

**FILED**

DEC 23 2011

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 DEAN A. SCHWARTZMILLER,

C 10-0057 JSW (PR)

9 Petitioner,

**ORDER DENYING PETITION  
FOR WRIT OF HABEAS  
CORPUS AND DENYING  
CERTIFICATE OF  
APPEALABILITY**

10 vs.

11 KENNETH CLARK, Warden,

12 Respondent.  
13 \_\_\_\_\_/

14 This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C.  
15 § 2254. The court ordered respondent to show cause why the writ should not be granted.  
16 Respondent has filed an answer and a memorandum of points and authorities in support  
17 of it, and has lodged exhibits with the court, and petitioner has filed a traverse. For the  
18 reasons set out below, the petition is denied.

19 **BACKGROUND**

20 Petitioner was convicted of 10 counts of lewd and lascivious acts on a child under  
21 14 years of age. *See* Cal. Penal Code § 288(a). The jury found true the allegations that  
22 he committed the crime against more than one victim, *see id.* §§ 667.61(b), (e), and that  
23 he had substantial sexual contact with the victims, *see id.* § 1203.066(a)(8). In addition,  
24 the jury found appellant guilty of one count of inducing a minor to pose for a sexual  
25 photograph, *see id.* § 311.4(c); and one misdemeanor count of possessing child  
26 pornography, *see id.* § 311.11(a). He was sentenced to prison for 152 years to life. His  
27 conviction and sentence were affirmed by the California Court of Appeal and his petition  
28 for review in the California Supreme Court was denied.



1 petitioner's claims, the court looks to the last reasoned opinion, in this case that of the  
2 California Court of Appeal. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991);  
3 *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th Cir. 2000).

#### 4 DISCUSSION

5 Petitioner was convicted of sexually abusing teenage boys R. and M. *People v.*  
6 *Schwartzmiller*, No. H031156, 2008 WL 4947264 at \*1 (Cal. Ct. App. Nov. 19, 2008).

7 Both boys testified to repeated sexual incidents over a period of time. *Id.* at \*1-3. In  
8 addition, the prosecution presented testimony by six other witnesses that they were  
9 extensively abused by petitioner when they were teenagers. *Id.* at \*4-6. Notebooks and  
10 a manuscript belonging to petitioner also were introduced; a police witness testified that  
11 he had examined the manuscript – labeled “fiction” – and concluded that it recorded  
12 molestations of 105 victims in eight states, Mexico and Brazil, and that the notebooks  
13 mentioned 250 to 300 victims. *Id.* at \* 20.

14 As grounds for habeas relief petitioner claims (1) that his due process rights were  
15 violated by admission of the “other bad acts” evidence of his manuscript and notebooks,  
16 and (2) that his due process and jury trial rights were violated by the trial court's  
17 exclusion of “other bad acts” evidence in support of his defense that his roommate was  
18 responsible for the offenses. The California Court of Appeals held that both of these  
19 claims were forfeited by petitioner's failure to make a contemporaneous objection on the  
20 grounds he relied upon in the appeal, which were the same as those he raises here. *Id.* at  
21 \*15, 22.

22 The Ninth Circuit has recognized and applied the California contemporaneous  
23 objection rule in affirming denial of federal petitions on grounds of procedural default  
24 where there was a failure to object at trial. *See Inthavong v. Lamarque*, 420 F.3d 1055,  
25 1058 (9th Cir. 2005) (holding petitioner barred from challenging admission of evidence  
26 for failure to object at trial); *Davis v. Woodford*, 384 F.3d 628, (9th Cir. 2004) (holding  
27 objection on evidentiary ground insufficient to preserve constitutional claim, which  
28 therefore was procedurally barred on federal habeas); *Paulino v. Castro*, 371 F.3d 1083,

1 1092–93 (9th Cir. 2004) (holding petitioner barred from challenging jury instruction for  
2 failure to object at trial); *Vansickel v. White*, 166 F.3d 953, 957–58 (9th Cir. 1999)  
3 (holding petitioner barred from challenging denial of peremptory challenges for failure  
4 to contemporaneously object).

5 Petitioner contends that he did object to admission of the “other bad acts”  
6 evidence, but because the California courts are the final expositors of California law, this  
7 court must accept the state appellate court's conclusion as to its state procedural bar. *See*  
8 *Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1999) (federal courts lack jurisdiction to  
9 review state court applications of procedural rules; refusing to review state court's  
10 finding of procedural default). The claims here thus are barred unless petitioner can  
11 show grounds to avoid the bar. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991)  
12 (petitioner can avoid procedural bar by demonstrating cause for the default and actual  
13 prejudice, or demonstrating that failure to consider the claims will result in a  
14 fundamental miscarriage of justice). Petitioner does not even attempt to do so. Both  
15 claims therefore are procedurally barred, and the petition must be denied.

#### 16 CONCLUSION

17 The petition for a writ of habeas corpus is DENIED. A certificate of appealability  
18 is DENIED. The Clerk shall close the file.

19 **IT IS SO ORDERED.**

20 DATED: DEC 23, 2011

  
21 JEFFREY S. WHITE  
22 United States District Judge  
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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

DEAN A. SCHWARTZMILLER,  
Plaintiff,

Case Number: CV10-00057 JSW  
**CERTIFICATE OF SERVICE**

v.

KENNETH CLARK et al,  
Defendant.

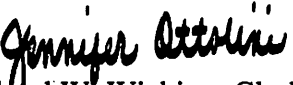
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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 23, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Dean A. Schwartzmiller  
F67490  
P.O. Box 5246  
Corcoran, CA 93212

Dated: December 23, 2011

  
Richard W. Wicking, Clerk  
By: Jennifer Ottolini, Deputy Clerk