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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN L. HARDY, Petitioner-Appellant, v. KELLY SANTORO, Acting Warden, Respondent-Appellee.	No. 17-55243 D.C. No. 5:11-cv-00948-GW-JEM Central District of California, Riverside ORDER

Before: GOULD and NGUYEN, Circuit Judges, and BENITEZ,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Gould and Nguyen have voted to deny the petition for rehearing en banc, and Judge Benitez has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc is DENIED.

* The Honorable Roger T. Benitez, United States District Judge for the Southern District of California, sitting by designation.

NOT FOR PUBLICATION

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MAR 14 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTIN L. HARDY, Petitioner-Appellant, v. KELLY SANTORO, Respondent-Appellee.	No. 17-55243 D.C. No. 11-00948-GW (JEM) MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted February 4, 2019
Pasadena, California

Before: GOULD and NGUYEN, Circuit Judges, and BENITEZ,** District Judge.

Kristin Hardy appeals the district court's denial of his petition for habeas corpus under 28 U.S.C. § 2254. We affirm.

Following a trial by jury, Hardy was sentenced to 25-years-to-life in prison under California's Three Strikes Law for convictions of aggravated assault and

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

** The Honorable Roger T. Benitez, Senior United States District Judge for the Southern District of California, sitting by designation.

inflicting corporal injury on a cohabitant. Hardy argues his counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Hardy claims that, if his attorney had discovered Hardy's second prior strike conviction and advised him of the resulting 25-years-to-life sentencing exposure, he would have accepted the prosecution's more lenient four-year plea offer.

To demonstrate ineffective assistance of counsel and warrant habeas relief, a petitioner must show both (1) his attorney's performance was deficient and (2) resulting legal prejudice. *See Strickland*, 466 U.S. at 687. On this record, Hardy has not shown the first prong—that his attorney's "representation 'fell below an objective standard of reasonableness'" as measured by "prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). 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. Likewise, the California Department of Corrections did not mail Hardy's prison records until after Hardy rejected the plea offer. 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. Moreover, there is no evidence showing that Hardy's counsel knew of Hardy's second strike until after the four-year plea offer expired.

Thus, 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. *See Strickland*, 466 U.S. at 688. Because a showing on both *Strickland* prongs is required for habeas relief, the district court correctly denied Hardy's petition.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KRISTIN L. HARDY,

Petitioner,

v.

ROBERT H. TRIMBLE, Warden,

Respondent.

Case No. EDCV 11-0948-GW (JEM)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the pleadings, the records on file, and the Report and Recommendation of the United States Magistrate Judge. Petitioner has filed Objections, and the Court has engaged in a de novo review of those portions of the Report and Recommendation to which Petitioner has objected.[1] The Court accepts the findings and recommendations of the Magistrate Judge.

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[1] The Court has considered all Objections to the Report and Recommendation, including those filed by Plaintiff pro se on October 9, 2015, and those filed by the Federal Public Defender's Office on November 2, 2015.

IT IS ORDERED that: (1) the First Amended Petition for Writ of Habeas Corpus is denied; and (2) Judgment shall be entered dismissing the action with prejudice.

DATED: February 21, 2017

GEORGE H. WU
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KRISTIN L. HARDY,

Petitioner,

v.

ROBERT H. TRIMBLE, Warden,

Respondent.

Case No. EDCV 11-0948-GW (JEM)

J U D G M E N T

In accordance with the Order Accepting Findings and Recommendations of United States Magistrate Judge filed concurrently herewith,

IT IS HEREBY ADJUDGED that the action is dismissed with prejudice.

DATED: February 21, 2017

GEORGE H. WU
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KRISTIN L. HARDY, Petitioner, v. ROBERT H. TRIMBLE, Warden, Respondent.	Case No. EDCV 11-0948-GW (JEM) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable George H. Wu, United States District Judge, pursuant to 28 U.S.C. Section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

On June 15, 2011, Kristin L. Hardy ("Petitioner"), a prisoner in state custody, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 ("Petition"). On July 25, 2011, Petitioner filed a First Amended Petition. The action was stayed while Petitioner exhausted an unexhausted claim in the California Supreme Court. On October 15, 2012, after the stay was lifted, Warden Robert Trimble ("Respondent") filed an Answer to the First Amended Petition. On January 3, 2013, Petitioner filed a Reply.

On July 25, 2013, the Court appointed the Office of the Federal Public Defender to represent Petitioner in connection with his ineffective assistance claim in Ground Four and directed supplemental briefing. The Court also ordered Respondent to file a supplemental brief addressing Ground Five, which was not addressed in the Answer. On July 29, 2014, Respondent filed a Supplemental Brief ("First Supplemental Brief") addressing Ground Five. On August 28, 2014, Petitioner, through his counsel, filed a Supplemental Reply addressing Grounds Four and Five.[1] Respondent elected not to file a response to the Supplemental Reply.

On April 8, 2015, the Court directed further supplemental briefing regarding Ground Four. On May 12, 2015, Respondent filed a Second Supplemental Brief. On July 6, 2015, Petitioner filed a Response to the Second Supplemental Brief.

The matter is ready for decision.

PRIOR PROCEEDINGS

On July 29, 2009, a Riverside County Superior Court jury found Petitioner guilty of assault by means of force likely to produce great bodily injury (Cal. Penal Code § 245(a)(1)) (Count Three) and corporal injury to cohabitant (Cal. Penal Code § 273.5(a)) (Count Four). (2 Clerk's Transcript ["CT"] 490-91.) The jury acquitted Petitioner of rape (Cal. Penal Code § 261(a)(2)) (Count One), forcible oral copulation (Cal. Penal Code § 288a(c)(2) (Count Two)), and criminal threats (Cal. Penal Code § 422) (Count Five). (2 CT 486-87, 492.)

After a bench trial, the trial court found true allegations that Petitioner had sustained two "strike" convictions within the meaning of California's Three Strikes law and one serious

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[1] Prior to filing a Supplemental Reply, Petitioner's counsel sought leave to file a Second Amended Petition asserting additional claims and a stay of the proceedings pending exhaustion of the newly-asserted claims. (Docket No. 54.) On July 3, 2014, the Court denied leave to amend, finding that the proposed claims were untimely, unexhausted, and/or based on tenuous legal grounds. (Docket No. 62.) Petitioner filed a motion for review and reconsideration, which was denied by the District Court on October 6, 2014. (Docket Nos. 63, 67.) The District Court concurred with the reasoning of the order denying leave to amend and specifically noted that: (1) the proposed claims did not relate back to the original claims; (2) the proposed claims were unexhausted; and (3) Petitioner had not made a sufficient showing to warrant a stay and abeyance. (Docket No. 67.)

felony conviction within the meaning of Cal. Penal Code § 667(a), and had served one prison term within the meaning of Cal. Penal Code § 667.5(b). (1 CT 117-18; 2 CT 504.) On September 14, 2009, the trial court sentenced Petitioner to 25 years to life in state prison for Count Three and five concurrent years for the Section 667(a) enhancement. The trial court imposed a 25-years-to-life sentence for Count Four, but stayed the sentence pursuant to Cal. Penal Code § 654. The trial court struck the Section 667.5(b) enhancement. (2 CT 537.)

Petitioner filed an appeal in the California Court of Appeal. (Lodgment ["LD"] 2.) On December 29, 2010, the Court of Appeal issued an unpublished decision affirming Petitioner's conviction. The Court of Appeal reversed Petitioner's sentence so that the trial court could strike the five-year Section 661(a) enhancement and decide whether to impose the one-year Section 667.5 enhancement, which it had previously stricken. (LD 5 at 25.) Petitioner filed a petition for review in the California Supreme Court. (LD 6.) On March 16, 2011, the California Supreme Court summarily denied review. (LD 7.)

While his petition for review was still pending, Petitioner filed a habeas petition in the Riverside County Superior Court, asserting an ineffective assistance claim arising out of plea negotiations. (LD 8.) The state filed an informal response and Petitioner filed a reply. (LD 9, 10.) On December 14, 2010, the Superior Court denied relief in a short reasoned order. (LD 11.) Petitioner filed a habeas petition asserting the same claim in the California Court of Appeal. (LD 12.) On February 25, 2011, the Court of Appeal denied the petition without comment or citation to authority. (LD 13.) After commencing this action, Petitioner filed a habeas petition asserting the same claim in the California Supreme Court. (LD 14.) The state filed an informal response and Petitioner filed a reply. (LD 16-18.) On August 29, 2012, the California Supreme Court denied the petition without comment or citation to authority. (LD 19.)

SUMMARY OF EVIDENCE AT TRIAL

Based on its independent review of the record, the Court adopts the following factual summary from the California Court of Appeal's unpublished opinion as a fair and accurate summary of the evidence presented at trial:

A. *911 Call*.

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

B. *Initial Interview*.

At 7:15 a.m., Officer Vicente De La Torre responded to the 911 call. When he arrived, M. 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 M.'s injuries were admitted into evidence.

M. told Officer De La Torre that defendant 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, defendant forced her to orally copulate him and then to have sexual intercourse with him. Afterwards, he fell asleep. M. thought for about an hour about what to do, but once she decided to leave, she ran to the market.

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

C. *Sexual Assault Examination*.

Officer De La Torre took M. to the hospital, where a nurse performed a sexual assault examination. M.'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.

M. 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 DNA from sperm cells found in M.'s vagina matched defendant's DNA.

D. *Defendant's Mother's Testimony*.

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

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

E. *M.'s Meeting with a Defense Investigator.*

In February 2006, M. told a defense investigator that defendant 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 defendant to choke her for erotic purposes.

F. *The Letter from M. to Defense Counsel.*

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

G. *Interview Before a Previous Hearing.*

In March 2006, Officer De La Torre, a deputy district attorney, and M. were in court together for a previous hearing. M. 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.

H. *Jail Phone Calls.*

The jury heard two phone calls that defendant made to M. 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, defendant said, "What I did was foul, it was fucking wrong. It was stupid, it was sick." He told M.: "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...."

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

I. *M.'s Telephone Calls with Defense Counsel*

Between January and July 2007, Stephen Cline, defendant's then counsel, had a number of phone calls and one meeting with M. 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 ...."

Defendant 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.

M. also 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...."

J. *M.'s Meeting with a Defense Investigator.*

Roughly around March 2008, a defense investigator had a conversation with M. at court. M. 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.

K. *M.'s Testimony at Trial.*

At trial, M. testified that she and defendant 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]

[4] Although M. did not mention it on direct, cross, or redirect, on recross, she testified that defendant had already hit her twice that night. First, when she and defendant 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 defendant went to sleep, M. answered a (continued...)

she woke up because defendant came into the bedroom. He asked, "Why didn't you answer the phone? I was trying to call." According to M., he was not angry. She realized that the phone was off the hook.

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

Defendant 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 defendant and "trying to push him off."

After defendant 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). M. fell on the bed and pretended to pass out so defendant 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 consensual).[5]

M. stayed in the apartment for about an hour, until defendant 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 defendant's child.

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[4](...continued)
phone call from one of the women from the chat line. M. yelled at defendant; "[h]e jumped, and then his hand hit [her] face."

[5] M. 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.

M. 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 M., 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 Del La Torre.[6]

L. *Defendant's Testimony.*

According to defendant, on the night of the incident, he was worried because M. was not answering the phone. When he got home, he found that it had been off the hook; he was not angry.

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

After that, defendant phoned the chat line. This made M. angry, and they got into an argument. Defendant stopped it by going to sleep. He awoke because M. 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;

[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 M. regarding her rights, and it so instructed the jury.

one of them hit M. 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, defendant went back to sleep.

When defendant 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 [M.'s] eye."

(LD 5 at 3-10.)

PETITIONER'S CONTENTIONS

1. Petitioner's due process rights were violated by the trial court's refusal to give a unanimity instruction.

2. The trial court abused its discretion by refusing to dismiss one of Petitioner's "strike" convictions.

3. Petitioner's sentence is cruel and unusual, in violation of the Eighth Amendment.

4. Petitioner's prior counsel rendered ineffective assistance in connection with plea negotiations.

5. (a) Petitioner's trial counsel was ineffective for failing to file a motion for a new trial based on a defense investigator's destruction of her notes of a conversation with the victim; and (b) appellate counsel was ineffective for failing to raise this ineffective assistance claim on direct appeal.

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[7] On direct, defendant testified that first, someone hit him; then, he threw a couple of punches; and then, he heard M. 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."

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs the Court's consideration of Petitioner's cognizable federal claims. 28 U.S.C. § 2254(d), as amended by AEDPA, states:

> 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.

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court held that a state court's decision can be contrary to federal law if it either (1) fails to apply the correct controlling authority, or (2) applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result. Id. at 405-06. A state court's decision can involve an unreasonable application of federal law if it either (1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or (2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. Id. at 407-08. The Supreme Court has admonished courts against equating the term "unreasonable application" with "clear error." "These two standards . . . are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." Lockyer v. Andrade, 538 U.S. 63, 75 (2003). Instead, in this context, habeas relief may issue only if the state court's application of federal law was "objectively unreasonable." Id. "A state court's determination that a claim lacks merit precludes federal

habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101 (2011).

Under 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, 529 U.S. at 412 ("§ 2254(d)(l) restricts the source of clearly established law to this Court's jurisprudence"); see also Andrade, 538 U.S. at 71. If there is no Supreme Court precedent that controls a legal issue raised by a habeas petitioner in state court, the state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law. Wright v. Van Patten, 552 U.S. 120, 125-26 (2008) (per curiam); see also Carey v. Musladin, 549 U.S. 70, 76-77 (2006). A 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." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam); see also Bell v. Cone, 543 U.S. 447, 455 (2005) (per curiam).

A state court's silent denial of federal claims constitutes a denial "on the merits" for purposes of federal habeas review, and the AEDPA deferential standard of review applies. Richter, 562 U.S. at 98-99. Under the "look through" doctrine, federal habeas courts look through a state court's silent decision to the last reasoned decision of a state court, and apply the AEDPA standard to that decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding the judgment or rejecting the same claim rest upon the same ground."). The AEDPA standard applies, however, even if no state court issued a decision explaining the reasons for its denial of the federal claim. Richter, 562 U.S. at 98-99.

Petitioner presented Grounds One through Three to the state courts on direct appeal. (LD 2, 6.) The California Court of Appeal denied his claims in a reasoned decision and the California Supreme Court summarily denied review. (LD 5, 7.) The Court looks through the

California Supreme Court's silent denial to the Court of Appeal's reasoned decision, and applies the AEDPA standard to that decision. See Ylst, 501 U.S. at 803.

Petitioner presented Ground Four to the Riverside County Superior Court, the California Court of Appeal, and the California Supreme Court by habeas petition. (LD 8, 12, 14.) The Riverside County Superior Court denied the claim in a brief reasoned decision and the California Court of Appeal and California Supreme Court denied it summarily. (LD 11, 13, 19.) Accordingly, with respect to Ground Four, the Court looks through the summary denials by the California Supreme Court and the Court of Appeal to the Superior Court's reasoned decision, and applies the AEDPA standard to that decision. See Ylst, 501 U.S. at 803; Cannedy v. Adams, 706 F.3d 1148, 1158 (9th Cir. 2013) (even after Richter, it remains Ninth Circuit practice to look through state courts' summary denials of habeas petitions to the last reasoned decision), as amended on denial of rehearing, 733 F.3d 794 (9th Cir. 2013), cert. denied, __ U.S. __, 134 S. Ct. 1001 (2014).

The Court will discuss the standard of review applicable to Ground Five together with its discussion of that claim.

DISCUSSION

I. GROUND ONE DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground One, Petitioner contends that his due process rights were violated when the trial court refused to give a unanimity instruction, *i.e.*, instruct the jurors that they had to unanimously agree which acts formed the basis for the verdicts. For the reasons set forth below, the California Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

A. Background

Trial counsel requested the trial court to instruct the jury with California's unanimity instruction, CALCRIM No. 3501. The trial court refused. It found the case to be "a classic case of the doctrine of continuous course of conduct," which obviated any need for the jury to agree on which act constituted the offense. (3 Reporter's Transcript ["RT"] 468.)

B. California Court of Appeal's Decision

On direct appeal, the Court of Appeal explained that under California law the jury must agree unanimously that the defendant is guilty of a specific crime. When the evidence suggests more than one crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. (LD 5, citing People v. Russo, 25 Cal. 4th 1124, 1132 (2001)). However, there are exceptions to this rule, such as when the case involves a continuous course of conduct, or when the defendant offers the same defense to the various acts constituting the charged crime. (LD 5 at 11-12, citing People v. Jennings, 50 Cal. 4th 616, 679 (2010)).

The Court of Appeal stated that with respect to the charge of assault with force likely to cause great bodily injury, the relevant acts were closely connected in time and Petitioner offered the same defense to them. The charge was necessarily based on choking the victim with a scarf, choking her with hands, or a combination of both. (LD 5 at 12.) It could not be based on punching her in the eye or holding or scratching her wrists, because these acts involved only simple assault. (LD 5 at 12.)

The Court of Appeal explained:

> The evidence with respect to the two acts of choking, however, was virtually identical. M. told Officer De La Torre that defendant did one right after the other, out of anger. Defendant admitted doing one right after the other, but he claimed that he did both because M. wanted "kinky sex." No reasonable juror could have found that the act of choking M. with a scarf was a crime, but the act of choking her with the hands was not; or vice versa. Moreover -- particularly given defendant's admission -- no reasonable juror could have found that defendant did choke M. with the scarf but did not choke her with his hands, or vice versa. The jurors necessarily found defendant guilty of aggravated assault based on both acts.

(LD 5 at 12-13.)

The Court of Appeal stated that the analysis was different with respect to the charge of inflicting corporal injury on a cohabitant. It explained:

> This charge did not require force likely to cause great bodily injury; accordingly, it could have been based not only on the chokings, but also on the act of punching M. in the eye or the act of restraining her wrists. At least according to defendant, these acts were separated in time: The chokings came first, followed by an interlude in which the couple argued and defendant went to sleep; then came the punch in the eye and the wrist restraint. Moreover, defendant offered different defenses to the different acts. With respect to the chokings, he testified (and M. had, at times, admitted) that they were done with M.'s consent, for erotic purposes. With respect to the punch in the eye and the wrist restraint, he testified (and M. had, at times, suggested) that they were in self-defense.

(LD 5 at 13.)

The Court of Appeal assumed, without deciding, that the trial court erred by failing to give a unanimity instruction regarding the infliction of corporal injury on a cohabitant count. (LD 5 at 13.) However, it found the error harmless under the standard of Chapman v. California, 386 U.S. 18 (1967), which California courts apply to constitutional errors. (LD 5 at 13-14.) It explained:

> [F]rom the jury's verdict finding defendant guilty of assault with force likely to cause great bodily injury, we know that the jury *unanimously* found that defendant choked M. both with a scarf and with his hands. The jury also unanimously found that this was a crime – i.e., that it was not done at M.'s request or with her consent. It necessarily follows that the jury also unanimously found that this also constituted the infliction of corporal injury on a cohabitant. Of course, it is possible that some or all of the jurors found that the punch in the eye additionally constituted the infliction of corporal injury on a

> cohabitant. Nevertheless, we can be sure that, even if the trial court had given a unanimity instruction, the jurors would have agreed unanimously that defendant was guilty of inflicting corporal injury on a cohabitant based on both of his acts of choking M.

(LD 5 at 14.)

C. The California Court of Appeal Did Not Unreasonably Apply Clearly Established Federal Law.

The Supreme Court has never held that there is a federal constitutional right to a unanimous jury verdict in state cases. See Apodaca v. Oregon, 406 U.S. 404, 410-12 (1972) (Sixth Amendment does not mandate jury unanimity in state trials); Johnson v. Louisiana, 406 U.S. 356, 359-60 (1972) (noting that "this Court has never held jury unanimity to be a requisite of due process of law"). Moreover, clearly established Supreme Court precedent indicates that the Constitution does not require unanimous agreement on the means by which each element of a crime is satisfied. See Schad v. Arizona, 501 U.S. 624, 630-32 (1991) (plurality opinion) (no constitutional right to unanimity regarding whether first degree murder was premeditated murder or felony murder); see also McKoy v. North Carolina, 494 U.S. 433, 449 (1990) (J. White, concurring) ("Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict"); Richardson v. United States, 526 U.S. 813, 817 (1999) ("[A] federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."). Whether Petitioner was entitled to a unanimity instruction is purely a question of state law and does not implicate the Constitution. See People v. Vargas, 91 Cal. App. 4th 506, 562 (2001) ("There being no right to a unanimous verdict under the United States Constitution, the question of whether defendant was entitled to a unanimity instruction is a state, not a federal, issue.").

Because there is no federal law requiring a state jury verdict to be unanimous, Petitioner's contention that the jurors might have disagreed regarding which of his acts constituted the conviction offenses does not state a claim under the federal Constitution. As with any instructional error, Petitioner is must show that the trial court's failure to give a unanimity instruction "so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72 (1991); Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Cupp v. Naughten, 414 U.S. 141, 147 (1973).

The California Court of Appeal found that Petitioner was not entitled to a unanimity instruction with respect to the aggravated assault count. The Court defers to the Court of Appeal's determination that punching the victim and holding or scratching her wrist did not involve great bodily injury under California law and could only support a conviction for simple assault. See Estelle, 502 U.S. at 67-68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); see also Bueno v. Hallahan, 988 F.2d 86, 88 (9th Cir. 1993) (per curiam) (federal court must defer to state court's interpretation of state law). It follows that a guilty verdict on the aggravated assault count could only be based on one or both of the acts of choking shown by the evidence. According to both Petitioner and the victim, the two acts of choking -- choking with hands and choking with a scarf -- occurred one after the other, and a rational juror could not have found that Petitioner committed only one of the acts of choking, especially since Petitioner admitted committing both but contended that he did so at the victim's request. (1 RT 213-16; 2 RT 253-55, 419-21.) Thus, the Court of Appeal reasonably found that there was no need for a unanimity instruction.

As for the corporal injury to a cohabitant count, the Court of Appeal declined to decide whether a unanimity instruction was required because it concluded that any error was harmless beyond a reasonable doubt. (LD 5 at 14.) The jury could find Petitioner guilty of corporal injury to a cohabitant based not only on the acts of choking, but also on the punch to the victim's eye and the restraint of her wrist. (Id.) Petitioner testified that the chokings were separated in time from the punch and wrist restraint and offered different defenses to

them: he contended that the chokings were consensual and the punch and wrist restraint were in self-defense. (2 RT 418-21.) However, since the jury convicted Petitioner of the aggravated assault count, it necessarily found that he choked the victim without her consent, and, as explained above, logically must have found that he committed both acts of choking. It follows that the jury must have unanimously found that both acts of choking constituted corporal infliction of injury on a cohabitant. As the Court of Appeal reasoned, even if some jurors additionally found that the punch to the eye or the wrist restraint constituted corporal injury to a cohabitant, *all* the jurors must have agreed that both of Petitioner's acts of choking the victim constituted corporal injury to a cohabitant, and would have done so even if given a unanimity instruction. There is no reasonable likelihood that the absence of a unanimity instruction rendered Petitioner's trial fundamentally unfair. See Estelle, 501 U.S. at 72.

Accordingly, the California Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). Ground One does not warrant federal habeas relief.

II. GROUND TWO DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground Two, Petitioner contends that the trial court abused its discretion by refusing to dismiss one of his strike convictions. For the reasons set forth below, the California Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

Under California Penal Code § 1385, a California court may dismiss a defendant's strike conviction for purposes of sentencing under the Three Strikes law. People v. Superior Court (Romero), 13 Cal.4th 497, 529-30 (1996). Petitioner moved to dismiss one of his two strike convictions under Romero, but the trial court denied his motion. (3 RT 566, 576-78; 2 CT 539-57.)

A claim challenging a California court's refusal to strike prior convictions under Romero is not cognizable on federal habeas review. See Brown v. Mayle, 283 F.3d 1019, 1040 (9th Cir. 2002), vacated on other grounds, Mayle v. Brown, 538 U.S. 901 (2003); Ely v.

Terhune, 125 F. Supp. 2d 403, 411 (C.D. Cal. 2000) (claim that trial court failed to strike prior conviction was not cognizable on federal habeas review); see also Estelle, 502 U.S. at 67-68. "Absent a showing of fundamental unfairness, a state court's misapplication of its own sentencing laws does not justify federal habeas relief." Christian v. Rhode, 41 F.3d 461, 469 (9th Cir. 1994). Petitioner has not shown any misapplication of Romero, much less a misapplication rising to the level of fundamental unfairness. Petitioner's claim is cognizable on federal habeas solely as a challenge to the length of his sentence – a claim that he has raised in Ground Three.

Accordingly, the California Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). Ground Two does not warrant federal habeas relief.

III. GROUND THREE DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground Three, Petitioner contends that his Three Strikes sentence violates the Cruel and Unusual Clause of the Eighth Amendment. For the reasons set forth below, the California Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1).

A. Applicable Clearly Established Federal Law

As a general matter, a criminal sentence that is not proportionate to the conviction offense may violate the Eighth Amendment. Solem v. Helm, 463 U.S. 277, 284 (1983) (holding that sentence of life imprisonment without possibility of parole for seventh nonviolent felony violated Eighth Amendment). But outside the context of capital punishment, successful challenges to the proportionality of particular sentences are "exceedingly rare." Id. at 289-90 (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)). "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." Ewing v. California, 538 U.S. 11, 23 (2003) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)). If "a threshold comparison of the crime committed and the

sentence imposed leads to an inference of gross disproportionality," the reviewing court should compare the sentence with sentences imposed on other criminals in the same jurisdiction and for the same crime in other jurisdictions. Harmelin, 501 U.S. at 1005. If a comparison of the crime and the sentence does not give rise to an inference of gross disproportionality, a comparative analysis is unnecessary. Id.

B. California Court of Appeal's Decision

After discussing the United States Supreme Court's decision in Ewing, the California Court of Appeal found that Petitioner's sentence did not constitute the "rare case" in which a Three Strikes sentence violates the Eighth Amendment. (LD 5 at 19-20.) It stated:

> Even though defendant's criminal record was not as extensive as that of the defendant in Ewing, it did include two recent strike priors, both involving violence and the use of a weapon, as well as a number of violent misdemeanors. Moreover, unlike the defendant in Ewing, defendant's current offenses involved actual violence. Thus, his sentence was justified by the state's interest in incapacitating and deterring recidivist felons.

(LD 5 at 20.)

C. The Court of Appeal Did Not Unreasonably Apply Clearly Established Federal Law

Petitioner argues that his Three Strikes sentence is grossly disproportionate to his crimes, given the nature of his conviction offenses and the circumstances of his strike convictions. (Reply at 9-34.)

In Rummel, the Supreme Court upheld an indeterminate life sentence for a defendant with two prior serious felony convictions who obtained $120.75 by false pretenses. Rummel, 445 U.S. at 266, 285. In Harmelin, the Supreme Court did not view as disproportionate a sentence of life without the possibility of parole for possession of a large amount of cocaine, even though the defendant had no prior felony convictions. Harmelin, 501 U.S. at 996. In Ewing, the Supreme Court upheld a Three Strikes sentence of 25 years to life for a defendant convicted of grand theft for stealing three $399 golf clubs. Ewing, 538 U.S. at 18,

28-31. In Andrade, the Supreme Court upheld a Three Strikes sentence of 50 years to life for two counts of petty theft with a prior conviction involving $153.54 of videotapes. Andrade, 538 U.S. at 66-68, 77. Unlike these offenses, Petitioner's crimes – assault by means of force likely to cause great bodily injury and corporal injury to a cohabitant – involved violence. If the facts of Rummel, Harmelin, Ewing, and Andrade fell short of the "exceedingly rare" and "extreme" situation where a sentence is grossly disproportionate to the crime, then Petitioner's sentence cannot meet that exacting standard.

Petitioner's strike convictions were a 2001 conviction for aggravated assault and a 2003 conviction for robbery. (1 CT 117-18.) Petitioner argues that they were relatively minor. The victim in the incident giving rise to Petitioner's 2001 aggravated assault conviction was his father and the weapons were "a straight edge razor and a chair." (1 CT 118; 3 RT 567.) At the Romero hearing, Petitioner's father told the trial court that he was in an alcoholic rage, and Petitioner, who was 18 at the time, was trying to protect himself and other family members. (3 RT 567-70.) The 2003 conviction arose out of a shoplifting incident. A security guard at a market attempted to stop Petitioner from taking alcoholic beverages without paying, and Petitioner lunged at him with a broken kitchen paring knife. (2 CT 541-42.)

As the Court of Appeal pointed out, Petitioner's strike convictions both involved violent conduct, as do his current offenses. That circumstance distinguishes Petitioner's case from the few decisions that have found that a Three Strikes sentence violated the Eighth Amendment. See Gonzalez v. Duncan, 551 F.3d 875, 884-85 (9th Cir. 2008) (28-years-to-life sentence was grossly disproportionate to offense of failure to update annual sex offender registration, where defendant had twice updated his registration and was still living at his last registered address, and offense was "an entirely passive, harmless, and technical violation"); Ramirez v. Castro, 365 F.3d 755, 768, 885 (9th Cir. 2004) (25-years-to life sentence was grossly disproportionate to theft of $199 VCR when strike convictions, although nominally robberies, involved no weapons or violence). Petitioner's sentence is not one of the extraordinary cases for which the principle of gross disproportionality is reserved. Under

applicable Supreme Court precedent, its length is within the broad discretion the Constitution allows to legislatures to fashion appropriate punishments. See Andrade, 538 U.S. at 76.

Accordingly, the California Court of Appeal's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court. 28 U.S.C. § 2254(d)(1). Ground Three does not warrant federal habeas relief.

IV. GROUND FOUR DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground Four, Petitioner contends that his counsel Stuart Sachs ("Sachs") rendered ineffective assistance in connection with plea negotiations. Specifically, Petitioner contends that Sachs failed to advise him that although the prosecution had only alleged one strike conviction, his criminal record actually included two strikes, so that he potentially faced a Three Strikes sentence of 25 years to life or more if he went to trial. He maintains that if he had known that he faced a Three Strikes sentence, he would not have rejected the prosecution's plea offer of four years. (First Amended Petition, Ground Four, Attachment ["Attach."] at 1-3; Reply at 35-55; Supplemental Reply at 10-22.) For the reasons set forth below, the Riverside County Superior Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court, nor did it constitute an unreasonable determination of the facts in light of the record before the state court. 28 U.S.C. § 2254(d)(1)&(2).

A. Pertinent Facts

1. Background

In a felony complaint filed on August 30, 2005, Petitioner was charged with rape (Cal. Penal Code § 261(a)), forcible oral copulation (Cal. Penal Code § 288a), assault by means of force likely to produce great bodily injury (Cal. Penal Code § 245), infliction of corporal injury on a cohabitant (Cal. Penal Code § 273.5), and false imprisonment (Cal. Penal Code § 236). The complaint also alleged that Petitioner had sustained a 2003 robbery conviction and had served a prior prison term within the meaning of Cal. Penal Code § 667.5(b). (1 CT 1-2.) This allegation exposed Petitioner to a one-year enhancement. Cal. Penal Code § 667.5(b).

Petitioner was arraigned and the public defender's office was appointed to represent him. (1 CT 3.) On September 15, 2005, Deputy Public Defender Sachs made his first court appearance on behalf of Petitioner. (1 CT 3.) On October 25, 2005, the state filed an amended felony complaint, alleging the same charges as the original complaint but adding additional allegations based on the 2003 robbery conviction. In addition to the Section 667.5(b) enhancement, the state alleged that the 2003 robbery conviction constituted a serious felony under Cal. Penal Code § 667(a) and a strike under California's Three Strikes law. (1 CT 8-9.) The Section 667(a) enhancement carried an additional five-year term and the strike allegation exposed Petitioner to a doubling of his sentence for the conviction offenses.

Settlement discussions were held between Sachs and the prosecution. Sachs described these discussions in some detail during the December 21, 2005 hearing on Petitioner's motion to substitute counsel pursuant to People v. Marsden, 2 Cal. 3d 118 (1970). (LD 20 [Transcript of December 21, 2005 Marsden hearing] at 4-5.) Sachs said that the prosecution first made an offer of six years based on a guilty plea to the rape count, but Sachs persuaded the prosecutor to offer a guilty plea to the Section 273.5 domestic abuse count, with a sentence of four years (the low term doubled) to be served at 80%. (LD 20 at 4-5.) This offer was memorialized in writing on December 2, 2005, when the parties obtained a continuance in order to allow Petitioner to consider the offer. (Supplemental Reply, Exh. A.) Previously Petitioner had told trial counsel that he would accept four years at 80%, but after the prosecution made its offer, he said that he wanted to plead guilty to a non-strike offense. At Petitioner's request, trial counsel made a counter-offer of 32 months (the low term doubled) for a guilty plea to the false imprisonment count, but the prosecution rejected the offer. (LD 20 at 5.)

Petitioner told the trial court that he understood that his sentence would be doubled on account of his strike conviction, but argued that the prosecution should consider factors such as the seriousness of the prior conviction offense and the fact that he had never committed crimes similar to the current charges. (LD 20 at 6.) The trial court stated that Sachs had

been "very successful in getting very reasonable offers" from the prosecution, and that it was sure that Sachs had explained to Petitioner that if he lost at trial, his exposure was very high. (LD 20 at 5.) Petitioner said that he had not discussed the matter with Sachs because Sachs had not visited him in jail. (LD 20 at 6.) Sachs had previously admitted that he had not yet visited Petitioner in jail, but said that he had spent several hours with him on the phone. (LD 20 at 3.)

The trial court warned Petitioner that after the preliminary hearing the prosecution's offers would not be as good. (LD 20 at 7.) It found that Sachs was properly representing Petitioner and denied the motion for substitute counsel. (LD 20 at 7-8.)

On February 22, 2006, Petitioner again requested another counsel, or alternatively leave to represent himself. The trial court held a Marsden hearing and denied his request for substitute counsel.[8] (1 RT 10-19; 1 CT 17.) The trial court granted Petitioner leave to represent himself. (1 RT 19-23; 1 CT 17.) Petitioner represented himself until March 2, 2006, when he requested counsel to be appointed and the trial court re-appointed the public defender's office. (1 CT 20.)

The preliminary hearing was held on March 14, 2006. Petitioner was represented by Sachs. (1 CT 24-75.) The court dismissed the Section 236 false imprisonment count for insufficient evidence, but held Petitioner to answer on all other counts, including an uncharged count for criminal threats under Cal. Penal Code § 422. (1 CT 73-74.) On March 27, 2006, the state filed an Information. Like the amended felony complaint, the Information alleged a single strike conviction, the 2003 robbery conviction. (1 CT 77-79.) On March 28, 2006, Petitioner was arraigned on the Information, represented by Sachs. (1 CT 84.) On April 13, 2006, there was a mandatory settlement conference. Another deputy public defender appeared for Sachs. (1 CT 85.)

The record reflects that by April 27, 2006, Petitioner was represented by another deputy public defender, Jennifer Mullins. (1 CT 86.) On June 1, 2006, the prosecution filed

[8] The transcript of the February 22, 2006 Marsden hearing is not before the Court.

an Amended Information, which alleged two strike convictions: the previously-alleged 2003 robbery and a 2001 conviction for assault with a deadly weapon (a straight edge razor and a chair).[9] (1 CT 116-18.) Petitioner was arraigned on the Amended Information on August 10, 2006. (1 CT 115, 116.) When Mullins told Petitioner's parents that he now faced a life term, they said that they would hire private counsel. (1 CT 112.) The case was continued to enable them to do so. (1 CT 126-30.)

On September 20, 2006, the public defender's office was relieved as counsel. Petitioner retained private counsel, who shortly afterwards discovered a conflict and another private counsel was substituted. (1 CT 131, 133-35.) On March 7, 2007, counsel Stephen Cline wrote a letter to the prosecutor attempting to settle the case based on the prosecution's previous four year plea offer, and offered to add a one year enhancement for a total of five years. (First Amended Petition, Ex. D.)

Petitioner was subsequently represented by several different counsel. (1 CT 173-75, 223, 225, 234, 240.) Settlement discussions continued; on April 7, 2008, the prosecution sought a continuance on the ground that it was considering a defense settlement offer. (1 CT 194-95, 221, 1 RT 67-77.) The parties were discussing a resolution of the case at 17 years, but Petitioner's conduct during a discussion of this offer on April 10, 2008 caused his counsel to declare a doubt regarding his mental competence. Petitioner was evaluated by two psychiatrists and was found competent to stand trial. The plea negotiations, however, broke down. (1 RT 67-77.) On July 20, 2009, the prosecution filed a Second Amended Information, again alleging two strikes. (1 CT 281-84.) Trial started on July 20, 2009. (1 RT 83.)

The jury acquitted Petitioner of the rape, forcible oral copulation, and criminal threats counts. It convicted him of the aggravated assault and domestic abuse counts. (2 CT 483-

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[9] The record does not reflect when the prosecution became aware of Petitioner's 2001 conviction. The documents introduced to prove Petitioner's prior convictions reflect that the prior conviction packet was sent by the California Department of Corrections and Rehabilitation with a certification dated March 24, 2006. (2 CT 511.)

84.) The trial court refused to dismiss the 2001 strike conviction under Romero, and Petitioner received a Three Strikes sentence of 25 years to life. (2 CT 537-38.)

2. Declarations Submitted by Petitioner

Petitioner has submitted declarations by himself, his parents, and his trial counsel. He submitted the same declarations to the state courts.

In his own declaration, Petitioner declares that Sachs told him that he felt confident that Petitioner could be acquitted of all charges except perhaps the Section 273.5 domestic abuse count, and that he had a good chance of mounting a defense even against that count. Sachs told Petitioner that his maximum exposure if he lost at trial on the domestic abuse count was 9 years (four years high term doubled on account of the strike, plus one year for the prison prior).[10] (Petition, Exh. A [Declaration of Kristin Hardy, undated ["Pet. Decl."] at 1.) Petitioner felt that Sachs's advice regarding the prospects of winning at trial was good and turned down the offer. After the prosecution filed an Amended Information adding another strike, Petitioner tried to get the offer back, but the prosecution refused. Petitioner declares that Sachs never mentioned that he was facing a life sentence under the Three Strikes law. (Id.) He maintains that if he had known "the true consequences" of going to trial, he would not have taken the risk and would have accepted the offer. (Id. at 1-2.)

Petitioner's parents, Curtis and Denise Hardy, declare that they had numerous discussions with Sachs regarding Petitioner's case, but Sachs never mentioned that Petitioner faced a life sentence under the Three Strikes law if he proceeded to trial. (Declaration of Curtis Hardy, undated ["C. Hardy Decl."] at 1; Declaration of Denise Hardy, undated ["D. Hardy Decl."] at 1.) Petitioner also never mentioned a possible life term. (D. Hardy at 1.) Petitioner's father declares that he and his wife were "not very pleased" with the four year offer because they felt that Petitioner was innocent, but they would have urged him to accept the offer if they had known that he faced a life term. (C. Hardy Decl. at 1.)

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[10] In his informal brief in support of his state habeas petition, Petitioner asserted that Sachs also told him that if he was convicted of all counts, he faced more than 30 years in prison, and that the four year offer was a good one. (LD 10 at 7.)

Petitioner's mother similarly declares that she and Petitioner's other family members would have "forced him to take the deal" had they been aware of a possible life sentence. (D. Hardy Decl. at 1.)

Petitioner's trial counsel, Samuel Long, declares that Petitioner clearly told him that he would have accepted the four year offer "had he been apprised of the exposure he faced and the evidentiary procedures available to bring in the victim's statements." (Declaration of Samuel J. Long, dated July 20, 2010 ["Long Decl."] ¶ 8.)

3. The Victim's Pre-Preliminary Hearing Statements and Preliminary Hearing Testimony

Some time before the December 21, 2005 Marsden hearing, the victim, Melissa Malone ("Malone"), gave Sachs a letter in which she said that she had fabricated the rape charges. (LD 20 at 4; 1 RT 145-56, 195-96.) Sachs gave the letter, which was signed by Malone under penalty of perjury, to the prosecutor. (LD 20 at 4; 1 CT 50.) Malone met with Sachs several times and told him that she and Petitioner had consensual sex. (1 CT 448-49.) On February 21, 2006, Malone told a defense investigator that there was no rape. (1 RT 180-81.)

At the preliminary hearing on March 14, 2006, however, Malone gave testimony essentially consistent with her statements to the police when she reported the crime. (1 CT 32-64.) She admitted that she previously told both Sachs and the prosecutor that the incident involved consensual sex, but said that she lied. (1 CT 49.) She said that she lied in the letter that she gave to Sachs, and that Petitioner and his parents had encouraged her to write it. (1 CT 50-51, 56-57, 66.)

4. Petitioner's Jailhouse Conversations with the Victim

The prosecution played at trial portions of two surreptitiously taped telephone conversations between Petitioner and Malone while he was in jail: one on February 24, 2006 and one on April 18, 2006. (2 CT 298-319, 413-35.) During these conversations, Petitioner made statements regarding his sentence exposure, which were redacted from the recordings played for the jury and from the accompanying transcripts.

The record does not contain an unredacted transcript of the February 24, 2006 conversation, which took place before the preliminary hearing, but the trial court and counsel quoted statements by Petitioner referring to his sentence exposure when discussing the redaction of the transcript. They referred to Petitioner saying "getting no 11 years" and "I was going to go to jail for 20 years." (2 RT 281, 282, 296).

The record contains an unredacted transcript of the April 18, 2006 conversation, which took place after the preliminary hearing. Petitioner makes numerous references to facing 37 years in prison. (2 CT 322, 323, 324, 325, 341.) At one point, while begging Malone not to testify against him, he says, "I'm going for life." (2 CT 328.) He also says "They took the deal off the table." and "When I went to court deal was off the table. The District Attorney took the deal off then they apply pressure to you: threatening to throw you in jail just to get me. Do you think a [sic] really deserve 37 years in prison Melissa?" (2 CT 323.) Later, when talking about Malone's preliminary hearing testimony, he says, "But damn it, I would rather you have told me from the beginning that you was going to do that, I would of jump on that ___ I was gonna take it, but they took the deal back when I went to court." (2 CT 333.)

B. Applicable Clearly Established Federal Law

The Sixth Amendment right to counsel extends to the plea bargaining process. Lafler v. Cooper, __ U.S. __, 132 S. Ct. 1376, 1384 (2012); Missouri v. Frye, __ U.S. __, 132 S .Ct. 1399, 1405-06 (2012); Padilla v. Kentucky, 559 U.S. 356, 373 (2010); Hill v. Lockhart, 474 U.S. 52, 57 (1985). Criminal defendants are entitled to the effective assistance of competent counsel during plea negotiations. Lafler, 132 S. Ct. at 1384. "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." Id. at 1387.

Ineffective assistance of counsel claims in the plea bargain context, like other ineffective assistance claims, are governed by the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). Frye, 132 S .Ct. at 1405; Hill, 474 U.S. at 57. Under Strickland, Petitioner must prove that his attorney's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. Petitioner also must show that

he was prejudiced by counsel's deficient performance. Id. at 687. Petitioner can prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id. Petitioner must prove both prongs of Strickland. Id. at 687. The Court may reject his claims upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. Id. at 697; see Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002) ("[f]ailure to satisfy either prong of the Strickland test obviates the need to consider the other").

In the context of plea offers, counsel cannot be required to predict accurately what the jury or court might find if the case goes to trial, but he must give the defendant the tools needed to make an intelligent decision. Turner v. Calderon, 281 F.3d 851, 881 (9th Cir. 2002). In order to show prejudice, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 132 S. Ct. at 1384. When a defendant contends that counsel's defective advice caused him to reject a plea offer and proceed to trial, he has shown prejudice where "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Id. at 1385.

"The standards created by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." Richter, 562 U.S. at 105 (internal citations omitted). To succeed on an ineffective assistance of counsel claim governed by Section 2254(d), "it is not enough" to persuade a federal court that the Strickland test would be satisfied if a claim "were being analyzed in the first instance." Bell v. Cone, 535 U.S. 685, 698-99 (2002). It also "is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly." Id. at 699.

Rather, the habeas petitioner must show that the state courts "applied Strickland to the facts of his case in an objectively unreasonable manner." Id.

C. Analysis

The Riverside County Superior Court denied Petitioner's ineffective assistance claim, stating: "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." (LD 11 at 2.) Thus, the state court denied Petitioner's claim purely under the prejudice prong of Strickland. The Court must determine whether the state court's conclusion that Petitioner had not shown prejudice was contrary to, or an unreasonable application of, clearly established federal law, or rested on an unreasonable determination of the facts in light of the evidence before the state court.[11] 28 U.S.C. § 2254(d)(1)&(2).

In assessing the state court's prejudice determination, the Court accepts that during their discussions of the state's plea offer, Sachs never advised Petitioner that he had two strikes and potentially faced a Three Strikes sentence. In addition to Petitioner's own declaration and the declarations of his parents, Sachs's statements during the Marsden hearing corroborate that he believed that Petitioner had only one strike conviction. He told the trial court that "[Petitioner] does have a strike, which, of course, complicates his case," and both Sachs and Petitioner spoke of the doubling of Petitioner's sentence as a result of having one strike. (LD 20 at 4, 5.)

Respondent argues that Petitioner knew, even if his counsel did not, that he potentially faced a life sentence. Petitioner presumably knew that he had sustained an aggravated assault conviction in 2001, and his plea papers reflect that he acknowledged at the time that the conviction would constitute a strike in the future. (2 CT 519.) However, Petitioner declares that he was "somewhat ignorant" of the Three Strikes law (Pet. Decl. at 1-2), and the

[11] There is no need to reach the performance prong if the state court reasonably denied Petitioner's ineffective assistance claim under the prejudice prong. Strickland, 466 U.S. at 697; Rios, 299 F.3d at 805.

record does not show that he knew that he faced a sentence of 25 years to life or more if the prosecution alleged both his 2001 conviction and his 2003 conviction as strikes. The Court is unpersuaded by Respondent's argument that Petitioner's statement to Malone during their April 18, 2006 conversation that "I'm going for life" shows that he knew that he faced a life sentence. (Answer at 39; 2 CT 301.) Read in context, it is apparent that Petitioner is exaggerating in order to make Malone feel bad enough to change her story. Moreover, in the same conversation, Petitioner repeatedly refers to going to prison for 37 years. (2 CT 322, 323, 324, 325, 341.) The April 18, 2006 conversation shows that Petitioner knew that he faced a long sentence if convicted of all charges, but does not show that he knew that he faced an indeterminate sentence under the Three Strikes law.

Thus, when Petitioner rejected the four year plea offer, neither he nor Sachs realized that he faced an indeterminate Three Strikes sentence if the state alleged his 2001 conviction in addition to his 2003 conviction. Even so, Sachs told Petitioner that the four year offer was "a good deal" and advised him to accept it. (First Amended Petition, Ground Four, Attach. at 1; LD 10 at 7; see also 1 CT 153 [Petitioner's complaint to the State Bar mentioning that Sachs "seemed to become angry" when Petitioner declined the offer].) Petitioner is not claiming that Sachs advised him to reject the four year plea offer – he is claiming that he would have accepted it if Sachs had provided him with correct information about his potential sentence exposure.

A defendant who contends that his counsel's deficient advice caused him to reject a plea offer must show that, but for the deficient advice: (1) he would have accepted the plea offer; (2) the prosecution would not have withdrawn it; (3) the trial court would have accepted it; and (4) his sentence would have been less severe. Lafler, 132 S. Ct. at 1385. The last factor is not in question here – Petitioner's sentence of 25 years to life is clearly more severe than the four year plea offer. Nor is there any indication that the trial court would not have accepted the plea agreement -- the trial court granted Petitioner a continuance to consider the offer and spoke favorably of it at the December 21, 2005 Marsden hearing. (LD 20 at 6, 7; Supplemental Reply, Exh. A.) The Superior Court reasonably could have based its finding

of no prejudice only on one or both of the first two Lafler factors, *i.e.,* that Petitioner would not have accepted the plea offer and/or that the prosecution would have withdrawn it.

Although the record does not show exactly when the four year plea offer expired, the parties agree that it did not survive the March 14, 2006 preliminary hearing. The trial court warned Petitioner at the December 21, 2005 Marsden hearing that the prosecution's offers would not be as good after the preliminary hearing (LD 20 at 4), and the March 7, 2007 letter of Petitioner's counsel Cline refers to the Riverside County district attorney's office policies regarding post-preliminary hearing plea agreements (First Amended Petition, Exh. D). Moreover, Petitioner told Malone on April 18, 2006 that the offer was no longer available when he tried to accept it in court, presumably referring to the April 13, 2006 mandatory settlement conference. (1 CT 85; 2 CT 323, 333.) The relevant period during which Petitioner could have accepted the offer was prior to the preliminary hearing.

Prior to the preliminary hearing, Petitioner had reason to feel optimistic about his prospects. Malone had repeatedly recanted her allegations that Petitioner had sexually assaulted her and she had done so in writing under penalty of perjury. She had told Sachs as well as the prosecutor that the sexual activity between her and Petitioner was consensual. (LD 21 at 4; 1 CT 48-51.) Malone was pregnant with Petitioner's child, she was in regular contact with Petitioner and his parents, and Petitioner could reasonably believe that she would stick to her recantation and testify favorably to him at the preliminary hearing. (1 RT 145-46, 150-51, 169.) This changed after Malone disavowed her recantation and testified against Petitioner at the preliminary hearing. The prosecution's case became stronger and Petitioner's prospects for escaping significant prison time became dimmer. In fact, Petitioner himself told Malone during a conversation with her after the preliminary hearing that he would have accepted the plea offer if he had known that she would testify against him. (2 CT 333.) Petitioner also said that he tried to accept the plea offer when he "went to court," but it was no longer available. (2 CT 323, 333.) Thus, the record shows that the most significant factor in Petitioner's rejection of the plea offer was his reliance on Malone's recantation. Once she

testified against him at the preliminary hearing, Petitioner tried to accept the plea offer even though he did not yet know that he would be charged with a second strike.

These facts distinguish the case from the Ninth Circuit decision in Riggs v. Fairman, 399 F.3d 1179 (9th Cir. 2005), rehearing en banc granted, 430 F.3d 1222 (9th Cir. 2005), appeal dismissed, 2006 WL 6903784 (9th Cir., Apr. 14, 2006). Riggs was charged with petty theft with a prior conviction. He had previously been convicted of four counts of robbery, but during plea negotiations none of the parties understood that he had four strikes and faced a potential life term under the Three Strikes law. The prosecutor and Riggs knew Riggs's criminal history but did not realize that each robbery count constituted a separate strike, while defense counsel was unfamiliar with Riggs's criminal record. Defense counsel advised Riggs that his maximum exposure on the petty theft charge was nine years and advised him to reject the prosecution's five year offer and wait for a better one. No better offer came, and Riggs was convicted and sentenced to 25 years to life. Riggs, 399 F.3d at 1181.

The Ninth Circuit affirmed the district court's grant of habeas relief. It found that defense counsel performed deficiently when she failed to independently investigate Riggs's criminal history or seek information about it from Riggs himself. Riggs, 399 F.3d at 1183. It also found that Riggs had suffered prejudice. The Ninth Circuit found that Riggs's testimony that he would have accepted the five year offer was supported by three factors: (1) the significant disparity between the plea offer and a sentence of 25 years to life; (2) the strong prosecution case against Petitioner; and (3) the fact that Riggs tried to get the offer reinstated once he became aware of the application of the Three Strikes law to his case. Id.

Only one of those three factors is present here: the significant disparity between the four year plea offer and Petitioner's 25-years-to-life sentence. However, unlike the strong prosecution case in Riggs, where witnesses saw Riggs running from the store with stolen vitamins and he made incriminating statements when apprehended, see Riggs v. Fairman, 178 F. Supp. 2d 1141, 1143 (C.D. Cal. 2001), the prosecution's case against Petitioner was relatively weak at the time that he was considering the plea offer. The victim had recanted and claimed that she had fabricated her allegations. Nor do Petitioner's efforts to reinstate

the four year plea offer carry the same weight as those in Riggs, because his April 18, 2006 conversation with the victim shows that he tried to get the four year offer reinstated *before* he was aware of the application of the Three Strikes law to his case.

An additional factor is that in Riggs, the defendant's exposure with only one strike was nine years – a significantly shorter period than his ultimate 25-years-to-life sentence. Riggs, 399 F.3d at 1183, 1187. Here, Petitioner admits that Sachs told him that his exposure would be more than 30 years if he was convicted on all counts. (LD 10 at 7.) Petitioner understood that Sachs's nine year estimate assumed that Petitioner would prevail on all charges except the domestic violence charge (Pet. Decl. at 1), and depended on Malone maintaining her recantation. As shown by Petitioner's references to 37 years during his April 18, 2006 conversation with Malone, Petitioner knew that he potentially faced a long sentence if she testified against him and he was convicted of all charges. He took the risk in reliance on her recantation. The state court could reasonably infer that he would have done the same even if he had known that he was a third striker.

The Court concludes that, on this record, a finding by the Superior Court that Petitioner would have rejected the four year plea offer even if he had known of a potential Three Strikes sentence would not have been objectively unreasonable. The state court could reasonably find no prejudice under the first Lafler factor. See Lafler, 132 S. Ct. at 1385.

In his Second Supplemental Brief, Respondent argues that the second Lafler factor also supports the Superior Court's decision, because the prosecution would have retracted the plea offer once it realized that Petitioner had a second strike. (Second Supplemental Brief at 5-7.) Petitioner counters that there is no evidence that the prosecution was unaware of the 2001 strike when it made the four year offer, and argues that the prosecution's later refusal to re-extend the offer was due to the case having gone past the preliminary hearing stage. (Response to Second Supplemental Brief at 2-3.)

The Court agrees with Respondent that the record strongly suggests that the prosecution was unaware of the second strike when it made its four year plea offer. During the Marsden hearing, Sachs talked about plea negotiations lasting "almost an hour or two"

(LD 20 at 4), and it is difficult to envisage that the prosecutor would not have mentioned Petitioner's Three Strikes exposure during that time. Moreover, the prosecution did not allege the second strike in the Information filed on March 27, 2006, but only did so in an Amended Information filed June 1, 2006. (1 CT at 77-79, 116-118.)

Under California law, the prosecutor can amend the complaint or information to add prior convictions until sentencing, as long as the jury has not been discharged. People v. Tindall, 24 Cal.4th 767, 776 (2000). "[I]f a defendant pleads guilty or nolo contendere, the prosecution may, on the court's order, amend the information to add previously unalleged prior convictions until sentencing." Id. at 778. Moreover, in Perez v. Rosario, 459 F.3d 943 (9th Cir. 2006), the Ninth Circuit held that a defendant could not show prejudice when his counsel's deficient advice led him to reject a plea offer that was based on the prosecutor's mistaken belief that one of defendant's prior convictions did not count as a strike. The Ninth Circuit declared that the defendant "was not entitled to a plea bargain offer made on mistaken legal assumptions." Id. at 946-49.[12]

In this case, however, Respondent's argument that the prosecution would have withdrawn its four year plea offer once it realized that Petitioner had two strikes rests on factual assumptions not warranted by the record that was before the state court that rejected Petitioner's claim. First, there is no reason to believe that if Petitioner had promptly accepted the plea offer, the prosecution would have discovered his 2001 conviction any earlier than it ultimately did. Second, in Perez it was undisputed that the plea offer would not have been

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[12] See also King v. Curry, EDCV 04-1107-R (RCF), 2011 WL 1790779, *11-12 (C.D. Cal., Feb. 23, 2011), adopted by, 2011 WL 1790953 (C.D. Cal., May 9, 2011) (defendant who rejected plea offer was not prejudiced by counsel's failure to advise him that he actually had three strikes rather than only one as alleged by the prosecution, because the prosecution could have amended information to allege additional strikes and under Perez defendant was not entitled "to capitalize on the prosecutor's mistaken belief about the extent of his criminal history"); Hampton v. Evans, 07-cv-00550 ALA (HCV), 2009 WL 807457, *10-11 (E.D. Cal., Mar. 26, 2009) (when prosecutor made plea offer not realizing that defendant had a strike conviction, defendant was not prejudiced by counsel's failure to advise him of actual sentence exposure, because the prosecution could have amended information to allege new strike and a defendant is not prejudiced under Strickland when he is deprived of benefiting from a "windfall error").

extended if the prosecution had realized that Perez was a third striker. Perez, 459 F.3d at 948. Here, given the victim's recantation, the relatively minor nature of Petitioner's 2001 strike, and the lack of evidence regarding pertinent Riverside County district attorney's policies, this is not a case where the record on its face shows that the four year offer would not have been extended or honored once the prosecutor knew of the 2001 strike. It may be so, but on this record, the second Lafler factor does not support the Superior Court's decision.

Thus, only one of the Lafler factors supports the state court's decision. That, however, is sufficient. Petitioner's claim fails because the state court could reasonably find that he would not have accepted the plea offer prior to the preliminary hearing even if he had known of his second strike. Critically, the Court is not making the prejudice determination de novo: rather, it is determining whether, under the record before the Superior Court, the state court's finding that Petitioner was not prejudiced "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. In view of the victim's adherence to her recantation at the time the plea offer was open, her continuing contacts with Petitioner and his family, Petitioner's awareness that even with one strike he faced a sentence of more than 30 years if convicted on all counts, and his expressed desire to accept the plea offer after the preliminary hearing even though the second strike had not yet come to light, the Superior Court's conclusion that Petitioner had not shown prejudice was not so unreasonable as to meet this demanding standard.

Petitioner complains that the Superior Court made credibility findings against him without holding an evidentiary hearing. Thus, he argues, the Superior Court's fact-finding process was unreasonable and its determination that he failed to show prejudice rests on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). (Supplemental Reply at 9, 19.) The Ninth Circuit has stated that when "a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an 'unreasonable determination' of the facts." Taylor v. Maddox, 366

F.3d 992, 1001 (9th Cir. 2004). For instance, in Nunes v. Mueller, 350 F.3d 1045 (9th Cir. 2003), the Ninth Circuit found that the state court acted unreasonably by rejecting Nunes's claim that his attorney was ineffective for inaccurately conveying to him the state's plea offer without first holding an evidentiary hearing. The Ninth Circuit found that although the state court had purported to accept Nunes's version of the facts, it had actually discredited his credibility and rejected his assertions. Id. at 1054-1055 & n.7.

However, even in Nunes the Ninth Circuit acknowledged that the state court need not always hold an evidentiary hearing in order to reject the petitioner's allegations, id. at 1055, and in Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004), the Ninth Circuit expressly declined "to inject an 'evidentiary hearing' requirement as a pre-requisite to AEDPA deference." Moreover, in Perez the Ninth Circuit declared that "state court fact determinations are reasonable without an evidentiary hearing, as here, where the record conclusively establishes a fact or where petitioner's factual allegations are entirely without credibility." 459 F.3d at 951. "Where there is no likelihood that an evidentiary hearing would have affected the determination of the state court, its failure to hold one does not make such determination unreasonable." Id.

That is the case here. In its analysis of Petitioner's claim, the Court has accepted Petitioner's central factual premises – that Sachs did not tell him that he potentially faced an indeterminate sentence under the Three Strikes law and that he did not know it when he rejected the state's four year plea offer. Even so, the Court has concluded, for the reasons explained above, that the Superior Court could reasonably find no prejudice based on the record before it. Petitioner has not shown that the Superior Court's decision rested on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2).

It bears stressing that the Court is not deciding whether, in its view, Petitioner has suffered prejudice under the Strickland standard. The question before the Court is whether the Superior Court's determination that Petitioner did not suffer prejudice was objectively unreasonable. Richter, 562 U.S. at 101-02. This is an extremely difficult standard to meet. Id. at 102. For the reasons set forth above, Petitioner has not satisfied it.

Accordingly, the Riverside County Superior Court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law as set forth by the United States Supreme Court, nor did it rest on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1), (2). Ground Four does not warrant federal habeas relief.

V, GROUND FIVE DOES NOT WARRANT FEDERAL HABEAS RELIEF.

In Ground Five, Petitioner contends that trial counsel was ineffective for failing to move for a new trial based on a defense investigator's destruction of a report of a conversation with the victim. Petitioner maintains that the report would have shown that Malone admitted to the investigator that she struck Petitioner first, and would have impeached her testimony at trial that Petitioner struck her first. Petitioner also contends that appellate counsel was ineffective for failing to raise this ineffective assistance claim on direct appeal. (First Amended Petition, Ground Five, Attach. at 1-7.)

In his Supplemental Brief, Respondent contends that Ground Five is unexhausted. (Supplemental Brief at 7-15.) In his Supplemental Reply, Petitioner contends that Respondent waived this argument when he stated in the Answer: "Petitioner's First Amended Petition for Writ of Habeas Corpus appears to be timely and exhausted." (Supplemental Reply at 1-2; Answer at 2.) 28 U.S.C. § 2254(b)(3) provides: "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." It is doubtful that Respondent's blanket assertion that the First Amended Petition is exhausted constitutes an express waiver of the exhaustion requirement with respect to Ground Five, because Respondent's utter failure to address Ground Five in the Answer suggests that Respondent overlooked this claim. In any event, an unexhausted claim may be denied on the merits if it is perfectly clear that it does not constitute a colorable claim. Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005); see 28 U.S.C. § 2254(b)(2). As shown below, such is the case here.

A. Background

Investigator Lacy Robitzer was called to the stand by the defense. She testified that she was hired as an investigator by Petitioner's previous counsel Christopher Dombrowski

and kept a hard file regarding Petitioner's case. The file included notes of her conversation with Malone. After Dombrowski was relieved and replaced by James Curtis,[13] Robitzer tried to contact Curtis about continuing to work on Petitioner's case, but her messages were not returned. (2 RT 363-64.) After about a year she destroyed her notes, consistent with her usual practice when a defendant obtains new counsel and the new counsel does not expressly ask her to retain her file. (2 RT 364-65.)

Robitzer testified that she had one meeting with Malone, which took place at the courthouse. (2 RT 365.) Malone told her that she had lied to the police regarding the rape allegations. Malone said that she was afraid to change the story she told the police, because the district attorney's office had told her that charges would be brought against her for lying and she was afraid of losing her children. (2 RT 365-66.) Robitzer planned to conduct another interview with Malone, who did not want to do a full interview at the courthouse. (2 RT 366.) Robitzer did not do so because Petitioner changed counsel and the new counsel did not retain her. (2 RT 366.)

On cross-examination, Robitzer testified that her conversation with Malone took place between February and April of 2008. (2 RT 366.) Her previous attempts to contact Malone were unsuccessful, and she came to the courthouse because she knew that Malone would be there that day. (2 RT 370-71.) She testified that Malone told her that she lied to the police about the rape, but did not specifically say that she also lied about the physical abuse. (3 RT 373.) Robitzer admitted that her notes had been more detailed than her testimony was. (3 RT 374.)

In his First Amended Petition, Petitioner contends that after Robitzer spoke with Malone, she visited him in jail to discuss the interview. Robitzer told Petitioner that Malone had admitted that she struck Petitioner first. (First Amended Petition, Ground Five, Attach. at 2.) A few days before trial, trial counsel told Petitioner that he had spoken to Robitzer about

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[13] Dombrowski was relieved as Petitioner's counsel on May 20, 2008, after the trial court granted Petitioner's Marsden motion. Dombrowski was replaced by Curtis, another attorney from the Conflict Defense Lawyers (CDL) panel (1 CT 223, 225.)

her 2008 interview with Malone, and Robitzer had told him that she did not remember Malone telling her that she had struck Petitioner first. (Id. at 3.)

At trial Malone testified that Petitioner hit her in the eye during an argument and she hit him in the face. (1 RT 113-14, 178, 201.) She testified that Petitioner hit her first and then she hit him. (1 RT 202, 203.) Petitioner testified that Malone hit him while he was asleep, and he started throwing punches before he realized who had hit him. (2 RT 424-25.)

B. Analysis

Petitioner contends that trial counsel was ineffective for failing to move for a new trial based on Robitzer's destruction of her notes. He contends that Robitzer's notes would have reflected that Malone admitted that she struck him first. Thus, according to Petitioner, Robitzer's notes would have impeached Malone's testimony that Petitioner struck her first, and would have corroborated his testimony that Malone hit him while he was asleep and he reflexively hit back. (First Amended Petition, Ground Five, Attach. at 2-5.)

As an initial matter, there is no evidence in the record that Robitzer's notes would have reflected that Malone told Robitzer that she had struck Petitioner first. When she testified at trial, Robitzer did not recall Malone telling her that she had lied to the police about the physical abuse as well as about the rape. (2 RT 373.) Petitioner has submitted a report prepared February 21, 2006 by a defense investigator retained by Sachs, in which that investigator states that Malone told him that Petitioner hit her accidentally after she startled him by screaming into his ear while he was asleep. (Reply, Exh. S.) However, Malone's conversation with Robitzer took place two years later, and there is no declaration by Malone regarding what she told Robitzer. Petitioner's contention rests purely on his unsworn and unsupported assertion in his First Amended Petition that after her conversation with Malone, Robitzer told him that Malone had admitted striking him first. (First Amended Petition, Ground Five, Attach. at 2.) This is not enough to show that Robitzer's notes contained material impeaching Malone's trial testimony.

Second, Petitioner has not shown that trial counsel could have brought a meritorious motion for a new trial. Robitzer's destruction of her notes does not fall within the grounds for

a new trial enumerated in Cal. Penal Code § 1181, nor did it constitute ineffective assistance of counsel, which is also a basis for granting a new trial in California. See People v. Fosselman, 33 Cal. 3d 572, 582-83 (1983). Moreover, there would have been no factual basis for a motion for a new trial, since Petitioner could not show that Robitzer's notes reflected that Malone admitted hitting Petitioner first.

To the extent Petitioner's claim is not limited to trial counsel's failure to file a motion for a new trial on this basis, the record belies his contention that trial counsel was ineffective in his presentation of the defense case. Trial counsel called Robitzer as a witness and elicited from her testimony that Malone had told her that she lied to the police regarding the rape allegations. (2 RT 365-66.) Trial counsel also called Petitioner's former counsel Stephen Cline, who spoke with Malone while he was representing Petitioner. Cline testified that Malone told him that she had made up the story about the rape allegations. (2 RT 395-96.) He further testified that Malone told him that she had falsely led the police to believe that the physical violence was one-sided, and "was adamant that she had started it and been involved in it as well." Malone told Cline that she and Petitioner both hit each other and there was a mutual fight going on. (2 RT 400, 404.) While Cline's testimony was not entirely consistent with Petitioner's testimony that Malone hit him while he was asleep and he hit her back before he realized it was her, Petitioner has not shown that Malone gave Robitzer a version more consistent with his testimony. Moreover, Cline squarely testified that Malone told him that "she had started it." (2 RT 406-07.) Thus, trial counsel *was* able to introduce testimony that Malone hit Petitioner during a mutual fight and admitted hitting him first. Although the jury found Petitioner guilty of the aggravated assault and domestic abuse charges, trial counsel was able to obtain an acquittal on the sexual assault charges and the dissuading a witness charge. His performance cannot be considered "outside the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689.

Petitioner also contends that appellate counsel was ineffective for not raising this claim on appeal. (First Amended Petition, Ground Five, Attach. at 7-8.) Petitioner had a Sixth Amendment right to effective assistance of appellate counsel in connection with his direct

appeal to the California Court of Appeal. Evitts v. Lucey, 469 U.S. 387, 396 (1985). However, ineffective assistance claims requiring factual development of matters outside the trial record are properly raised by habeas petition rather than direct appeal. People v. Mendoza Tello, 15 Cal. 4th 264, 266 (1997). Appellate counsel did not perform deficiently by failing to present Petitioner's ineffective assistance of trial counsel claim on direct appeal, nor did Petitioner suffer any prejudice as a result. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (discussing application of Strickland standard on direct appeal). Nor can appellate counsel be deemed ineffective for failing to file a habeas petition raising the ineffective assistance of trial counsel claim, because appointed appellate counsel have no duty to file habeas petitions on their clients' behalf. See In re Golia, 16 Cal. App. 3d 775, 786 (1971). Finally, since, as discussed above, Petitioner's ineffective assistance claim is without merit, there is no reasonable likelihood that Petitioner would have obtained relief if appellate counsel had raised the claim. Wildman v. Johnson, 261 F.3d 832, 840 (9th Cir. 2001) ("[A]ppellate counsel's failure to raise issues on direct appeal does not constitute ineffective assistance when appeal would not have provided grounds for reversal.").

For the reasons set forth above, Petitioner has not shown that trial counsel rendered ineffective assistance in connection with Robitzer's notes, or that appellate counsel rendered ineffective assistance by failing to argue that trial counsel was ineffective. Accordingly, Ground Five does not warrant federal habeas relief.

VI. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING.

Petitioner requests an evidentiary hearing. (First Amended Petition at 1; Supplemental Reply at 20-22.)

The United States Supreme Court has held that federal habeas review under 28 U.S.C. § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." Cullen v. Pinholster, 563 U.S. 170, __, 131 S. Ct. 1388, 1398 (2011). By its express terms, the same is true of federal habeas review under 28 U.S.C. § 2254(d)(2). Id. at 1400 n.7. "[A]n evidentiary hearing is pointless once the district court has determined that § 2254(d) precludes habeas relief." Sully v. Ayers, 725 F.3d 1057, 1075 (9th

Cir. 2013); see Pinholster, 131 S. Ct. at 1411 n. 20 ("Because Pinholster has failed to demonstrate that the adjudication of his claim based on the state-court record resulted in a decision 'contrary to' or 'involv[ing] an unreasonable application' of federal law, a writ of habeas corpus 'shall not be granted' and our analysis is at an end.") (quoting 28 U.S.C. § 2254(d)). Since Petitioner did not surmount the barrier of Section 2254(d) with respect to his ineffective assistance claim in Ground Four, he is not entitled to an evidentiary hearing. Sully, 725 F.3d at 1075.

To the extent Petitioner also seeks an evidentiary hearing with respect to Grounds One, Two and Three, his request is similarly foreclosed by Pinholster. See Pinholster, 131 S. Ct. at 1398; Sully, 725 F.3d at 1075. Pinholster does not bar an evidentiary hearing with respect to Ground Five, which was never adjudicated by a state court. However, an evidentiary hearing is not warranted where, as here, "the record refutes the applicant's factual allegations or otherwise precludes habeas relief." Schriro v. Landrigan, 550 U.S.465, 474 (2007).

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

RECOMMENDATION

THE COURT, THEREFORE, RECOMMENDS that the District Court issue an Order: (1) accepting this Report and Recommendation; (2) denying the First Amended Petition; and (3) directing that Judgment be entered dismissing this action with prejudice.

DATED: September 2, 2015

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

S194417

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re KRISTIN LEE HARDY on Habeas Corpus.

The petition for writ of habeas corpus is denied.

Werdegar, J., was absent and did not participate.

SUPREME COURT
FILED

AUG 29 2012

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

Filed 2/25/11

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

In re KRISTIN LEE HARDY

on Habeas Corpus.

E052890

(Super.Ct.Nos. RIC10018163 & RIF125676)

The County of Riverside

THE COURT

The petition for writ of habeas corpus is DENIED.

KING

Acting P. J.

cc: See attached list

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

In the Matter of the Petition of

KRISTIN LEE HARDY

For a Writ of Habeas Corpus

Habeas Case #: RIC10018163

Riverside Case #: RIF125676

ORDER RE PETITION FOR WRIT OF HABEAS CORPUS

The Court, having read and considered the Petition for Writ of Habeas Corpus filed SEPTEMBER 13, 2010, hereby denies as follows:

A. DENIALS

1. _____ The petition is denied because the petition fails to state a prima facie factual case supporting the petitioner's release. (Cal. Rules of Court, rule 4.551(c).) The petition makes assertions regarding the applicable law that are contrary to established California case decisions.

2. _____ The petition is denied because the petition fails to state a prima facie factual case supporting the petitioner's release. (Cal. Rules of Court, rule 4.551(c).) While the petition states a number of factual conclusions, these broad conclusions are not backed up with specific details, and/or are not supported by the record in the case.

3. _____ The petition is denied with prejudice because the issues raised in the petition were raised and considered in a prior appeal. "[I]ssues resolved on appeal will not be reconsidered on habeas corpus . . . ." (*In re Clark* (1993) 5 Cal.4th 750, 765.)

4. _____ The petition is denied because the petition fails to raise any new issue that has not previously been addressed in an earlier writ petition. "[A]bsent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected." (*In re Clark* (1993) 5 Cal.4th 750, 767.)

5. _____ The petition is denied because the issues raised in the petition could have been but were not raised in an appeal, and no excuse for failing to do so has been demonstrated. "'[I]n the absence of

special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.'" (*In re Clark* (1993) 5 Cal.4th 750, 765.)

6. _____ The petition is denied because the petitioner has delayed the petition long after the facts occurred that allegedly justify relief, and he has failed to adequately explain the reason for the delay. A petitioner must justify any substantial delay in presenting a claim by, inter alia, stating when he became aware of the legal and factual bases for his claims, and explaining the reason for any delay since that time. (*In re Clark* (1993) 5 Cal.4th 750, 783, 786-787.)

7. _____ The petition is denied without prejudice because the petitioner has brought prior petitions arising from the same detention or restraint but the current petition fails to describe the nature and disposition of the claims made in those prior petitions. (Pen. Code, § 1475.)

8. _____ The petition is denied without prejudice because the petitioner is represented by counsel.

9. _____ The petition is denied because the petition fails to establish that the petitioner has exhausted available administrative remedies.

10. _____ The petition is denied because the petition is now moot due to changed conditions, e.g., no longer in custody.

11. _____ The petition is denied because the petition is incomplete, unintelligible, and/or unclear.

12. _____ The petition is denied without prejudice because it is not made on Judicial Council form MC-275, and there is not showing of good cause for failing to do so. (Cal. Rules of Court, rule 4.551(a)(1)&(2).)

13. _____ No order to show cause having been issued, the request for appointment of counsel is denied. (Cal. Rules of Court, rule 4.551(c)(2).)

14. xxx___ Other: 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

B. GRANTS:

1. _____ Pursuant to California Rules of Court, rule 4.551(b), the Court invites the respondent, _____, to submit an informal response to the petition within 15 days. Should an informal response be submitted, it shall be served on the petitioner. The petitioner shall have an additional 15 days after service of the informal response in which to file a reply. Unless the Court orders otherwise, the matter will be deemed submitted upon the filing of the petitioner's reply or when the time for submitting a reply has expired.

2. _____ Pursuant to California Rules of Court, rule 4.551(c), the court finds that the petition states a prima facie basis for relief. The respondent, _____ is ordered to show cause why the petition should not be granted. The respondent is ordered to submit a return to the

petition within 30 days. Unless the Court orders otherwise, the matter will be deemed submitted upon the filing of the petitioner's denial or when the time for submitting a denial has expired.

3. _____ An order to show cause having been issued, the request for appointment of counsel is granted. (Cal. Rules of Court, rule 4.551(c)(2)). The Court appoints _____ to represent petitioner. The court further orders that payment therefor shall be from the County Treasury. (Cal. Pen. Code Sections 987.2, 987.8(g)(2)(B); Charlton v. Superior Court (1979) 93 Cal.App.3d 858, 862.)

4. _____ Other: THE COURT ALSO REVIEWED ALL INFORMAL RESPONSES FILED BY BOTH PARTIES

C. TRANSFERS:

1. _____ The petition challenges the terms of a judgment. Without determining whether a prima facie case for relief exists, the Court transfers the petition to the Superior Court for the County of _____, the county in which the judgment was entered. (Cal. Rules of Court, rule 4.552(b)(2)(A).)

2. _____ The petition challenges the conditions of the inmate's confinement. Without determining whether a prima facie case for relief exists, the Court transfers the petition to the Superior Court for the County of _____, the county in which the petitioner is confined. (Cal. Rules of Court, rule 4.552(b)(2)(B).)

3. _____ The petition challenges the denial of parole or the petitioner's suitability for parole. Without determining whether a prima facie case for relief exists, the Court transfers the petition to the Superior Court for the County of _____, the county in which the underlying judgment was rendered. (Cal. Rules of Court, rule 4.552(c).)

4. _____ Other: _____

D. OTHER ORDERS:

Other Orders: _____

Date: 12/14/10 Time: 4:10 PM

_____
Jorge C Hernandez
Judge of the Superior Court
Riverside County

Court of Appeal, Fourth Appellate District, Division Two - No. E049453

S190126

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

KRISTIN LEE HARDY, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KRISTIN LEE HARDY,

Defendant and Appellant.

E049453

(Super.Ct.No. RIF125676)

OPINION

APPEAL from the Superior Court of Riverside County. Richard J. Hanscom, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part and reversed in part with directions.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzalez and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant's live-in girlfriend called 911; she told the police officer who responded that defendant had choked her with a scarf and with his hands, threatened to kill her,

raped her, and forced her to orally copulate him. She had marks on her neck consistent with being choked; she also had a black eye.

Whenever the girlfriend talked to defense counsel, defense investigators, or defendant's mother, however, she maintained that the sex acts had been consensual. On occasion, she also told them that defendant choked her at her request, for erotic purposes, and that she hit defendant first, before he hit her in the eye. Finally, at trial, she affirmatively testified that the sex acts had been consensual; however, she admitted that defendant did choke her and punch her in the eye out of anger.

A jury found defendant guilty of assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)) and inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)). However, it found him not guilty of rape (Pen. Code, § 261, subd. (a)(2)), unlawful oral copulation (Pen. Code, § 288a, subd. (c)(2)), and making a criminal threat (Pen. Code, § 422). Two "strike" prior allegations (Pen. Code, §§ 667, subds. (b)(1), 1170.12), one prior serious felony enhancement (Pen. Code, § 667, subd. (a)) and one 1-year prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) were found true. Defendant was sentenced to a total of 25 years to life in prison.

Defendant now contends:

1. The trial court erred by refusing to give a unanimity instruction.

2. The trial court abused its discretion by denying defendant's *Romero* motion.[1]

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[1] A "*Romero* motion" is a motion to dismiss a strike prior in the interest of justice under Penal Code section 1385. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.)

3. The sentence constitutes cruel and unusual punishment in violation of the state and federal Constitutions.

4. The sentence violates the federal double jeopardy clause.

5. The trial court erred by imposing the prior serious felony enhancement.

The People concede that the prior serious felony enhancement should not have been imposed. Accordingly, we will remand the matter to the trial court with directions to consider whether to impose the one-year prior prison term enhancement, which it struck because it arose out of the same conviction as the prior serious felony enhancement. Otherwise, we find no prejudicial error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *911 Call.*

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

B. *Initial Interview.*

At 7:15 a.m., Officer Vicente De La Torre responded to the 911 call. When he arrived, M. 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 M.'s injuries were in evidence.

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

M. told Officer De La Torre that defendant 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, defendant forced her to orally copulate him and then to have sexual intercourse with him. Afterwards, he fell asleep. M. thought for about an hour about what to do, but once she decided to leave, she ran to the market.

C. *Sexual Assault Examination.*

Officer De La Torre took M. to the hospital, where a nurse performed a sexual assault examination. M.'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.

M. 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 M.'s vagina matched defendant's DNA.

D. *Defendant's Mother's Testimony.*

Defendant's mother testified that on August 27, 2005, around 7:00 or 8:00 a.m., defendant had some scratches, and one of his lips was "burst or scratched." Later that

morning, defendant was arrested. Photos of his injuries showed a scratch on his neck and a "busted" or bruised upper lip.

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

E. *M's Meeting with a Defense Investigator.*

In February 2006, M. told a defense investigator that defendant 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 defendant to choke her for erotic purposes.

F. *The Letter from M. to Defense Counsel.*

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

G. *Interview Before a Previous Hearing.*

In March 2006, Officer De La Torre, a deputy district attorney, and M. were in court together for a previous hearing. M. 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.

H. *Jail Phone Calls.*

The jury heard two phone calls that defendant made to M. 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, defendant said, "What I did was foul, it was fucking wrong. It was stupid, it was sick." He told M.: "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 . . . ."

I. *M.'s Telephone Calls with Defense Counsel.*

Between January and July 2007, Stephen Cline, defendant's then-counsel, had a number of phone calls and one meeting with M. 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 . . . ."

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3 Defendant's mother testified that defense counsel showed her the letter that M. had written, but she denied ever having a copy in her possession.

Defendant 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.

M. 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 . . . ."

J. *M.'s Meeting with a Defense Investigator.*

Roughly around March 2008, a defense investigator had a conversation with M. at court. M. 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.

K. *M.'s Testimony at Trial.*

At trial, M. testified that she and defendant 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 defendant came

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[4] Although M. did not mention it on direct, cross, or redirect, on recross, she testified that defendant had already hit her twice that night. First, when she and defendant initally 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 defendant went to sleep, M. answered a phone call from one of the women from the chat line. M. yelled at defendant; "[h]e jumped, and then his hand hit [her] face."

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

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

Defendant 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 defendant and "trying to push him off."

After defendant 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). M. fell on the bed and pretended to pass out so defendant 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 consensual).[5]

M. stayed in the apartment for about an hour, until defendant 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 defendant's child.

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[5] M. 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.

M. 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 M., 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]

L. *Defendant's Testimony.*

According to defendant, on the night of the incident, he was worried because M. was not answering the phone. When he got home, he found that it had been off the hook; he was not angry.

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

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[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 M. regarding her rights, and it so instructed the jury.

After that, defendant phoned the chat line. This made M. angry, and they got into an argument. Defendant stopped it by going to sleep. He awoke because M. 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 M. 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, defendant went back to sleep.

When defendant 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 [M.'s] eye."

II

UNANIMITY INSTRUCTION

Defendant contends that the trial court erred by refusing to give a unanimity instruction. He argues that the jury could have found him guilty of assault with force likely to cause great bodily injury based on the act of choking M. with a scarf, the act of choking her with his hands, or the act of punching her in the eye. Similarly, he argues that it could have found him guilty of inflicting corporal injury on a cohabitant based on

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[7] On direct, defendant testified that first, someone hit him; then, he threw a couple of punches; and then, he heard M. 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."

any one of these three acts or, additionally, based on the act of restraining her by the wrists.

A. *Additional Factual and Procedural Background.*

Defense counsel requested a unanimity instruction, Judicial Council of California Criminal Jury Instructions No. 3501. The trial court refused to give it. It explained: "[T]his is, in my view, a classic case of the doctrine of continuous course of conduct. Under those circumstances, the jury does not have to agree on which particular blow or act . . . of many that are alleged constituted the offense."

B. *Analysis.*

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

"There are, however, several exceptions to this rule. For example, no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises 'when the acts are so closely connected in time as to form part of one transaction' [citation], or 'when . . . the statute contemplates a continuous course of conduct or a series of acts over a period of time' [citation]. There also is no need for a unanimity instruction if the defendant offers the same defense or defenses to the various

acts constituting the charged crime. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 679.)

With respect to the charge of assault with force likely to cause great bodily injury, the relevant acts were closely connected in time, and defendant offered the same defense. This charge was necessarily based on the act of choking M. with a scarf, the act of choking her with hands, or both. The act of punching her in the eye was a simple assault; it did not involve force likely to cause great bodily injury. (Cf. *People v. McDaniel* (2008) 159 Cal.App.4th 736, 748-749 [repeated punches, which fractured attacker's own knuckle and caused victim to require five stitches, involved force likely to cause great bodily injury]; *People v. Chavez* (1968) 268 Cal.App.2d 381, 384 [jury could find that repeated blows, which caused victim to require 13 stitches, involved force likely to cause great bodily injury].) Likewise, the act of holding or scratching her wrist was also simple assault. In closing argument, the prosecutor argued that defendant was guilty of assault with force likely to cause great bodily injury based exclusively on "the strangling with the scarf and the choking with the hands . . . ."

The evidence with respect to the two acts of choking, however, was virtually identical. M. told Officer De La Torre that defendant did one right after the other, out of anger. Defendant admitted doing one right after the other, but he claimed that he did both because M. wanted "kinky sex." No reasonable juror could have found that the act of choking M. with a scarf was a crime, but the act of choking her with the hands was not; or vice versa. Moreover — particularly given defendant's admission — no reasonable juror could have found that defendant did choke M. with the scarf but did not choke her with

his hands, or vice versa. The jurors necessarily found defendant guilty of aggravated assault based on both acts.

With respect to the charge of inflicting corporal injury on a cohabitant, however, our analysis is somewhat different. This charge did not require force likely to cause great bodily injury; accordingly, it could have been based not only on the chokings, but also on the act of punching M. in the eye or the act of restraining her wrists. At least according to defendant, these acts were separated in time: The chokings came first, followed by an interlude in which the couple argued and defendant went to sleep; then came the punch in the eye and the wrist restraint. Moreover, defendant offered different defenses to the different acts. With respect to the chokings, he testified (and M. had, at times, admitted) that they were done with M.'s consent, for erotic purposes. With respect to the punch in the eye and the wrist restraint, he testified (and M. had, at times, suggested) that they were in self-defense.

The law is unclear with respect to whether this evidence showed a single count or multiple counts of inflicting corporal injury on a cohabitant. (Compare *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1473-1477 with *People v. Thompson* (1984) 160 Cal.App.3d 220, 224-226.) For this reason, we will assume, without deciding, that the trial court erred by failing to give a unanimity instruction with respect to this charge.

We therefore turn to whether the error was prejudicial. The People urge us to apply the state law *Watson*[8] standard of harmless error. This court, however, is on record

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8 *People v. Watson* (1956) 46 Cal.2d 818, 836.

as holding that the higher federal constitutional *Chapman*[9] standard applies. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-188 [Fourth Dist., Div. Two].) We must follow this holding as a matter of stare decisis. The question, then, is whether the failure to give a unanimity instruction was harmless beyond a reasonable doubt.

As already discussed, from the jury's verdict finding defendant guilty of assault with force likely to cause great bodily injury, we know that the jury *unanimously* found that defendant choked M. both with a scarf and with his hands. The jury also unanimously found that this was a crime — i.e., that it was not done at M.'s request or with her consent. It necessarily follows that the jury also unanimously found that this also constituted the infliction of corporal injury on a cohabitant. Of course, it is possible that some or all of the jurors found that the punch in the eye *additionally* constituted the infliction of corporal injury on a cohabitant. Nevertheless, we can be sure that, even if the trial court had given a unanimity instruction, the jurors would have agreed unanimously that defendant was guilty of inflicting corporal injury on a cohabitant based on both of his acts of choking M.

We therefore conclude that the trial court did not err by failing to give a unanimity instruction with regard to assault with force likely to cause great bodily injury. Assuming, without deciding, that it erred by failing to give a unanimity instruction with

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[9] *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]

regard to the infliction of corporal injury on a cohabitant, the error was harmless beyond a reasonable doubt.

III

THE DENIAL OF DEFENDANT'S *ROMERO* MOTION

Defendant contends that the trial court abused its discretion by denying his *Romero* motion.

A. *Additional Factual Background.*

Defendant was born in June 1982; thus, at sentencing in 2009, he was 27.

Defendant had the following prior juvenile adjudications:

June 1998: Battery (Pen. Code, § 242), a misdemeanor. He failed to appear at his disposition hearing, and an arrest warrant was issued.

July 1999: Battery, a misdemeanor. He was committed to juvenile hall on both the 1998 and 1999 adjudications. After he was released, he violated his probation. Once again, he failed to appear, and an arrest warrant was issued. He was committed to juvenile hall again.

He also had the following prior adult convictions:

November 2000: Battery, a misdemeanor. He was placed on probation.

January 2001: Assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), a felony. He was placed on probation. This was one of the strike priors.

January 2003: Second degree robbery (Pen. Code, § 211), a felony. He was sentenced to prison for two years. This was the other strike prior.

Defendant was still on parole when he committed the current offenses.

In the strike assault, defendant attacked his father with a straight-edged razor and a chair.

In the strike robbery, defendant tried to walk out of a supermarket with two half gallons of liquor concealed in his pants. When a loss prevention officer stopped him, he tried to stab the officer, who sustained a "small cut."

Defendant's father spoke (though not under oath) at the sentencing hearing. He considered the prior assault to be his fault. He explained that he was an alcoholic, he was drunk at the time, he got into a fight with defendant, and defendant was trying to protect the other family members.

M. wrote a letter stating that defendant had already served enough time and that his daughter needed him.

In the past, defendant had been diagnosed as having bipolar disorder. He was willing to enter Teen Challenge, a "live-in drug and alcohol rehabilitation center . . . ."

B. *Additional Procedural Background.*

Defendant filed a written *Romero* motion. The prosecution filed a written opposition. The trial court denied the motion. It found it "disturbing" that defendant had a "pretty striking . . . record of violence" over "a short time."

C. *Analysis.*

In *Romero*, the Supreme Court held that a trial court has discretion to dismiss a three-strikes prior felony conviction allegation under Penal Code section 1385. (*People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at pp. 529-530.) The focus of the analysis must be on "'whether, in light of the nature and circumstances of his present felonies and

prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 375.) "[W]e are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

"[T]he three strikes law . . . creates a strong presumption that any sentence that conforms to [its] sentencing norms is both rational and proper." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within

which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary case — where the relevant factors . . . manifestly support the striking of a prior conviction and no reasonable minds could differ — the failure to strike would constitute an abuse of discretion." (*Ibid.*)

There are no extraordinary circumstances in this case. Defendant had a recidivist history of violent crime. It was punctuated by failures to appear along with probation and parole violations. This criminal record amply demonstrated that he was unable to conform his conduct to the requirements of the law. The trial court correctly observed that, if, as he claimed, he was willing to change, he had had plenty of opportunities.

Defendant argues that his youth is mitigating. The flip side of this, of course, is that he had already managed to rack up two strike priors between the ages of 18 and 20, and he showed no sign of stopping. Indeed, his crimes tended to be increasingly serious.

Defendant also argues that his current offenses were "wobblers," not serious felonies, and that M.'s injuries were minor. This does not place him outside the spirit of the three strikes law, however, which applies even when the current offenses are not serious felonies. It is significant that they *were* crimes of violence, rather than nonviolent property crimes.

He also notes that two of his victims — his father and M. — asked for leniency. However, this is very common in domestic violence cases; while it is relevant, it cannot be controlling.

Finally, defendant points out that he was "willing[] to undergo counseling and treatment" at Teen Challenge. Teen Challenge, however, was a drug and alcohol rehabilitation program; defendant had no known problems with drugs or alcohol. Thus, it does not appear that this was either a meaningful effort at reform or likely to be effective.

For all these reasons, we conclude that the trial court did not abuse its discretion by denying defendant's *Romero* motion.

IV

CRUEL AND UNUSUAL PUNISHMENT

Defendant contends that his sentence constitutes cruel and unusual punishment in violation of the state and federal constitutions.

Defendant forfeited this contention by failing to raise it below. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) Separately and alternatively, we reject this contention on the merits.

A. *Analysis Under the Federal Constitution.*

In *Ewing v. California* (2003) 538 U.S. 11 [123 S.Ct. 1179, 155 L.Ed.2d 108], the plurality opinion, signed by three justices, upheld a three-strikes sentence of 25 years to life for grand theft. It explained: "When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating

criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." (*Id.* at p. 25 (plur. opn. of O'Connor, J.).) With respect to the particular defendant, it noted: "In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." (*Id.* at p. 29.) It concluded: "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." (*Id.* at pp. 29-30, fn. omitted.)

Justices Scalia and Thomas, concurring in the judgment, believed that the cruel and unusual punishment clause simply does not guarantee of proportionality. (*Ewing v. California*, *supra*, 538 U.S. at pp. 31 [conc. opn. of Scalia, J.], 32 [conc. opn. of Thomas, J.].) Thus, a clear majority of the United States Supreme Court would uphold a three-strikes sentence in all but an "'exceedingly rare'" case. (*Id.* at p. 21; see also *Lockyer v. Andrade* (2003) 538 U.S. 63, 73-76 [123 S.Ct. 1166, 155 L.Ed.2d 144] [state court opinion upholding three-strikes sentence of 25 years to life for petty theft with a prior was not unreasonable application of previous United States Supreme Court decisions].)

This is not such a case. Even though defendant's criminal record was not as extensive as that of the defendant in *Ewing*, it did include two recent strike priors, both involving violence and the use of a weapon, as well as a number of violent misdemeanors. Moreover, unlike the defendant in *Ewing*, defendant's current offenses involved actual violence. Thus, his sentence was justified by the state's interest in incapacitating and deterring recidivist felons.

B. *Analysis Under the State Constitution.*

Under the state constitutional standard, "'[t]o determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.]' [Citation.] . . . 'If the court concludes that the penalty imposed is "grossly disproportionate to the defendant's individual culpability" [citation], or, stated another way, that the punishment """shocks the conscience and offends fundamental notions of human dignity""" [citation], the court must invalidate the sentence as unconstitutional.' [Citation.]" (*People v. Jennings*, *supra*, 50 Cal.4th at p. 686.)

In re Lynch (1972) 8 Cal.3d 410 indicated that a court may also "compare the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses* which, by the same test, must be deemed more serious" (*id.* at p. 426), and "compar[e] . . . the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* having an identical or similar constitutional provision" (*id.* at p. 427). Subsequently, however, our high court held that if punishment is proportionate to the defendant's individual culpability ("intracase proportionality"), there is no requirement that it be proportionate to the punishments imposed in other similar cases ("intercase proportionality"). (*People* v. *Webb* (1993) 6 Cal.4th 494, 536; *People* v. *Mincey* (1992) 2 Cal.4th 408, 476; *People* v. *Miller* (1990) 50 Cal.3d 954, 1010.)

Accordingly, the determination of whether punishment is cruel and unusual may be based solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; see, e.g., *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Here, the outstanding characteristic of both the offense and the offender is the recidivist commission of serious or violent felonies. Defendant has manifested a persistent inability to conform his conduct to the requirements of the law. Based on such recidivism, a term of 25 years to life for each current offense "is not constitutionally proscribed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 715.)

Defendant points out that his current offenses are not serious felonies. However, the Legislature and the electorate have chosen to make the three strikes law applicable even when the current felony offense is neither violent nor serious. The California Constitution does not prohibit this. (E.g., *People v. Meeks* (2004) 123 Cal.App.4th 695, 709-710 [three strikes sentence for failure to register as a sex offender].)

Defendant complains that he must serve a term longer than the sentence for such offenses as second degree murder, manslaughter, rape, or kidnapping. But "proportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible. The seriousness of the threat a particular offense poses to society is not solely dependent on whether it involves physical injury. Consequently, the commission of a single act of

murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825.)

In sum, a sentence of 25 years to life, for these offenses and this offender, is not cruel or unusual punishment within the meaning of either the state or the federal Constitution.

V

DOUBLE JEOPARDY

Defendant also contends that his three strikes sentence violates the federal double jeopardy clause.

Defendant forfeited this contention by failing to raise it below. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1201.) He has not argued that his trial counsel's failure to raise it constituted ineffective assistance. (Cf. *People v. Scott* (2000) 83 Cal.App.4th 784, 792.)

Separately and alternatively, we reject this contention on the merits. Defendant asserts that "reliance solely upon prior convictions to increase punishment is a violation of the double jeopardy clause," citing, among other things, *Witte v. United States* (1995) 515 U.S. 389 [115 S.Ct. 2199, 132 L.Ed.2d 351]. *Witte*, however, actually said the exact opposite: "In repeatedly upholding . . . recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an

aggravated offense because a repetitive one.' [Citations.]" (*Id.* at p. 400; see also *Moore v. Missouri* (1895) 159 U.S. 673, 677 [16 S.Ct. 179, 40 L.Ed. 301].)

Defendant also cites *People v. Carmony* (2005) 127 Cal.App.4th 1066 and *Duran v. Castro* (E.D. Cal. 2002) 227 F.Supp.2d 1121.) However, while both courts loosely peppered their analyses with double jeopardy terminology, their actual holdings were based on cruel and unusual punishment. (*Carmony*, at p. 1089; *Duran*, at p. 1136.) "'[I]t is axiomatic that cases are not authority for propositions not considered. [Citations.]' [Citation.]" (*Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1153.)

Accordingly, both in this case and in general, a three-strikes sentence does not violate double jeopardy. (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1520; *Allen v. Stratton* (C.D. Cal. 2006) 428 F.Supp.2d 1064, 1078.)

VI

THE PRIOR SERIOUS FELONY ENHANCEMENT

Defendant contends that the trial court erred by imposing a prior serious felony enhancement (Pen. Code, § 667, subd. (a)), because neither of his current convictions was a serious felony. The People concede the error. We agree. Aggravated assault under Penal Code section 245, subdivision (a)(1) is not a serious felony unless the prosecution both pleads and proves that the defendant personally used a deadly weapon. (Pen. Code, §§ 667, subd. (a)(4), 1197, subd. (c)(23)); *People v. Equarte* (1986) 42 Cal.3d 456, 465-466.) Defendant was charged with and convicted of assault by means of force likely to cause great bodily injury, which, by itself, is not a serious felony. (*People v. Haykel* (2002) 96 Cal.App.4th 146, 151.) Hence, this enhancement must be stricken.

The People have asked us to remand so the trial court can consider imposing the one-year prior prison term enhancement (Pen. Code, § 667.5, subd. (b)), which it originally struck, because it arose out of the same conviction as the prior serious felony enhancement. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1149-1153.) Defendant has not opposed this request. We agree that this is the appropriate disposition.

VII

DISPOSITION

The judgment with respect to conviction is affirmed. The judgment with respect to sentence is reversed. The matter is remanded to the trial court with directions to strike the prior serious felony enhancement, to consider imposing the one-year prior prison term enhancement (see part VI, *ante*), and otherwise to reimpose the original sentence.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

CODRINGTON
J.*

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* Judge of the Riverside Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.