Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 14 2021

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

RONALD ANTHONY GOMEZ, Petitioner-Appellant, v. CHRISTIAN PFEIFFER, Warden; RALPH DIAZ, Respondents-Appellees.	No. 20-56214 D.C. No. 2:19-cv-03756-DMG-MRW Central District of California, Los Angeles ORDER

Before: THOMAS, Chief Judge, and BRESS, Circuit Judge.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

RONALD ANTHONY GOMEZ,
Petitioner,
v.
CHRISTIAN PFEIFFER, WARDEN
Respondent.

Case No. CV 19-3756 DMG (MRW)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court reviewed the Complaint, the records on file, the Report and Recommendation of the United States Magistrate Judge, the parties' supplemental submissions, and the Magistrate Judge's Supplemental Statement of Decision. Further, the Court engaged in a de novo review of those portions of the Report to which Petitioner objected. The Court accepts the findings and recommendation of the Magistrate Judge.

IT IS ORDERED that Judgment be entered denying the petition and dismissing this action with prejudice.

DATED: October 19, 2020

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

RONALD ANTHONY GOMEZ, Petitioner, v. CHRISTIAN PFEIFFER, Warden, Respondent.	Case No. CV 19-3756 DMG (MRW) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

SUMMARY OF RECOMMENDATION

This is a habeas action involving a state prisoner. A jury convicted Petitioner of assaulting a police officer. On federal habeas review, Petitioner presents several claims centered on an allegedly defective response to a jury question.

The Court concludes that the state court decisions denying Petitioner's claims were neither contrary to, nor unreasonable applications of, clearly established federal law. As a result, the Court recommends that the petition be denied.

FACTS AND PROCEDURAL HISTORY

Trial

Petitioner injured a police officer in an altercation on the porch of a house. The officer testified that Petitioner dragged the officer over an elevated ledge, causing the officer to suffer significant injuries when he fell to the ground. Another police officer corroborated this account by testifying that the injured officer stated at the scene that Petitioner pulled him over the ledge. (Docket # 15-6 at 3.)

The prosecution charged Petitioner with assault on a police officer (Count 1) and resisting arrest (Count 2) plus an enhancement for causing great bodily injury. (Docket # 15-1 at 34.) The jury convicted Petitioner of both counts and found the enhancement true. The trial court sentenced Petitioner to 14 years in prison. (Docket # 15-6 at 5.)

State Appellate and Habeas Proceedings

In a reasoned, unpublished decision, the state appellate court affirmed Petitioner's substantive convictions. (Id.) The gist of the decision addressed the trial court's response to a jury question about the assault charge (discussed below). However, the court reversed Petitioner's GBI enhancement. (Id. at 18-19.) The state supreme court denied review without comment. (Docket # 15-8.) On remand, the trial court resentenced Petitioner to an 11-year term. (Docket # 1 at 10.)

Petitioner then sought habeas relief in the state courts. His habeas petitions raised issues regarding the jury question, the trial court's response,

and derivative allegations of ineffective assistance by Petitioner's trial and appellate lawyers. Both the state appellate and supreme courts denied relief without comment. (Docket # 15-14, 15-16.) This federal action followed.

DISCUSSION

Standard of Review under AEDPA

Under AEDPA, federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (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).

In a habeas action, this Court generally reviews the reasonableness of the state court's last reasoned decision on a prisoner's claims. Martinez v. Cate, 903 F.3d 982, 991 (9th Cir. 2018); Harrington v. Richter, 562 U.S. 86, 99 (2011). Here, to the extent that the state appellate court opinion on direct appeal addressed Petitioner's claims, this federal court reviews that decision for reasonableness under AEDPA. (Docket # 15-6.) In doing so, the Court received and independently reviewed the relevant portions of the state court record. Nasby v. McDaniel, 853 F.3d 1049, 1053 (9th Cir. 2017).

Petitioner presented his remaining claims on state habeas review. The state court decisions denying those claims were "unaccompanied by an explanation" of the courts' reasoning. Richter, 562 U.S. at 98. The Court presumes that the state supreme court reached and rejected the merits of

Petitioner's constitutional claims.[1] Richter, 562 U.S. at 99; Johnson v. Williams, 568 U.S. 289, 301 (2013) (federal court ordinarily "must presume that [a prisoner's] federal claim was adjudicated on the merits").

AEDPA requires the Court to perform an "independent review of the record" to determine "whether the state court's decision was objectively unreasonable." Richter, 562 U.S. at 98. When the state court does not explain the basis for its rejection of a prisoner's claim, a federal habeas court "must determine what arguments or theories [ ] could have supported the state court's decision" in evaluating its reasonableness. Id. at 102 (emphasis added). "Crucially, this is not a de novo review of the constitutional question." Murray v. Schriro, 882 F.3d 778, 802 (9th Cir. 2018) (prisoner's burden on independent review "still must be met by showing there was no reasonable basis for the state court to deny relief") (quotations omitted).

* * *

Overall, AEDPA presents "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Burt v. Titlow, 571 U.S. 12, 19 (2013). On habeas review, AEDPA places on a prisoner the burden to show that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" among "fairminded jurists." Richter, 562 U.S. at 101, 103; White v. Wheeler, ___ U.S. ___, 136 S. Ct. 456, 461 (2015). Federal habeas corpus review therefore serves as "a guard against extreme malfunctions in the state criminal justice

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[1] The Attorney General does not convincingly explain why the appellate court's silent habeas denial is the relevant decision here. (Docket # 14 at 35.) Given the parameters of independent deferential review, though, the distinction is irrelevant to this Court's analysis.

systems, not a substitute for ordinary error correction" in the state court system. Richter, 562 U.S. at 102.

Jury Instruction Claim (Ground One)

During jury deliberations, the jury asked the trial court "what is the alleged act in Count 1 that constitutes [ ] the assault?" The jury then identified two disputed factual aspects of the altercation between Petitioner and the police officer. (Docket # 15-11 at 103.) The trial court referred the jurors to the CALCRIM instruction for assault. The court also told the jurors that they did "not have to unanimously agree as to which act the defendant committed" against the victim. (Docket # 15-6 at 6-7.) Petitioner's trial lawyer agreed to the instruction at the time. (Id.; Docket # 15-3 at 94-95.)

In posttrial proceedings and on direct appeal, Petitioner contended that the trial court's response was defective. However, the appellate court held that Petitioner forfeited any argument of instructional error by agreeing to the trial court's answer to the jury question in real time and failing to properly present the matter on appeal. (Id. at 7-8.)

Procedural Bar

Petitioner is procedurally barred from federal consideration of his claims challenging the propriety of the response to the jury question. Under AEDPA, federal courts cannot consider a claim if the state courts deny relief due to "a procedural barrier to adjudication of the claim on the merits" arising under state law. Walker v. Martin, 562 U.S. 307, 315 (2011); Cooper v. Neven, 641 F.3d 322, 327 (9th Cir. 2011).

California's "contemporaneous objection rule" provides an independent and adequate basis to bar federal consideration of a claim on habeas review. Paulino v. Castro, 371 F.3d 1083, 1092-93 (9th Cir. 2004) (claim is barred where state appellate court "clearly and expressly held that the issue was

waived because defense counsel consented to the trial court's handling of the issue[; Paulino's] claim is therefore procedurally barred"); Kelly v. Swarthout, 599 F. App'x 267, 268 (9th Cir. 2015) (same); Rogers v. Soss, 775 F. App'x 879 (9th Cir. 2019) (same). Petitioner's agreement with the trial judge's response to the jury question was fatal to his claim on direct appeal. That precludes federal consideration of the claim too.

Cause and Prejudice

A party may avoid a procedural bar by demonstrating cause for the default and prejudice resulting from it. Cooper, 641 F.3d at 327; Ayala v. Chappell, 829 F.3d 1081, 1095 (9th Cir. 2016) (same).

"Cause" may be established by a showing that a prisoner's "post-conviction counsel was ineffective." Martinez v. Ryan, 566 U.S. 1, 17 (2012); Ramirez v. Ryan, 937 F.3d 1230, 1241 (9th Cir. 2019). Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must show that the lawyer's performance was deficient and that there was a "reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." Ramirez, 937 F.3d at 1241. "Prejudice" requires demonstrating that the underlying legal claim is "substantial." Martinez, 566 U.S. at 17; Ramirez, 937 F.3d at 1041 (procedural default "will not be excused" if underlying claim "does not have any merit"). The analysis of "whether both cause and prejudice are established under Martinez will necessarily overlap" because the strength of the underlying claim affects both components. Id.; Djerf v. Ryan, 931 F.3d 870, 880 (9th Cir. 2019).

Analysis

Petitioner cannot overcome the procedural bar to his jury instruction claim. Assuming that his appellate lawyer provided deficient performance by

failing to properly raise the issue on direct appeal,[2] Petitioner has not convincingly demonstrated that the appellate lawyer's error – or the underlying jury instruction challenge – would likely have led to a different jury verdict.

As an initial issue, jury instruction issues are generally matters of state law for which federal habeas relief is not available. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Federal constitutional relief is only available if the jury instruction error "so infected the entire trial that the resulting conviction violates due process." McGuire, 502 U.S. at 68; Martinez v. Ryan, 926 F.3d 1216, 1230 (9th Cir. 2019) (same).

Moreover, the U.S. Supreme Court has never held that a defendant in a noncapital case is entitled to a jury unanimity instruction as to an element, an object of the offense, or the ultimate verdict. Apodaca v. Oregon, 406 U.S. 404, 406 (1972); Schad v. Arizona, 501 U.S. 624, 631-32 (1991). As a result, the failure of a state court to give a unanimity instruction cannot be contrary to clearly established federal law as determined by the Supreme Court. Hassan v. Morawcznski, 405 F. App'x 129, 131 (9th Cir. 2010) ("the Supreme Court has never held jury unanimity to be a requisite of due process of law") (quotation omitted).

From this, it is apparent that Petitioner cannot demonstrate that his federal constitutional claim of instructional error – if revived under the cause-and-prejudice analysis – could lead to relief. The formulation of the instruction given in response to the jury question was an issue of state law that is typically not reviewable. McGuire, 502 U.S. at 68; Martinez, 926 F.3d

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[2] See Appellate Decision, Docket # 15-3 at 8 n.3 (Petitioner "also forfeited" appellate challenge to jury instruction because his lawyer "did not make it until his reply brief" in violation of state appellate rules). The Court notes that Petitioner's state-appointed appellate lawyer continues to represent him in the federal proceedings.

at 1230. And the specific claim asserted (an allegedly erroneous instruction that the jurors did not have to agree on the specific act constituting the assault) does not itself rely on clearly established federal law. Apodaca, 406 U.S. at 406; Schad, 501 U.S. at 631-32; Hassan, 405 F. App'x at 131.

* * *

Indeed, Petitioner may not even have alleged a violation of California law. The trial court surely did not err by simply repeating the previously-agreed-upon CALJIC instruction for the elements of the assault offense. Doing so directly responded to the jury's question about the "act that constitutes the assault," not issues regarding the injuries derived from the act. (Docket # 15-11 at 103.)

Rather, the gist of Petitioner's claim is the failure to add a unanimity component to the re-instruction. As the Attorney General notes, though, state law does not require jury unanimity when evaluating acts that are part of a continuous course of conduct. That rule applies when "(1) the acts are so closely connected in time as to form part of one transaction, (2) the defendant tenders the same defense or defenses to each act, and (3) there is no reasonable basis for the jury to distinguish between them." People v. Leuth, 206 Cal. App. 4th 189, 196 (2012) (quotations omitted). A unanimity instruction is not required when "a guilty verdict indicates that the jury rejected the defendant's defense in toto." People v. Hernandez, 217 Cal. App. 4th 559, 575 (2013).

The core of the case involved a momentary struggle between Petitioner and a police officer. As the state appellate court put it, Petitioner and the officer "described what happened [ ] differently" at trial. (Docket # 15-3 at 3.) The binary presentation of events (either Petitioner dragged the officer over the ledge while they were briefly grappling or the officer failed to let go of the

fleeing suspect) demonstrated a closely connected sequence of events – and the jury's clear rejection of Petitioner's explanation of the incident. Leuth, 206 Cal. App. 4th at 196; Hernandez, 217 Cal. App. 4th at 575. Petitioner therefore likely may not have identified any error under state law, much less a federal constitutional "infection" of his trial that warrants habeas relief. McGuire, 502 U.S. at 68. As a result, the Court concludes that he cannot salvage his forfeited instructional error claim on federal review.[3]

Ineffective Assistance of Trial and Appellate Lawyers

(Grounds Two and Three)

Petitioner asserts derivative claims of ineffective assistance against his trial and appellate lawyers based on the jury instruction issue discussed above. Petitioner contends that the trial lawyer's failure to properly object to the response to the jury question constituted deficient performance. Relatedly, he claims that the appellate lawyer was ineffective by failing to raise the issue in the opening brief on appeal (thereby providing another basis for the forfeiture of the claim on direct appeal).

Relevant Federal Law

The Sixth Amendment of the Constitution guarantees a criminal defendant the right to effective assistance of a lawyer. Strickland v. Washington, 466 U.S. 668 (1984). To establish ineffective assistance under Strickland, "a defendant must show both deficient performance by counsel and prejudice." Knowles v. Mirzayance, 556 U.S. 111, 112 (2009). "Failure to

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[3] Petitioner expends great energy trying to "federalize" his argument that his state law entitlement to a unanimity instruction must lead to a constitutional due process violation. (Docket # 18 at 6-8 (reply brief).) However, his papers barely address the requirement under AEDPA [28 U.S.C. § 2254] that Petitioner demonstrate the unreasonableness of the state court decisions under clearly established federal law as determined by the Supreme Court.

satisfy either prong of the Strickland test obviates the need to consider the other." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002).

Deficient performance is defined as representation that falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. A defense attorney is not ineffective for failing to raise a meritless objection. Gonzalez v. Knowles, 515 F.3d 1006, 1017 (9th Cir. 2008).

As to prejudice, a challenger must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Padilla v. Kentucky, 599 U.S. 356, 366 (2010) (quotation omitted); Boyer v. Chappell, 793 F.3d 1092, 1104 (9th Cir. 2015) (prejudice where there was a "substantial likelihood of a different result, as opposed to a mere conceivable possibility," based on the lawyer's performance "sufficient to undermine confidence in the outcome" of the trial).

Ineffective assistance by an appellate lawyer is measured by the same Strickland criteria. Smith v. Robbins, 528 U.S. 259, 285 (2000); Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002). An appellate lawyer does not act unreasonably in failing to raise a meritless claim, nor will a criminal defendant be prejudiced by that omission. Moormann v. Ryan, 628 F.3d 1102, 1107 (9th Cir. 2010).

"Surmounting Strickland's high bar is never an easy task." Padilla, 559 U.S. at 371. Establishing that a state court's application of Strickland was unreasonable under AEDPA "is all the more difficult." Richter, 562 U.S. at 105. The standards created by Strickland and Section 2254(d) are both "highly deferential"; when the two apply in tandem, "review is doubly so." Id. (quotation omitted).

Analysis

Petitioner cannot prevail on either of his ineffective assistance claims. On deferential, independent review under AEDPA, the Court concludes that the state supreme court could plausibly have found that Petitioner was not originally entitled to a unanimity instruction during his trial.

The Court assumes (without deciding) that a reasonably competent trial lawyer should not have acquiesced to the trial court's decision to re-instruct the jury without addressing the unanimity issue. Had the trial lawyer objected to the instruction, the issue would likely have been preserved on direct appeal. And the Court easily concludes that a reasonably skilled appellate practitioner knows not to raise new issues in a reply submission in a criminal appeal. Strickland, 466 U.S. at 688.

Yet, the state supreme court could reasonably have found no prejudice to Petitioner attributable to the alleged errors of either the trial or appellate attorney. Rios, 299 F.3d at 805. As noted above, there's a strong argument that the trial court properly instructed the jury (as a matter of state or federal law) without sua sponte requiring them to unanimously find the specific act during the struggle that constituted the assault on the police officer. The state supreme court therefore could plausibly have found that the trial lawyer's objection or the appellate lawyer's assertion of the issue on appeal would have been fruitless. Gonzalez, 515 F.3d at 1017; Moormann, 628 F.3d at 1107; Richter, 562 U.S. at 102; Murray, 882 F.3d at 802.

That would not have been an unreasonable application of Strickland to the circumstances of the case. On independent, deferential review, the Court concludes that the state supreme court could have legitimately found no prejudice to Petitioner attributable to the lawyers' actions. Fairminded judges would not uniformly find constitutional error with the state court's silent

analysis. White, 136 S. Ct. at 461. As a result, any deficient performance did not rise to the level of a constitutional violation for which habeas relief is available.

Sufficiency of Evidence (Ground Four)

The jury found that Petitioner personally caused the police officer's injuries. On habeas review, Petitioner briefly claims that sufficient evidence did not support that verdict. (Docket # 1 at 45-46.)

The Court summarily recommends denial of this claim. A criminal defendant may be convicted only by proof beyond a reasonable doubt of every element necessary to constitute a charged crime or enhancement. Jackson v. Virginia, 443 U.S. 307, 319 (1979). The relevant issue under Jackson is "whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (emphasis in original). Review under AEDPA is doubly-deferential. A federal court's consideration is limited to the determination of whether the state court analysis – which itself is deferential to a jury's verdict – was "objectively unreasonable." Cavazos v. Smith, 562 U.S. 1, 2 (2011) (quotation omitted).

* * *

The state appellate court did not commit constitutional error here. By citation to a state law analogue, the court expressly applied the principles of Jackson on direct appeal. The court determined that, if believed, the officer's corroborated trial testimony that Petitioner "caused [the officer's] injuries by grabbing his arm and pulling him off the porch" was sufficient evidence to support the assault conviction. (Docket # 15-6 at 9-10.)

The state court was well aware that "the evidence was not undisputed" – that is, Petitioner and the officer gave competing explanations of the

incident – and that the jury evidently rejected Petitioner's testimony. (Id. at 11.) On doubly-deferential habeas review, the Court finds nothing unreasonable about either the appellate court's analysis of the trial record or that court's deference to the jury's credibility determination. Cavazos, 562 U.S. at 2. There was no "extreme malfunction" of the criminal justice system that warrants habeas relief. Richter, 562 U.S. at 102.

CONCLUSION

IT IS THEREFORE RECOMMENDED that the District Judge issue an order: (1) accepting the findings and recommendations in this Report; (2) directing that judgment be entered denying the Petition; and (3) dismissing the action with prejudice.

Dated: January 8, 2020

HON. MICHAEL R. WILNER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 19-3756 DMG (MRW)	Date	August 21, 2020
Title	Gomez v. Pfeiffer		

Present:	Hon. Michael R. Wilner, U.S. Magistrate Judge

Veronica Piper	n/a
Deputy Clerk	Court Reporter / Recorder
Attorneys for Petitioner:	Attorneys for Respondent:
n/a	n/a

Proceedings: SUPPLEMENTAL STATEMENT OF DECISION

1. This is a habeas action involving a represented state prisoner. After the issuance of a Report and Recommendation to deny habeas relief, the Court received supplemental briefing from the parties regarding the applicability (if any) of the Supreme Court's recent ruling in Ramos v. Louisiana, ___ U.S. ___, 140 S. Ct. 1390 (Apr. 20, 2020). (Docket # 23, 27.) After considering both filings, the Court briefly supplements its previous Report and Recommendation (Docket # 20) as follows:

* * *

2. The jury convicted Petitioner of assaulting a police officer. Petitioner's claim of constitutional error centers on the trial court's instruction to the jury that they "did not have to unanimously agree as to which act [of assault] the defendant committed" against the victim. (Docket # 20 at 5.)

3. The original Report stated that "the U.S. Supreme Court has never held that a defendant in a noncapital case is entitled to a jury unanimity instruction as to an element, an object of the offense, or the ultimate verdict." (Id. at 7.) The Report cited Supreme Court authority (namely, Apodaca v. Oregon and Schad v. Arizona) for that principle.

4. However, the Ramos decision (a series of plurality, concurrence, and dissenting opinions) clearly overruled Apodaca. Ramos, 140 S. Ct. at 1416 (Kavanaugh, J., concurring) ("I agree with the Court's decision to overrule Apodaca."). Both of these Supreme Court decisions dealt with the constitutionality of a jury verdict when non-unanimous juries convicted a criminal defendant. That is, only 10 of the 12 jurors voted to convict Messrs. Ramos and Apodaca; two voted to acquit. Id. at 1393. The impact

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 19-3756 DMG (MRW)	Date	August 21, 2020
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of Ramos and the vitiation of Apodaca now expressly require that all jury members must vote to convict the accused for that person to be found guilty.

5. But Ramos (and, for that matter, the overruled aspect of Apodaca) did not directly address the fundamental question raised in Petitioner's current action: the constitutionality of a unanimous general verdict of guilt. To that end, it's not apparent how Ramos could serve as the "clearly established Federal law, as determined by the Supreme Court of the United States," that the state courts failed to reasonably apply in Petitioner's case. 28 U.S.C. § 2254(d)(1). While the Supreme Court has now firmly held that a noncapital defendant is entitled to jury unanimity as to the "ultimate verdict," Petitioner points to no aspect of the Ramos decision that overtly supports his claim regarding unanimity regarding specific acts of conviction.

6. To the extent that the Report relied on now-outdated Supreme Court precedent, that result should not stand. However, the rest of the portion of the Report quoted above remains good law. There still is no clearly established Supreme Court authority requiring unanimity in the manner demanded in Petitioner's papers. He's not entitled to relief under AEDPA.[1]

* * *

7. Further, even if Ramos could be interpreted to require the granular level of unanimity for conviction that Petitioner seeks, the Attorney General's observations regarding Teague convincingly preclude its application here. Teague prohibits retroactive application of new constitutional rules on habeas review unless the rule is (a) substantive (decriminalizing conduct) or (b) a "watershed" change in criminal procedure. Teague v. Lane, 489 U.S. 288, 311 (1989).

8. The Ramos Court did not expressly take up the Teague question. However, I agree with the Attorney General's nose-counting. (Docket # 27 at 4.) The four-member plurality expressly minimized the potential disruption of the Ramos result on earlier convictions by noting that "Teague's test is a demanding one, so much so that this Court has yet to announce a new rule of criminal procedure capable of meeting it." Ramos,

[1] To that end, the Court notes the Attorney General's comments that Petitioner forfeited this claim in state court proceedings – and likely cannot overcome the cause-and-prejudice standard under AEDPA on habeas review even with Ramos in hand. (Docket # 27 at 5-6.)

140 S. Ct. at 1407. Further, at least one concurring justice affirmatively opined that, when the issue is properly presented, Ramos "will not apply retroactively on federal habeas corpus review" by operation of Teague "and will not disturb convictions that are final" – such as Petitioner's. Ramos, 140 S. Ct. at 1420 (Kavanaugh, J., concurring, and cataloguing Supreme Court decisions that failed to satisfy the Teague retroactivity standard).

9. If Ramos is to be the sole, historic Supreme Court decision to survive Teague analysis in the decades since that ruling, the Ninth Circuit or the High Court itself should tell us. Based on well-settled precedent, this district court cannot properly apply Ramos retroactively to grant habeas relief to Petitioner.

* * *

10. The Report, Petitioner's objections, the parties' supplemental statements, and this supplemental statement will be forwarded to the assigned district judge for consideration under 28 U.S.C. § 636.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

RONALD ANTHONY GOMEZ, Petitioner, v. CHRISTIAN PFEIFFER, WARDEN Respondent.	Case No. CV 19-3756 DMG (MRW) JUDGMENT

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

IT IS ADJUDGED that the petition is denied and this action is dismissed with prejudice.

DATED: October 19, 2020

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

RONALD ANTHONY GOMEZ,

Petitioner,

v.

CHRISTIAN PFEIFFER, WARDEN

Respondent.

Case No. CV 19-3756 DMG (MRW)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts requires a district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

Under 28 U.S.C. § 2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the

issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). The COA inquiry is only a "threshold question" to determine whether a decision is "debatable." It is made "without full consideration of the factual or legal bases adduced in support of the claims." Buck v. Davis, ___ U.S ___, 137 S. Ct. 759, 773-74 (2017) (quotation marks omitted).

Here, after duly considering Petitioner's contentions in support of the claims of error regarding a jury instruction alleged in the petition, the Court concludes that petitioner failed to make the requisite showing for the issuance of a Certificate of Appealability.

Accordingly, a Certificate of Appealability is denied in this case.

DATE: October 19, 2020

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE