No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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KRISTIN L. HARDY
PETITIONER

V.

KELLY SANTORO,
RESPONDENT

◆

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

◆

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QUESTIONS PRESENTED

(1) Whether a federal appellate court fails to provide legitimate federal habeas review when it rejects an ineffective assistance of counsel claim solely on the performance prong, a prong never addressed by any state court or by the district court, based on assumptions and findings of fact that are contrary to the petitioner's habeas allegations, that are not supported by the record before the court, and that have never been the subject of an evidentiary hearing.

(2) Whether trial counsel involved in pre-trial plea negotiations has an obligation to examine his client's prior criminal history and determine his client's maximum sentencing exposure before advising him on a pending plea offer.

LIST OF PARTIES

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears at Appendix B with the order denying petition for rehearing at Appendix A. The unpublished opinion (including the Report and Recommendation) of the United States District Court appears at Appendix C. The unpublished orders of the California Supreme Court (habeas and appeal) appear at Appendix D & G. The unpublished opinions of the California Court of Appeal (habeas and appeal) appear at Appendix E & H. The unpublished decision of the Riverside County Superior Court (habeas) appears at Appendix F.

JURISDICTION

The district court had jurisdiction of petitioner's habeas corpus petition under 28 U.S.C. §2254. The district court issued a Certificate of Appealability so the federal court of appeals had jurisdiction under 28 U.S.C. §2253(c)(1). The federal court of appeals entered judgment on March 14, 2019. App B. A timely petition for rehearing and rehearing en banc was denied on July 5, 2019. App A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 (d):

(d) 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.

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

On July 29, 2009, a jury convicted petitioner Kristin Hardy of one count of assault by force likely to produce great bodily injury (CA Pen. Code § 245(a)(1)), and one count of corporal injury to a cohabitant (CA Pen. Code § 273.5(a)). The jury acquitted Hardy of forcible rape, forcible oral copulation, and criminal threats, as well as two lesser included charges of battery. In a separate proceeding, the court found that Hardy suffered two prior convictions that constituted strikes.

Pursuant to the Three Strikes law, the court sentenced Hardy to 25 years to life for the assault conviction and imposed but stayed a sentence of 25 years to life for the corporal injury conviction.

On December 29, 2010, the Fourth District Court of Appeal affirmed Hardy's convictions but ordered minor modifications to his sentence. App. H. On March 18, 2011, the California Supreme Court denied Hardy's petition for review. App. G.

On December 14, 2010, the Riverside Superior Court denied Hardy's pro per petition for writ of habeas corpus in a reasoned decision. App. F.

On February 25, 2011, the Fourth District Court of Appeal summarily denied

Hardy's pro per state habeas petition. App. E.

On August 29, 2012, the California Supreme Court summarily denied Hardy's pro per state habeas petition without citation. App. D.

Hardy's federal habeas, which had been stayed pending his return to state court for exhaustion, resumed in the district court. After the filing of the return and the reply, the court appointed counsel for Hardy for his ineffective assistance of counsel claim that was the subject of the state habeas petitions and which is the subject of this petition for certiorari.

On September 2, 2015, following supplemental briefing by both sides, the Magistrate Judge recommended that the district court deny Hardy's first amended habeas petition. App. C.

On February 21, 2017, the district court entered an order adopting the Magistrate Judge's Report and Recommendation and denying and dismissing the petition. App. C. On that same date, the district court granted a certificate of appealability on Hardy's ineffective assistance of counsel claim related to pretrial plea negotiations.

On March 14, 2019, the Court of Appeals affirmed the denial of Hardy's habeas petition in an unpublished memorandum decision. App. B.

On July 5, 2019, the Court of Appeals denied Hardy's petitions for panel rehearing or rehearing en banc in an unpublished order. App. A.

FACTUAL BACKGROUND

Trial Evidence[1/]

On August 27, 2005, Melissa Malone made a 911 call from a payphone at a market. She told the operator, "[M]y boyfriend was beating me." She named Hardy as her boyfriend.

At 7:15 a.m., Officer Vicente De La Torre responded to the 911 call. When he arrived, Malone was crying. She had a black eye and red "linear marks" on the sides of her neck. He did not see any finger marks.[2/] Photographs of Malone's injuries were in evidence.

Malone told Officer De La Torre that Hardy came home around 3:00 or 4:00 a.m. He had been trying to phone her, and he was angry because the phone was off the hook. He took a pink scarf, wrapped it around her neck, and strangled her with it. Next, he choked her with his hands. He said, "I'm gonna kill you...." She lost consciousness for a couple of seconds, but he slapped her and she came to.

Next, Hardy forced her to orally copulate him and then to have sexual intercourse with him. Afterwards, he fell asleep. Malone thought for about an hour about what to do, but once she decided to leave, she ran to the market.

[1/] The magistrate judge's report and recommendation copied verbatim the statement of facts from the state court's appellate decision. App. C, quoting App. H. Hardy also repeats those facts verbatim although he uses names to facilitate reading and omits headings.

[2/] A paramedic who examined Malone, however, noted "[o]bvious marks from hands around [her] neck...."

Officer De La Torre took Malone to the hospital, where a nurse performed a sexual assault examination. Malone's right eye was bruised and swollen and there were red marks around her neck. There was also a scratch on her wrist. She had no injuries to her genitals, but this would be true 60 to 70 percent of the time when an adult female reported a sexual assault.

Malone told the nurse that her boyfriend had wrapped a pink scarf around her neck and choked her with it for 15 minutes. He also slapped her and hit her. She "blacked out for a couple [of] seconds." The sex consisted of intercourse and oral copulation. It was stipulated that the DNA from sperm cells found in Malone's vagina matched Hardy's DNA.

Hardy's mother testified that on August 27, 2005, around 7:00 or 8:00 a.m., Hardy had some scratches, and one of his lips was "burst or scratched." Later that morning, Hardy was arrested. Photos of his injuries showed a scratch on his neck and a "busted" or bruised upper lip.

Malone later told Hardy's mother that she had punched Hardy in the face "[o]ver a girl." She also said that she had made up the rape charges.

In February 2006, Malone told a defense investigator that Hardy did not force her to have sex. She had made up this allegation because she was upset about a phone call from a girl. She also said that she had asked Hardy to choke her for erotic purposes.

In late 2005 or early 2006, Malone gave defense counsel a letter (or declaration) in which she said that the sex had been consensual.

In March 2006, Officer De La Torre, a deputy district attorney, and Malone were in court together for a previous hearing. Malone told them, "Everything I said in that letter was a lie." She added that everything she had told Officer De La Torre on the day of the incident was the truth.

The jury heard two phone calls that Hardy made to Malone while he was in jail, one before and one after the previous hearing.

In the first call, on February 24, 2006, he told her to stop talking to "these people," adding, "[W]ould you rather me go to jail?"

He also told her, "[F]iling a false police report is only a misdemeanor, you're going to get probation. Would you rather me go to prison or you get probation?"

"I know what I did was wrong," he stated; "... I'm owning up to my responsibility."

In addition, he said, "[I]t's gonna have to go to prelim and I want you to be ready. I want you to get that letter from my mom.[3/] Don't forget, read over everything. Memorize it like it's a movie script."

In the second call, on April 18, 2006, Hardy said, "What I did was foul, it was fucking wrong. It was stupid, it was sick." He told Malone: "Go [into] hiding, something[,] either that or call you an attorney and tell them you have a problem in your hands, you got scared in ... making some false accusations. I know, the accusations are real, but babe, just try to help me...."

[3/] Hardy's mother testified that defense counsel showed her the letter that Malone had written, but she denied ever having a copy in her possession.

Between January and July 2007, Stephen Cline, Hardy's then-counsel, had a number of phone calls and one meeting with Malone She told him that the sex had been consensual. She had made up the sexual assault allegations because she was angry. The pink scarf was used as part of the sex; "they had done this kind of thing before...."

Hardy had hit her, she said, but she had started it, and she had hit him as well. She explained that, in the jailhouse phone calls, they had been talking solely about the domestic violence allegations.

Malone said she had lied at the preliminary hearing because the district attorney's office told her, "You have to tell the story you told initially or you could lose your child. You could go to jail for perjury...."

Roughly around March 2008, a defense investigator had a conversation with Malone at court. Malone told the investigator that she had lied to the police about the rape allegations. She also said she was afraid to change her story because a prosecution investigator had threatened to charge her with perjury, which could mean that she would go to jail and lose custody of her child. She did not say that she was lying about the physical abuse.

At trial, Malone testified that she and Hardy had been living together since June 2005. On the night of August 26-27, 2005, she was jealous because he had been flirting with some women on a chat line. At 3:00 a.m.,[4/] she woke up because

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[4/] Although Malone did not mention it on direct, cross, or redirect, on recross, she (continued...)

Hardy came into the bedroom. He asked, "Why didn't you answer the phone? I was trying to call." According to Malone, he was not angry. She realized that the phone was off the hook.

They argued. During the argument, Hardy hit her in the eye with his fist, giving her a black eye. She hit him back, causing his cut lip.

Hardy put a pink scarf around her neck and tightened it, causing red marks. It hurt, but she testified that it did not make it hard to breathe. She did not lose consciousness (though she admitted telling Officer De La Torre that she did). She was hitting Hardy and "trying to push him off."

After Hardy removed the scarf, he put his hands around her neck and squeezed. She testified that he was not applying much pressure. The squeezing lasted for less than a minute. It did not make it hard to breathe (though she admitted telling Officer De La Torre that it did). Malone fell on the bed and pretended to pass out so Hardy would take his hands off her neck. He slapped her, but "not a hard slap, just like a pat to make sure I didn't pass out."

After the argument, they had consensual sex, including both intercourse and oral copulation (though she admitted telling Officer De La Torre that it was not

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[4/](...continued)
testified that Hardy had already hit her twice that night. First, when she and Hardy initially got home, "I was cussing at him, and ... he was calm, and he hit me, and then I hit him in his face." Next, after Hardy went to sleep, Malone answered a phone call from one of the women from the chat line. Malone yelled at Hardy; "[h]e jumped, and then his hand hit [her] face."

consensual).[5/]

Malone stayed in the apartment for about an hour, until Hardy was sound asleep. She then went to the closest liquor store and called 911. About a week later, she learned that she was pregnant with Hardy's child.

Malone testified that she lied to Officer De La Torre and the sexual assault nurse because she was angry. What she said in the letter that she gave defense counsel was "[w]hat really happened."

According to Malone, she had contacted the prosecution several times to try to "set the record straight." Around the time of the preliminary hearing, however, when she was at court, a man "came out of nowhere" and said he was "an advocate of the judge...." He knew about the letter. He told her that if she changed her story, she would go to jail for filing a false police report (or for perjury) and her child would be taken away from her. As a result, she felt "pressured" to stick with the story she had originally told Officer De la Torre.[6/]

[Hardy testified on his own behalf.] According to Hardy, on the night of the incident, he was worried because Malone was not answering the phone. When he got home, he found that it had been off the hook; he was not angry.

[5/] Malone testified that the pink scarf was not used during the sex-"[t]hat was completely separate...." After being reminded, however, of her earlier statements, she testified that it was used.

[6/] The trial court took judicial notice that a private attorney, not employed by either the prosecution or the defense, had been appointed to advise Malone regarding her rights, and it so instructed the jury.

At that point, they had consensual sex, including both intercourse and oral copulation. Malone wanted "kinky sex"; at her request, Hardy put first a scarf and then his hands around her neck. That "must have been" what caused the marks on Malone's neck. She was never unconscious.

After that, Hardy phoned the chat line. This made Malone angry, and they got into an argument. Hardy stopped it by going to sleep. He awoke because Malone punched him in the face, which caused his "busted lip." At first, he did not know who had hit him. In self-defense, he started throwing punches; one of them hit Malone and presumably caused her black eye.[7/] She kept trying to hit him, so he grabbed her wrists to restrain her. A further argument ensued. Eventually, Hardy went back to sleep.

When Hardy heard that the police wanted to talk to him, he contacted them voluntarily.

In the jailhouse conversations, when he said what he did was wrong, he meant "his relationship with other women and the injury to [Malone's] eye."

Plea Offer Evidence

When Hardy was first charged in this case in August 2005, the felony

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[7/] On direct, Hardy testified that first, someone hit him; then, he threw a couple of punches; and then, he heard Malone scream (inferably when one of the punches connected). That was when he realized she was the person who hit him. On cross, however, he testified, "she screamed while she was striking me. I hadn't hit her yet when she screamed." He admitted knowing who was hitting him. When the prosecutor pointed out the contradiction and asked which version was the truth, he said, "Whichever one. I guess you could say the first one."

complaint alleged that he had a prior robbery conviction in 2003 for which he served a state prison sentence. That allegation would potentially add one-year to Hardy's sentence. The prosecution amended that complaint on October 25, 2005, and alleged that the 2003 robbery conviction was also a serious felony that constituted a strike under California's Three Strikes law. That allegation would potentially result in the doubling of Hardy's sentence plus an additional five-year term.

Although Hardy was arrested on August 27, 2005, his preliminary hearing was not held until March 23, 2006. During that intervening time, Hardy's then attorney, Riverside Deputy Public Defender Stuart Sachs, engaged in plea negotiations with the prosecution. On December 2, 2005, the prosecution and the defense jointly sought and received a trial continuance for "further investigation (▵ to consider offer) (offer 4 yrs @ 80% was made by D.A.)."

On December 21, 2005, the court held a *Marsden* hearing.[8/] Sachs told the court he had been trying to resolve the case since October. At the time of the hearing, Sachs had an offer from the prosecutor for Hardy to plead guilty to corporal injury to a cohabitant in exchange for a low term sentence of two years, doubled to four years for the strike, for which Hardy would serve 80% time. Sachs had counter-offered a plea to false imprisonment for the low term of 16 months doubled to 32 months, but the prosecutor refused to go lower than the four years at 80%.

Sachs noted that although he believed the case was triable, he was "doing

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[8/] A *Marsden* hearing arises when a defendant seeks to replace appointed counsel. *See People v. Marsden*, 2 Cal.3d 118 (1970).

everything he could" to get it resolved. The court noted that Hardy's exposure at trial "as I'm sure Mr. Sachs explained to you," would be "very high" if Hardy lost at trial. The court advised Hardy to listen to Sachs, "a very experienced lawyer," because any offers made after the preliminary hearing were not likely to be as good.

Two months later the court held another *Marsden* hearing. Sachs reported that they remained stuck in plea negotiations with the prosecution fixed on the four year (two years doubled) deal. In the meantime, the prosecution had sought continuances of the trial to talk to the alleged victim, Melissa Malone, who had since recanted. The court declined to relieve Sachs as counsel, but granted Hardy's request to represent himself.

At no time during these plea negotiations did Sachs advise Hardy that he had an uncharged prior conviction for assault that could be alleged as a second strike raising Hardy's sentence exposure to 25 years to life. Indeed, Sachs advised Hardy that he could probably win at trial on all the charges except corporal injury to a cohabitant and opined that even that charge might be defensible on a self-defense theory. Thus, Sachs told Hardy that his maximum sentencing exposure was nine years calculated as the high term of four years for the corporal injury count doubled to eight years because of the prior strike, plus one year for having served a prior prison term. Although Hardy had previously told Sachs he would accept the four year offer, Hardy turned down the offer believing his chances at prevailing at a trial were good and his sentencing risk not that great.

Two days after the second *Marsden* hearing, Hardy and Malone spoke on the

phone in a call that was taped by the jail. During that call Hardy told Malone that if she didn't say anything he could beat the charges.

The next month the preliminary hearing was held, and Malone testified consist with her initial report to the police and contrary to her signed recantation. After the preliminary hearing, the prosecution filed an information that alleged just the one robbery strike alleged in the earlier amended felony complaint.

On April 18, 2006, Hardy and Malone spoke again in a recorded phone call. Hardy repeatedly told Malone that they took the deal off the table and if he was convicted, he would be facing 37 years in jail.

In August 2006, the prosecution amended the information to add allegations involving a second prior conviction strike: an assault with a deadly weapon (straight edge razor and chair) in January 2001. That new allegation made Hardy's case a possible Three Strikes case with a minimum sentence of 25 years to life. *See* Penal Code section 667 (c) & (e)(2)(A) and section 1170.12(c)(2)(A).

Although Hardy's subsequent attorneys attempted to negotiate another plea offer following this amendment, no acceptable offers were made and Hardy went to trial. The jury acquitted Hardy of the two sex charges as well as the threats charge but convicted him of assault and corporal injury to a cohabitant. In a court trial, the court found that Hardy suffered two prior strike convictions. After the court denied Hardy's motion to strike one of his strike priors, the court sentenced Hardy pursuant to the Three Strikes law to 25 years to life for the assault conviction and stayed a sentence of 25 years to life for the corporal injury conviction.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD GRANT THIS PETITION TO DETERMINE WHETHER A COURT OF APPEALS FAILS TO PROVIDE LEGITIMATE FEDERAL HABEAS REVIEW WHEN IT AFFIRMS THE DENIAL OF HABEAS CORPUS RELIEF ADDRESSING ONLY THE PERFORMANCE PRONG OF AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, A PRONG NEVER ADDRESSED BY ANY STATE COURT OR BY THE DISTRICT COURT, AND DOES SO BASED ON ASSUMPTIONS AND FINDINGS OF FACT THAT ARE CONTRARY TO THE PETITIONER'S HABEAS ALLEGATIONS, THAT ARE NOT SUPPORTED BY THE RECORD BEFORE THE COURT, AND THAT HAVE NEVER BEEN THE SUBJECT OF AN EVIDENTIARY HEARING

The federal court of appeals failed to provide Hardy the federal habeas corpus review he is entitled to under 28 U.S.C. § 2254. In his state and federal habeas petitions, Hardy argued that his attorney provided ineffective assistance of counsel when he failed to investigate Hardy's criminal history during plea negotiations. As detailed above, although counsel encouraged Hardy to take the four-year plea offer, he never advised Hardy that his prior conviction for assault could be alleged as a second strike raising Hardy's sentence exposure to 25 years to life if he was convicted of any count. Without that knowledge, Hardy turned down a four year

offer. The prosecution subsequently alleged a second strike but, by that time, the prosecution would no longer honor the earlier offer. Hardy went to trial and convicted of only two of the five counts against him, but he was sentenced to 25 years to life because of his two prior strikes.

Hardy raised this ineffective assistance of counsel claim in state habeas petitions in the superior court, the appellate court, and the California Supreme Court. In each court, Hardy alleged that his attorney violated his duty to investigate Hardy's maximum sentencing exposure and requested an evidentiary hearing on that ineffective assistance of counsel claim. Indeed, in his reply to the state's informal response in the superior court, Hardy specifically sought an evidentiary hearing to determine why his attorney had not advised him that he was possibly facing a sentence of 25 years to life if he was convicted of any of the five charges against him.

The superior court, in the only "reasoned" decision, denied the petition based on a lack of prejudice:

> The petitioner fails to establish prejudice in this case. Petitioner has failed to establish a reasonable probability that a more favorable outcome would have resulted but for the complained about deficiencies of the attorney. *In re Cox* (2003) 30 Cal.4th 974. App. F.

Both the state appellate court and the California Supreme Court summarily denied (without comment or citation) Hardy's habeas petitions containing this ineffective assistance of counsel claim. App. D & E. Thus, the superior court denial based solely on the prejudice prong was the operative opinion for federal habeas review by

the district court and the court of appeals. *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991).

If a federal habeas claim involves ineffective assistance of counsel and there is a state court finding on the merits of only one of the two prongs, then the AEDPA does not apply to the prong that was not adjudicated on the merits, and federal review of that prong is de novo. *Porter v. McCollom*, 558 U.S. 30, 39 (2009).

The district court, without holding an evidentiary hearing, ruled that the superior court's denial of Hardy's ineffective assistance of counsel claim based on a finding of no prejudice was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law nor was it based on an unreasonable determination of facts based on the record before it. App. C. The district court opted not to decide the performance prong because it found the state court's finding of no prejudice to be reasonable. App. C.

Thus, when Hardy's case arrived at the court of appeals, no prior court --neither the state courts nor the district court– had ever addressed the merits of the performance prong of Hardy's ineffective assistance of counsel claim. Nevertheless, despite the requirement of de novo review, and despite the failure of both the state court and the district court to hold an evidentiary hearing and make factual findings, the court of appeals found counsel's performance to be reasonable based on assumptions, factual findings never made in any court, and facts not supported by the record before the court.

Specifically, the court relied on five "facts" or assumptions for which there is

no support in the record:

First, the court wrote, "The record reflects that Hardy's counsel requested Hardy's chart report from the District Attorney, who did not obtain the report until after Hardy rejected the four-year plea offer." App. B, at 3. Based on that statement as well as a question asked at oral argument, it appears the court assumed that a "chart report" was a rap sheet.[9/] There is nothing in the record that supports such an assumption. Indeed a search of every state and federal court database in Westlaw for the phrase "chart report," revealed not a single a reference to "chart report" in any criminal case.[10/] Thus, there is no basis for the court to have assumed that Hardy's attorney unsuccessfully sought a copy of Hardy's rap sheet from the prosecutor during the plea negotiation stage.

Second, the court wrote, "The California Department of Corrections did not mail Hardy's prison records until after Hardy rejected the plea offer." App. B, at 3. The mailing of the prison records was irrelevant. Both the prosecutor and Hardy's

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[9/] While discussing the chronology of plea negotiations during a pre-trial hearing, Hardy's attorney said,:

> At the same time I emailed [the prosecutor] can you please give me the chart report. She has not now been able to obtain that. She said she would take the 32 month offer to the supervisor. Nothing was done. ... .

There is nothing in the context of counsel's statement that supports that he asked the prosecutor for a rap sheet or for anything related to Hardy's criminal history. If the court felt that phrase was important, the appropriate procedure would be to remand for an evidentiary hearing to determine what counsel was talking about.

[10/] Every reference to a "chart report" involved a medical context.

attorney could have searched Hardy's criminal history by looking them up in the Riverside County courthouse or in their own offices. Neither trial counsel nor the prosecutor needed prison records to determine whether Hardy had prior convictions and what those prior convictions entailed.

Third, the court wrote, "The record is devoid of evidence showing that, in Riverside County, Hardy's counsel would have had access to Hardy's rap sheet prior to advising Hardy to accept the four-year plea offer." App. B, at 3. The record is equally devoid of evidence showing that Hardy's counsel would ***not*** have had access to information about Hardy's prior convictions either through the Riverside County courthouse or through the Riverside County Public Defender's Office where Hardy's attorney worked.[11/] In fact, the Riverside County Public Defender represented Hardy in a probation revocation proceeding arising from the very conviction that was the basis for the second strike allegation that Hardy's attorney failed to discover. At best, the resolution of what Hardy's counsel knew or could have known or should have known should be resolved in an evidentiary hearing and not be resolved by the court with no record-based facts to support the court's assumptions.

Fourth, the court wrote, "There is no evidence showing that Hardy's counsel knew of Hardy's second strike until after the four-year plea offer expired." App. B,

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[11/] For a very nominal fee, Riverside County criminal case histories are available on-line to the public: https://www.riverside.courts.ca.gov/publicaccess.shtml. Surely if criminal case information is so easily available to the public, then Riverside County criminal defense counsel must have access to their clients' criminal history, at least their prior history in Riverside County.

at 3. That was exactly the point. Counsel should have looked into Hardy's criminal history and determined whether he had additional prior convictions that might subject him to enhanced sentencing, such as another strike, but counsel did not do so.

Fifth, the court concluded: "Hardy's counsel's performance did not fall below 'an objective standard of reasonableness' where he relied upon the information known to him and the prosecution at the time of the preliminary hearing—that Hardy had a single strike—and repeatedly advised Hardy to accept the four-year plea offer, a favorable offer for a single strike offender." App. B, at 3. This assumes, without any factual basis, that the prosecutor did not know about Hardy's second strike at the time of the plea offer. An evidentiary hearing would likely prove that assumption to be untrue. More importantly, this statement begs the essential question of whether counsel could have and should have known that Hardy had a second strike.

In finding that counsel's performance was reasonable, the court failed to acknowledge or apply the pleading requirements for California state habeas proceedings and the well-established rules for holding evidentiary hearings in habeas cases where the AEDPA does not apply. Under California law, a state habeas petitioner's burden is "to *plead* sufficient grounds for relief, and then later to *prove* them." *People v. Duvall*, 9 Cal.4th 464, 474 (1995) (emphasis in original). The reviewing court then asks whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. *Id.* at 474-475.

In this case, Hardy specifically alleged in his state habeas petitions that his attorney should have investigated and learned of Hardy's possible second strike so he could accurately advise Hardy about his potential maximum sentencing exposure. Further, Hardy clearly and explicitly sought an evidentiary hearing to determine what his attorney knew and should have known. Nevertheless, no state court ordered an evidentiary hearing and no factfinding took place; the state courts simply never addressed the performance prong of Hardy's ineffective assistance of counsel claim.

Likewise, although the district court never held an evidentiary hearing, that court also never addressed the performance prong of Hardy's ineffective assistance of counsel claim.

The court of appeals, as the first court to consider the performance prong, should have remanded the case for an evidentiary hearing if it doubted the truthfulness of Hardy's allegations. Significantly, respondent never proffered any evidence that disputed Hardy's allegation that his attorney could have and should have investigated his prior criminal history.

The AEDPA generally bars an evidentiary hearing for habeas corpus proceedings in federal court except under a few limited circumstances. 28 U.S.C. § 2254(e)(2). However, that bar applies only "If the applicant has failed to develop the factual basis of a claim in State court proceedings." A petitioner meets this condition only if "there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000).

"Diligence require[s] in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437. Absent a showing of a lack of due diligence, a petitioner will be excused from showing compliance with the balance of the requirements of 28 U.S.C. § 2254(e)(2). *Jaramillo v. Stewart*, 340 F.3d 877, 882 (9th Cir. 2003).

Hardy met his pleading burden in his state habeas petitions by explaining the factual and legal bases for his claim. Any failure to develop the facts more adequately in state court cannot be attributed to him.

In a case such as this where Hardy alleged facts which, if true, would entitle him to relief, there are material facts in dispute, and the state court has failed to hold an evidentiary hearing, the federal court must hold an evidentiary hearing to develop the facts and resolve factual disputes. *Townsend v. Sain*, 372 U.S. 293, 312-314 (1963), overruled in part on other ground by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

Here, the court affirmed the district court's denial of Hardy's habeas petition based on factual assumptions that are not supported by the record and which are directly contrary to Hardy's allegations in his habeas petition. If the court disputed Hardy's allegations, then the proper resolution was to remand this case to the district court for an evidentiary hearing on counsel's performance. This Court should grant certiorari because the court's handling of Hardy's petition is outside the parameters of how this Court has defined federal habeas corpus review.

II.

THIS COURT SHOULD GRANT THIS PETITION BECAUSE THE COURT OF APPEAL'S RULING THAT AN ATTORNEY HAS NO DUTY TO DETERMINE HIS CLIENT'S POSSIBLE SENTENCING EXPOSURE BEFORE ADVISING THE CLIENT ABOUT THE RISKS AND BENEFITS OF A PLEA OFFER CONFLICTS WITH CASES FROM THIS COURT AND OTHER COURTS

Prior convictions can play a fundamental role in California sentencing. California has had a Three Strikes law since 1994. At the time of Hardy's trial, the Three Strikes law required a defendant who is convicted of any new felony and who has also suffered one prior conviction of a serious felony to be sentenced to state prison for twice the term otherwise provided for the new felony. If the defendant had two or more prior strikes, the law mandates a state prison term of at least 25 years to life for any new felony conviction. CA Penal Code §§ 667(c) & (e) and 1170.12 (c) & (e). Thus, at the time of Hardy's trial, the presence of prior felony convictions that could qualify as a strike mattered significantly in terms of potential sentencing.

Yet, despite the importance of prior convictions in determining sentencing exposure, the court of appeals held in this case that trial counsel had no duty to learn about Hardy's prior convictions because the information would not have been

available to counsel. As discussed above, the court had no factual basis for reaching that conclusion. Further, the court's legal premise --that an attorney advising his client about a pre-trial plea offer has no duty to look into the client's prior criminal history to determine whether he faced a possible third strike-- is contrary to case law from this Court and other courts.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances...." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). During the plea bargaining phase, defense counsel must inform the defendant of the maximum and minimum sentences that may be imposed in the event of a conviction. *In re Alvernaz*, 2 Cal.4th 924, 937 (1992); *In re Vargas*, 83 Cal.App.4th 1125, 1139 (2000). "Knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty." *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992).

Defense counsel are obligated to obtain information that the state has and will use against the defendant. *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). "A reasonably competent lawyer will attempt to learn all of the relevant facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis to the client before allowing the client to plead guilty." *Bethel v. United*

States, 458 F.3d 711, 717 (7th Cir. 2006).[12/] "When representing a criminal client, the obligation to conduct an adequate investigation will often include verifying the status of the client's criminal record, and the failure to do so may support a finding of ineffective assistance of counsel." *United States v. Russell,* 221 F.3d 615, 621 (4th Cir. 2000).

In a plea offer context, "Counsel cannot be required to accurately predict what the jury or court might find, but he can be required to give the defendant the tools he needs to make an intelligent decision." *Turner v. Calderon*, 281 F.3d 851, 881 (9th Cir. 2002); *see also Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986) ("counsel have a duty to supply criminal defendants with necessary and accurate information" so they can intelligently assess the advantages of a plea offer); *Crawford v. Fleming*, 323 F.Supp.3d 1186, 1192-1193 (D. Or. 2018) ("In the context of a plea offer, counsel must reasonably investigate and assess the potential

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[12/] *Bethel* discusses the need for a hearing when counsel's sentencing advisements are called into question. There, trial counsel failed to recognize that the defendant was subject to the career offender provision of the federal sentencing guidelines; thus, counsel significantly underestimated the defendant's maximum sentencing exposure when advising the defendant to plead guilty. *Bethel*, 458 F.3d at 712-715. In analyzing the defendant's subsequent ineffective assistance of counsel claim under de novo review, the Seventh Circuit observed that although not conclusive, "a gross mischaracterization of the sentencing consequences of a plea may strongly indicate deficient performance." *Id.* at 717. The court then highlighted the need for a fact finding hearing to determine what steps counsel undertook to determine the defendant's sentencing exposure. *Id.* at 717-718; *see also Day*, 969 F.2d at 41, (further hearing needed to determine whether trial counsel told defendant that his maximum exposure was 11 years when his actual exposure as a career offender was significantly higher and the defendant was ultimately sentenced to almost 22 years after turning down a 5 year plea offer).

consequences and sentencing ramifications to ensure that a defendant makes an informed decision whether to accept or reject a plea offer").

The *Crawford* case is instructive. There, trial counsel repeatedly advised his client not to accept various plea offers, including an offer of 200 months (~16½ years) because the client faced no more than a maximum sentence of 17-19 years and the spread between the offers and the maximum sentence at trial was not great enough to warrant taking the plea. As in Hardy's case, counsel had not looked into the client's prior criminal history before providing this advice. After the client was convicted, and based on the client's juvenile and uncharged criminal conduct, the recommended sentence was 475 months (39½ years). The court ultimately sentenced the defendant to 396 months (33 years). *Crawford*, 323 F.Supp.3d at 1188-1190.

The court in *Crawford* found trial counsel's failure to investigate the client's prior criminal history to constitute deficient performance. "Counsel did not fully investigate petitioner's sentencing exposure before advising petitioner that he would probably receive a sentence of 17 ½ years and "never" more than 20 years if convicted at trial. Counsel's advice was not simply an inaccurate sentencing prediction; it was a 'gross mischaracterization of the likely outcome.'" *Id.* at 1194, quoting *Iaea*, 800 F.2d at 865. The court concluded, "If counsel fails to reasonably investigate or seek critical sentencing information and provides inaccurate or misleading advice as a result, counsel's performance is deficient." *Id.* at 1193.

Similarly, in a situation comparable to Hardy's situation, the Ninth Circuit previously held that counsel's failure to learn about the defendant's additional strike priors constituted deficient performance because it caused counsel to minimize the defendant's sentencing exposure when the defendant was weighing a plea offer. *Riggs v. Fairman*, 399 F.3d 1179 (9th Cir. 2005), reh'g en banc granted, 430 F.3d 1222 (9th Cir. 2005), appeal dismissed, 2006 WL 6903784 (9th Cir. 2006).[13/] There, Riggs, facing a shoplifting charge that included an allegation of one prior strike conviction, was advised by his attorney to reject a five year offer because he was only facing a maximum sentence of nine years. In fact, Riggs actually had four robbery convictions which could each be pled as a prior strike leaving Riggs facing a Three Strike sentence of 25 years to life. Riggs turned down the five year offer without knowing his true risk. Later, the prosecution added the additional strike allegations. Riggs was unable to revive the plea; he went to trial where he was convicted and sentenced to 25 years to life. *Riggs*, 399 F.3d at 1181,

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[13/] The disputed issue in *Riggs* that resulted in an order for en banc review was the proper remedy: returning the parties to the plea bargain stage (the majority) or specific performance of the original plea offer (as urged by the dissent). The panel was unanimous in its ruling that Riggs was entitled to habeas relief for ineffective assistance of counsel. *Riggs*, 399 F.3d at 1184-1186. According to the case docket sheet, after this Court granted an en banc hearing, the parties settled the case and the Court granted Riggs' motion to dismiss the case.

Despite this subsequent history of *Riggs*, numerous courts, including this Court, have cited *Riggs* even after the case was dismissed. *See e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 171, 172 (2012); *Chioino v. Kernan*, 581 F.3d 1182, 1184 (9th Cir. 2009); *Brazzel v. Washington*, 491 F.3d 976, 981 (9th Cir. 2007); *United States v. Wilson*, 719 F. Supp.2d 1260, 1275 (D. Or. 2010); *Wait v. State*, 212 So.3d 1082, 1090 (Fla. 2017); *Carmichael v. People*, 206 P.3d 800, 809 (Colo. 2009). Thus, the holding and reasoning in *Riggs* continues to resonate in other courts.

1183.

The *Riggs* court found trial counsel's failure to discover the additional strike convictions to be constitutionally deficient given the severity of the possible sentence exposure. *Id.* at 1183. "Simply stated, Riggs' counsel had a duty to investigate whether California's three strikes law would be applicable to Riggs. Riggs' counsel unjustifiably failed to discover such information in this case. Her omission fell below an objective standard of reasonableness." *Id.* Indeed, the court specifically found that counsel performed egregiously in failing to obtain Riggs' rap sheet and failing to seek sufficient information from Riggs about his prior robbery convictions. *Id.* In so holding, the court focused on counsel's "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, quoting *Strickland*, 466 U.S. at 691.

Hardy's case is virtually indistinguishable from *Riggs*. There is nothing in the record that supports that trial counsel ever advised Hardy that he could potentially face a Three Strikes sentence. To the contrary, Hardy has stated repeatedly under the penalty of perjury that counsel told him only two possible sentences: around 30 years if he was convicted of everything and nine years if he was convicted of corporal injury, the most likely count of conviction.

Because the court's decision in this case is inconsistent decisions by this Court and other courts, particularly the *Riggs* case which is no longer citable law, this Court should grant certiorari and settle whether an attorney involved in plea

negotiations has a duty to conduct a reasonable investigate into a client's possible sentencing exposure, including looking into the client's criminal history, to allow the criminal defendant to make an informed plea decision. This Court should settle this important question of counsel's duties in these circumstances.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari on these two claims.

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Respectfully submitted,

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