No. _____

IN THE

Supreme Court of the United States

ARMANDO J. MENA,

Petitioner,

v.

ROSEMARY NDOH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX

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FILED

MAY 22 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARMANDO J. MENA, AKA A. J. Mena, Petitioner-Appellant, v. ROSEMARY NDOH, Respondent-Appellee.	No. 17-55524 D.C. No. 5:13-cv-00490-CJC-AFM ORDER

Before: PAEZ and CLIFTON, Circuit Judges, and KATZMANN,* Judge.

The petition for rehearing is DENIED.

* The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

NOT FOR PUBLICATION

FILED

MAY 1 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARMANDO J. MENA, AKA A. J. Mena, Petitioner-Appellant, v. ROSEMARY NDOH, Respondent-Appellee.	No. 17-55524 D.C. No. 5:13-cv-00490-CJC-AFM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted April 10, 2019
Pasadena, California

Before: PAEZ and CLIFTON, Circuit Judges, and KATZMANN,** Judge.

Armando Mena appeals the district court's denial of his petition for habeas relief. In 2011, Mena was indicted for eleven counts of committing a lewd act upon a child under fourteen years of age in violation of California Penal Code § 288(a). In exchange for dropping those eleven counts, Mena pled guilty to five

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

new counts of committing a forcible lewd act upon a child under fourteen in violation of California Penal Code § 288(b)(1). Mena's trial counsel tried to discourage him from entering into this plea agreement, but Mena insisted on pleading guilty because he "[did not] want to put . . . the alleged victims through the trial process." Although Mena's trial counsel did not join in Mena's guilty plea, Mena verified that he had spoken with his trial counsel about the plea agreement and that he understood the consequences of his plea. The trial court did not discuss the elements of the counts to which Mena pled guilty during the plea colloquy. Mena was sentenced to a forty-year state prison term.

Following his sentencing, Mena sought to appeal his guilty plea on the basis that his trial counsel had provided ineffective assistance. Although Mena received the necessary certificate of probable cause to appeal his guilty plea, his appellate counsel filed a brief under the authority of *People v. Wende*, 600 P.2d 1071 (Cal. 1979), representing that there were no arguable issues on appeal. The court of appeal affirmed. Mena sought state and federal habeas relief, asserting that his plea was involuntary in a constitutional sense and that he had been rendered ineffective assistance by trial and appellate counsel. Mena exhausted his claims in state court, and the district court denied Mena's habeas petition.

We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, and we affirm.

1. Mena claims that his guilty plea was not voluntary in a constitutional sense because he did not receive an explanation of the force element of the § 288(b)(1) charges. In *Henderson v. Morgan*, the Supreme Court held that a defendant's guilty plea could not be voluntary in a constitutional sense "unless the defendant received 'real notice of the true nature of the charge against him,'" including an explanation of each element of the crime. 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)).

The Supreme Court noted, however, that a plea would be found involuntary only in unique circumstances. *Id.* at 647. Where the record contains an explanation of the charge by the trial judge or a representation by defense counsel that counsel explained the elements of the charge to the defendant, the guilty plea is not involuntary under *Henderson*. *Id*. Even if neither of these representations is in the record, "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Id*.

It would not have been objectively unreasonable for the California Supreme Court to apply the *Henderson* presumption here. Mena verified on his plea form that he "had sufficient time to consult with [his] attorney concerning [his] intent to plead guilty/no contest to the [§ 288(b)(1)] charges" and that "[his] lawyer ha[d] explained everything . . . to [him]." Mena again verified to the district court that

he had discussed the plea offer with his trial counsel. Although the record contains neither an express explanation of the element of force by the trial court nor a representation by trial counsel that he explained the force element to Mena, the California Supreme Court could have reasonably presumed that Mena's trial counsel explained the elements of the § 288(b)(1) charges. *See Henderson*, 426 U.S. at 647. Furthermore, because the trial court conducted an evidentiary hearing to ascertain whether Mena understood the plea, Mena is not entitled to relief on the basis that the fact-finding process was unreasonable. Thus, the district court properly denied habeas relief on this ground.

2. Mena next contends that his trial counsel provided ineffective assistance by failing to explain the force element of the § 288(b)(1) charges. To demonstrate ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and that this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The probability of prejudice must be "sufficient to undermine confidence in the [case's] outcome." *Hurles v. Ryan*, 752 F.3d 768, 782 (9th Cir. 2014). Here, even if we assume deficient performance, Mena has not demonstrated that it was objectively unreasonable for the California Supreme Court to determine that there was no prejudice. Mena pled guilty for reasons unrelated to the nature of the charges against him and in spite of his trial counsel's advice not to plead guilty. Because

the California Supreme Court could have reasonably determined that Mena was not prejudiced by his counsel's performance, the district court did not err in denying habeas relief on this claim.

3. Mena lastly argues that his appellate counsel provided ineffective assistance by filing a *Wende* brief on direct appeal. Although a defendant has a right to be represented effectively by counsel on direct appeal, appellate counsel is not required to make arguments that are frivolous as a matter of professional judgment. *See Jones v. Barnes*, 463 U.S. 745, 751–52 (1983). In *People v. Wende*, the California Supreme Court established a constitutionally sufficient procedure by which appellate counsel may inform the court of the nature of an appeal and decline to brief issues judged to be frivolous. *See Smith v. Robbins*, 528 U.S. 259, 265 (2000); *Wende*, 600 P.2d at 1073–74. Appellate counsel's decision to file a *Wende* brief is reviewed under *Strickland*. *Smith*, 528 U.S. at 285.

As discussed previously, the California Supreme Court could have reasonably determined that neither Mena's involuntary plea claim nor his ineffective assistance of trial counsel claim constituted a viable appellate issue. Thus, it was not objectively unreasonable for the California Supreme Court to determine that Mena's appellate counsel did not perform deficiently by filing a *Wende* brief—even though Mena was granted a certificate of probable cause on his ineffective assistance of trial counsel claim. *See Delgado v. Lewis*, 223 F.3d 976,

981 (9th Cir. 2000) (noting that while filing a *Wende* brief after the defendant receives a certificate of probable cause is unusual, deficient performance stems from not briefing "very viable appellate issues"). Habeas relief was properly denied on this ground.

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARMANDO J. MENA,

Petitioner,

v.

DAVID A. LONG,

Respondent.

Case No. ED CV 13-00490 CJC (AFM)

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendations of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the First Amended Petition is denied and the action is dismissed with prejudice.

DATED: March 29, 2017

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARMANDO J. MENA,

Petitioner,

v.

DAVID A. LONG,

Respondent.

Case No. ED CV 13-00490 CJC (AFM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Petition, the records on file, the Report and Recommendation of United States Magistrate Judge, petitioner's objections to the Report, and respondent's response to the objections. Further, the Court has engaged in a *de novo* review of those portions of the Report to which petitioner has made objections.

The crux of the First Amended Petition is that petitioner's guilty plea to multiple counts of forcible lewd acts on a child was involuntary because he lacked real notice of the critical element of "force." For the following reasons, petitioner's objections to the Report do not warrant a change in the Magistrate Judge's recommendation that the First Amended Petition be denied that this action be dismissed with prejudice.

First, petitioner argues that it the California Supreme Court's fact-finding process was defective under 28 U.S.C. § 2254(d)(2) because it rejected petitioner's claims without first permitting further development of the state court record. (Objections at 2.) "In some limited circumstances," a state court's "failure to hold an evidentiary hearing may render its fact-finding process unreasonable under § 2254(d)(2)." *Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012). "But we have never held that a state court must conduct an evidentiary hearing to resolve every disputed factual question; such a per se rule would be counter not only to the deference owed to state courts under AEDPA, but to Supreme Court precedent." *Id.* "A state court's decision not to hold an evidentiary hearing does not render its fact-finding process unreasonable so long as the state court could have reasonably concluded that the evidence already adduced was sufficient to resolve the factual question." *Id.* In light of the evidence already adduced in the state court record, as discussed in detail in the Report, it was not objectively unreasonable for the California Supreme Court to reject petitioner's claims without further development of the record.

Second, petitioner argues that it would have been objectively unreasonable for the California Supreme Court to presume from petitioner's plea form that he had real notice of the force element because the plea form contained an important error. (Objections at 3.) The error, which is undisputed, is that the sentencing range for the offense to which petitioner pled guilty was written incorrectly on the plea form as three, six, or eight years. (Clerk's Transcript ["CT"] 170 at ¶ 3.) The trial court repeated this error about the sentencing range during the plea colloquy. (Reporter's Transcript ["RT"] 33.) In fact, the correct sentencing range for the offense to which petitioner pled guilty, forcible lewd on a child, is five, eight, or ten years. *See* Cal. Penal Code § 288(b)(1). This error, however, could not have confused petitioner about the nature of the charge, because on the same plea form, next to the misstatement about the sentencing range, is a correct citation to § 288(b)(1), as well

as a correct description of the offense as "forcible lewd act on child." (CT 170 at ¶ 3.) Nothing in the record before the California Supreme Court suggests that the misstated sentencing range was relevant to petitioner's understanding of the nature of the charge. Indeed, the sentencing range, which was only hypothetical, appeared to play no role in petitioner's decision to plead guilty because he had negotiated a total sentence of forty years before entering his plea, and because the plea form elsewhere affirmed that he was to be sentenced to forty years. (RT 33; CT 171 at ¶ 9.)[1]

Third, petitioner argues that it would have been objectively unreasonable for the California Supreme Court to presume that petitioner had real notice of the force element in light of his "mental impairment." (Objections at 4.) The record before the state courts, however, did not contain any evidence of petitioner having a mental impairment. Rather, it reflected that he had a low literacy level, shown by petitioner's score of 3.2 on the Test for Adult Basic Education. (ECF No. 1 at 15; Lodgment 8 at 95.) Notwithstanding petitioner's low literacy level, it would not have been objectively unreasonable to presume that he had real notice of the charge because his trial counsel explained, and the Spanish-language interpreter translated, the entire contents of the plea form to him, including the fact that he was pleading guilty to five counts of "forcible lewd act on child" under Cal. Penal Code § 288(b)(1). (CT 170 at ¶ 3 and 171 at ¶¶ 19, 22.) Nothing in the record suggests that this process required reading. Petitioner has not explained how his low literacy level would have prevented him from understanding the contents of the plea form when they were explained and translated to him.

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[1] Respondent also points out that the plea form clearly stated that petitioner was pleading guilty to a "violent" felony, which would have given petitioner further notice of the force element. (CT 171 at ¶ 10.) The Court is not persuaded by this fact because the identification of the offense to which petitioner pled guilty as a violent felony did not differentiate it from the original charges of non-forcible lewd acts, which also are violent felonies. *See* Cal. Penal Code § 667.5(c)(6).

Fourth, petitioner argues that it would have been objectively unreasonable for the California Supreme Court to reject his claim of ineffective assistance of trial counsel, based on trial counsel's failure to explain the nature of the charge to him. (Objections at 7-8.) In particular, petitioner argues that the Court improperly relied on the Tenth Circuit's decision in *Miller v. Champion*, 161 F.3d 1249 (10th Cir. 1998), to apply a test for deficient performance. Although circuit authority cannot be relied upon to grant relief under the AEDPA, it can serve as persuasive authority for purposes of determining whether a particular state court decision is an unreasonable application of Supreme Court law, and may help determine what law is clearly established. *Robinson v. Ignacio*, 360 F.3d 1044, 1057 (9th Cir. 2004). The Court did not misapply circuit authority in this context. As respondent points out, petitioner has not shown that *Miller* is contrary to Supreme Court precedent. Moreover, this objection goes only to deficient performance, but petitioner raises no objection to the Court's conclusion that he had failed to show prejudice, which by itself is enough to defeat his claim of ineffective assistance of trial counsel.

Fifth, petitioner argues that the Court improperly analyzed his claim of ineffective assistance of appellate counsel. (Objections at 9-10.) Petitioner argues that appellate counsel was ineffective for filing a *Wende* brief despite the fact that the trial court had earlier issued a certificate of probable cause — thereby permitting him to challenge his guilty plea on appeal — for his claim that "he did not receive good advice from his trial attorney regarding his plea and sentence." (CT 198.) In *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000), the Ninth Circuit remarked that it would be "unusual" for appellate counsel to file a *Wende* brief after a certificate of probable cause had been issued. But in *Delgado*, the prisoner also had "very viable appellate issues." *Id.* Here, the claim for which petitioner received a certificate of probable cause, ineffective assistance of trial counsel, was not similarly viable. For the reasons discussed in the Report, there was no reasonable probability that, but for trial counsel's failure to give good

advice regarding the plea and sentence, petitioner would have rejected the plea offer and insisted on going to trial. (Report at 23-24.) It was trial counsel, not petitioner, who insisted on going to trial. By all accounts, petitioner was determined to plead guilty and ignore trial counsel's advice to go to trial. As noted, petitioner does not object to the Court's determination that, based on these circumstances, he had failed to show prejudice for purposes of his *Strickland* claim.

Relatedly, petitioner argues that the Court should not have presumed in the Report that, because his proposed appellate claims would have failed under the stringent AEDPA standard of review, they necessarily would have failed had appellate counsel raised them under a less-stringent standard on direct appeal. Petitioner has not shown that this distinction would have made any difference. Under California law, a claim by appellate counsel on direct appeal that petitioner lacked real notice of the charge would have failed because, for the same reasons discussed in the Report, the record before the state courts would have permitted a reasonable presumption that petitioner had real notice of the force element. *See In re Ronald E.*, 19 Cal. 3d 315, 324 (1977) (noting that there is no compulsion that the record show an explanation of the technical elements of the offense; it is sufficient that the record fairly demonstrates that the defendant knowingly admitted to having engaged in a detailed course of conduct which constituted the violation), *overruled on another ground by People v. Howard*, 1 Cal. 4th 1132, 1175-78 (1992); *People v. Dolliver*, 181 Cal. App. 3d 49, 61 (1986) ("The law does not require that an express discussion of the elements of the offense be contained in the transcript nor even an express statement that the elements have been discussed with counsel.").

In sum, petitioner's objections are overruled.

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IT THEREFORE IS ORDERED that (1) the Report and Recommendation of the Magistrate Judge is accepted and adopted; (2) petitioner's request for an evidentiary hearing is denied; and (3) Judgment shall be entered denying the First Amended Petition and dismissing this action with prejudice.

DATED: March 29, 2017

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ARMANDO J. MENA,

Petitioner,

v.

DAVID A. LONG,

Respondent.

Case No. ED CV 13-00490 CJC (AFM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Cormac J. Carney, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On March 18, 2013, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254). The operative pleading is the First Amended Petition ("FAP") filed by petitioner's counsel on November 19, 2013. Petitioner raises four grounds for federal habeas relief directed to his conviction, pursuant to his guilty plea, of five counts of forcible lewd or lascivious acts on a

child. The crux of the Petition is that petitioner's guilty plea was involuntary because he was never informed of the "force" element of the offense.

Respondent filed an Answer on August 18, 2016. Petitioner filed a Reply on November 23, 2016.

Thus, this matter is ready for decision. For the reasons discussed below, the Court recommends that the First Amended Petition be denied and that this action be dismissed with prejudice.

PROCEDURAL BACKGROUND

In September 2011, petitioner was charged by information with 11 counts of lewd or lascivious acts upon a child under the age of 14 years, in violation of Cal. Penal Code § 288(a). (Clerk's Transcript ["CT"] 67-82.) The information also alleged multiple victims. (CT 81.)

On November 3, 2011, the prosecutor amended the information to add Counts 12 to 16, which alleged lewd or lascivious acts upon a child by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person ("force element"), in violation of Cal. Penal Code § 288(b)(1). (Reporter's Transcript ["RT"] 32.) On the same date, pursuant to a plea agreement and against the advice of his trial counsel, petitioner pled guilty to Counts 12 to 16. (RT 34-35; CT 170-72.) The trial court dismissed the remaining counts and sentenced petitioner to state prison for 40 years. (RT 37, 45; CT 188-89.)

On January 11, 2012, petitioner filed a handwritten notice of appeal challenging the validity of his guilty plea. (CT 199.) On January 20, 2012, petitioner filed, with the assistance of a staff attorney at Appellate Defenders, Inc., an amended notice of appeal that included a request for certificate of probable cause on the ground that he did not receive good advice from his counsel regarding the

plea and sentence. (CT 197.) The trial court granted the request for certificate of probable cause. (CT 198.)

On January 24, 2012, petitioner filed a pro se habeas petition in the San Bernardino County Superior Court. (Respondent's notice of lodging, Lodgment 4.) On February 3, 2012, the Superior Court rejected the petition as "premature and inappropriate" because petitioner's direct appeal was pending. (Lodgment 5.)

On direct appeal, petitioner's appellate counsel filed a brief under the authority of *People v. Wende*, 25 Cal. 3d 436 (1979), and *Anders v. California*, 386 U.S. 738 (1967), setting forth a statement of the case, but raising no issues and requesting that the Court of Appeal independently review the record. (Lodgment 3 at 3.) Although the Court of Appeal afforded petitioner an opportunity to file a personal supplemental brief, he did not do so. In an unpublished decision filed on October 3, 2012, the California Court of Appeal found no arguable issues and affirmed the judgment. (Lodgment 3 at 4.) Petitioner did not file a Petition for Review in the California Supreme Court. (FAP at 2.)

On November 7, 2012, petitioner filed a habeas petition in the California Supreme Court. (Lodgment 6.) Petitioner alleged that his trial counsel and appellate counsel were ineffective because petitioner's guilty plea was involuntary. On February 13, 2013, the California Supreme Court denied the petition with a citation to "See *People v. Duvall* (1995) 9 Cal. 4th 464, 474; *In re Swain* (1949) 34 Cal. 2d 300, 304." (Lodgment 7.) The citations to both *Duvall* and *Swain* meant that the California Supreme Court found that petitioner had not alleged his claims with sufficient particularity. *See Seeboth v. Allenby*, 789 F.3d 1099, 1104 n.3 (9th Cir. 2015) (citing *Cross v. Sisto*, 676 F.3d 1172, 1176-77 (9th Cir. 2012); *Gaston v. Palmer*, 417 F.3d 1030, 1039 (9th Cir. 2005), *as amended*, 447 F.3d 1165 (9th Cir. 2006); *and King v. Roe*, 340 F.3d 821, 823 (9th Cir. 2003) (per curiam), *abrogated in part on other grounds as recognized in Waldrip v. Hall*, 548 F.3d 729, 733 (9th

Cir. 2008)). For purposes of federal habeas review, this meant that petitioner's claims could have been unexhausted because petitioner had not fairly presented them to the California Supreme Court. *See Kim v. Villalobos*, 799 F.2d 1317, 1319 (9th Cir. 1986) (citing *Harris v. Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc); *and McQuown v. McCartney*, 795 F.2d 807 (9th Cir. 1986)).

On March 18, 2013, petitioner filed the instant Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254). The Petition again alleged that petitioner's trial counsel and appellate counsel were ineffective because petitioner's guilty plea was involuntary. On March 25, 2013, the previously-assigned Magistrate Judge found that the Petition suffered from several deficiencies and dismissed the Petition with leave to amend. (ECF No. 4.) In particular, the previously-assigned Magistrate Judge had independently examined petitioner's California Supreme Court habeas petition as required by *Kim*, 799 F.2d at 1319-20, and was inclined to concur with the California Supreme Court's determination and find that petitioner had not exhausted his state remedies with respect to his grounds for federal habeas relief. (ECF No. 4 at 3.) Moreover, counsel was appointed for petitioner in the interests of justice, in light of the procedural complexity of the case and the unlikelihood that petitioner, who had a low literacy level, could understand and rectify the pleading deficiencies of the Petition.

On November 19, 2013, petitioner's counsel filed a First Amended Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254). Concurrently, petitioner's counsel filed a "Motion for Stay Pending Exhaustion of State Remedies" pursuant to *Rhines v. Weber*, 544 U.S. 269, 277 (2005).

On November 21, 2013, the Court issued a Report and Recommendation in which it recommended that the Motion be denied and that the action be summarily dismissed without prejudice. In particular, the Report and Recommendation found that this was not an appropriate case for a *Rhines* stay because the First Amended

Petition was fully unexhausted. Judgment was entered dismissing the case on December 20, 2013.

At around this time, petitioner filed another series of habeas petitions in the California courts, thereby exhausting all of his claims in the First Amended Petition. On December 5, 2013, petitioner filed a habeas petition in the San Bernardino County Superior Court. (Lodgment 8.) On March 18, 2014, the Superior Court denied the petition as untimely, and cited *In re Clark*, 5 Cal. 4th 750, 765 (1993). (Lodgment 9.) On April 4, 2014, petitioner filed a habeas petition in the California Court of Appeal. (Lodgment 10.) It was denied without comment or citation of authority on April 15, 2014. (Lodgment 11.) On April 21, 2014, petitioner filed a habeas petition in the California Supreme Court. (Lodgment 12.) On March 11, 2015, the California Supreme Court denied the petition as follows: "The petition for writ of habeas corpus is denied on the merits. (See *Harrington v. Richter* (2011) 562 U.S. 86, citing *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803.)."

On February 17, 2016, in *Mena v. Long*, 813 F.3d 907 (2016), the Ninth Circuit reversed the Court's decision to dismiss the First Amended Petition, holding that district courts have discretion to stay and hold in abeyance fully unexhausted habeas petitions under *Rhines*. Accordingly, the Ninth Circuit remanded this case for a decision in the first instance as to whether petitioner is entitled to a *Rhines* stay.

On May 5, 2016, this case was assigned to the calendar of the undersigned Magistrate Judge. By then, petitioner's request for a *Rhines* stay had become moot because all of the claims in the First Amended Petition had been exhausted. The parties were ordered to file supplemental briefing on the merits of petitioner's claims in the First Amended Petition. On August 18, 2016, respondent filed an Answer. On November 23, 2016, petitioner's counsel filed a Reply.

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SUMMARY OF THE EVIDENCE

The California Court of Appeal gave the following brief summary of petitioner's underlying crimes (Lodgment 3 at 2-3)[1]:

> [Petitioner] and his wife got into an argument one night. [Petitioner's] wife left the house and took her two minor daughters with her. Her daughters then told her that [petitioner], who was their stepfather, had been sexually abusing them for years. They also told her that [petitioner] had been sexually abusing their cousin, as well. [Petitioner's] wife confirmed with their cousin that [petitioner] had been sexually abusing her. The cousin's father contacted the police and drove the three girls to the police station to be interviewed.

PETITIONER'S CLAIMS

1. Petitioner's guilty plea was involuntary because he was not given an explanation of the added charges under Cal. Penal Code § 288(b)(1), specifically the force element, before he pled guilty to them. (FAP at 7-14; Reply at 9-13.)

2. Petitioner's trial counsel was ineffective for failing to explain to him the nature of the charges under § 288(b)(1). (FAP at 14-16; Reply at 13-14.)

3. The trial court erred in failing to warn petitioner of the dangers of proceeding "pro se," or against the advice of his trial counsel, in pleading guilty. (FAP at 16-17; Reply at 14-16.)

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[1] The Ninth Circuit has held that the factual summary set forth in a state appellate court opinion is entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1), which a party may rebut only by clear and convincing evidence that the facts were otherwise. *See Brown v. Horell*, 644 F.3d 969, 972 (9th Cir. 2011); *Moses v. Payne*, 555 F.3d 742, 746 n.1 (9th Cir. 2009); *Tilcock v. Budge*, 538 F.3d 1138, 1141 (9th Cir. 2008); *Mejia v. Garcia*, 534 F.3d 1036, 1039 n.1 (9th Cir. 2008). Petitioner has not purported to rebut the Court of Appeal's factual summary.

4. Petitioner's appellate counsel was ineffective for failing to raise any issues on appeal. (FAP at 18-21; Reply at 16-17.)

STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *see also Carey v. Musladin*, 549 U.S. 70, 74 (2006).

Although a particular state court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. *See Williams*, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam); *Williams*, 529 U.S. at 405-06. When a state court decision adjudicating a claim is contrary to controlling Supreme

Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." *See Williams*, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *See Early*, 537 U.S. at 8.

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law, or based on 'an *unreasonable* determination of the facts.'" *See Early*, 537 U.S. at 11 (citing 28 U.S.C. § 2254(d)) (emphasis added). A state-court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. *See Williams*, 529 U.S. at 406-10, 413 (*e.g.*, the rejected decision may state the *Strickland* standard correctly but apply it unreasonably); *Woodford v. Visciotti*, 537 U.S. 19, 24-27 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." *Visciotti*, 537 U.S. at 24-27; *Williams*, 529 U.S. at 413. An "unreasonable application" is different from an erroneous or incorrect one. *See Williams*, 529 U.S. at 409-10; *Visciotti*, 537 U.S. at 25; *Bell v. Cone*, 535 U.S. 685, 699 (2002). Moreover, review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." *See Cullen v. Pinholster*, 563 U.S. 170, 180 (2011).

As the Supreme Court explained in *Harrington v. Richter*, 562 U.S. 86, 102 (2011):

> "Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here [i.e., where there was no reasoned state-court decision], could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree

> that those arguments or theories are inconsistent with the holding in a prior decision of this Court."

Furthermore, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

Here, petitioner's claims were denied "on the merits" by the California Supreme Court when it denied his state habeas petition. (Lodgment 13.) Thus, the California Supreme Court's decision constitutes the relevant state court adjudication on the merits for purposes of the AEDPA standard of review.

DISCUSSION

As an initial matter, respondent argues that petitioner's claims are procedurally defaulted. (Answer Mem. at 6-7.) Because it is more efficient to dispose of these claims on the merits, however, the Court elects to resolve them solely on that basis, as discussed below. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002).

The crux of petitioner's claims is that he was not advised of the force element before pleading guilty to Counts 12 to 16 of the amended information. The plea hearing proceeded as follows (RT 31-36):

> THE COURT: . . . I'll note for the record [petitioner] is also being assisted by the Spanish language interpreter.
>
> The Court has received a plea bargain form with regard to this case and if counsel would give me just a moment, I'll review that before we begin with the plea.
>
> Counsel, he is pleading to 12 through 16 counts and those are

added counts, correct?

[PROSECUTOR]: That is correct, your Honor.

The Court: Is there a People's motion to add Counts 12 through 16?

[PROSECUTOR]: So moved.

The Court: Counts 12 through 16, felony violations of Penal Code Section 288 (b)(1).

[Counsel], waive arraignment. Waive any defects on those added counts.

[COUNSEL]: I'm wonder if I – I suppose so. That's something my client wants to do. It's not something I recommend, so I would not be joining in the plea but given the – it's what my client wants to do, I'll do that, yes.

THE COURT: All right. Thank you.

Mr. Mena, you've provided to the Court a three-page plea form entitled Declaration by Defendant.

Did you read this form and discuss it with your attorney?

[PETITIONER]: Yes.

THE COURT: Did you initial and sign the form?

[PETITIONER]: Yes.

THE COURT: Do you understand all of the legal rights and consequences explained in this plea form?

[PETITIONER]: Yes.

THE COURT: Do you understand all of the legal rights and consequences explained in this plea form?

[PETITIONER]: Yes.

THE INTERPRETER: I'm telling him to wait until I interpret, your Honor.

THE COURT: Your response to that, Mr. Mena, do you understand all the legal rights and consequences explained in the plea form?

[PETITIONER]: Yes.

THE COURT: Are you under the influence of alcohol, drugs or any substance that might prevent you from understanding what's happening in court today?

[PETITIONER]: No.

THE COURT: This plea form explains the legal rights that apply to the case such as your right to a jury trial, your right to confront and cross-examine any witnesses against you, your right to subpoena witnesses and present evidence on your own behalf and your right to remain silent by pleading guilty. You will be giving up all of those rights.

Do you understand that, Mr. Mena?

[PETITIONER]: Yes.

THE COURT: The plea form indicates you'll enter guilty pleas to Counts 12, 13, 14, 15 and 16. Those are all felony charges. The penalty range for those offenses is up to three years, six years or eight years in state prison. The total exposure for those offenses is up to 40 years in state prison. This agreement indicates that you will serve 40 years in state prison. You will be required to register as a sex offender. There will be a restitution determination and you will come back for sentencing next month in December.

Is that your understanding of the agreement, Mr. Mena?

[PETITIONER]: Yes.

THE COURT: Other than what's been discussed in this plea bargain agreement, has anyone made any other promises to convince

you to plead guilty?

[PETITIONER]: No.

THE COURT: Has anyone used any threats or violence to force you to plea guilty?

[PETITIONER]: No.

THE COURT: Are you entering these pleas of your own free will?

[PETITIONER]: Yes.

THE COURT: How then do you plead to the charge added as Count 12, a felony violation of Penal Code Section 288(b)(1)?

[PETITIONER]: No contest.

[PROSECUTOR]: We are not accepting a no contest plea, your Honor.

THE COURT: Mr. Mena, your options are to plead guilty or not guilty.

How do you plead to the added count, guilty or not guilty?

[PETITIONER]: Guilty.

THE COURT: How do you plead to the added charge of Count 13, violation of Penal Code Section 288(b)(1), guilty or not guilty?

[PETITIONER]: Guilty.

THE COURT: How do you plead to Charge 14, felony violation of Penal Code Section 288(b)(1)?

[PETITIONER]: Guilty.

THE COURT: How do you plead go added Count 15, a felony violation of Penal Code Section 288(b)(1)?

[PETITIONER]: Guilty.

THE COURT: How do you plead to added Charge 16, a felony violation of Penal Code Section 288(b)(1)?

[PETITIONER]: Guilty.

THE COURT: [Counsel], it's my understanding you are not joining in the plea; is that correct?

[COUNSEL]: No. I tried to discourage my client to enter into such a lengthy plea which is essentially going to be the rest of his life. I see no down side of going to trial. He apparently has some feelings for — he doesn't want to put the victims through — the alleged victims through the trial process is my understanding. I tried to discourage him from entering this plea. He's doing this against my advice.

THE COURT: People, do you accept the plea?

[PROSECUTOR]: Yes, your Honor.

THE COURT: Is there a factual basis?

[PROSECUTOR]: I believe that would be in the preliminary hearing transcript.

THE COURT: [Counsel], do you stipulate to the factual basis as set forth in the preliminary hearing transcript?

[COUNSEL]: Can I do that since I'm not joining in the plea?

THE COURT: I guess what we can do is the Court can find that there is a factual basis based on the preliminary hearing transcript included in the Court file. We'll do that.

The Court will find that [petitioner] read and understands the declaration and plea form, understands the nature of the charges pending and the consequences of the plea. He understandingly and intelligently waived his constitutional rights, has personally and orally entered his plea and entered the plea freely and voluntarily.

The Court further finds there's a factual basis for the plea and the Court will accept the plea.

I. Habeas relief is not warranted with respect to petitioner's claim that his plea was involuntary (Ground One).

In Ground One, petitioner claims that his guilty plea was involuntary because he was not given an explanation of the added charges under Cal. Penal Code § 288(b)(1), specifically the force element, before he pled guilty to them. (FAP at 7-14; Reply at 9-13.)

A. Legal standard.

A guilty plea cannot support a judgment of guilt "unless it was voluntary in a constitutional sense." *Henderson v. Morgan*, 426 U.S. 637, 644 (1976). A plea cannot be voluntary "unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Id.* at 645 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). In *Henderson*, the Supreme Court invalidated a guilty plea to second-degree murder because the defendant entered the plea without being informed that intent to cause death was an element of the offense. *See Henderson*, 426 U.S. at 646-47. However, even if the record contains no express representation that the nature of the charge was explained to the accused, "it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *See Henderson*, 426 U.S. at 647.

The notice requirement of *Henderson* is limited to "critical elements" of the offense. *See United States v. Minore*, 292 F.3d 1109, 1116 (9th Cir. 2002) (citing *Henderson*, 426 U.S. at 647 n.18 (assuming that constitutionally adequate notice does not always require a description of every element of the offense). If an element is "critical" within the meaning of *Henderson*, the amount of notice required can vary depending on the complexity of the element. *See United States v. Lalonde*, 509 F.3d 750, 760 (6th Cir. 2007) ("[W]e have found that the amount of

discussion required to properly inform the defendant of the charges against him varies based upon the complexity of the charges.").

B. Analysis.

Respondent claims that the notice requirement enunciated in *Henderson* did not apply here because the force element was not a critical element of the offense of forcible lewd or lascivious act on a child. (Answer at 15.) The Court disagrees. In *Minore*, 292 F.3d at 1117, the Ninth Circuit held that an element of drug quantity, as part of a federal criminal prosecution for conspiracy to import marijuana, was a critical element within the meaning of *Henderson* because it exposed the defendant to a higher statutory maximum sentence. Here, the force element also exposed petitioner to a higher statutory maximum sentence. By the same reasoning as in *Minore*, the force element in this case was a critical element of the offense. *See also Harned v. Henderson*, 588 F.2d 12, 21-22 and n.10 (2d Cir. 1978) (holding that element of "physical injury," or "violence," was a critical element of first-degree burglary).

Nonetheless, it would not have been objectively unreasonable for the California courts to find that petitioner had notice of the nature of the charges against him before he pled guilty. Moreover, although the record contains no express representation that the force element was explained to petitioner, it would be appropriate to presume that it was. *See Henderson*, 426 U.S. at 647.

As an initial matter, the force element of the crime of lewd act on a child did not require much explanation because the element is relatively straightforward and easy to understand. *See Wabasha v. Solem*, 694 F.2d 155, 158 (8th Cir. 1982) (element of "force or fear" was "not complex"); *see also Salerno v. Secretary, Florida Dept. of Corrections*, 646 F. App'x 757, 762 (11th Cir. 2016) (charges of sexual offenses against a child were "not particularly complex"). "Force" for purposes of Cal. Penal Code § 288(b)(1) is "physical violence, compulsion or

constraint against the victim other than, or in addition to, the physical contact which is inherent in the prohibited act." *See People v. Garcia*, 247 Cal. App. 4th 1013, 1024 (2016). This definition of force is the substantially same as the ordinary meaning of the term. *See United States v. Brown*, 526 F.3d 691, 705 (11th Cir. 2008) (presuming that defendant understood elements that "had the same meaning in legal usage as in ordinary usage"), *vacated on other grounds*, *Knowles v. Mirzayance*, 556 U.S. 111 (2009). While petitioner refers to his TABE educational assessment in discussing other issues, he does not contend that he could not understand the plea form with the assistance of the interpreter, and nothing in the record suggested that petitioner would be confused when apprised of the element of force. In light of the relative simplicity of the element of force, the amount of notice required for this element was not extensive.

A plea form is prima facie evidence that a criminal defendant was notified of the critical elements of the charged crime. *See Theriot v. Whitley*, 18 F.3d 311, 314 (5th Cir. 1994) (citing *Bonvillain v. Blackburn*, 780 F.2d 1248, 1250 (5th Cir. 1986)). A number of courts within the Ninth Circuit have found that a criminal defendant's statements on his plea form warranted a presumption that he was informed of the critical elements of the offense. *See*, *e.g.*, *Zepeda v. Figueroa*, 2014 WL 2605360, at *20 (S.D. Cal. Jun. 11, 2014); *Jenkins v. Warden*, 2012 WL 4754725, at *17 (S.D. Cal. Aug. 7, 2012); *Woods v. Wong*, 2011 WL 6214393, at *12 (S.D. Cal. Mar. 10, 2011); *Root v. Martel*, 2010 WL 6548492, at *7 (C.D. Cal. Oct. 29, 2010); *United States v. Shetty*, 2009 WL 841566, at *9 (C.D. Cal. Mar. 27, 2009).

Petitioner's signed plea form contained multiple statements warranting a finding that he was apprised of the force element. First, the plea form explicitly stated that petitioner was pleading guilty to five counts of "*forcible* lewd act on child" under Cal. Penal Code § 288(b)(1). (CT 170 at ¶ 3.) (Emphasis added.) The word "forcible" is not so complex that petitioner could not have understood it.

Second, the plea form contained petitioner's initials next to the following statement about discussing the plea form with his trial counsel (CT 172 at ¶ 19):

> I have had sufficient time to consult with my attorney concerning my intent to plead guilty/no contest to the above charge(s) (and admit any prior conviction or enhancement). My lawyer has explained everything on this declaration to me, and I have had sufficient time to consider the meaning of each statement. I have personally placed my initials on certain boxes on this declaration to signify that I fully understand and adopt as my own each of the statements which correspond to those boxes.

Third, the plea form contained petitioner's initials next to the following statement about receiving translation assistance for the plea form (CT 172 at ¶ 19): "I cannot read/understand English, but I have had the assistance of an interpreter to read this form to me and I now understand all the contents of this form." The form also contained a certification by the interpreter that she had explained the contents of the form to petitioner in Spanish. (CT 172 at ¶ 22.) Notwithstanding the translator's assistance, petitioner appeared to have "a pretty good grasp of the English language." (RT 6-7.)

Fourth, the plea form stated that petitioner had initially been charged in Counts 1 to 11 with violations of Cal. Penal Code § 288(a), or "lewd acts on a child." These initial charges under § 288(a) are contrasted on the plea form with the eventual charges under § 288(b)(1) to which petitioner pled guilty — "forcible lewd acts on a child." The form clearly cites to different code sections and adds "forcible" to the new charges. (CT 170 at ¶ 2.)

Fifth, the plea form contained a handwritten statement by petitioner's counsel that petitioner was "entering into this plea agreement against counsel's advise." (CT 172.) It would not be unreasonable to presume that, in trying to persuade petitioner to reject the plea offer, trial counsel informed petitioner that the offer

involved added charges that were different from and more serious than those that had been initially charged, particularly because the added charges could result in a higher sentence count because of the element of force.

In addition to the plea form, petitioner's statements during the plea hearing also supported a finding that he was aware of the critical elements of the charged offenses. Petitioner verified to the trial court that he had discussed the plea form with his counsel, that he had initialed and signed it, and that he understood all of the legal rights and consequences explained in the plea form. (RT 32-33.) Petitioner's statements carried a strong presumption of truth. *See Chizen v. Hunter*, 809 F.2d 560, 562 (9th Cir. 1986) ("Solemn declarations in open court carry a strong presumption of verity.") (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)). The trial court also made a finding that petitioner "understands the nature of the charges pending and consequences of the plea." (RT 36.)

In sum, based on the record before the state courts, it would not have been objectively unreasonable for the California Supreme Court to conclude that petitioner had notice of the critical element of force. The Court therefore is unable to conclude that the rejection of petitioner's claim was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *See Richter*, 131 S. Ct. at 786-87.

II. Habeas relief is not warranted with respect to petitioner's ineffective-assistance-of-trial-counsel claim (Ground Two).

In Ground Two, petitioner claims that his trial counsel was ineffective for failing to explain to him the nature of the charges to which he pled guilty, specifically, the force element of § 288(b)(1). (FAP at 14-16; Reply at 13-14.)

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A. Legal standard.

In *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the Supreme Court held that there are two components to a claim of ineffective assistance of counsel: "deficient performance" and "prejudice." "Deficient performance" in this context means unreasonable representation falling below professional norms prevailing at the time of trial. *See Strickland*, 466 U.S. at 688-89. To show "deficient performance," petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. Further, petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The Court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Id.* The Supreme Court in *Strickland* recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Accordingly, to overturn the strong presumption of adequate assistance, petitioner must demonstrate that "the challenged action cannot reasonably be considered sound trial strategy under the circumstances of the case." *See Lord v. Wood*, 184 F.3d 1083, 1085 (9th Cir. 1999).

To meet his burden of showing the distinctive kind of "prejudice" required by *Strickland*, petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See Strickland*, 466 U.S. at 694; *see also Richter*, 562 U.S. at 111 ("In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if

counsel acted differently."); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (noting that the "prejudice" component "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair").

Moreover, it is unnecessary to address both *Strickland* requirements if the petitioner makes an insufficient showing on one. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed."); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other."); *Williams v. Calderon*, 52 F.3d 1465, 1470 & n.3 (9th Cir. 1995) (disposing of an ineffective assistance of counsel claim without reaching the issue of deficient performance because petitioner failed to make the requisite showing of prejudice).

The *Strickland* standard applies to claims of ineffective assistance during the plea bargain process. *See Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985); *see also Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) ("During plea negotiations, defendants are 'entitled to the effective assistance of competent counsel.'" (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Specifically, "a defendant has the right to make a reasonably informed decision whether to accept a plea offer." *See Turner v. Calderon*, 281 F.3d 851, 880 (9th Cir. 2002) (citation omitted).

To establish deficient performance during the plea stage, a petitioner must demonstrate that counsel's advice was not "within the range of competence demanded of attorneys in criminal cases." *See Hill*, 474 U.S. at 56. To establish prejudice from ineffective assistance during the plea stage, a petitioner must demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See Hill*, 474 U.S. at 59; *see also Sophanthavong v. Palmateer*, 378 F.3d 859, 867 (9th Cir. 2004).

In *Richter*, the Supreme Court reiterated that the AEDPA requires an additional level of deference to a state court decision rejecting an ineffective assistance of counsel claim. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *See Richter*, 562 U.S. at 101. As the Supreme Court further observed (*id.* at 105):

> "'Surmounting *Strickland*'s high bar is never an easy task.' *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' *Id.*, at 689, 104 S. Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S .Ct. 2052.

"Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and

§ 2254(d) are both 'highly deferential,' *id.*, at 689, 104 S. Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7 (1997), and when the two apply in tandem, review is 'doubly' so, *Knowles*, 556 U.S., at 123, 129 S. Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard."

B. Analysis.

In *Miller v. Champion*, 161 F.3d 1249 (10th Cir. 1998), the Tenth Circuit set out a three-part test for deficient performance in the context of an attorney's alleged failure to inform his client about the nature of the charges. A petitioner must (1) show that the element was critical; (2) overcome the presumption that trial counsel explained the critical element to him at some time prior to his guilty plea; and (3) demonstrate that he did not receive notice of the critical element from any other source. *See id.* at 1255. Petitioner has made only the first showing.

The record before the California courts contained a factual basis to support a presumption that petitioner's trial counsel explained the force element to him at some time prior to his guilty plea, a presumption which petitioner has not overcome. In particular, as discussed above, petitioner stated both in his plea form and during his plea hearing that he had discussed the entire contents of the plea form with trial counsel, including the fact that petitioner was pleading guilty to *forcible* lewd acts on a child. (CT 172 at ¶ 19; RT 32.) Petitioner also has not demonstrated that he did not receive notice of the force element from any other source. The record contained a factual basis to support a finding that petitioner received notice of the force element from the Spanish-language interpreter, who

translated for petitioner the entire contents of the plea form, including the fact that petitioner was pleading guilty to forcible lewd acts on a child. (CT 172 at ¶ 21.) Petitioner affirmed on the form that he had received assistance from the interpreter and, as a result, understood all contents of the form. (*Id*. at ¶ 22.) Accordingly, petitioner has not met his burden of showing deficient performance because he has not overcome the presumption that he was appropriately advised of the force element from his trial counsel and the notice provided by the translated plea form.

Nor has petitioner shown "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See Hill*, 474 U.S. at 59. Petitioner's bare allegation that, but for his trial counsel's deficient advice, he would not have pled guilty and insisted on going to trial is insufficient to establish prejudice. *See Turner*, 281 F.3d at 881 (petitioner's self-serving statements that the plea process would have had a different result had he been accurately advised did not establish that counsel was constitutionally defective); *Lambert v. Blodgett*, 393 F.3d 943, 980 (9th Cir. 2004) (a "bare allegation that [petitioner] would not have pled guilty" if counsel had properly advised him is "insufficient"). Moreover, nothing in the record suggests that, but for petitioner's alleged ignorance of the force element, he would not have pled guilty and would have insisted on going to trial. Rather, the record reflects that petitioner was insistent about pleading guilty, contrary to the advice of his trial counsel, in order to avoid putting the victims through the ordeal of a trial. (RT 35.) Petitioner also insisted on accepting the plea offer despite being aware that it involved a negotiated sentence of 40 years, a term which his trial counsel felt was too harsh because it was "essentially going to be the rest of his life." (RT 33, 35.) Nonetheless, in exchange for the plea, the prosecutor dismissed Counts 1 to 11. (CT 187.)

Prejudice from counsel's performance during the plea stage generally does not exist when a defendant insists on pleading guilty. *See Smith v. Mahoney*, 611

F.3d 978, 991 (9th Cir. 2010) (petitioner was "determined to plead guilty") (citing *Langford v. Day*, 110 F.3d 1380, 1384 (9th Cir. 1996) (petitioner strongly and repeatedly insisted on pleading guilty); and *Lambert*, 393 F.3d at 980 (where petitioner "chose to plead guilty of his own accord and for his own reasons, with full knowledge of the consequences of his plea, it is unlikely that [his attorney] could have provided any information which would have dissuaded him")). Given the circumstances — petitioner's insistence on accepting the plea offer and 40-year sentence in order to avoid subjecting the victims to a trial, his rejection of trial counsel's advice to turn down the offer, and the fact that the offer involved the dismissal of several counts — it was not reasonably probable that petitioner would have insisted on going to trial simply because his trial counsel told him that he was being accused of using force in 5 of the 16 counts. *See Sophanthavong*, 387 F.3d at 870-71 (finding no reasonable likelihood that petitioner would have rejected a plea offer but for counsel's advice where, in part, petitioner knew what the eventual sentence would be, the offer involved the dismissal of other charges, and the plea was voluntary); *Lambert*, 393 F.3d at 980 (same where petitioner was aware of the eventual sentence and wanted to avoid trial); *Elmore v. Sinclair*, 799 F.3d 1238, 1252 (9th Cir. 2015) (same where petitioner wanted to take responsibility and spare his family the publicity of a trial).

In sum, it would not have been objectively unreasonable for the California Supreme Court to reject this claim on the grounds that petitioner had failed to make the requisite showings of deficient performance and prejudice.

III. Habeas relief is not warranted with respect to petitioner's *Faretta* claim (Ground Three).

In Ground Three, petitioner claims that the trial court erred in failing to warn petitioner of the dangers of proceeding "pro se," or against the advice of his trial counsel, in pleading guilty. (FAP at 16-17; Reply at 14-16.)

A criminal defendant's request to represent himself is governed by *Faretta v. California*, 422 U.S. 806 (1975). Under *Faretta*, when a criminal defendant properly invokes his right to self-representation, the trial court must give adequate warnings that ensure that he understands the nature of the charges against him, the possible penalties, and the dangers and disadvantages of self-representation. *See United States v. Hantzis*, 625 F.3d 575, 579 (9th Cir. 2010). However, *Faretta* does not apply unless a criminal defendant's request for self-representation is "unequivocal." *See Adams v. Carroll*, 875 F.2d 1441, 1442 (9th Cir. 1989).

As respondent points out, the Eleventh Circuit rejected a claim similar to petitioner's in *Stano v. Dugger*, 921 F.2d 1125, 1147 (11th Cir. 1991). In *Stano*, the Eleventh Circuit held that a criminal defendant was not entitled to *Faretta* warnings simply because he pled guilty against the advice of his counsel. According to the reasoning in *Stano*, the defendant "made deliberate choices"; "chose to have counsel, and never waived his right to counsel in any way whatsoever"; "had advice from an experienced and conscientious attorney"; and against the advice of counsel, elected to change his plea to guilty. *See Stano*, 921 F.2d at 1147. Likewise, in this case, petitioner simply made a deliberate choice to plead guilty against the advice of his experienced attorney, without waiving his right to counsel in any way whatsoever. In other words, petitioner did not request self-representation, much less request self-representation in an unequivocal manner, as required by *Faretta*. And in any event, as the Eleventh Circuit further noted in *Stano*, a voluntary guilty plea necessarily means that a defendant is relinquishing his defense, rendering it unnecessary to give him *Faretta* warnings about the dangers of self-representation. *See Stano*, 921 F.2d at 1148. The Court finds the reasoning in *Stano* persuasive.

In sum, it would not have been objectively unreasonable for the California Supreme Court to conclude that petitioner's right to self-representation was not violated.

IV. Habeas relief is not warranted with respect to petitioner's ineffective-assistance-of-appellate-counsel claim (Ground Four).

In Ground Four, petitioner claims that Petitioner's appellate counsel was ineffective for failing to raise any issues on appeal and filing a *Wende* brief instead. (FAP at 18-21; Reply at 16-17.)

Claims of ineffective assistance of appellate counsel are reviewed under the *Strickland* standard. Petitioner must show that the performance of appellate counsel fell below an objective standard of reasonableness and that, for appellate counsel's professional errors, there is a reasonable probability that petitioner would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). However, as the Ninth Circuit observed in *Miller v. Keeney*, 882 F.2d 1428 (9th Cir. 1989), the two *Strickland* prongs "partially overlap" when evaluating appellate counsel's failure to raise particular claims:

> "In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. . . . Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason – because she declined to raise a weak issue." *Id.* at 1434 (citations and footnotes omitted).

Accordingly, in the absence of a showing that, but for appellate counsel's failure to raise the omitted claim(s), there is a reasonable probability that the petitioner would have prevailed on appeal, neither *Strickland* prong is satisfied. *See, e.g., Moormann v. Ryan*, 628 F.3d 1102, 1109 (9th Cir. 2010); *Pollard v. White*, 119 F.3d 1430, 1435-37 (9th Cir. 1997); *Miller*, 882 F.2d at 1434-35.

To the extent that petitioner is claiming that appellate counsel was ineffective for filing a *Wende* brief instead of raising Grounds One to Three as issues on

appeal, each of these claims has been shown to be invalid for the reasons discussed above. Petitioner therefore has failed to meet his burden of showing a reasonable probability that he would have prevailed on appeal if his appellate counsel had raised these issues. *See Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985) ("[Petitioner] claims as well that appellate counsel's failure to argue the issues presented above constituted ineffective assistance of counsel. In view of the fact that those claims have been shown to be invalid [petitioner] would not have gained anything by raising them.").

In sum, it would not have been objectively unreasonable for the California Supreme Court to reject this claim on the ground that neither *Strickland* prong was satisfied.

V. Petitioner's request for an evidentiary hearing should be denied.

Petitioner requests an evidentiary hearing to resolve his claims. (FAP at 22; Reply at 18.)

However, as noted above, the Supreme Court held in *Pinholster*, 563 U.S. at 180, that review of state court decisions under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." By its express terms, § 2254(d)(2) restricts federal habeas review to the record that was before the state court. *See also Pinholster*, 563 U.S. at 185 n.7 (noting that an unreasonable determination of fact under § 2254(d)(2) must be unreasonable "in light of the evidence presented in the State court proceeding," and stating that "[t]he additional clarity of § 2254(d)(2) on this point . . . does not detract from our view that § 2254(d)(1) also is plainly limited to the state-court record."). Thus, federal courts may not consider new evidence on claims adjudicated on the merits in state court unless the petitioner first satisfies his burden under § 2254(d) and then satisfies his burden under § 2254(e)(2). *See Pinholster*, 563 U.S. at 181-85; *Holland v. Jackson*, 542 U.S. 649, 652-53 (2004). Accordingly, the Court's

findings above that petitioner is not entitled to habeas relief under the AEDPA standard of review are dispositive of petitioner's request for an evidentiary hearing.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; (2) denying petitioner's request for an evidentiary hearing; and (3) directing that Judgment be entered denying the First Amended Petition and dismissing this action with prejudice.

DATED: January 24, 2017

ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

S217924

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ARMANDO JACINTO MENA on Habeas Corpus.

The petition for writ of habeas corpus is denied on the merits. (See *Harrington v. Richter* (2011) 562 U.S. 86, citing *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 803.)

SUPREME COURT
FILED

MAR 11 2015

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

SAN BERNARDINO, CALIFORNIA; THURSDAY, NOVEMBER 3, 2011

A.M. SESSION

DEPARTMENT S-6 HON. RICHARD V. PEEL, JUDGE

APPEARANCES:

(The Defendant with his Counsel,
JAMES CARSON, Deputy Public Defender;
MELISSA RODRIGUEZ, Deputy District Attorney
of San Bernardino County representing the
People of the State of California.)

(Kimberly Morrow, C.S.R., RPR, CRR,
Official Reporter, CSR-9396)

THE COURT: All right. We'll go on the record in People V Mena, case FSB 1103706. Appearances.

MS. RODRIGUEZ: Melissa Rodriguez on behalf of the People.

MR. CARSON: Jim Carson for the defense who's present in custody at the counsel table.

THE COURT: Thank you. I'll note for the record Mr. Mena is also being assisted by the Spanish language interpreter.

The Court has received a plea bargain form with regard to this case and if counsel would give me just a moment, I'll review that before we begin with the plea.

Counsel, he is pleading to 12 through 16 counts and those are added counts, correct?

MS. RODRIGUEZ: That is correct, your Honor.

THE COURT: Is there a People's motion to add Counts 12 through 16?

MS. RODRIGUEZ: So moved.

THE COURT: Counts 12 through 16, felony violations of Penal Code Section 288(b)(1).

Mr. Carson, waive arraignment. Waive any defects on those added counts.

MR. CARSON: I'm wondering if I -- I suppose so. That's something my client wants to do. It's not something I recommend, so I would not be joining in the plea but given the -- it's what my client wants to do, I'll do that, yes.

THE COURT: All right. Thank you.

Mr. Mena, you've provided to the Court a three-page plea form entitled Declaration by Defendant.

Did you read this form and discuss it with your attorney?

THE DEFENDANT: Yes.

THE COURT: Did you initial and sign the form?

THE DEFENDANT: Yes.

THE COURT: Do you understand all of the legal rights and consequences explained in this plea form?

THE DEFENDANT: Yes.

THE INTERPRETER: I'm telling him to wait until I interpret, your Honor.

THE COURT: Your response to that, Mr. Mena, do you understand all of the legal rights and consequences explained in the plea form?

THE DEFENDANT: Yes.

THE COURT: Are you under the influence of alcohol, drugs or any substance that might prevent you from understanding what's happening in court today?

THE DEFENDANT: No.

THE COURT: This plea form explains the legal rights that apply to the case such as your right to a jury trial, your right to confront and cross-examine any witnesses against you, your right to subpoena witnesses and present evidence on your own behalf and your right to remain silent by pleading guilty. You will be giving up all of those rights.

Do you understand that, Mr. Mena?

THE DEFENDANT: Yes.

THE COURT: The plea form indicates you'll enter guilty pleas to Counts 12, 13, 14, 15 and 16. Those are all felony charges. The penalty range for those offenses is up to three years, six years or eight years in state prison. The total exposure for those offenses is up to 40 years in state prison. This agreement indicates that you will serve 40 years in state prison. You will be required to register as a sex offender. There will be a restitution determination and you will come back for sentencing next month in December.

Is that your understanding of the agreement, Mr. Mena?

THE DEFENDANT: Yes.

THE COURT: Other than what's been discussed in this plea bargain agreement, has anyone made any other promises to convince you to plead guilty?

THE DEFENDANT: No.

THE COURT: Has anyone used any threats or violence to force you to plead guilty?

THE DEFENDANT: No.

THE COURT: Are you entering these pleas of your own free will?

THE DEFENDANT: Yes.

THE COURT: How then do you plead to the charge added as Count 12, a felony violation of Penal Code Section 288(b)(1)?

THE DEFENDANT: No contest.

MS. RODRIGUEZ: We are not accepting a no contest plea, your Honor.

THE COURT: Mr. Mena, your options are to plead guilty or not guilty.

How do you plead to the added count, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: How do you plead to the added charge of Count 13, violation of Penal Code Section 288(b)(1), guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: How do you plead to Charge 14, felony violation of Penal Code Section 288(b)(1)?

THE DEFENDANT: Guilty.

THE COURT: How do you plead to added Count 15, a felony violation of Penal Code Section 288(b)(1)?

THE DEFENDANT: Guilty.

THE DEFENDANT: How do you plead to added Charge 16, a felony violation of Penal Code Section 288(b)(1)?

THE DEFENDANT: Guilty.

THE COURT: Mr. Carson, it's my understanding you are not joining in the plea; is that correct?

MR. CARSON: No. I tried to discourage my client to enter into such a lengthy plea which is essentially going to be the rest of his life. I see no down side of going to trial. He apparently has some feelings for -- he doesn't want to put the victims through -- the alleged victims through the trial process is my understanding. I tried to discourage him from entering this plea. He's doing this against my advice.

THE COURT: People, do you accept the plea?

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Is there a factual basis?

MS. RODRIGUEZ: I believe that would be in the preliminary hearing transcript.

THE COURT: Mr. Carson, do you stipulate to

the factual basis as set forth in the preliminary hearing transcript?

MR. CARSON: Can I do that since I'm not joining in the plea?

THE COURT: I guess what we can do is the Court can find that there is a factual basis based on the preliminary hearing transcript included in the Court file. We'll do that.

The Court will find that the defendant read and understands the declaration and plea form, understands the nature of the charges pending and the consequences of the plea. He understandingly and intelligently waived his constitutional rights, has personally and orally entered his plea and entered the plea freely and voluntarily.

The Court further finds there's a factual basis for the plea and the Court will accept the plea. Mr. Mena, first of all, I'll refer this to the probation department for preparation of a sentencing report.

Mr. Mena, you are ordered to cooperated with the probation department in the preparation of that probation report. You have a right to be sentenced within 20 days of today's date.

Do you waive and give up that right to return on December 9th for sentencing?

THE DEFENDANT: I want to come back December the 9th.

THE COURT: You have a right to be sentenced on or before December the 6th.

Do you waive and give up that speedy sentencing right so you can come back on December 9th?

THE DEFENDANT: Yes, that's fine.

THE COURT: Counsel join in that time waiver?

MR. CARSON: Join.

THE COURT: Mr. Mena, you will be ordered back December 9th, 8:30 this department for sentencing.

Ms. Rodriguez, it's my understanding you would like to address victim impact statements at this time.

MS. RODRIGUEZ: If the Court wants to excuse the jury, I'm not sure if the Court wants to do that first. I think there's a juror that has an issue. We'll excuse them and address the victim impact statements.

THE CLERK: The other counts, will they be dismissed?

MS. RODRIGUEZ: They will be dismissed as PJ.

THE COURT: Thank you.

(The following proceedings were held in the presence of the jury:)

THE COURT: All right. We'll go on the record in People V Mena, case FSB 1103706. Let the record reflect both attorneys are present. Mr. Mena is present assisted with the Spanish language

interpreter. Our jurors are also present in the courtroom at this time.

Ladies and gentlemen, I wanted to apologize first off for the late start this morning. However, I also wanted to inform you that this case has now been concluded. On behalf of the Court, the attorneys, and my staff, I'd like to thank you for your jury service or over the past couple of days. You are excused from further jury service at this time. Thank you very much. You are free to go. Please make sure you see my bailiff on the way out. Thank you very much.

(The following proceedings were held outside the presence of the jury:)

THE COURT: Okay. Back on the record outside the presence of our jurors.

Ms. Rodriguez, you'd like to address victim impact statements at this time.

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: You may do so.

MS. RODRIGUEZ: Speak loud because she's taking it down. Say your first name.

JASMIN HASHIDA: I'm reading this for my cousin, Lena.

THE COURT: Thank you.

JASMIN HASHIDA: She wrote it. My name is Lena. I am very angry about what happened and what he did to me. I feel hurt because I thought of him like a dad. I wanted him to go away for a long time, so he

can't hurt anyone else. I just want this all to be over.

THE COURT: Thank you. Can we have the name of the young lady that was reading that statement on behalf of Lena?

JASMIN HASHIDA: Jasmin Hashida.

THE COURT: Thank you very much, Jasmin.

MS. RODRIGUEZ: Jasmin, do you want to say something?

Jasmin wants to.

THE COURT: You may do so.

JASMIN HASHIDA: My name is Jasmin. I don't -- I feel bad that he's going away, but not because for what he did, but because I wouldn't want anybody like, you know, to lose their life. But I just hope he realizes that he hurt more than one person and that he completely changed our lives the second that he even thought to touch us and that now because of him, our lives won't ever be the same like the way they could have been. I don't want to say anymore.

THE COURT: Jasmin, thank you very much for your statement.

ISENIA ALVARADO: My name is Isenia Alvarado. I'm the mother of the two girls and my niece. I just want him to know that I'm very angry and I'm sad because my girls have to go through what he put them through. I trusted him. I loved him and I took care

of him. What he did was he lied to me. He made me believe that we were a family. I trusted him to be alone with my girls and my niece and my son.

I want him to know that I will never from now to the rest of my life, I will never think of him again and if he ever does be released, that I will not ever want to see him at my door nor bother my children nor come to see his own son. I don't want him near our family ever again, no letters, no letters from friends, no phone calls, nothing. I don't want anything to do with him again. That's it.

THE COURT: Thank you, Ms. Alvarado.

MS. RODRIGUEZ: That's all, your Honor.

THE COURT: All right. Thank you, Counsel. All right. We're set for pronouncement of judgment in this matter December 9th, 2011, 8:30 this department.

Counsel, is there anything else we need to address before we conclude?

MS. RODRIGUEZ: No, your Honor.

MR. CARSON: No, your Honor.

THE COURT: All right.

Mr. Mena, you are ordered back December 9th, 8:30 this department for sentencing. Thank you.

(Whereupon, the proceedings were concluded for the day.)

SAN BERNARDINO, CALIFORNIA; FRIDAY, DECEMBER 9, 2011

A.M. SESSION

DEPARTMENT S-6 HON. RICHARD V. PEEL, JUDGE

APPEARANCES:

(The Defendant with his Counsel,
JAMES CARSON, Deputy Public Defender;
MELISSA RODRIGUEZ, Deputy District Attorney
of San Bernardino County representing the
People of the State of California.)

(Kimberly Morrow, C.S.R., RPR, CRR,
Official Reporter, CSR-9396)

THE COURT: We'll go on the record in People V Mena, case FSB 1103706. Appearances, please.

MS. RODRIGUEZ: Melissa Rodriguez on behalf of the People.

MR. CARSON: Jim Carson for the defense. Mr. Armando Mena present in custody at counsel table.

THE INTERPRETER: Interpreter case, your Honor.

THE COURT: Let's let the record reflect the Spanish interpreter is here to interpret for Mr. Mena. Now is the time for sentencing in this matter. Have both sides received the probation officer's report in this case.

MR. CARSON: Yes, your Honor.

MS. RODRIGUEZ: Yes, your Honor.

THE COURT: Mr. Mena, did you go over the probation officer's case this morning?

THE DEFENDANT: No, with you --
THE INTERPRETER: And he pointed at me, your Honor.
MR. CARSON: I also asked him if he had any questions. He had no questions.
Do you have any questions?
THE DEFENDANT: No. No.
THE COURT: The record will reflect that Mr. Mena reviewed the probation officer's report with the assistance of the interpreter and had the opportunity to ask any questions he might have of his attorney.
At this time, Mr. Carson, waive arraignment for sentencing?
MR. CARSON: Yes, your Honor.
THE COURT: Any legal cause?
MR. CARSON: No, your Honor.
THE COURT: Either side wish to be heard on the report?
MS. RODRIGUEZ: No, your Honor.
MR. CARSON: On one matter, your Honor.
THE COURT: Yes, go right ahead.
MR. CARSON: On the victim restitution fine statutory minimum currently is at $10,000.
THE COURT: Your request is $200.
MR. CARSON: Yes, your Honor.
THE COURT: I will do so. Anything else?
MR. CARSON: No, your Honor.

THE COURT: Anything by the People?

MS. RODRIGUEZ: No, your Honor.

THE COURT: The Court has also read and reviewed the probation officer's report in this matter. I'll make the following findings and orders. I will find that a motor vehicle was not involved in the commission of the offense. I will impose the Court security fee and criminal conviction fees. I'll find the defendant is not liable for reimbursement of appointed counsel fees nor for reimbursement of investigative costs.

I'll note that the defendant previously provided required samples pursuant to Penal Code Section 296.

I will order the defendant to submit to an HIV test pursuant to Penal Code Section 1202.1, that test to be performed by the Department of Corrections.

Pursuant to Penal Code Section 1202.05 I will order that all visitation be prohibited between the defendant and the child victims in this matter. That order is issued to the Department of Child -- of Corrections. I will order a victim restitution fine both in the amount of $200. The latter fine will be stayed pending successful completion of parole. I will reserve the issue of actual victim restitution in this matter.

The court will follow the agreement in this matter. I will deny probation and sentence the

defendant as follows: In Count 12 for the violation of Penal Code Section 288(b)(1), the defendant is sentenced to upper or aggravated term of eight years in state prison.

In Count 13 for the violation of Penal Code Section 288(b)(1) the defendant is sentenced to the upper term of eight years state prison. That term shall be consecutive to the previously imposed term.

For COUNT 14 for the violation of Penal Code Section 288(b)(1), the defendant is sentenced to the upper term of eight years in state prison. That term shall be consecutive to all previously imposed terms.

For Count 15 for the violation of Penal Code Section 288(b)(1), the defendant is sentenced to the upper term of eight years in state prison. That term shall be consecutive to any previously imposed term.

And Count 16 for the violation of Penal Code Section 288(b)(1), the defendant is sentenced to the upper term of eight years in state prison. That sentence is consecutive to any previously imposed terms. Total commitment to state prison is 40 years.

Credit for time served in this matter is 121 days actual, 18 days conduct, total of 139 days.

Mr. Mena, you are advised that this period of incarceration will be followed by a period of parole up to five to seven years. The defendant is remanded to the custody of the sheriff's department for transportation to the Department of Corrections.

Anything else on this, Counsel?

MR. CARSON: No, your Honor.

MS. RODRIGUEZ: No, your Honor.

THE COURT: Mr. Mena, you are all set. Good luck to you, sir.

(The proceedings in the above-entitled matter were concluded.)

--oOo--

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO

DEPARTMENT S-6 HON. RICHARD V. PEEL, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ARMANDO JACINTO MENA, Defendant.	No. FSB 1103706 REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

I, KIMBERLY ANN MORROW, Official Reporter of the Superior Court of California, County of San Bernardino, do hereby certify that the foregoing pages, 1 to 45, to the best of my knowledge and belief, comprise a full, true and correct computer-aided transcript of the proceedings taken in the matter of the above-entitled cause held on November 1, 2, 3 and December 9, 2011.

Dated this 30th day of January, 2012.

KIMBERLY ANN MORROW, C.S.R.
Official Reporter, C-9396, RPR, CRR

File Stamp

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT
NOV 3 2006
BY DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
FSB1103706 Central **DISTRICT**

E OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
mando Jacinto Mena
Defendant.

Case No. FSB 1103706

RATION BY DEFENDANT ☐ Under Penal Code Section 859a ☒ Re: Change of Plea (Guilty)

My true name is Armando Jacinto Mena, born 2/1/66.

The Information (Complaint/Indictment/Information) filed herein accuses me of the offense(s) of:

I-II PC 288(a). Lewd act on a child

I-II PC 667.61(b)(c). multiple victims

AJM 3. desire to change my plea(s) and plead guilty/nolo contendere (no contest) to (and admit the following enhancement(s) or prior(s)): including lesser offense(s) to which plea to be made and the maximum sentence.)

12	PC 288(b)(1)	Forcible lewd act on child	3-6-8
Count(s)	Code Section	Name of Offense	Sentencing Range
13	PC 288(b)(1)	Forcible lewd act on child	3-6-8
Count(s)	Code Section	Name of Offense/Enhancement/Prior	Sentencing Range
14	PC 288(b)(1)	Forcible lewd act on child	3-6-8
Count(s)	Code Section	Name of Offense/Enhancement/Prior	Sentencing Range
15	PC 288(b)(1)	Forcible lewd act on child	3-6-8
Count(s)	Code Section	Name of Offense/Enhancement/Prior	Sentencing Range
16	PC 288(b)(1)	Forcible lewd act on child	3-6-8
Count(s)	Code Section	Name of Offense/Enhancement/Prior	Sentencing Range

AJM 4a. I understand that the law allows me to enter a guilty plea to a magistrate, but that as soon as I do so, my case will be transferred to the superior court, which will then have complete control over every aspect of it. For 859a Only

AJM 4b. I further understand that even after I plead guilty, I will retain my right to be released on reasonable bail, but that all questions concerning bail will be determined by a judge of the superior court. For 859a Only

I understand that as to each charge, prior conviction, and/or enhancement alleged against me in this case, I have many rights, including the constitutional right to:

AJM 5a. **A speedy and public trial by jury** or by a judge without a jury;

AJM 5b. **Be represented by an attorney at trial** and at all stages of the proceeding; and if I cannot afford an attorney, the court will appoint an attorney to represent me at no charge. However, a judge may later direct me to pay such part of the cost of the attorney as the judge determines that I am able to pay;

AJM 5c. **See, hear, and question all witnesses** who testify against me at trial;

AJM 5d. **Have the judge order into court all the evidence** and order my witnesses to attend the trial without cost to me;

AJM 5e. **Present evidence** in my favor at trial;

AJM 5f. **Remain silent** at trial, or, if I wish, testify for myself; and

AJM 5g. (If applicable) A preliminary hearing at which the district attorney would have to show that there was sufficient cause that I had committed the offense(s), and the right at such hearing to be represented by an attorney, to see, hear, and question all witnesses who testify against me, and to present evidence in my favor if I so desire, and to either testify or remain silent. For 859a Only

AJM 6a. I understand that in addition to any other punishment, I shall be required to pay a mandatory restitution fine of not less than $200 nor greater than $10,000 and subject to a penal fine up to $10,000 ($20,000 for Health & Safety/. Code §§ 11350-11353, 11355, 11359-11361 or $50,000 for Health and Safety Code § 11379.6 or Arson, Penal Code §§ 451-455) whether probation is granted or denied.

AJM 6b. Any state prison commitment will be followed by a period of PAROLE of 3 to 4 years, 5 to 7 years, or life. Any violation of the terms of parole could result in up to an additional year in custody for each violation, up to a maximum of 4 years, 7 years, or life. (Circle appropriate parole.)

☒ 6c. **If I am found to be addicted to the use of narcotics or in the imminent danger of becoming so addicted,** I may be committed to the Department of Corrections Narcotic Rehabilitation Program for a period of time equal to that which I would otherwise have to spend in state prison.

☒ 6d. **If I plead guilty to any drug offense covered by Health & Safety Code Section 11590,** I will be required to register as a controlled-substance offender with the chief of police of the city in which I reside or the sheriff of the county if I reside in an unincorporated area.

☒ 6e. **If a motor vehicle is found to be involved in or incidental to the commission of the offense,** my driving privileges may be revoked by the court and/or Department of Motor Vehicles.

f. **IF I plead guilty to any sex crime covered by Penal Code Section 290,** I will be required to register as a sex offender with the chief of police of the city in which I reside or the sheriff of the county if I reside in an unincorporated area. AJM 6f.

g. Federal and state law prohibit a convicted felon from possessing a firearm. AJM 6g.

h. **IF I plead guilty to a DUI case,** (cvc 23152, 23153 or 23103 pursuant to 23103.5) then pursuant to cvc 23593, I am hereby advised that being under the influence of alcohol or drugs, or both, impairs my ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If I continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, I can be charged with murder. X 6h.

As to each crime, enhancement, and/or prior conviction, I now intend to plead guilty/nolo contendere (no contest) and/or admit to:

a. I waive and give up each of the above constitutional rights listed in paragraph 5. AJM 7a.

a. I understand that the court will not decide whether to impose sentence or extend probation until a probation officer conducts an investigation and reports on my background, prior record (if any), and the circumstances of the case. AJM 8a.

b. I understand that if I am now on probation/parole, my plea if guilty/nolo contendere (no contest) in this case may constitute a violation of my probation/parole and result in its revocation and the imposition of sentence. AJM 8b.

am freely and voluntarily entering the plea(s) of guilty/nolo contendere [and admission(s)] as indicated: AJM 9.

☐ Because I am guilty (and for no other reason), and/or ☐

☒ As a result of plea bargaining after discussing with my attorney the possibility of my being convicted on other or more serious charges and/or risking the possibility of a longer sentence, and/or ☐

Because the ☒ district attorney/ ☐ court has agreed to:

Ct. 12	8 yrs	Jane	Doc #1	40 yrs SP
Ct. 13	8 yrs	Jane	Doc #2	PC 290 registration
Ct. 14	8 yrs	Jane	Doc #3	
Ct. 15	8 yrs	Jane	Doc #1	Restitution to be determined
Ct. 16	8 yrs	Jane	Doc #2	PJ [illegible] 12.9.11

y attorney explained to me that other possible consequences of this plea and any admission of any enhancement(s) nd/or any prior conviction(s) may be: (Circle possible consequences): AJM 10.

(a) Mandatory/presumptive prison sentence
(b) Increased punishment for future felonies
(c) Serious/violent felony (strike) ←
(d) Reduced earning of custody credits
(e) Sexual Violent Predator Act
(f) Loss of driving privileges
(g) Registration as an arson offender
(h) Required to submit to HIV test
(i) Civil/asset forfeiture consequences per H & S 11469, et seq.
(j) Other: _____

xcept otherwise stated herein, no one has promised or suggested to me that I will receive a lighter sentence, probation, ward, immunity, or anything else to get me to plead guilty/nolo contendere (no contest) as indicated. AJM 11.

o one has used any force or violence or threats or menace or duress or undue influence of any kind on me or anyone lse to me to get me to plead guilty/nolo contendere (no contest) as indicated. AJM 12.

m not now under the influence of alcohol, or of any drugs, narcotics, medicine, or any other substance which could terfere with my ability to understand what I am doing; nor am I suffering from any condition which could have the effect. AJM 13.

derstand that if I am not a citizen of the United States, deportation, exclusion from admission to the United States, denial of naturalization will result from a conviction of the offense(s) to which I plead guilty/nolo contendere (no contest). AJM 14.

I understand that even though the court may approve the agreement for sentence set forth, the court is not bound by the agreement, and that the court may withdraw its approval at any time before pronouncement of judgement, in which case I shall be able to withdraw my plea should I desire to do so. AJM 15a.

I understand that any agreement as to sentence applies only in the original sentence and that a violation of probation may cause the court to send me to county jail or state prison for the maximum term provided by law. AJM 15b.

(**Harvey Waiver**) I waive my rights regarding dismissed counts and any charges the district attorney agrees not to file to the extent that the court may consider these factors in deciding whether or not to grant probation and in deciding whether or not to impose a midterm, aggravated, or mitigated prison term, and as to restitution. X 15c.

e Waiver (if applicable) I understand I have an absolute right under California law to withdraw my plea if the court, any reason, does not follow the plea bargain agreement. I also understand that I cannot receive any additional nalty or punishment for any subsequent failure to appear or any new offense unless I am properly charged and victed of such an offense. I understand and agree as part of this plea bargain agreement to be released upon my recognizance and to waive these rights, and as a condition of my release, I will: 16.

Report to the probation department as ordered by the court. 16a.

Keep any appointment(s) set by the probation department. 16b.

Appear in court for sentencing, or any other date set by the court. 16c.

Not violate any law (excluding infractions) between today and the date of sentencing. 16d.

Submit to **Bravo** search terms, a search of my person, place of residence or property under my control at anytime of the day or night with or without the necessity of a search warrant by any law enforcement or probation officer. 16e.

16f.

g. If I violate any of the above conditions in paragraph 16a-16f, I then agree the court will no longer be bound by this plea bargain and I would not have any right to withdraw my plea. I further understand and agree that any willful violation of these terms will be decided by the sentencing judge without a jury and by a preponderance of the evidence. I further understand and agree, that if the court finds any willful violation of these terms, the court will be free to impose any greater sentence than expressly stated in this agreement, up to the maximum penalty for each offense and enhancement to which I am pleading guilty/no contest or admitting, and I will not have any right to withdraw my plea. [X] 16g.

Vargas Waiver (if applicable) I understand that I am being sentenced today pursuant to the initial terms stated in paragraph 9. If I comply with the conditions set forth in numbers 16a, 16b, 16c, 16d, 16e, and 16f, and any other terms as ordered, the court will resentence me pursuant to the remainder of the terms described in paragraph 9. [X] 17.

(Arbuckle Waiver) I understand that I have the right to be sentenced by the judge who accepted my plea, but I agree that any judge of the superior court may impose sentence in this case. [X] 18.

I have had sufficient time to consult with my attorney concerning my intent to plead guilty/no contest to the above charge(s) (and admit any prior conviction or enhancement). My lawyer has explained everything on this declaration to me, and I have had sufficient time to consider the meaning of each statement. I have personally placed my initials on certain boxes on this declaration to signify that I fully understand and adopt as my own each of the statements which correspond to those boxes. DJM 19.

I waive and give up any right to appeal from any motion I may have brought or could bring and from the conviction and judgment in my case since I am getting the benefit of my plea bargain. DJM 20.

a. I can read and understand English. [X] 21a.

OR

b. I cannot read/understand English, but I have had the assistance of an interpreter to read this form to me and I now understand all the contents of this form. DJM 21b.

(If applicable) I understand that a plea of no contest is the same as a plea of guilty in this criminal case and for all purposes has the same consequences as a plea of guilty and can be used against me in a civil lawsuit. DJM 22.

are under the penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I am signing this ration on November 3, 2011 20 ____, at San Bernardino, California

D J Mena
Defendant's Signature

TIFICATE OF INTERPRETER: I declare under the penalty of ~~perjury under~~ the laws of the State of California that I translated the entire nts of this form from English to Spanish *(language)* in the presence of and ~~directly to the defendant~~ in this case and that efendant in this case subscribed to this document in my presence.

Date

Marie E. Bueich
Interpreter's Signature

RNEY STATEMENT: I, Jim Carron, state that I am above-named defendant's attorney in the -entitled criminal action; that I personally read and explained the contents of the above declaration to the defendant; that I personally ed the defendant sign said declaration; that I concur in the defendant's withdrawal of his/her plea(s) of not guilty; and that I concur in efendant's plea(s) of guilty/nolo contendere (no contest) and or admissions to the charge(s) as set forth by the defendant in the declaration.

Defendant entering into this plea agreement against counsel's advise.

11/3/11
Date

Attorney for Defendant

11. 3. 11
Date

Approved: Jim A. Carron
Deputy District Attorney

ORDER
(Read these findings orally into the record)

ctly examining the defendant, the court finds:

The defendant has read and understands the DECLARATION BY DEFENDANT
☐ PURSUANT TO PENAL CODE SECTION 859A ☒ RE CHANGE OF PLEA (GUILTY).

That the defendant understands the nature of the crime(s) charged against him/her and the consequences of his/her guilty/nolo contendere plea(s) (and admissions).

That the defendant understandingly and intelligently waives his/her constitutional rights.

The defendant is personally and orally entering his/her plea of guilty/no contest [and admission(s)] to the offense(s).

That the defendant's plea(s) of guilty/no contest [and admission(s)], is/are free and voluntary.

That a factual basis exists for the plea(s) of guilty [and admission(s)], and/or that the plea bargain is hereby approved.

That the defendant personally waives his/her right to have his/her probation hearing and pronouncement of judgment within 20 court days.

(For 859a only) Plea confirmed in superior court.

d that this Declaration by Defendant be received and filed with the court's records of this case and that the defendant's plea(s) of ntest [and admission(s)] be accepted and entered in the minutes of this court.

3rd day of November, 19 ____ / 20 11

Judge

h sentence
cement of judgment will be set on 12/9/11 at 830 A m. in Department S-6
ncing (Vargas) will be set on ____ at ____ m. in Department ____.