APPENDIX - A

ORDER OF THE 9TH CIRCUIT,
DENYING C.O.A.
DATED: JUNE 28, 2019

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 28 2019

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

ROOSEVELT BRIAN MOORE, Petitioner-Appellant, v. DEBBIE ASUNCION, Warden, Respondent-Appellee.	No. 18-56557 D.C. No. 2:17-cv-08608-JAK-LAL Central District of California, Los Angeles ORDER

Before: SILVERMAN and WATFORD, Circuit Judges.

The request for judicial notice (Docket Entry No. 5) is granted.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROOSEVELT MOORE, Petitioner, v. DEBBIE ASUNCION, Warden, Respondent.	Case No. LACV 17-8608-JAK (LAL) **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Report and Recommendation is submitted to the Honorable John A. Kronstadt, United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On November 28, 2017, Roosevelt Moore ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 ("Petition"). On March 7, 2018, Respondent filed a Return to the Petition. On April 13, 2018, Petitioner filed a Reply. Thus, this matter is ready for decision.

///

///

///

II.

PROCEDURAL HISTORY

On September 11, 1991, Petitioner, a juvenile, was convicted after a jury trial in the Los Angeles County Superior Court of nine counts of forcible rape,[1] seven counts of forcible oral copulation,[2] two counts of robbery,[3] two counts of attempted robbery,[4] one count of sodomy by force,[5] one count of penetration with a foreign object,[6] and one count of unlawful driving or taking a motor vehicle.[7] (Clerk's Transcript ("CT") at 132-55, 157-65, 176-78.) Before sentencing, the trial court remanded Petitioner to the Department of the Youth Authority for an evaluation of his suitability for a Youth Authority commitment. (CT at 171.) On January 6, 1992, the trial court found Petitioner unsuitable for a juvenile commitment and sentenced Petitioner to a state prison term of 254 years and four months. (CT at 173-74, 176-78; 2 RT at 257-58.)[8]

Petitioner appealed his convictions to the California Court of Appeal. (Lodgments 2-3.) On May 27, 1993, the California Court of Appeal affirmed the judgment. (Lodgment 1.)

Seventeen years later, on May 24, 2010, Petitioner filed a habeas corpus petition in the California Supreme Court alleging that his sentence was cruel and unusual. (Lodgment 4.) On June 8, 2011, the California Supreme Court denied the petition. (Lodgment 6.)

Following the United States Supreme Court's May 17, 2010 decision in Graham v. Florida,[9] Petitioner filed a new habeas corpus petition in the Los Angeles County Superior Court based on Graham. (Lodgments 7.) On July 26, 2010, the Los Angeles County Superior Court denied relief. (Lodgments at 8.)

---

[1] Cal. Penal Code § 261(a)(2).
[2] Cal. Penal Code § 288a(c).
[3] Cal. Penal Code § 211.
[4] Cal. Penal Code §§ 244, 664.
[5] Cal. Penal Code § 286(c).
[6] Cal. Penal Code § 289.
[7] Cal. Veh. Code § 10851(a).
[8] The trial court ordered that Petitioner be housed with the Youth Authority until the age of 21 and then transferred to state prison. (2 RT at 257-58.)
[9] 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (Eighth Amendment prohibits life without parole sentence for juvenile non-homicide offenders).

Petitioner then filed a habeas corpus petition in the California Court of Appeal. (Lodgment 9.) On January 24, 2011, the California Court of Appeal denied the petition. (Lodgment 10.)

Next, Petitioner filed in the California Supreme Court a petition for review of the California Court of Appeal's denial of habeas relief. (Lodgment 11.) On April 20, 2011, the California Supreme Court denied review. (Lodgment 13.)

On May 18, 2011, Petitioner filed his original habeas corpus petition in the United States District Court. (Lodgment 14.) The District Court denied the petition and Petitioner's motion for reconsideration, but granted Petitioner a certificate of appealability. (Lodgments 15-17.)

Petitioner appealed to the Ninth Circuit Court of Appeals. (Lodgment 18-22.) On August 7, 2013, the Ninth Circuit reversed the District Court's denial of habeas relief and remanded with instructions to grant the petition. (Lodgment 23; Moore v. Biter, 725 F.3d 1184 (9th Cir. 2013).) Respondent filed a petition for rehearing and rehearing en banc. (Lodgment 24.) On February 12, 2014, the Ninth Circuit denied rehearing and rehearing en banc. (Lodgment 27; Moore v. Biter, 742 F.3d 917 (2014).)

On July 30, 2014, the District Court granted Petitioner a conditional writ of habeas corpus, directing the State of California to resentence Petitioner in conformity with Graham or release him. (Lodgment 28.)

On October 24, 2014, the Los Angeles County Superior Court resentenced Petitioner to the same number of years confinement, but ordered that he receive a parole hearing on his 62nd birthday. (Augmented RT at 24.)

On February 13, 2015, Petitioner received a youth offender parole hearing pursuant to the newly enacted California Penal Code section 3051. (Lodgment 41.) At that hearing, Petitioner stipulated to a five-year finding of unsuitability to allow him time to become and remain disciplinary free. (Lodgment 41 at 5-6.)

Despite having received a parole hearing, Petitioner appealed his new sentence to the California Court of Appeal. (Lodgments 29-30.) On December 8, 2015, the California Court of Appeal affirmed. (Lodgment 31.)

Next, Petitioner filed a petition for review in the California Supreme Court. (Lodgment 32.) On August 17, 2016, the California Supreme Court ordered the California Court of Appeal to vacate its decision affirming Petitioner's sentence and reconsider Petitioner's claim in light of the California Supreme Court's decision in People v. Franklin, 63 Cal.4th 261, 268-69, 283-84 (2016), which held that Penal Code section 3051 mooted Eighth Amendment challenges to life-equivalent sentences for juvenile offenders. (See Lodgment 33.)

On remand to the California Court of Appeal, the appellate court considered Petitioner's claims in light of Penal Code section 3051. (Lodgments 36-37.) On January 24, 2017, the California Court of Appeal found Petitioner's appeal moot in light of Penal Code section 3051. (Lodgment 38.)

Petitioner filed a petition for review in the California Supreme Court. (Lodgment 39.) On May 10, 2017, the California Supreme Court denied review. (Lodgment 40.)

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

The facts of Petitioner's crimes are not essential to the consideration of his Petition. To summarize, Petitioner sexually assaulted four women over the course of approximately two weeks when he was 16 years old. (Lodgment 1 at 2-7; 2014 CT at 2-3, 7, 80.)

IV.

PETITIONER'S CLAIMS

Petitioner raises the following claims for habeas corpus relief:

(1) The California Court of Appeal violated Petitioner's right to appellate review by denying his appeal as moot;

(2) Petitioner's new sentence violates the Eighth Amendment and his entitlement to a youth offender parole hearing does not moot his claim; and

(3) Petitioner received ineffective assistance of counsel at resentencing and his entitlement to a youth offender parole hearing does not moot his claim.

///

///

V.

STANDARD OF REVIEW

A. 28 U.S.C. § 2254

The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

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

28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be. As the United States Supreme Court stated in Harrington v. Richter,[10] while the AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings[,]" habeas relief may be granted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts" with United States Supreme Court precedent. Further, a state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.[11]

B. Sources of "Clearly Established Federal Law"

According to Williams v. Taylor,[12] the law that controls federal habeas review of state court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." To determine what, if any,

---

10 562 U.S. 86, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).
11 28 U.S.C. § 2254(e)(1).
12 529 U.S. 362, 412, 120 S. Ct. 1495, 146, L. Ed. 2d 389 (2000).

"clearly established" United States Supreme Court law exists, a federal habeas court also may examine decisions other than those of the United States Supreme Court.[13] Ninth Circuit cases "may be persuasive."[14] A state court's decision cannot be contrary to, or an unreasonable application of, clearly established federal law, if no Supreme Court decision has provided a clear holding relating to the legal issue the habeas petitioner raised in state court.[15]

Although a particular state court decision may be both "contrary to" and an "unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings under Williams.

A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts.[16] If a state court decision denying a claim is "contrary to" controlling Supreme Court precedent, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)."[17] However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them."[18]

State court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'"[19] Accordingly, this Court may reject a state court decision that correctly identified the applicable federal rule but unreasonably applied the rule to the facts of a particular case.[20] However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that

---

13 LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).

14 Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

15 Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S. Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators' courtroom conduct, the state court's decision could not have been contrary to or an unreasonable application of clearly established federal law).

16 Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06).

17 Williams, 529 U.S. at 406.

18 Early, 537 U.S. at 8.

19 Id. at 11 (citing 28 U.S.C. § 2254(d)).

20 See Williams, 529 U.S. at 406-10, 413.

the state court's application of Supreme Court law was "objectively unreasonable" under Woodford v. Visciotti.[21] An "unreasonable application" is different from merely an incorrect one.[22]

Where, as here, there has been no state court ruling on the merits of a claim, the federal habeas court reviews the claim de novo.[23] (OBJECT)

VI.

DISCUSSION

A. Appellate Review

In Claim One, Petitioner argues the California Court of Appeal violated Petitioner's Fourteenth Amendment right to appellate review by denying his appeal as moot. (Petition at 7-8.)[24]

There is no constitutional right to an appeal.[25] Thus, Petitioner cannot show the state court violated any constitutional right to appellate review. However, to the extent Petitioner argues the denial of appellate review violated his Fourteenth Amendment right to due process (Reply and 5-6), his claim still fails. The state court did not deny Petitioner appellate review. The state court considered Petitioner's appeal and found it was mooted by his opportunity for parole review. Thus, Petitioner received state appellate review, although he disagreed with the outcome.

Accordingly, habeas relief is not warranted on Claim One.

B. Eighth Amendment

1. Background

In Claim Two, Petitioner argues his sentence violates the Eighth Amendment as interpreted by Graham v. Florida[26] and the California Court of Appeal erred in its consideration

---

[21] 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).
[22] Williams, 529 U.S. at 409-10.
[23] See Chaker v. Crogan, 428 F.3d 1215, 1221 (9th Cir. 2005) (federal habeas court applies de novo review to claim denied by the state courts on procedural grounds).
[24] This Court refers to the pages of the Petition as applied by the electronic docketing system.
[25] See Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); Abney v. United States, 431 U.S. 651, 656, 97 S. Ct. 1034, 52 L. Ed. 2d 651 (1977) ("it is well settled there is no constitutional right to an appeal") (citation omitted).
[26] 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

of Petitioner's Graham claim. Petitioner further contends this claim was not rendered moot by his opportunity for parole consideration and, thus, the California Court of Appeal erred in failing to consider the merits of Petitioner's claim. (Petition at 7-9.)

2. Legal Standard

In Graham, the Supreme Court considered whether a sentence of life without the possibility parole for a juvenile convicted of a nonhomicide offense violated the Eighth Amendment's ban on cruel and unusual punishments.[27] The Supreme Court stated that, while "[t]he Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life,"[28] "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[29] "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."[30]

In response to Graham and related cases, the California legislature enacted California Penal Code section 3051, which requires parole eligibility hearings for offenders convicted as a juveniles.[31] The California Supreme Court then held in Franklin, that Penal Code section 3051 rendered moot Eighth Amendment claims pursuant to Graham.[32]

3. Analysis

The Supreme Court in Graham granted juvenile offenders only a realistic opportunity to obtain release before the end of a life term. The Supreme Court did not require that juvenile offenders be resentenced to a lesser term or "foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life."[33] Moreover, in finding Petitioner's sentence unconstitutional in Petitioner's original federal habeas

---

[27] Id. at 74-82.
[28] Id. at 75.
[29] Id. at 82.
[30] Id.
[31] People v. Franklin, 63 Cal.4th 261, 276-78 (2016).
[32] Franklin, 63 Cal.4th at 268-69.
[33] Graham, 560 U.S. at 75.

proceeding, the Ninth Circuit focused only on the fact that Petitioner's sentence did not provide him a meaningful opportunity to obtain release in his lifetime. [34]

Pursuant to section 3051, Petitioner has already received a parole eligibility hearing. Graham and Moore do not entitle him to more. Because Petitioner has received the only relief owed him, his claim is moot.[35] Habeas relief is not warranted on Claim Two.

C. Ineffective Assistance of Counsel

1. Background

Finally, in Claim Three, Petitioner argues he received ineffective assistance of counsel at the resentencing hearing and that his claim was not rendered moot by the grant of a parole hearing. Specifically, Petitioner argues his counsel at resentencing was ineffective for failing to inform the sentencing court that it had discretion to impose a sentence below the statutory maximum and that imposing the same prison term would violate Graham. (Petition at 10, 12.)

2. Legal Standard

In order to prevail on his ineffective assistance of counsel claim under the United States Supreme Court decision in Strickland v. Washington, Petitioner must prove two things: (1) that counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance.[36] A court evaluating an ineffective assistance of counsel claim does not need to address both elements of the test if a petitioner cannot prove one of them.[37]

To prove deficient performance, a petitioner must show that counsel's performance was below an objective standard of reasonableness.[38] There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[39] Only if counsel's

---

[34] Moore v. Biter, 725 F.3d 1184, 1194 (9th Cir. 2013).

[35] See Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997) (as amended) ("If an event occurs that prevents the court from granting effective relief, the claim is moot and must be dismissed."); see also Lugo v. McEwan, EDCV 12-549-DMG (AGR), 2017 WL990530, at *3-*4 (C.D. Cal. Jan. 24, 2017) (petitioner conceding, and the court finding, Eighth Amendment claim mooted by Franklin and Penal Code section 3051).

[36] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[37] Id. at 697.

[38] Id. at 687-88.

[39] Id. at 689.

acts or omissions, examined in light of all the surrounding circumstances, fell outside this "wide range" of professionally competent assistance will petitioner prove deficient performance.[40] Proof of deficient performance does not require habeas corpus relief if the error did not result in prejudice.[41] Accordingly, a petitioner must also show that, but for counsel's unprofessional errors, the result of the proceedings would have been different.[42] Thus, a petitioner will prevail only if he can prove that counsel's errors resulted in a "proceeding [that] was fundamentally unfair or unreliable."[43]

In Strickland, the Supreme Court expressly declined to consider the role of counsel in a noncapital sentencing proceeding, stating: "We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance."[44] However, the Ninth Circuit has found, based on the United States Supreme Court's application of the Strickland standard in the sentencing context, that "the Supreme Court has clearly established that Strickland governs claims for ineffective assistance of counsel in noncapital sentencing proceedings."[45]

3. Analysis

Petitioner's counsel specifically argued that resentencing Petitioner to the same term of years would violate Graham. (Augmented RT at 6-7.) Petitioner's counsel also argued against imposing a maximum statutory sentence and suggested the mitigating factors outweigh the aggravating factors. (Augmented RT at 12-14.) In addition, Petitioner personally argued to the court that resentencing him to the same term of years would violate Graham and that mitigating factors weigh in favor of a sentence below the statutory maximum. (Augmented RT at 19-23.) Notably, in its resentencing memorandum, the prosecution also laid out aggravating and mitigating factors and argued the trial court should exercise its discretion to again impose the

---

[40] Id. at 690.
[41] Id. at 691.
[42] Id. at 694.
[43] Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).
[44] Strickland, 466 U.S. at 686.
[45] Daire v. Lattimore, 812 F.3d 766, 767 (9th Cir. 2016).

maximum statutory sentence. (2014 CT at 4-10.) The prosecution further argued the sentencing court could exercise its discretion and sentence Petitioner to a lesser term of 91 years and four months. (2014 CT at 10-11.)

Despite these arguments from the parties, after taking into consideration all of the relevant factors, the sentencing court found the original term of years to be appropriate and resentenced Petitioner accordingly, merely adding an order that Petitioner receive a parole hearing to comply with Graham. (Augmented RT at 24-25.) Petitioner has not shown that any additional arguments regarding the sentencing court's compliance with Graham or its exercise of discretion in imposing sentence would have resulted in a different sentence. Thus, even if he could show his trial counsel could have more strenuously argued in favor of a lesser sentence, he cannot show his counsel's alleged ineffectiveness resulted in prejudice.[46]

Accordingly, habeas relief is not warranted on Claim Three.

VII.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: August 31, 2018

Louise A. LaMothe

HONORABLE LOUISE A. LA MOTHE
United States Magistrate Judge

[46] To the extent Petitioner's claim relates to discussions between the trial court and the parties at Petitioner's original sentencing hearing in 1992 regarding consecutive sentences, his claim still fails. At that time, Petitioner's trial counsel suggested the court had discretion to impose concurrent, rather than consecutive, sentences. (2 RT at 263.) The trial court and the prosecutor correctly noted that consecutive sentences were mandated by California Penal Code section 667.6(d) to the extent Petitioner was convicted of crimes against separate victims or against the same victim on different occasions. (2 RT at 263-64, 266; Cal. Penal Code § 667.6(d) (consecutive sentences must be applied when defendant is convicted of enumerated sex crimes against separate victims or against the same victim on different occasions).) Accordingly, the record shows Petitioner's counsel urged the trial court to exercise its discretion to impose concurrent sentences and the trial court correctly applied consecutive sentences under Penal Code section 667.6(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROSEVELT MOORE, Petitioner, v. DEBBIE ASUNCION, Warden, Respondent.	Case No. LACV 17-8608-JAK (LAL) **ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Magistrate Judge's Report and Recommendation, Petitioner's Objections and the remaining record, and has made a *de novo* determination.

Petitioner's Objections lack merit for the reasons stated in the Report and Recommendation.

Accordingly, IT IS ORDERED THAT:

1. The Report and Recommendation is approved and accepted;

2. Judgment be entered denying the Petition and dismissing this action with prejudice; and

///

///

///

3. The Clerk serve copies of this Order on the parties.

Dated: October 15, 2018

JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROSEVELT MOORE,

Petitioner,

v.

DEBBIE ASUNCION, Warden,

Respondent.

Case No. LACV 17-8608-JAK (LAL)

ORDER DENYING CERTIFICATE OF APPEALABILITY

For the reasons stated in the Report and Recommendation, the Court finds that Petitioner has not made a substantial showing of the denial of a constitutional right.[1] Thus, the Court declines to issue a certificate of appealability.

Dated: October 15, 2018

JOHN A. KRONSTADT
UNITED STATES DISTRICT JUDGE

[1] See 28 U.S.C. § 2253; Fed. R. App. P. 22(b); Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).