



1 sexual intercourse with a child ten years of age or younger (Cal. Penal Code § 288.7(a));  
2 sodomy with a child ten years of age or younger (Cal. Penal Code § 288.7(a)); digital  
3 penetration of a child ten years of age or younger (Cal. Penal Code § 288.7(b)); oral  
4 copulation with a child ten years of age or younger (Cal. Penal Code § 288.7(b)); and  
5 found true the allegation that Petitioner engaged in substantial sexual conduct with a  
6 child under the age of fourteen (Cal. Penal Code §1203.066(a)(9)). *See* Doc. No. 1.  
7 Petitioner asserts he was denied his fundamental right to a fair trial due to a combination  
8 of prosecutorial misconduct and the admission of irrelevant and highly prejudicial  
9 evidence. *See id.* at 3-8. Respondent answered on the merits, requesting the petition be  
10 denied with prejudice, and that no certificate of appealability be issued. *See* Doc. No. 6.  
11 Petitioner filed a traverse. *See* Doc. No. 12.

12 The matter was referred to United States Magistrate Judge Burkhardt for  
13 preparation of a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1), and  
14 Civil Local Rule HC.2. Judge Burkhardt has issued a detailed and well-reasoned report  
15 recommending that the Court deny Petitioner’s claims for relief without an evidentiary  
16 hearing and dismiss the petition. *See* Doc. No. 17. Petitioner filed a motion for extension  
17 of time to file his objections to the Report and Recommendation. *See* Doc. No. 19. The  
18 Court granted Petitioner’s motion (Doc. No. 20), and Petitioner filed objections to the  
19 Report and Recommendation on August 17, 2016. *See* Doc. No. 21. For the reasons set  
20 forth below, the Court **OVERRULES** Petitioner’s objections and **ADOPTS** the Report  
21 and Recommendation in its entirety.

#### 22 STANDARD OF REVIEW

23 Pursuant to Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. §  
24 636(b)(1), the Court must “make a *de novo* determination of those portions of the report .  
25 . . to which objection is made,” and “may accept, reject, or modify, in whole or in part,  
26 the findings or recommendations made by the magistrate [judge].” 28 U.S.C. §  
27 636(b)(1); *see also United States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989).

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1 DISCUSSION

2 Petitioner objects to Judge Burkhardt’s Report and Recommendation on various  
3 grounds. *See* Doc. No. 21. The Court has conducted a *de novo* review of the pertinent  
4 portions of the record with respect to each of Petitioner’s objections, and each objection  
5 is addressed in turn.

6 First, Petitioner objects to the legal standard applied in the portion of the Report  
7 and Recommendation entitled “IV. Scope of Review,” on the ground that the applicable  
8 provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) are  
9 “in part unconstitutional and illegal, and denies Petitioner due process and equal  
10 protection of the law.” Doc. No. 21 at 2. The provisions of AEDPA govern federal  
11 habeas corpus petitions. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). The Supreme  
12 Court has consistently upheld the constitutionality of AEDPA and has stated, “[s]ection  
13 2254(d) [as amended by AEDPA] reflects the view that habeas corpus is a ‘guard against  
14 extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary  
15 error correction through appeal.” *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011),  
16 quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979). Judge Burkhardt clearly  
17 defined the applicable legal standard a federal court utilizes in determining whether to  
18 grant a habeas corpus petition. Thus, the Court finds Petitioner’s objection to be without  
19 merit.

20 Second, Petitioner contends he has met the appropriate standard to prevail on his  
21 claims of prosecutorial misconduct, and admission of highly prejudicial evidence. *See*  
22 Doc. No. 21 at 4. Petitioner’s objections do not present new argument and repeat the  
23 arguments found in the petition. Judge Burkhardt thoroughly addresses these arguments  
24 in the Report in Recommendation. Accordingly, the Court finds Petitioner’s  
25 prosecutorial misconduct and admission of prejudicial evidence objections are without  
26 merit.

27 Third, Petitioner objects to Judge Burkhardt’s denial of Petitioner’s request for  
28 appointment of counsel. Doc. No. 21 at 5. Judge Burkhardt twice considered Petitioner’s

1 motions requesting appointment of counsel, and found in both instances that Petitioner  
2 failed to demonstrate that the interests of justice are best served by appointment of  
3 counsel. *See* Doc. Nos. 10, 16. The Court finds Judge Burkhardt came to a sound  
4 conclusion, and thus finds Petitioner’s objection without merit.

5 Finally, Petitioner claims he had insufficient time to respond to the Report and  
6 Recommendation, and requests an additional “sixty (60) days with which to fully and  
7 adequately file Petitioner’s objection(s).” Doc. No. 21 at 6. All written objections to the  
8 Report and Recommendation were due on or before July 21, 2016. Doc. No. 17 at 38.  
9 On July 25, 2016, Petitioner filed a motion with the Court requesting an extension of time  
10 to respond to the Report and Recommendation. Doc. No. 19. The Court granted the  
11 motion, and extended the deadline four weeks to August 18, 2016. Doc. No. 20.  
12 Petitioner filed his objections on August 17, 2016. Doc. No. 21. Because the Court  
13 previously granted Petitioner an extension of time to respond, coupled with the fact that  
14 Petitioner filed his objections in a timely fashion, the Court finds Petitioner’s argument  
15 meritless.

16 Accordingly, Petitioner’s objections are **OVERRULED**, the Report and  
17 Recommendation is **ADOPTED** in its entirety, and the Petition for Writ of Habeas  
18 Corpus and request for evidentiary hearing are **DENIED**.

19 **CERTIFICATE OF APPEALABILITY**

20 Rule 11 of the Federal Rules Governing Section 2254 Cases states that “the district  
21 court must issue or deny a certificate of appealability when it enters a final order adverse  
22 to the applicant.” A certificate of appealability is not issued unless there is “a substantial  
23 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Under this  
24 standard, a petitioner must show that reasonable jurists could debate whether the petition  
25 should have been resolved in a different manner, or that the issues presented were  
26 adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S.  
27 322, 336 (2003), quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

28 For the reasons set forth in the Report and Recommendation, the Court finds this

1 standard has not been met. Accordingly, the Court **DECLINES** to issue a certificate of  
2 appealability as to any claims or issues raised in the petition.

3 **CONCLUSION**

4 Based on the foregoing, Petitioner's objections are **OVERRULED**, the Report and  
5 Recommendation is **ADOPTED** in its entirety, the Petition for Writ of Habeas Corpus  
6 and request for evidentiary hearing are **DENIED**, and the Court **DECLINES** to issue a  
7 certificate of appealability.

8 The Clerk of Court shall terminate this case and enter judgment in favor of  
9 Respondent.

10 **IT IS SO ORDERED.**

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12 Dated: December 15, 2016

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14 HON. MICHAEL M. ANELLO  
15 United States District Judge  
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