trip, when defendant masturbated S.W. On the fifth trip,
defendant masturbated S.W., and orally copulated him. Later,
when S.W. was in the ninth grade, he orally copulated defendant
while sleeping at his house.

S.W. testified that he went on seven or eight trips with defendant,
at least once a month. Counting contacts with defendant at his
house, S.W. estimated he was with defendant three or four times a
month. According to S.W., “something sexual” happened two or
three times a month. The prosecutor attempted to clarify S.W.’s
testimony:

“Q.... Up until that point what had been occurring? We talked
about the fact he had masturbated you and he had given you a blow
job. Had you ever masturbated him?”

“A. Yes. Yes.

“Q. When did that start?”

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“A. The same time.

“Q. As everything else had started?

“THE COURT: Is that a ‘yes’?

“THE WITNESS: Yes.

“[THE PROSECUTOR]: Q. Okay. So from the time you were 12 until the time you were about 15, it had been mutual masturbation and him orally copulating you, giving you blow jobs?

“A. That was further down, the blow job part.

“Q. Him giving you blow jobs?

“A. Yes. Yes.

“Q. First it started with the masturbation?

“A. Yes.

“Q. And then a little bit later it was him giving you blow jobs?

“A. Yes.

“Q. And then when you hit ninth grade is when the first time you gave him a blow job?

“A. Yes.

“Q. Okay. And you saw him about three or four times a month and something happened probably two times a month?

“A. Yeah.

“Q. Okay. Something sexual happened two times a month?

“A. Yes.”

The prosecutor continued:

“Q.... I need to clarify a couple of things as far as amounts and times go. Do you remember when you were in seventh grade? Were you hanging out with him in seventh grade?

“A. Yes. I lived in a house.

“Q. During the seventh grade, was that first year-was he putting his hand-was he masturbating you in the seventh grade during that

1 time period? That's when you first met him?

2 "A. Yeah.

3 "Q. Okay. And that's him putting his hand on your penis?

4 "A. Yes.

5 "Q. Were you doing the same to him in seventh grade?

6 "A. No.

7 "Q. Not yet? Okay. Did that start in eighth grade?

8 "A. It was further to the end, yes. More frequent as I got older.

9 "Q. So that was happening in eighth grade?

10 "THE COURT: Is that a 'yes'?

11 "THE WITNESS: Yes."

12 For purposes of his argument that the prosecution failed to prove
13 he violated section 288.5, defendant excludes the specific acts
14 S.W. said occurred when he was in the eighth and ninth grade, and
15 arguably over 14. He acknowledges three substantial sexual acts
16 occurred on the third and fifth fishing trips, but argues the two
17 trips could not have been three months apart in light of S.W.'s
18 testimony they occurred at least once a month. Defendant
19 maintains that S.W.'s testimony that "something sexual" happened
20 twice a month is "overly broad and can embrace such matters as
21 the display of pornography or the making of lewd remarks." Thus,
22 he says the acts S.W. described in a generic manner do not qualify
23 as the additional acts needed beyond the three-month period set
24 forth in the statute.

19 We conclude there is no merit in defendant's argument. Even if
20 we were to assume the three acts described in the third and fifth
21 trips did not occur over a period of more than three months, there
22 is sufficient evidence to support a finding substantial sexual
23 conduct occurred over a period of more than three months, at
24 defendant's house as well as in his motor home.

23 Based on this record, the jury could reasonably infer S.W.'s
24 testimony that "something sexual" happened two or three times a
25 month referred to masturbation and oral copulation. The
26 prosecutor used the term "something sexual" during 15 pages of
reporters transcript in which S.W. recounts only acts of oral
copulation and mutual masturbation. The prosecutor summarized
what S.W. described, saying: "We talked about the fact he had
masturbated you and he had given you a blow job." Contrary to

1 defendant's suggestion S.W.'s generic testimony could include
2 pornography or lewd remarks, the record shows S.W. did not
3 consider watching "pornos" within the meaning of the prosecutor's
4 term "something sexual."

4 Opinion at 4-10

5 In counts 2 through 11, involving C.W., petitioner was charged with violating Cal. Penal
6 Code § 288(a), which provides that "Any person who willfully and lewdly commits any lewd or
7 lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or
8 with the body, or any part or member thereof, of a child who is under the age of 14 years, with
9 the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that
10 person or the child, is guilty of a felony and shall be punished by imprisonment in the state
11 prison for three, six, or eight years." The California Court of Appeal rejected petitioner's claim
12 of insufficient evidence as to those counts. It explained it's reasoning as follows:

13 **Counts 2 Through 11 (S.W.)**

14 Defendant's challenge to his convictions of violating section 288,
15 subdivision (a) in counts 2 through 11 reprise the arguments made
16 in support of reversing count 1. (footnote omitted.) Each count
17 alleges defendant committed a lewd and lascivious act on S.W.
18 "between the 1st day of August, 1991, and the 29th day of
19 November, 1993."

18 On the claim of insufficient evidence, defendant again argues "the
19 generic phrase, 'something sexual' cannot, as a matter of law,
20 establish on this record or otherwise, a lewd or lascivious
21 touching." Thus, he contends reversal is required on seven of the
22 10 counts alleging defendant committed lewd and lascivious acts
23 on S.W. while he was under the age of 14. We reject defendant's
24 contentions based on our conclusion the jury could reasonably
25 infer S.W.'s testimony that "something sexual" happened two or
26 three times a month referred to masturbation and oral copulation.¹³
Given this inference, the jury could also reasonably infer that
defendant committed at least 10 lewd or lascivious acts before
S.W. turned 14 on November 30, 1993, as alleged in counts 2
through 11.

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¹³ See discussion, *infra*, at page 9.

1 S.W. testified he met defendant when S.W. was “[a]bout 13” and
2 in the sixth grade. He stated he lived in a house on Sunset at the
3 time, but later moved to a new house. S.W.’s mother confirmed
4 that she first met defendant after her family moved into the house
5 on Sunset in August of 1992, when S.W. was 12 years old. S.W.
6 acknowledged the mutual masturbation started when he was 12,
7 that is, before November 30, 1992. He testified “something
8 sexual” happened at least twice a month in the motor home or
9 elsewhere from the time he first started going on trips with
10 defendant. Even if the jury were to conclude S.W. was molested
11 only three times in the first five camping trips, and the camping
12 trips began in the summer of 1992, the record supports the
13 inference defendant masturbated or orally copulated S.W. a
14 minimum of 20 times before November 30, 1993.

9 Opinion at 22-23.

10 In counts 14-18, involving C.W., petitioner was charged with violating Cal. Penal Code
11 § 288(c)(1), and in counts 19-23, petitioner was charged with violating Cal. Penal Code
12 § 288a(b)(2). The California Court of Appeal rejected petitioner’s claims of insufficient
13 evidence with respect to those counts on the same grounds, reasoning as follows:

14 **Counts 14 Through 18 (S.W.)**

15 Counts 14 through 18 involved allegations defendant committed
16 lewd acts on S.W. when he was 14 or 15 years old. (§ 288, subd.
17 (c)(1).)¹⁴ Defendant maintains that three of the five counts must be
18 reversed because they were based on S.W.’s “generic assertion that
19 ‘something sexual’ occurred two times a month.” We rejected this
20 argument as to the lewd and lascivious acts defendant committed
21 when S.W. was under 14.¹⁵ The same analysis applies here.

19 * * *

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22 ¹⁴ Section 288, subdivision (c)(1) reads: “Any person who commits an act described in
23 subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15
24 years, and that person is at least 10 years older than the child, is guilty of a public offense and
25 shall be punished by imprisonment in the state prison for one, two, or three years, or by
26 imprisonment in a county jail for not more than one year. In determining whether the person is
at least 10 years older than the child, the difference in age shall be measured from the birth date
of the person to the birth date of the child.”

¹⁵ See discussion, *infra*, at pages 22-23.

1 **Counts 19 Through 23 (S.W.)**

2 Counts 19 through 23 involved allegations defendant orally
3 copulated S.W. when he was under 16.¹⁶ (§ 288a, subd. (b)(2).)
4 Defendant maintains there is insufficient evidence to sustain his
5 conviction of three of the five counts because they were based on
6 S.W.'s "generic assertion that 'something sexual' occurred twice a
7 month." We already concluded there is no merit in that
8 argument.¹⁷

9 Opinion at 25-27.

10 Petitioner was charged in count 30 with continuous abuse of victim D.H., and in count 31
11 with oral copulation of D.H. Petitioner challenges his conviction on count 31 on the basis that
12 there was insufficient evidence that the crimes alleged in each count occurred in different time
13 periods. The California Court of Appeal rejected this claim, reasoning as follows:

14 Count 30 alleged defendant continuously abused D.H. sexually
15 between November 22, 1993, and September 30, 1996, in violation
16 of section 288.5, subdivision (a). Count 31 alleged defendant
17 orally copulated D.H. between October 1, 1996, and October 31,
18 1996, in violation of section 288a, subdivision (c). Defendant
19 maintains he is entitled to reversal of his conviction in count 31
20 because there is insufficient evidence the two crimes occurred in
21 different time periods. He contends D.H. gave no testimony as to
22 the frequency of the acts, and argues the record provides "no way
23 to determine whether an act of molestation occurred in September,
24 when the information alleged the end of the course of conduct for
25 the 288.5, or whether an act of molestation occurred in October,
26 the time period alleged for the 288 in count 31." The record does
 not support defendant's argument.

 D.H. met defendant when D.H. was eight or nine years old. He
 and other young boys did odd jobs for defendant. After about five
 months, D.H. started going on trips with defendant and the other
 boys. Defendant fondled D.H. during the first trip. He orally
 copulated D.H. on the fourth trip, and committed the same act on
 each subsequent trip. Defendant began to sodomize D.H. The
 abuse also occurred at defendant's house. D.H. took trips with
 defendant almost every week, and went to his house once or twice
 a week. The sexual abuse continued for two years, and stopped

24 ¹⁶ Section 288a, subdivision (b)(2) states: "Except as provided in Section 288, any
25 person over the age of 21 years who participates in an act of oral copulation with another person
26 who is under 16 years of age is guilty of a felony."

¹⁷ See discussion, *infra*, at pages 22 and 23.

1 two months before defendant left the area in January 1997. D.H.
2 said defendant fondled him about 100 times, orally copulated him
3 over 50 times, made D.H. orally copulate defendant over 50 times,
4 and sodomized him about 50 times during the two-year period.

5 We conclude a reasonable jury could find on this record that
6 defendant orally copulated D.H. in October 1996 as alleged in
7 count 31. Contrary to defendant's characterization of the record,
8 D.H. testified about the frequency of the abuse. He also indicated
9 his father stopped him from visiting defendant two months before
10 he fled to Mexico. This evidence pinpointed October 1996 as the
11 last period the abuse occurred.

12 Opinion at 28-29.

13 **b. Applicable Law**

14 There is sufficient evidence to support a conviction if, "after viewing the evidence in the
15 light most favorable to the prosecution, any rational trier of fact could have found the essential
16 elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319
17 (1979). "[T]he dispositive question under *Jackson* is 'whether the record evidence could
18 reasonably support a finding of guilt beyond a reasonable doubt.'" *Chein v. Shumsky*, 373 F.3d
19 978, 982 (9th Cir. 2004) (quoting *Jackson*, 443 U.S. at 318). A petitioner in a federal habeas
20 corpus proceeding "faces a heavy burden when challenging the sufficiency of the evidence used
21 to obtain a state conviction on federal due process grounds." *Juan H. v. Allen*, 408 F.3d 1262,
22 1274, 1275 & n.13 (9th Cir. 2005). In order to grant the writ, the habeas court must find that the
23 decision of the state court reflected an objectively unreasonable application of *Jackson* and
24 *Winship* to the facts of the case. *Id.*

25 The court must review the entire record when the sufficiency of the evidence is
26 challenged in habeas proceedings. *Adamson v. Ricketts*, 758 F.2d 441, 448 n.11 (9th Cir. 1985),
27 *vacated on other grounds*, 789 F.2d 722 (9th Cir. 1986) (en banc), *rev'd*, 483 U.S. 1 (1987). It is
28 the province of the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw
29 reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. If the trier
30 of fact could draw conflicting inferences from the evidence, the court in its review will assign

1 the inference that favors conviction. *Turner v. Calderon*, 281 F.3d 851, 881-82 (9th Cir. 2002).
2 The relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but
3 whether the jury could reasonably arrive at its verdict. *United States v. Mares*, 940 F.2d 455,
4 458 (9th Cir. 1991). The federal habeas court determines the sufficiency of the evidence in
5 reference to the substantive elements of the criminal offense as defined by state law. *Jackson*,
6 443 U.S. at 324 n.16; *Chein*, 373 F.3d at 983.

7 **c. Analysis**

8 Viewing the evidence in the light most favorable to the verdict, and for the reasons
9 expressed by the state appellate court, there clearly was sufficient evidence from which a rational
10 trier of fact could have found beyond a reasonable doubt that petitioner was guilty of counts 1-
11 11, 14-23, and 31. The state appellate court identified the correct legal standards and carefully
12 considered the evidence introduced at petitioner's trial. The conclusion of the state court that
13 sufficient evidence supported petitioner's conviction on these counts is not contrary or an
14 unreasonable application of United States Supreme Court authority. Accordingly, petitioner is
15 not entitled to relief on his claims of insufficient evidence.

16 **5. Ineffective Assistance of Counsel**

17 Petitioner claims that his trial and appellate counsel rendered ineffective assistance.
18 These claims were raised for the first time in petitioner's application for a writ of habeas corpus
19 filed in the California Court of Appeal and California Supreme Court. Lodg. Docs. 19, 21. Both
20 courts summarily denied petitioner's claims. Lodg. Docs. 20, 22. Under these circumstances,
21 this court must independently review the record to determine whether habeas corpus relief is
22 available under section 2254(d). *Delgado*, 223 F.3d at 982. After setting forth the applicable
23 legal standards, the court will analyze petitioner's claims of ineffective assistance of counsel in
24 turn below.

25 ///

26 ///

1 investigation and preparation to make reasonably informed, reasonably sound judgments.”

2 *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc).

3 The *Strickland* standards apply to appellate counsel as well as trial counsel. *Smith v.*
4 *Murray*, 477 U.S. 527, 535-36 (1986); *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989).
5 However, an indigent defendant “does not have a constitutional right to compel appointed
6 counsel to press nonfrivolous points requested by the client, if counsel, as a matter of
7 professional judgment, decides not to present those points.” *Jones v. Barnes*, 463 U.S. 745, 751
8 (1983). Counsel “must be allowed to decide what issues are to be pressed.” *Id.* Otherwise, the
9 ability of counsel to present the client’s case in accord with counsel’s professional evaluation
10 would be “seriously undermined.” *Id.* See also *Smith v. Stewart*, 140 F.3d 1263, 1274 n.4 (9th
11 Cir. 1998) (Counsel is not required to file “kitchen-sink briefs” because it “is not necessary, and
12 is not even particularly good appellate advocacy.”) There is, of course, no obligation to raise
13 meritless arguments on a client’s behalf. See *Strickland*, 466 U.S. at 687-88 (requiring a
14 showing of deficient performance as well as prejudice). Thus, counsel is not deficient for failing
15 to raise a weak issue. See *Miller*, 882 F.2d at 1434. In order to establish prejudice in this
16 context, petitioner must demonstrate that, but for counsel’s errors, he probably would have
17 prevailed on appeal. *Id.* at 1434 n.9.

18 **b. Trial Counsel**

19 Petitioner raises numerous claims of ineffective assistance of trial counsel in a lengthy
20 argument that is divided into three “claims” describing myriad alleged failures by counsel. Pet.
21 at 15-28. The court will discuss each of these claims below.

22 **1. Deficiencies in Charging Documents**

23 Petitioner first claims that his trial counsel improperly failed to object to the prosecutor’s
24 use of “false testimony,” inadmissible evidence, and charges that were “time barred.” *Id.* at 15.
25 Petitioner’s claim of “false testimony” and “inadmissible evidence” appear to refer to an arrest
26 warrant issued on December 19, 1997, and the filing of a complaint on that same date, which

1 alleged, among other things, that petitioner had violated Cal. Penal Code § 12021(A)(1),
2 possession of a firearm by a felon. *Id.*, Ex. 1 at 1; CT at 1. Petitioner is apparently arguing that
3 any allegation that he was a “felon” is false, that statements in a police report to the effect that
4 petitioner had a prior felony conviction were false, and that “at best” he had only a prior
5 misdemeanor conviction. Pet. at 15-18; Traverse at 44-46. Petitioner also alleges that there was
6 a “scheme or conspiracy of charging a prior felony conviction” that was used, in part, to
7 extradite him back to the United States from Mexico. Pet. at 16-17. In essence, petitioner is
8 arguing that all references to a prior felony conviction were “false testimony.” *Id.* at 15-28.

9 Petitioner also contends that most of the counts against him were “time barred” because
10 they were charged in an amended complaint filed in 2000 that was dated more than one year
11 after the 1996 “original report.” *Id.* at 17. The 2000 amended complaint dropped the charge of a
12 violation of Cal. Penal Code § 12021(A)(1), which petitioner characterizes as the “suppression
13 of evidence” in order to “cover up” the prior error in charging petitioner as a felon. *Id.* at 18.
14 Petitioner also appears to argue, as he did in one of his previous claims, that the admission of
15 evidence of uncharged acts of child molestation violated the Ex Post Facto Clause and possibly
16 the Double Jeopardy Clause. *Id.* Petitioner is apparently alleging in the instant petition that his
17 trial counsel rendered ineffective assistance in failing to investigate and challenge these matters.

18 Petitioner has failed to demonstrate deficient performance or prejudice with respect to
19 these claims of ineffective assistance of trial counsel. First, the charge of being a felon in
20 possession of a firearm was dropped and petitioner was not convicted of that crime. Trial
21 counsel was certainly not deficient in failing to challenge a charge that was later dropped. Nor
22 was there any reference during trial to petitioner’s prior misdemeanor conviction. Second,
23 notwithstanding petitioner’s allegations with respect to his prior conviction, he has failed to
24 demonstrate that his extradition proceedings or his arrest were unlawful or invalid. *A fortiori*,
25 petitioner’s trial counsel was not ineffective in failing to challenge these matters. Further, for
26 reasons discussed above, petitioner has failed to demonstrate that the charges against him were

1 “time barred” or the result of a cover-up, or that the admission into evidence of prior acts of
2 molestation against other victims violated the Ex Post Facto Clause. For this reason, petitioner is
3 unable to establish prejudice with respect to his claim that his trial counsel should have
4 investigated or challenged these matters. There is no evidence the result of the proceedings
5 would have been different had petitioner’s trial counsel raised these challenges to his conviction.

6 For all of these reasons, petitioner is not entitled to relief on these claims.

7 **2. Failure to Call Witnesses**

8 In the next category of this claim, petitioner argues that his trial counsel rendered
9 ineffective assistance in failing to call specific witnesses at his trial. Pet. at 19-25. Those
10 witnesses are the following:

11 ***Carol Burch***

12 Sheriff’s Deputy Carol Burch wrote a report in support of the December 19, 1997 arrest
13 warrant described above, in which she stated that petitioner had “a \$250,000 Felony warrant for
14 his arrest stemming from the prior listed cases, and has a prior conviction of 288 PC in Tehama
15 County from March 1967.” Pet., Ex. 2 at 2. Petitioner contends that Ms. Burch knew or should
16 have known that these allegations were false. Pet. at 19; Traverse at 44-46. He argues that his
17 trial counsel should have called her as a witness prior to trial in order to “establish all relevant
18 facts” and to show that the warrant for his arrest was improperly issued. *Id.* Petitioner also
19 appears to contend that Ms. Burch’s statement in the report “led to admission of inadmissible
20 uncharged ex-post time barred charges” and “double jeopardy.” *Id.* at 20.

21 Petitioner has failed to demonstrate prejudice with respect to this claim. There is no
22 evidence Ms. Burch would have agreed to testify at petitioner’s trial, that the allegations
23 contained in her report are knowingly false, or that she would have testified as petitioner
24 suggests. See *United States v. Harden*, 846 F.2d 1229, 1231-32 (9th Cir. 1988) (no ineffective
25 assistance because of counsel’s failure to call a witness where, among other things, there was no
26 evidence in the record that the witness would testify); *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th

1 Cir. 2001) (no ineffective assistance where petitioner did “nothing more than speculate that, if
2 interviewed,” a witness might have given helpful information); *Dows v. Wood*, 211 F.3d 480,
3 486 (9th Cir. 2000) (no ineffective assistance of counsel where there was no evidence in the
4 record that an alibi witness actually existed and petitioner failed to present an affidavit
5 establishing that the alleged witness would have provided helpful testimony for the defense);
6 *United States v. Berry*, 814 F.2d 1406, 1409 (9th Cir. 1987) (appellant failed to meet prejudice
7 prong of ineffective assistance claim because he offered no indication of what potential
8 witnesses would have testified to or how their testimony might have changed the outcome of the
9 hearing). The *Strickland* standard “places the burden on the defendant, not the State, to show a
10 ‘reasonable probability’ that the result would have been different.” *Wong v. Belmontes*, ___ U.S.
11 ___, 130 S. Ct. 383, 390-391 (2009) (quoting *Strickland*, 466 U.S. at 694). Petitioner has failed
12 to meet that burden with respect to this ineffective assistance of counsel claim.

13 ***Janet Breshears***

14 Petitioner claims that his trial counsel rendered ineffective assistance in failing to
15 competently cross-examine Janet Breshears during a hearing on pretrial motions regarding the
16 admissibility of petitioner’s prior acts of sexual molestation. Pet. at 20. Petitioner states that his
17 trial counsel, or the court, was just about to ask Ms. Breshears a question when the trial court
18 called a recess. *Id.* According to petitioner, Ms. Breshears left the courthouse during this break
19 and did not return. *Id.* Petitioner faults his trial counsel for failing to call Ms. Breshears back to
20 the witness stand to complete his questioning, or to allow the court to complete its questioning of
21 this witness. *Id.*; Traverse at 58.

22 The state court record reflects that Janet Breshears was called as a witness by petitioner’s
23 counsel to establish facts relevant to the timing of discovery provided to the defense with regard
24 to petitioner’s 1967 prior conviction. RT at 43-63. After the prosecutor and the court questioned
25 Mr. Breshears, she was cross-examined by petitioner’s counsel. *Id.* She was then allowed to
26 step down, but the judge asked her a few clarifying questions after she had left the witness stand.

1 *Id.* at 62-63. After the trial court issued a ruling on several issues, petitioner’s counsel stated, “I
2 just have one question of my client.” *Id.* at 65. At that point the court took a recess. *Id.* Ms.
3 Breshears left the courtroom and did not reappear as a witness.

4 Petitioner has failed to demonstrate prejudice, or that the result of the proceedings would
5 have been different had his trial counsel recalled Ms. Breshears to the witness stand. Although
6 petitioner’s counsel wanted to ask petitioner a question, there is no indication from the record
7 that counsel had any further questions for Ms. Breshears. Nor is there evidence that the trial
8 judge was unable to complete his questioning of Ms. Breshears. On this record, there is no
9 evidence petitioner was denied the effective assistance of counsel or the right to confront Ms.
10 Breshears. Accordingly, he is not entitled to relief on this claim.

11 **John Villaneda**

12 The following evidence was admitted into evidence at petitioner’s trial by stipulation:

13 . . . the parties stipulate that John Villaneda is a police officer in
14 the State of Arizona. On July 25th of the year 2000, while
15 working with the Mexican authorities, he located a person who
16 was claiming to be John Robert Justice in the country of Mexico.
17 Through further investigation and fingerprint analysis, it was
18 determined that John Robert Justice was actually Robert Elmer
19 Barber. That John Villaneda with the assistance of the Mexican
20 authorities arrested and brought Robert Elmer Barber back into the
21 United States. The parties further stipulate that John Villaneda
22 would identify Robert Elmer Barber.

19 RT at 233, Pet., Ex. 9. Petitioner claims that: (1) Mr. Villaneda actually arrested petitioner on
20 July 6, 2000, not on July 25, 2000; (2) Mr. Villaneda did not have an arrest warrant; (3) the
21 extradition was illegal because “Arizona had no legal jurisdiction in Mexico;” and (4) the
22 stipulation is “constitutional barred for lack [of] a certified statement from Mr. Villaneda in
23 support of his alleged stipulated statement.” Pet. at 22; Traverse at 59. Petitioner also alleges
24 that Mr. Villaneda’s testimony might have had an impact on whether the statute of limitations
25 expired while petitioner was in Mexico. Traverse at 59-60. Petitioner states that he asked his
26 trial counsel to call Mr. Villaneda as a witness at trial but counsel declined to do so. Pet. at 22.

1 Petitioner claims that counsel's failure to call Mr. Villaneda constitutes ineffective assistance.

2 Even if these allegations constitute deficient performance, petitioner has failed to
3 demonstrate prejudice. There is no reasonable probability that the result of the proceedings
4 would have been different had counsel called Mr. Villaneda as a witness at trial. Trial counsel's
5 failure to call this witness regarding petitioner's arrest in Mexico and extradition to the United
6 States does not create a reasonable probability of a different result so as to undermine confidence
7 in the outcome. *See Tinsley v. Borg*, 895 F.2d 520, 532 (9th Cir. 1990). Accordingly, petitioner
8 is not entitled to relief on this claim.

9 **Doris Willabella Gurr**

10 The following evidence was admitted into evidence at petitioner's trial by stipulation:

11 Dorris Gurr, ladies and gentlemen, it's stipulated if called to testify
12 would testify that on January 7th, 1997, Robert Barber borrowed
13 Dorris Gurr's truck to go to the San Francisco Bay Area where he
told her a friend of his was having emergency open heart surgery.
Robert Barber drove the truck to Mexico.

14 RT at 232-33. Petitioner states that he asked his trial counsel to call Ms. Gurr as a witness but
15 counsel failed to do so. Pet. at 22. He explains that Ms. Gurr would have "told true facts as to
16 the young men and boys that worked for . . . petitioner." *Id.* Petitioner also states Ms. Gurr
17 would have testified that petitioner tried to return her truck, and that petitioner employed young
18 girls and adults in his business, as well as young boys. *Id.*

19 Petitioner's vague allegation that Ms. Gurr could have testified about "true facts"
20 regarding the persons in petitioner's employ are insufficient to establish deficient performance or
21 prejudice. *See Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995) ("[c]onclusory allegations
22 which are not supported by a statement of specific facts do not warrant habeas relief") (quoting
23 *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994)). Even assuming *arguendo* that Ms. Gurr would
24 have testified petitioner tried to return her truck and that he employed adults and young girls,
25 counsel's failure to introduce this testimony does not undermine confidence in the outcome of
26 petitioner's trial. Accordingly, petitioner is not entitled to relief on this claim.

1 **Kim Graeber**

2 The following evidence was admitted into evidence at petitioner’s trial by stipulation:

3 The parties stipulate Kim Graeber was the stepdaughter of Robert
4 Barber, period. On January 14th, 1997, Robert Barber called her
5 and said he was in Mexico and was not returning home, period.
6 He requested that she pack all his personal belongings into his
7 motor home and that he would make some arrangements to have
8 them picked up, period. On January 17th, 1997, she arrived at his
9 house. Molded food – comma, molded food was still on the stove.
10 The parties further stipulate that Exhibit 6 is a letter found by Kim
11 Graeber in the glove box of Robert Barber’s car. That the letter
12 was written by Robert Barber. It was found after Robert Barber
13 left the Redding area in January of 1997.

14 RT at 234-35.

15 Petitioner states that Ms. Graeber could have “established truth of facts as to evidence
16 admissible and inadmissible;” could have testified that petitioner hired young girls to work for
17 him and had tried to return Ms. Gurr’s truck to her; and that petitioner was a loving stepfather.
18 Pet. at 23. Petitioner states that he asked his trial counsel to call Ms. Graeber as a witness but he
19 declined, and he complains that Graeber’s stipulation was “admitted without challenge.” *Id.*

20 Petitioner’s vague allegations regarding the proposed testimony of Ms. Graeber are
21 insufficient to support this claim. *Jones*, 66 F.3d at 204; *James*, 24 F.3d at 26. In addition,
22 petitioner has failed to demonstrate that the result of the proceedings would have been different
23 had Kim Graeber testified as petitioner suggests. Accordingly, he is not entitled to relief.

24 **Steven, David, and Melissa Davis**

25 Petitioner claims that his trial counsel rendered ineffective assistance in failing to call
26 Steven, David, and Melissa Davis as witnesses at his trial. Pet. at 23-24. He states that Steven
and David Davis worked and went on camping trips with him and could have “cast doubt upon
the total alleged sexual activity.” *Id.* Melissa Davis is the mother of Steven and David and also
a young daughter who worked for petitioner as well. *Id.* at 24. Petitioner alleges that Melissa
Davis could have testified that she had heard “rumors” about one of the complaining witnesses.
Id.

1 Petitioner provides evidence that Melissa Davis brought Steven and David Davis to the
2 police station for an interview with a police investigator and that both boys “denied any sexual
3 contact between [petitioner] and themselves.” Pet., Ex. 3 at 11-12. However, David Davis also
4 told the investigator that other victims had told him “portions of the sexual assault circumstances
5 that happened to them,” that petitioner kept several firearms in his home, that petitioner had
6 given David money for no apparent reason, and that petitioner “would often make comments
7 about penises.” *Id.* at 12. Steven Davis informed the investigator that petitioner “often makes
8 comments about penises and ‘jacking off’” and that petitioner “had the Playboy channel on
9 television and that many of the kids have watched this.” *Id.* Melissa Davis informed the
10 investigator that she was aware of an incident wherein petitioner was accused by another person
11 of “child molest” and petitioner “made implicating statements and apologized.” *Id.* at 13. Under
12 these circumstances, petitioner’s trial counsel had a legitimate tactical reason not to call any of
13 these three persons as witnesses at trial. Further, trial counsel’s failure to call these witnesses
14 does not undermine confidence in the outcome of the proceedings. Accordingly, petitioner is not
15 entitled to relief on these claims.

16 **Lisa Roberson**

17 Petitioner claims that Lisa Roberson was “a key witness from day one” but that his trial
18 counsel improperly failed to call her as a witness at trial. Pet. at 24. Petitioner explains:

19 She made the first report of 12-17-96 . . . that made accusation
20 about [petitioner], making sexual passes at Lisa . . . IAC . . . for not
21 calling this witness as requested. She would have told of living at
22 [petitioner’s] home with boyfriend and having his baby, and
23 adopted out. Reason for scheme against [petitioner]. The right to
24 confront was denied.

25 *Id.* These cryptic allegations are vague and conclusory and are insufficient to establish deficient
26 performance or prejudice. Further, petitioner has failed to establish that the result of the
proceedings would have been different had his trial counsel called Ms. Roberson as a witness.
Accordingly, this claim of ineffective assistance of counsel should be denied.

1 **John Arnold**

2 Petitioner claims that his trial counsel rendered ineffective assistance in failing to call
3 John Arnold as a witness. Petitioner explains that: (1) Mr. Arnold is a “long time friend;” (2) he
4 “went fishing and camping with the boys and [petitioner]; (3) he worked for petitioner, along
5 with “the boys and girls and adults;” (4) he “went to Mexico for Ms. Gurr to recover her pick up
6 truck;” and (5) he would have established petitioner’s “true character.” Pet. at 24.

7 Petitioner’s unsupported statements are insufficient to demonstrate deficient performance
8 or prejudice with respect to this claim. Further, there is no evidence that Mr. Arnold would have
9 agreed to testify on petitioner’s behalf or that his testimony would probably have led to a
10 different outcome at trial. Accordingly, petitioner is not entitled to habeas relief.

11 **Vicki Chavez**

12 Petitioner also claims that his trial counsel rendered ineffective assistance in failing to
13 call Vicki Chavez as a witness at his trial. Petitioner explains that Ms. Chavez was interviewed
14 as a possible witness by the defense investigator. *Id.* at 25. According to petitioner, Ms. Chavez
15 would have testified that she was “raised” with petitioner’s older children; she never saw any
16 abuse taking place; and her son and daughter had spent time with petitioner and that no
17 molestation occurred. *Id.*

18 It appears from petitioner’s allegations that, although the defense investigator
19 interviewed Ms. Chavez, petitioner’s trial counsel decided not to call her as a witness at trial.
20 Petitioner has failed to establish that this tactical decision was unreasonable or outside the wide
21 range of professional legal assistance. “The decision whether to call any witnesses on behalf of
22 the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by
23 defense attorneys in almost every trial.” *United States v. Nersesian*, 824 F.2d 1294, 1321 (2nd
24 Cir. 1987). Reasonable tactical decisions, including decisions with regard to the presentation of
25 the case, are “virtually unchallengeable.” *Strickland*, 466 U.S. at 690. There is no evidence that
26 trial counsel’s decision not to call Vicki Chavez as a witness was unreasonable. Accordingly,

1 petitioner is not entitled to relief on this claim.

2 **Richard Hodges**

3 Petitioner claims that his trial counsel rendered ineffective assistance in failing to call
4 Richard Hodges as a witness at his trial. Pet. at 25. Petitioner explains that Mr. Hodges is the
5 father of one of his “alleged victims.” *Id.* He states that Mr. Hodges worked with petitioner and
6 stayed in his home and “went camping with [petitioner] and all the boys all the time without any
7 trouble.” *Id.* He also states that Mr. Hodges “wrote a letter at sentencing.” *Id.* Petitioner states
8 that he asked his trial counsel to call Mr. Hodges as a witness but he was never called. *Id.*

9 As in the claims described above, petitioner has failed to demonstrate either deficient
10 performance or prejudice with respect to this claim. There is no evidence that Mr. Hodges’
11 testimony would have resulted in a different outcome at trial. Accordingly, petitioner is not
12 entitled to relief on this claim.

13 **3. Failure to Request Proper Jury Instructions**

14 The record reflects that petitioner’s jury was given an instruction defining “sodomy.” RT
15 at 538. Petitioner claims that this was “misleading . . . without guidance of its application.” Pet.
16 at 27. He argues that “the jury could only have speculated the petition[er] was charged with the
17 act of sodomy, and that by testimony in alleging sodomy the act had been proven beyond a
18 reasonable doubt.” *Id.* In the traverse, petitioner explains:

19 The jury was subjected to uncharged alleged acts of sodomy;
20 through out the prosecutions questioning: this subjected the jury to
21 presume the uncharged sodomy was an act of conviction; without a
22 full and proper instruction on sodomy: the Sixth Amend. was
23 violated for lack of information. . . . Denied due process in that
24 counsel failed to challenge the alleged acts of sodomy that where
25 [sic] clearly outside the charges of indictment. Counsel failed to
26 ensure proper jury instructions where given as to uncharge[d]
sodomy.

24 Traverse at 64.

25 The state court record reflects that several witnesses, including the victims of petitioner’s
26 uncharged prior acts of molestation, testified that petitioner had committed “sodomy.” *See, e.g.,*

1 RT at 158-59, 198-200, 206-08, 227-28. Petitioner was charged with three counts of continuous
2 sexual abuse of a child pursuant to Cal. Penal Code § 288.5, which required proof that he
3 engaged in “three or more acts of substantial sexual conduct or three or more acts of lewd or
4 lascivious conduct with a child under the age of 14 years.” *Id.* at 530. The term “substantial
5 sexual conduct” is defined as “penetration of the vagina or rectum by the penis of the offender
6 . . .” *Id.* The jury was fully instructed on all of the charges against petitioner, including the
7 definitions of terms within those charges. As noted above, the jury was also instruction on the
8 definition of “sodomy.” Petitioner is apparently alleging that unless the jury was specifically
9 instructed as to how to apply the instruction defining “sodomy,” they would assume that he had
10 been separately charged with that crime. He argues, “The appeal court believed and shows
11 sodomy had been committed on D.J. some 50 times. Yet, this act, or acts where [sic] never
12 charged, nor was there physical evidence to support the charging of sodomy.” *Pet.* at 27.
13 Petitioner argues, “this cause of conviction must be reversed for failing to instruct the jury on
14 sodomy application and the instruction of sodomy instruction in jury deliberation as uncharged
15 acts.” *Id.* at 28.

16 Petitioner’s claim in this regard should be denied. Petitioner’s defense counsel did not
17 render ineffective assistance in failing to ensure that the jury was specifically instructed on how
18 to interpret the jury instruction on sodomy with respect to the charged offenses or the evidence
19 of prior uncharged offenses. There is no evidence the jury was confused about this issue or that
20 they believed petitioner had been charged with crimes in addition to those that were set forth in
21 the instructions. Petitioner has failed to demonstrate either defective performance or prejudice
22 with respect to this claim. Accordingly, he is not entitled to habeas relief.¹⁸

24 ¹⁸ In his traverse, petitioner states that the “cumulative effect” of the errors made by his
25 trial counsel violated his constitutional rights. Traverse at 23. He also makes several other
26 claims of error that are not contained in the petition before this court. As noted above, a traverse
is not the proper pleading to raise additional grounds for relief. Even if these claims were
properly raised, they should be denied. Petitioner is not entitled to relief on a claim of

1 **c. Appellate Counsel**

2 Petitioner’s final claim is that his appellate counsel rendered ineffective assistance
3 because of his failure to raise meritorious claims, including claims of ineffective assistance of
4 trial counsel. Pet. at 14; Traverse at 37-43. As described above, this court has concluded that all
5 of the claims raised in the instant petition lack merit. Appellate counsel’s decision to press the
6 claims he chose to raise on appeal was “within the range of competence demanded of attorneys
7 in criminal cases.” *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Petitioner has also failed
8 to demonstrate that he probably would have prevailed if his appellate counsel had raised any
9 other claims. He has therefore failed to establish prejudice. *Miller*, 882 F.2d at 2434 n.9.

10 **6. Evidentiary Hearing**

11 Petitioner requests an evidentiary hearing on his claims. The circumstances warranting
12 an evidentiary hearing are set out in 28 U.S.C. § 2254(e)(2), which provides as follows:

13 (e)(2) If the applicant has failed to develop the factual basis of a
14 claim in State court proceedings, the court shall not hold an
evidentiary hearing on the claim unless the applicant shows that-

15 (A) the claim relies on-

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18 cumulative error. “The fundamental question in determining whether the combined effect of
19 trial errors violated a defendant’s due process rights is whether the errors rendered the criminal
20 defense ‘far less persuasive,’ *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), and thereby
21 had a ‘substantial and injurious effect or influence’ on the jury’s verdict.” *Parle v. Runnels*, 505
22 F.3d 922, 927 (2007) (quoting *Brecht*, 507 U.S. at 637). This court has addressed each of
23 petitioner’s claims of ineffective assistance of trial counsel and has concluded that no error of
24 constitutional magnitude occurred at his trial in state court. The court also concludes that the
25 alleged errors, even when considered together, did not render petitioner’s defense “far less
26 persuasive,” nor did they have a “substantial and injurious effect or influence on the jury’s
verdict.” Accordingly, petitioner is not entitled to relief on any such claim. Nor is he entitled to
relief on other claims raised for the first time in the traverse; to wit, that his trial counsel should
have requested a preliminary hearing, objected to flaws in the charging documents or the verdict
forms, called favorable witnesses in addition to those specifically named in the petition,
conducted more effective cross-examination of witnesses not named in the petition, objected to
the admission of prior uncharged acts on federal constitutional grounds, failed to present
mitigating evidence at the sentencing hearing; or that the prosecutor committed misconduct.
Petitioner has failed to demonstrate prejudice with respect to those claims.

1 (I) a new rule of constitutional law, made retroactive to cases on
2 collateral review by the Supreme Court, that was previously
unavailable; or

3 (ii) a factual predicate that could not have been previously
4 discovered through the exercise of due diligence; and

5 (B) the facts underlying the claim would be sufficient to establish
6 by clear and convincing evidence that but for constitutional error,
no reasonable fact finder would have found the applicant guilty of
the underlying offense;

7 28 U.S.C. § 2254(e)(2).

8 Under this statutory scheme, a district court presented with a request for an evidentiary
9 hearing must first determine whether a factual basis exists in the record to support a petitioner's
10 claims and, if not, whether an evidentiary hearing "might be appropriate." *Baja v. Ducharme*,
11 187 F.3d 1075, 1078 (9th Cir. 1999). *See also Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir.
12 2005); *Insyxiengmay v. Morgan*, 403 F.3d 657, 669-70 (9th Cir. 2005). A federal court must
13 take into account the AEDPA standards in deciding whether an evidentiary hearing is
14 appropriate. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). A petitioner must also "allege[]
15 facts that, if proved, would entitle him to relief." *West v. Ryan*, No. 08-99000, 2010 WL
16 2303337, at *6 (9th Cir. June 10, 2010); *Schell v. Witek*, 218 F.3d 1017, 1028 (9th Cir. 2000).

17 The court concludes that no additional factual supplementation is necessary and that an
18 evidentiary hearing is not appropriate with respect to the claims raised in the instant petition.
19 Petitioner has failed to raise factual disputes that, if decided in his favor, would present a
20 colorable claim. *West*, 2010 WL 2303337, at *7. In addition, for the reasons described above,
21 petitioner has failed to demonstrate that the state courts' decision on his claims is an
22 unreasonable determination of the facts under § 2254(d)(2). *See Schriro*, 550 U.S. at 481.
23 Accordingly, an evidentiary hearing is not necessary or appropriate in this case.

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1 **III. Conclusion**

2 For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's
3 application for a writ of habeas corpus be denied.

4 These findings and recommendations are submitted to the United States District Judge
5 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
6 after being served with these findings and recommendations, any party may file written
7 objections with the court and serve a copy on all parties. Such a document should be captioned
8 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
9 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
10 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). In
11 his objections petitioner may address whether a certificate of appealability should issue in the
12 event he files an appeal of the judgment in this case. *See* Rule 11, Federal Rules Governing
13 Section 2254 Cases (the district court must issue or deny a certificate of appealability when it
14 enters a final order adverse to the applicant).

15 DATED: September 15, 2010.

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17 EDMUND F. BRENNAN
18 UNITED STATES MAGISTRATE JUDGE
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