APPENDIX "A"

APPENDIX "A"

NOT FOR PUBLICATION

FILED

AUG 22 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERIC JEFFREY COWAN, Petitioner-Appellant, v. JOSIE GASTELO, Warden, Respondent-Appellee.	No. 18-56681 D.C. No. 3:17-cv-01994-WQH-BLM MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted August 19, 2019**

Before: SCHROEDER, PAEZ, and HURWITZ, Circuit Judges.

California state prisoner Eric Jeffrey Cowan appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. We have jurisdiction under 28 U.S.C. § 2253. We review de novo a district court's denial of a habeas corpus petition, *see Stanley v. Cullen*, 633 F.3d 852, 859 (9th Cir. 2011),

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

and we affirm.

Cowan, who is serving an indeterminate term of life imprisonment under California's Three Strikes law, argues that the state trial court violated the Equal Protection Clause by denying his petition for a recall of sentence under the Three Strikes Reform Act of 2012. The Three Strikes Reform Act of 2012 sets forth the threshold eligibility requirements for resentencing and provides that inmates are ineligible for resentencing where, like Cowan, their commitment offense was a "serious and/or violent" felony. *See* Cal. Penal Code § 1170.126. The state court's conclusion that this classification scheme has a rational basis was neither contrary to, nor based upon an unreasonable application of, clearly established Supreme Court law. *See* 28 U.S.C. § 2254(d)(1); *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (where a law neither burdens a fundamental right nor targets a suspect class, it survives an Equal Protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification").

Cowan's claim that the state court denied him due process by failing to conduct a hearing is not cognizable because Cowan failed to raise it before the district court. *See Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994).

AFFIRMED.

APPENDIX "B"

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ERIC JEFFREY COWAN,

Petitioner,

v.

JOSIE GASTELO, Warden,

Respondent.

Case No.: 17cv1994 WQH (BLM)

REPORT AND RECOMMENDATION RE DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS.

I. INTRODUCTION

Petitioner Eric Jeffrey Cowan ("Petitioner" or "Cowan"), a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Cowan challenges his sentence in San Diego Superior Court case number SCD133703. In 1998 he was convicted of five counts of robbery, one count of conspiracy to commit robbery and one count of attempted robbery. (Am. Pet., ECF No. 5 at 1-2; *see also* Lodgment No. 2, ECF No. 11-2 at 11.)[1] He was sentenced to 140 years to life pursuant to California's Three Strikes law. (*See* Am. Pet., ECF No. 5 at 1; *see also* Lodgment No. 1, ECF No. 11-1 at 1-2.)

[1] Page numbers for docketed materials cited in this Report and Recommendation refer to those imprinted by the court's electronic case filing system.

In 2012, California voters passed Proposition 36, California's Three Strikes Reform Act. Cowan sought resentencing pursuant to the new law. In his Amended Petition, he argues the state courts' denial of his request for resentencing violated his rights under the U.S. Constitution. The Court has reviewed the Amended Petition, the Answer and Memorandum of Points and Authorities in Support of the Answer, the Traverse, the lodgments, and all the supporting documents submitted by both parties. For the reasons discussed below, the Court **RECOMMENDS** the Amended Petition be **DENIED**.

II. STATE COURT PROCEEDINGS

On December 14, 1998, a jury found Cowan guilty of five counts of robbery (Cal. Penal Code § 211). The jury further found true the allegation that Cowan had personally used a firearm (Cal. Penal Code § 12022.53) as to two of the robbery counts. The jury also found Petitioner guilty of one count of conspiracy to commit robbery (Cal. Penal Code §§ 182(a)(1), 211) and one count of attempted robbery (Cal. Penal Code §§ 211, 213(b)). (Lodgment No. 6, ECF No. 11-6 at 59-60; *see also* Lodgment No. 1, ECF No. 11-1 at 1-2.) The trial court further found two prior strike allegations for robbery and attempted robbery to be true. On March 31, 1999, the court sentenced Cowan to 140 years to life in prison. (Lodgment No. 2, ECF No. 11-2 at 18-19; *see also* Lodgment No. 1, ECF No. 11-1 at 1-2.)

Cowan challenged the conviction in state and federal court. (*See* Pet., ECF No. 5 at 2-3, 7.) This Court denied Cowan's federal habeas petition on October 23, 2003. (*See id.* at 7; *see also*, *Cowan v. Garcia*, 02cv2449 DMS (LSP) (ECF No. 15)).

Nine years later, on November 6, 2012, California voters approved Proposition 36, the Three Strikes Reform Act of 2012 ("Act"). "The Act change[d] the requirements for sentencing a third strike offender to an indeterminate term of 25 years to life imprisonment. Under the original version of the three strikes law a recidivist with two or more prior strikes who [was] convicted of any new felony [was] subject to an indeterminate life sentence. The Act diluted the three strikes law by reserving the life sentence for cases where the current crime [was] a serious or violent felony or the prosecution ha[d] pled and proved an

enumerated disqualifying factor. In all other cases, the recidivist [would] be sentenced a a second strike offender." *People v. Yearwood*, 213 Cal.App.4th 161, 167-68 (Cal. App 2013).

On August 13, 2014, Cowan filed a petition to have his sentence modified under th Act. (Lodgment No. 2, ECF No. 11-2 at 9-15.) The trial court denied the petition o August 19, 2014, concluding that Petitioner was ineligible for resentencing under the Ac because his commitment offenses (robbery, attempted robbery and conspiracy to comm robbery) were either serious or violent felonies. (*Id.* at 17-18.)

Cowan appealed. On January 13, 2015, Cowan's court appointed appellate attorne filed a brief pursuant to *People v. Wende*, 25 Cal. 3d 436 (Cal. 1979). (*See* Lodgment Nc 3, ECF No. 11-3.) Under *Wende*, appellate counsel is permitted to file a "no merits" brie when counsel determines that there are no arguable issues to pursue on appeal. *See Wende* 25 Cal. 3d at 441. In those circumstances, the appellate court independently reviews th record to determine whether any issues exist. *Id.* Cowan filed a supplemental brief on hi own behalf, arguing that the denial of his petition for sentence modification violated hi equal protection rights. (*See* Lodgment No. 1, ECF No. 11-1 at 4.)

On April 14, 2015, the California Court of Appeal affirmed the trial court's orde denying Cowan's petition for sentence modification. The appellate court found Cowan' equal protection claim lacked merit and concluded there were "no reasonably arguabl appellate issue[s]." (Lodgment No. 1, ECF No. 11-1 at 4-5.)

On May 26, 2015, Cowan filed a petition for review in the California Supreme Court again raising his equal protection claim. (*Id.*) On June 30, 2015, the California Supreme Court denied the petition for review without comment or citation. (Lodgment No. 5, ECF No. 11-5.)

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Cowan filed the instant Amended Petition for writ of habeas corpus in this Court o November 22, 2017.[2] (ECF No. 5.) Respondent filed an Answer and Memorandum c Points and Authorities on June 19, 2018. (ECF No. 10.) On July 19, 2018, Petitioner file a Traverse. (ECF No. 12.)

III. SCOPE OF REVIEW

Cowan's Petition is governed by the provisions of the Antiterrorism and Effectiv Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320 (1997). Unde AEDPA, a habeas petition will not be granted unless the adjudication: (1) resulted in decision that was contrary to, or involved an unreasonable application of clearly establishe federal law; or (2) resulted in a decision that was based on an unreasonable determinatio of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. 2254(d); *Early v. Packer*, 537 U.S. 3, 8 (2002).

A federal court is not called upon to decide whether it agrees with the state court' determination; rather, the court applies an extraordinarily deferential review, inquiring onl whether the state court's decision was objectively unreasonable. *See Yarborough v Gentry*, 540 U.S. 1, 4 (2003); *Medina v. Hornung*, 386 F.3d 872, 877 (9th Cir. 2004). I order to grant relief under § 2254(d)(2), a federal court "must be convinced that an appellat panel, applying the normal standards of appellate review, could not reasonably conclud that the finding is supported by the record." *See Taylor v. Maddox*, 366 F.3d 992, 100 (9th Cir. 2004).

A federal habeas court may grant relief under the "contrary to" clause if the stat court applied a rule different from the governing law set forth in Supreme Court cases, o

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[2] On September 28, 2017, the United States Court of Appeals for the Ninth Circuit transferred Petitioner' Application for Leave to File Second or Successive Petition to this Court. The appellate court found tha Petitioner was not required to seek permission to file his habeas petition in this Court, and directed th Clerk of this Court to file the Application as a Proposed Petition for a Writ of Habeas Corpus pursuant t 28 U.S.C. § 2254 nunc pro tunc to June 15, 2016. (ECF No. 1.) The Petition was dismissed withou prejudice on October 3, 2017 for failure to pay the filing fee and use the proper form. (ECF No. 2.) Cowa filed the Amended Petition on November 11, 2017. (ECF No. 5.) He paid the filing fee on April 12, 201 and the case was reopened. (ECF Nos. 7 & 8.)

if it decided a case differently than the Supreme Court on a set of materiall indistinguishable facts. *See Bell v. Cone*, 535 U.S. 685, 694 (2002). The court may grar relief under the "unreasonable application" clause if the state court correctly identified th governing legal principle from Supreme Court decisions but unreasonably applied thos decisions to the facts of a particular case. *Id.* Additionally, the "unreasonable application clause requires that the state court decision be more than incorrect or erroneous; to warrar habeas relief, the state court's application of clearly established federal law must b "objectively unreasonable." *See Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). "[A] federa habeas court may not issue the writ simply because that court concludes in its independer judgment that the relevant state-court decision applied clearly established federal lav erroneously or incorrectly. Rather, that application must also be unreasonable." *William v. Taylor*, 529 U.S. 362, 411 (2000). "A state court's determination that a claim lacks mer precludes federal habeas relief so long as 'fairminded jurists could disagree' on th correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Where there is no reasoned decision from the state's highest court, the Court "look through" to the underlying appellate court decision and presumes it provides the basis fo the higher court's denial of a claim or claims. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805 06 (1991). If the dispositive state court order does not "furnish a basis for its reasoning, federal habeas courts must conduct an independent review of the record to determin whether the state court's decision is contrary to, or an unreasonable application of, clearl established Supreme Court law. *See Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000 (overruled on other grounds by *Andrade*, 538 U.S. at 75-76); *accord Himes v. Thompsor* 336 F.3d 848, 853 (9th Cir. 2003). However, a state court need not cite Supreme Cour precedent when resolving a habeas corpus claim. *See Early*, 537 U.S. at 8. "[S]o long a neither the reasoning nor the result of the state-court decision contradicts [Supreme Cour precedent,]" the state court decision will not be "contrary to" clearly established federa law. *Id.* Clearly established federal law, for purposes of § 2254(d), means "the governin

> classification used by section 1170.126 -- inmates who might be eligible for a lighter sentence under the new three strikes law may petition for recall of sentence, but inmates who are categorically ineligible (because of a serious or violent third strike) may not -- is undeniably rational. Cowan does not argue to the contrary and we reject his equal protection argument.

(Lodgment No. 1, ECF No. 11-1 at 4.)

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *see also Vacco v. Quill*, 521 U.S. 793, 799, (1997) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982) and *Tigner v. Texas*, 310 U.S. 141, 147 (1940); *Fraley v. Bureau of Prisons*, 1 F.3d 924, 926 (9th Cir. 1993) (per curiam). "[A] mere demonstration of inequality is not enough: the Constitution does not require identical treatment. There must be an allegation of invidiousness or illegitimacy in the statutory scheme before a cognizable [equal protection] claim arises." *McQueary v. Blodgett*, 924 F.2d 829, 835 (9th Cir. 1991) (italics original). Moreover, unless the alleged discrimination involves a suspect class of persons or a fundamental right, a challenged statute satisfies equal protection if it bears a rational basis to a legitimate governmental interest. *See Romer v. Evans*, 517 U.S. 620, 631 (1996).

Cowan is not a member of a suspect class and resentencing is not a fundamenta right. Neither state prisoners nor persons convicted of crimes constitute suspect classes whose equal protection claims require a heightened level of scrutiny. *See United States v. Whitlock*, 639 F.3d 935, 941 (9th Cir. 2011). Moreover, resentencing is not a "fundamenta right" protected by the U.S. Constitution. *See McDonald v. City of Chicago*, 561 U.S. 742, 764 (2010). Therefore, the "rational relation" test applies in determining the legitimacy of California's statutory resentencing scheme. Under that test, the prisoner, not the state, "bear[s] the burden of establishing a prima facie case of "unequal application." *McQueary*, 924 F.2d at 835.

Here, Cowan has not demonstrated either that he was treated differently from other similarly situated prisoners, or that his alleged unequal treatment was the result of a discriminatory intent. Withholding resentencing eligibility from prisoners whose commitment convictions were for crimes classified as serious or violent offenses serves a legitimate state interest by limiting the possibility that prisoners granted early release would pose "an unreasonable risk of danger to the public." *Yearwood*, 213 Cal. App. 4th at 175-76, 179 ("Enhancing public safety was a key purpose of [Proposition 36].") Moreover, the Supreme Court has repeatedly upheld recidivism statutes in the face of equal protection challenges. *See, e.g., Parke v. Raley*, 506 U.S. 20, 27 (1992). Accordingly, Cowan has not established an equal protection claim.

Finally, to the extent that Petitioner seeks to challenge the state courts' specific determination that he was ineligible for resentencing under Proposition 36, that claim is not cognizable in this case because it turns solely on the interpretation of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (holding mere errors in the application of state law are not cognizable on habeas corpus); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."). Even if such a claim were cognizable on federal habeas, the Court would be bound by the state court's determination that Petitioner was ineligible for resentencing under California law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.").

In sum, the state court's denial of Cowan's petition for sentence modification under Proposition 36 was neither contrary to, nor an unreasonable application of, clearly established law. *See* 28 U.S.C. § 2254(d); *Williams*, 529 U.S. at 407-08. The Court therefore **RECOMMENDS** Cowan's equal protection claim be **DENIED.**

V. CONCLUSION AND RECOMMENDATION

The Court submits this Report and Recommendation to United States District Judge William Q. Hayes under 28 U.S.C. § 636(b)(1) and Local Civil Rule HC.2 of the United

APPENDIX "C"

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 17 2019

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

ERIC JEFFREY COWAN,

Petitioner-Appellant,

v.

JOSIE GASTELO, Warden,

Respondent-Appellee.

No. 18-56681

D.C. No. 3:17-cv-01994-WQH-BLM
Southern District of California, San Diego

ORDER

Before: SCHROEDER, PAEZ, and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

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. *See* Fed. R. App. P. 35.

Cowan's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 17), as supplemented by Docket Entry No. 18, are denied.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 1 2019

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

ERIC JEFFREY COWAN,

Petitioner-Appellant,

v.

JOSIE GASTELO, Warden,

Respondent-Appellee.

No. 18-56681

D.C. No.
3:17-cv-01994-WQH-BLM
Southern District of California,
San Diego

ORDER

Before: Peter L. Shaw, Appellate Commissioner.

The motion to proceed in forma pauperis (Docket Entry No. 3) is granted. The Clerk shall amend the docket to reflect this status.

The previously established briefing schedule remains in effect.

DA/Pro Se

APPENDIX "D"

APPENDIX "D"

Court of Appeal, Fourth Appellate District, Division One - No. D066572

S226592

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ERIC COWAN, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

APPENDIX "E"

APPENDIX "E"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ERIC JEFFREY COWAN,
Plaintiff,
v.
JOSIE GASTELO,
Defendants.

Case No.: 17cv1994-WQH-BLM

ORDER

HAYES, Judge:

The matter before the Court is the review of the Report and Recommendation (ECF No. 13) issued by the United States Magistrate Judge.

I. BACKGROUND

On August 31, 2018, the United States Magistrate Judge issued the Report and Recommendation concluding that the Petitioner was not entitled to relief on any grounds set forth in the Petition for Writ of Habeas Corpus and recommending that this court direct judgment be entered. (ECF No. 13).

On October 29, 2018, Petitioner filed objections to the Report and Recommendation. (ECF No. 16).

II. LEGAL STANDARD

The duties of the district court in connection with a report and recommendation of a magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28 U.S.C. §