No._____

In the
Supreme Court of the United States

CARLOS AMEZCUA, Petitioner -Appellant

v.

JOE A. LIZARRAGA, Warden, XAVIER BECERRA, Warden
Respondent-Appellee

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit
19-55910

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

CERTIORARI should be granted to review an unreasonable decision of the state court due to this issue:

Can appellant be convicted of three charges of child molestation when the testimony received in trial was totally and materially different than the three offenses which were charged? Can that state of the evidence satisfy *Jackson v. Virginia* 443 U.S. 307 (1979)?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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Petitioner Carlos Amezcua, respectfully petitions the Court for a writ of certiorari to review the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of the section 2254 petition for a writ of habeas corpus.

WHY THIS PETITION SHOULD BE GRANTED

Carlos Amezcua contends there was insufficient evidence to convict him of counts 7, 9 and 10 involving Jane Doe 2. Corpus Delicti is based on the insufficiency of the evidence that the charged crime was committed at all. Corpus delicti is simply a part of a defendant's claim of insufficiency of the evidence as set forth in *Jackson v. Virginia* 443 U.S. 307 (1979). Both lack of Corpus Delicti and insuffic

The Corpus Delicti rule speaks to a defendant's right to a fair trial inasmuch as it is "intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*People v. Alvarez,* 27 Cal. 4th 1116 at p. 1169. (2002).) As "[t]he touchstone of due process is fundamental fairness" (*Salas v. Cortez,* 24 Cal.3d 22, 27 (1979)), the rule implicates the Due Process Clause. (U.S. Const., 5th & 14th Amends; see *Wong Sun v. United States*, 371 U.S. 471, at pp. 488-489, (1963).) Thus, the lack of independent evidence supporting the convictions on counts 7, 9 and 10 violated petitioner's constitutional right to due process of law. Appellant respectfully requests the petition for certiorari be

granted.

OPINIONS BELOW

On April 16, 2021, the Ninth Circuit Court of Appeals, in a two page Memorandum Opinion, affirmed the district court denial of petitioner's habeas corpus petition filed under 28 U.S.C. 2254

(Appendix A, 9th Ckt. Memorandum Opinion .)

On June 25, 2021, a petition for rehearing was denied.(Appendix A.)

The Order of the United States District Court for the Southern District of California denying the petition for writ of habeas corpus and granting a certificate of appealability (COA) was filed on May 29, 2019, Dkt 9. (Appendix B.)

The opinion of the California Court of Appeal is attached as Appendix C.

The Civil Docket of both District Court and Ninth Circuit is appendix D.

JURISDICTION

The Ninth Circuit affirmed the denial of the habeas corpus petition

and on March 25, 2021 denied a petition for rehearing. (Dkt 59.)

The jurisdiction of this Court is, thus timely invoked under 28 USC section 1254(1). *Hohn v. United States,* 524 U.S. 236 (1998).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A defendant in a criminal case must have the right to Due Process of Law , and the Fifth and Fourteenth Amendment to the U. S. Constitution.

28 U.S.C. section 2254(d) provides:

> (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.

STATEMENT OF THE CASE

An information filed May 30, 2015, charged the appellant, Carlos Amezcua, with five counts of lewd or lascivious acts in violation of section 288,

subdivision (a), involving Jane Doe 1, with regard to events occurring April 11, 2001 to April 11, 2003 (counts 1-5); three counts of lewd or lascivious acts in violation of section 288, subdivision (a), involving Jane Doe 2, with regard to events occurring October 16, 2011 through October 16, 2013 (counts 6-8); and four counts of lewd or lascivious acts in violation of section 288, subdivision (a), involving Jane Doe 2, with regard to events occurring October 16, 2009 through October 16, 2011 (counts 9-12). (2 ER 95 - 2 ER 100.)

As to counts 1 through 6 and 9 through 12, it was alleged appellant committed the offenses against more than one victim and had substantial sexual conduct with a victim under 14 years of age, within the meaning of section 1203.066, subdivisions (a)(7) and (a)(8). (2 ER 93-95.)

As to all counts it was alleged appellant committed the offenses against more than one victim within the meaning of sections 667.61, subdivisions (b), (c) and (e). (2 ER 93-99.)

A jury trial began on August 26, 2015. (2 ER 316.)

On September 1, 2015, the trial court granted appellant's section 1118.1 motion in part, and dismissed the section 1203.066, subdivision (a)(8), allegation attached to count 6. (4 ER 579.)

On September 8, 2015, the jury returned guilty verdicts as to counts 2, 4, 6,

7, 9 and 10. (2 ER 239-248.)

The jury further found true the section 1203.066, subdivision (a)(7), allegations attached to counts 2, 4, 6, 9 and 10. (2 ER 239, 241, 243, 245, 247.)

The jury further found true the section 667.61 allegation. (2 ER 239-248.)

The jury deadlocked on counts 1, 3, 5, 8, 11 and 12. (5 ER 712.) The trial court declared a mistrial (*Id.*) and these counts were later dismissed on the People's motion. (2 ER 341.)

The probation report recommended a sentence of 30 years to life. (2 ER 209.)

The trial court imposed an aggregate prison term of 45 years to life comprised as follows: an indeterminate term of 15 years to life on count 2; a determinate upper term of eight years on count 4, to run concurrently; an indeterminate term of 15 years to life on count 6 to run consecutively; an indeterminate term of 15 years to life on count 7 to run concurrently; an indeterminate term of 15 years to life on count 9, to run consecutively; and an indeterminate term of 15 years to life on count 10, to run concurrently. (5 ER 739.)

Notice of appeal was timely filed December 22, 2015. (2 ER 291.)

On March 10, 2017, the court of appeal affirmed the judgment in a split

decision, one justice dissenting and contending there was insufficient evidence to support the convictions of counts 7 and 9. (1 ER 44,63.)

On June 14, 2017, the California Supreme Court denied, without comment, appellant's petition for review which had raised the same claims as had been raised in the California Court of Appeal (CCA). (1 ER 8, 42.)

On June 18, 2018, Amezcua, proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254 in the Federal District Court for the Southern District of California, raising the same issues he had raised on direct appeal. (1 ER 8, 5 ER 747, ECF 1.)

On May 29, 2019, the District Court issued a judgment and 40 page order denying the petition but granting a COA as to claim one which claim was that the convictions of counts 6, 7, 9 and 10 were based on insufficient evidence in violation of his right to due process. (Appendix B) (1 ER 10, 40.)

A late appeal to the this Ninth Circuit Court of Appeals was filed, with permission from the District Court, on 08-02-19. (5 ER 748, ECF 14.)

On June 25, 2021, after a two page memorandum opinion affirming the judgment in the district court, the court of appeals denied the petition for rehearing. (Appendix A.)

STATEMENT OF FACTS

The below facts are taken from Amezcua's state appellate briefing with cites to the Excerpt of Record which includes the state appellate record.

Prosecution's Case

Appellant is the grandfather to Jane Doe 1 and Jane Doe 2. Jane Doe 1 was born April 11, 1993 and was 22 years old at the time of trial. (3 ER 464.)

Jane Doe 2 was born October 16, 2001 and was 13 years old at the time of trial. (3 ER 445.) Jane Doe 1 is the step-daughter of appellant's oldest son, Carlos Jr. (2 ER 143, 144, 146.)

Jane Doe 2 is the biological daughter of appellant's middle son, Victor. (2 ER 175.)

Appellant is presently 70 years old having been born on January 31, 1950. (2 ER 142.) He had a residence in National City on South Drexel Avenue in the early 2000's (2 ER 147-48.) Jane Doe 1 and her family also lived at the South Drexel property. (*Id.*) In 2003, appellant purchased a home on Wintergrass Court in Winchester. (2 ER 142, 149, 151.) Jane Doe 2 and her family lived with appellant at the Wintergrass Court house for a couple of years before appellant moved to San Diego. (3 ER 448.)

Appellant lived at a residence on Alvarado Road in San Diego from about 2011 until March 2014. (2 ER 152, 171-72.)

Jane Doe 1's Testimony (Counts 1-5)

Jane Doe 1 testified she was 8 years old the first time appellant touched her in a way that made her feel uncomfortable. The incident occurred when she was living with appellant on South Drexel. (3 ER 465.)

According to Jane Doe 1, appellant called her into her grandparents' bedroom, put his hand down her underwear and rubbed her clitoris. (3 ER 466.)

While this was going on, appellant put Jane Doe 1's hand on his penis, which Jane Doe 1 testified was hard. (3 ER 467.) This was never skin to skin. (3 ER 475.)

He also put his hand in her shirt and rubbed her breast. (3ER467.) The incident lasted about 15 minutes after which appellant told Jane Doe 1 to clean up which she did by wiping her private area. Jane Doe 1 testified her grandfather cleaned up also but she did not remember how. According to Jane Doe 1, appellant suggested she not say anything. Jane Doe 1 did not tell anyone what happened because she was embarrassed. (3 ER 468.)

Jane Doe 1 testified appellant touched her in the same way and in the same place (her grandparents' bedroom) about six or seven times. (3 ER 469.)

Jane Doe 1 testified on one occasion, she was in her brother's room when appellant put her down on her brother's bed, pulled up her shirt, and put his mouth on her breast. (3 ER 469.)

All of the touchings occurred when Jane Doe 1 was 8 years old, although she could not remember dates and times. (3 ER 469-70.)

Jane Doe 1 did not report any of the incidents until 14 years later. She was in Florida when her mother called her and asked her if she had been molested by another family member because her sister was accusing that family member of molestation. She told her mother nothing like that happened with that family member but with her grandpa. (3 ER 470-71.)

Jane Doe 2's Testimony (counts 6-12)

Jane Doe 2 testified when she was younger, she lived with appellant at the house in Winchester (the Wintergrass Court residence). (3 ER 447-48; 2 ER 142, 149, 151.)

At some point, her grandparents moved to San Diego and she and her family stayed in Winchester. (3 ER 448-49.)

For about a year, Jane Doe 2 would visit appellant every other week in San Diego and would spend the night. (3 ER 460-461.)

Jane Doe 2 testified that when she would visit appellant in San Diego, he

would do things that made her feel uncomfortable. (3 ER 449.)

Jane Doe 2 testified to an incident which occurred in her grandparents' bedroom when appellant caressed her arms and touched her vagina. (3 ER 449-450.)

Jane Doe 2 described the arm touching as a squeeze above her elbow. (3 ER 451.)

She described the touching of her vagina as a "slight tap" over her clothes. (3 ER 453, 459.)

Appellant never touched her vagina again after the first time. (3 ER 452.)

According to Jane Doe 2, appellant said, "Don't tell." (3 ER 452.)

She felt embarrassed and did not tell anyone. (3 ER 451.)

The second time appellant touched Jane Doe 2, he touched her arms and touched her on her chest at the collarbone. (3 ER 452.)

This lasted a couple of seconds. (3 ER 458.)

Jane Doe 2 testified the touching of the arm, collarbone area and vagina were the only touchings and they occurred when she would visit appellant in San Diego. (3 ER 460-461.) She was 11 or 12 at the time. (3 ER 455.)

He touched her on her buttocks and her vagina, over her clothing. (2 ER 147.)

This happened about three times when Jane Doe 1 was about 8 or 9 years old. (2 ER 147,160.)

It usually happened in the living room. (2 ER 161.) Jane Doe 1 was living with him at the time. (2 ER 148-149.) Appellant stated there was a time he put Jane Doe 1's hand on his penis for a few seconds. He was not erect. (2 ER 162.)

Appellant stated in the interview he first touched Jane Doe 2 "at my residence where I live today." (2 ER 149.) Jane Doe 2 was living with him at the time. (2 ER 150, 156.)

When asked specifically about the first time He touched Jane Doe 2, appellant stated he and Jane Doe 2 were playing, he touched her rear end, and touched her vagina a few times over her clothes. (2 ER 149, 156, 157.)

Appellant stated after that, it happened about three more times, and always started with playing. (2 ER 158.)

Appellant stated he touched her vagina one time with his finger under her underwear. (2 ER 150.)

Appellant stated he touched Jane Doe 2 when she came to visit at the house on Alvarado Road. (2 ER 153.) He touched her vagina over her clothes and rubbed her buttocks. (2 ER 153-54.)

This occurred one time when Jane Doe 2 was about 10 years old. (2 ER

154-155, 158.)

Appellant stated his granddaughters were not at fault. (2 ER 162.)

In response to the question by the Detective, "What was it that made you think to touch them? He responded: "That's the unexplainable thing" Appellant stated he felt aroused but not physically, never erect. But mentally aroused and didn't" know why". (2 ER 162-63.)

Appellant stated he never touched any other children. A different detective did not believe him and appellant responded, "I have already lost everything, I have lost my sons and my family, why wouldn't I tell you if there were others." (2 ER 174, 177.)

Defense Evidence

Appellant testified he touched Jane Doe 1 in a playful manner. (3 ER 517.) He was not trying to get himself sexually aroused when he touched her, he was not trying to sexually arouse Jane Doe 1, and there was never any sexual intent on his part at all. (3 ER 518.) He never tried to penetrate her or have sex with her. (*Id.*)

He knew he could have a lawyer with him with the police but his three sons had confronted him, right before he went to the police, about what they had heard and they were all crying including himself. "In my way of thinking, I wanted to support them. I wanted to kind of like I'm trying to keep my composure. I was

trying to help them out."

He agreed he did the touchings with Jane Doe 1 that were mentioned on the videotape. (3 ER 519.)

Appellant testified the touchings that occurred with Jane Doe 2 were always in a playful manner. (3 ER 519.)

He testified the touchings were never sexual, he did not try to arouse himself or Jane Doe 2, and he never became aroused. There was never any kind of sexual intent.

Appellant testified he never touched either of his grandchildren with a sexual intent. (3 ER 521.)

Appellant testified when he said "aroused" during the police interview it was not related to sexual desire and instead, it was in the sense of, I should not be doing this. He tried to get across to the police that he had no sexual intentions at all. (3 ER 522,)

Appellant testified there were no sexual motives or desires involving Jane Doe 1 and Jane Doe 2, other than knowing that, "I shouldn't be doing this." Appellant testified, "I should not have done it." (3 ER 523.)

Appellant admitted on cross-examination he told the detectives that he touched Jane Doe 1's vagina three times, and she touched his penis one time. (3

ER 530.)

Appellant denied he ever touched Jane Doe 1's clitoris skin to skin. (3 ER 527.)

He denied having an erection when Jane Doe 1 touched his penis. (3 ER 532.)

He admitted telling the detectives he touched Jane Doe 2's vagina at the Alvarado house. He denied telling the detectives he touched Jane Doe 2 four times at the Winchester house. (3 ER 530.)

Appellant recalled only two "situations" with Jane Doe 2. (3 ER 531.)

The prosecutor asked appellant if he brought up Jane Doe 2 "in thin air" during the police interview? Appellant's answer was No, he was answering questions from his son who asked him "Is there anyone else Dad?" And appellant responded, Jane Doe 2.

The prosecutor then said:

> So let me ask you this. If you were—if you never crossed that line into becoming a molester by penetrating them and you never had an erection and all this touching was during play and you had no sexual intent, then how come you repeatedly are saying today and to the police that what you were doing was wrong? Why is it wrong?

Appellant responded:

> It's wrong because there's a line between adults and children. Working around with the Sheriff's Department these 30 years, I know

> that. I know. I know that there's certain lines you don't cross. You don't cross them.
> Now what you're trying to have me come up with is that is had to be sexual, it had to be. And I'm telling you that it was not. It was not sexual.

(3 ER 533.)

ARGUMENT

I

CERTIORARI MUST BE GRANTED AS TO THE CONVICTIONS ON COUNTS 7, 9 AND 10 BECAUSE THE FINDINGS OF GUILT AS TO THESE COUNTS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Introduction

Appellant was charged with seven counts of lewd or lascivious acts involving Jane Doe 2, in violation of section 288, subdivision (a) (counts 6-12). (2 ER 98-100.) The jury was unable to reach a verdict as to counts 8, 11 and 12 and a mistrial was declared as to those counts. The jury returned guilty verdicts on counts 6, 7, 9 and 10 and a true finding under 667.61(b)(c)(e) that the crimes were committed against multiple victims. (2 ER 243-249.)

Appellant contends the record does not contain evidence sufficient to support the jury's findings of guilt as to counts 7, 9 and 10, where Jane Doe 2 never testified to any of the conduct which formed the basis for these counts.

Specifically, as to count 7, Jane Doe 2 never testified that appellant touched

her buttocks, and as to counts 9 and 10, Jane Doe 2 never testified to any conduct occurring at the Wintergrass Court residence.

Moreover, as to count 9, substantial evidence does not support this conviction where Jane Doe 2 testified appellant "tapped" her underwear over her vagina only one time, and never touched her there again. (3 ER 452-454.)

It is clearly established that due process is violated "if it is found that upon the evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia, supra* at p. 324.

Where appellant's convictions on counts 7, 9 and 10 are unsupported by substantial evidence, the guilty verdicts resulted in a deprivation of appellant's right to due process under the federal Constitution. (U.S. Const. 14th Amend; *Jackson v. Virginia* 443 U.S. 307, 309 (1979).)

Accordingly, the writ should issue and the findings of guilt on counts 7, 9 and 10 must be reversed.

B. AEDPA Standard of Review

This Court reviews *de novo* the District Court's decision to deny the petition for writ of habeas corpus, meaning this Court "review[s] the state court's decision to determine whether the state court's adjudication of the claim 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established' Supreme Court case law or '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.'" (*Van Lynn v. Farmon*, 347 F.3d 735, 738 (9th Cir. 2003); *see* 28 U.S.C. § 2254 (d).)

28 U.S.C. § 2254 (d)(1) provides that an application for a writ of habeas corpus shall be granted with respect to a claim adjudicated in state court if the adjudication of the claim "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." The "'contrary to' and 'unreasonable application' clauses have independent meaning." (*Bell v. Cone*, 535 U.S. 685, 694 (2002).)

"A decision is contrary to clearly established federal law if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result. [¶] A state court's decision involves an unreasonable application of federal law if the state court identifies the correct governing legal principle but unreasonably applies that principle to the facts of the prisoner's case." (*Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003), internal quotation marks, ellipsis and citations omitted.) For a decision to fall under the

"unreasonable application" clause, it is not enough that the decision is erroneous or incorrect. Instead, "[s]ome increment of incorrectness beyond error is required" although this "increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." (*Smith v. Hollins*, 448 F.3d 533, 538 (2nd Cir. 2006), internal quotation marks and citation omitted.)

The term "clearly established Federal law as determined by the Supreme Court of the United States" refers to the holdings, as opposed to dicta, of United States Supreme Court's decisions as of the time the state court renders its decision. (*Williams v. Taylor*, 529 U.S. 362, 412 (2000).) To be clearly established, the Supreme Court precedent does not need to be directly on point, but it must provide a governing legal principle and articulate specific considerations for lower courts to follow. (*Quinn v. Haynes*, 234 F.3d 837, 844 (4th Cir. 2000).) As the Supreme Court has stated:

> "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." (*Panetti v. Quarterman*, 551 U.S. 930, 953 (2007), citations and internal quotation marks omitted.)

See also Cooper-Smith v. Palmateer, 397 F.3d 1236, 1242 (9th Cir. 2005)

("Supreme Court precedent includes not only the bright-line rules it establishes but also the legal principles and standards flowing from it." Footnote omitted). Accordingly, "AEDPA requires that if a clearly established rule or principle is stated, however general, state courts must adhere to a reasonable application of that rule." (*Garrus v. Secretary*, 694 F.3d 394, 404 (3d Cir. 2012), footnote omitted.) A federal court "looks through" unexplained orders and reviews the last reasoned decision in the state court system. (*Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Brazzel v. Washington*, 491 F.3d 976, 981 (9th Cir. 2007).) Where, as here, the California Supreme Court denies review without comment, the federal court reviews the decision of the California Court of Appeal. (*Garcia v. Carey*, 395 F.3d 1099, 1103, n. 7 (9th Cir. 2005).)

C. Standard of Review for Claims of Insufficient Evidence

The Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin*, 515 U.S. 506, 510 (1995).) In addition, "the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*Jackson v. Virginia*, 443 U.S. 307, 315 (1979),

internal quotation marks and citation omitted.)

The requirement of proof beyond a reasonable doubt applies to *any* fact, other than the fact of a prior conviction, that increases the penalty of a crime beyond the prescribed statutory maximum. (*Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).)

Due process requires that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." (*Jackson*, *supra*, 443 U.S. at 316.)

The test 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*. at 319, footnote omitted.)

Federal courts apply the test in *Jackson* with the additional layer of deference inherent in the "unreasonable application" standard in 28 U.S.C. § 2254(d)(1). (*Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005).) The federal court asks whether the decision of the California Court of Appeal reflected an unreasonable application of *Jackson* to the facts of the case. (*Id*. at 1275.)

This constitutes a "twice-deferential standard." (*Parker v. Matthews*, 567 U.S. 37, 43 (2012).) It consists of a "double dose of deference" under which it is

not enough for the federal court to conclude that it would have found the evidence insufficient or to think that the state court made a mistake. (*Boyer v. Belleaque*, 659 F.3d 957, 964 (9th Cir. 2011).) Instead, to grant relief, the federal court "must conclude that the state court's determination that a rational jury could have found that there was sufficient evidence of guilt, i.e., that each required element was proven beyond a reasonable doubt, was objectively unreasonable." (*Id*. at 965.)

When the evidence creates only a reasonable speculation about a fact necessary for conviction, it is insufficient to satisfy the *Jackson* standard and the defendant is entitled to relief. (*Newman v. Metrish*, 543 F.3d 793, 796 (6th Cir. 2008); *O'Laughlin v. O'Brien*, 568 F.3d 287, 302 (1st Cir. 2009).)

In addition, a defendant is entitled to relief if the adjudication of a claim in state court "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)(2).) This provision applies to factual issues, as opposed to legal ones. (*McMullan v. Booker*, 761 F.3d 662, 671 (6th Cir. 2014).)

Factual issues relate to basic, primary, or historical facts – facts in the sense of a recital of external events and the credibility of their narrators. (*Ibid*.)

When an issue is a factual one, a federal court determines two AEDPA issues: (1) whether the state court's finding was an unreasonable determination of

the facts in light of the evidence under section 2254(d)(2), and (2) whether the state court's decision unreasonably applied federal law under section 2254(d)(1). (*Maxwell v. Roe*, 606 F.3d 561, 576 (9th Cir. 2010).)

Section 2254(d)(2) applies when a state court makes a finding that is unsupported by sufficient evidence. (*Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir.2004).) A state-court factual finding is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. (*Wood v. Allen*, 558 U.S. 290, 301 (2010).)

However, a factual finding will be overturned when the federal court is convinced that the state "appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." (*Taylor v. Maddox*, *supra,* 366 F.3d at 1000.)

In addition, when a state court makes factual findings, but does so under a misapprehension as to the correct legal standard, the resulting factual determination is unreasonable and no presumption of correctness attaches to it. (*Id*. at 1001.)

For example, when a state appellate court employs an erroneous legal standard when deciding an issue, such as placing the burden of proof on the defendant instead of the prosecution, the federal court conducts de novo rather

than deferential review. (*Caliendo v. Warden*, 365 F.3d 691, 698 (9th Cir. 2004).)

The burden of showing that a state court's factual determination is unsupported by the record rests with the petitioner. (*Cook v. Schriro*,538 F.3d 1000, 1015 (9th Cir. 2008).)

D. Substantial Evidence Does Not Support the Findings of Guilt on Counts 7, 9 and 10 Because Jane Doe 2 Never Testified to Any Conduct Which Could Have Supported a Reasonable Inference the Unlawful Conduct Alleged in These Counts Ever Occurred

Before this discussion commences is a reminder that the jury deadlocked on counts 1, 3, 5, 8, 11 and 12.

Appellant was convicted of four counts of lewd or lascivious acts involving Jane Doe 2, in violation of section 288, subdivision (a) (counts 6, 7, 9, 10). (2 ER 98-100, 243-248.)

Section 288, subdivision (a), prohibits the commission of a lewd or lascivious act on a child under age 14 done with the intent to arouse or satisfy the sexual desires of the perpetrator or the child. (§ 288, subd. (a).)

In this case, each of the charges against appellant with regard to Jane Doe 2 related to a specific touching at a specific location, but, as will be pointed out, the proof did not meet those charges in those counts discussed below.

As to count 6, the jury was required to find beyond a reasonable doubt that appellant violated section 288, subdivision (a), when he placed his hand on the

child's vagina at the residence on Alvarado Road in San Diego. (2 ER 98, 243.)

As to count 7,the jury was required to find beyond a reasonable doubt that appellant violated section 288, subdivision (a), when he placed his hand on the child's buttocks at the residence on Alvarado Road. (2 ER 98, 244.)

As to counts 9 and 10, the jury was required to find beyond a reasonable doubt that appellant violated section 288, subdivision (a), when he placed his hand on the child's vagina at the residence on Wintergrass Court in Winchester. (2 ER 994, 245, 247.)

Thus the charging document and the verdict forms expressly identified how, when and where the unlawful conduct occurred. (2 ER 98-994, 243-247.)

The California Supreme Court has made clear that, in child molestation cases,

> "[t]he victim . . . must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period."

(*People v. Jones,* 51 Cal.3d, p. 316 (1990) [Italics original.]

Here, Jane Doe 2 testified only to incidents occurring at the residence on Alvarado, where she testified the conduct occurred when she was 11 or 12 years old and when she would visit appellant after he moved to San Diego, which would have been the house on Alvarado. (3 ER 449, 450, 452, 455; 2 ER 243, 244.)

Jane Doe 2 further testified appellant touched her vagina only once, and never touched her vagina again after the first time and not "skin to skin" but over her clothes. (3 ER 452-453.)

Jane Doe 2 never testified that appellant touched her buttocks (count 7) and she never testified to any inappropriate conduct occurring at the Wintergrass Court residence (counts 9 & 10).

Jane Doe 2 in this case thus failed to describe any unlawful conduct at all to support counts 7, 9 and 10. There simply was no evidence from Jane Doe 2 from which the jury could have concluded that appellant committed the acts as described in counts 7, 9 and 10.

This was not a case where there was generic testimony of a series of acts committed during a general period of time which could have sufficed to support a conviction. (See *People v. Jones, supra*, 51 Cal.3d at p. 314; *People v. Matute* 103 Cal.App.4th 1437, 1445 (2002) .)

In *Matute*, for example, the defendant was charged with multiple counts of forcible rape, where it was alleged he had sexual intercourse with his daughter over a period of about a year. (*Matute*, at p. 1441.) The daughter testified unequivocally that a week never went by without the defendant forcing sexual intercourse upon her; however, she was unable to give specific details regarding the time and circumstances of each count for which the defendant was charged. (*Id*. at p. 1439.)

The defendant argued on appeal that such generic testimony was insufficient to support the findings of guilt as to the charged offenses. (*Id*. at p. 1443.) The reviewing court disagreed. Citing to *Jones*, the court in *Matute* held that in child molestation cases, as long as the victim specifies the type of conduct involved, its frequency, and that the conduct occurred during the limitation period, nothing more is required to establish the substantiality of the victim's testimony. (*Matute*, at p. 1446.)

In contrast, in our case, the multiple counts relating to Jane Doe 2 were with regard to specific conduct s - touching the child's buttocks and vagina, respectively - occurring at specific times and locations, namely, the house on Alvarado between 2011 and 2013 and the house on Wintergrass Court between 2009 and 2011.

But Jane Doe 2's testimony, in counts 7, 9 and 10, did not track the charges at all. Jane Doe 2 testified the inappropriate touching happened when she would visit appellant in San Diego when she was 11 or 12 and living in Winchester.[1] (3 ER 448-449, 97, 100.) Jane Doe 2 testified while visiting appellant in San Diego, he touched her on the vagina, and he never touched her there again. (3 ER 449, 450, 452.)

Contrary to the charges, Jane Doe 2 unequivocally testified that the touching of the arm, collarbone area and vagina were the only touchings and they occurred when she visited appellant in San Diego. (3 ER 460-461.)

Jane Doe 2 never testified to any touchings at any other residence and never testified appellant touched her on the buttocks.

In other words, Jane Doe 2 described no acts whatsoever to support counts 7, 8 and 9, as required by *Jones*. (*People v. Jones*, *supra,* 51 Cal.3d at p. 316 [victim must be able to describe the acts committed with sufficient specificity, differentiate between the various types of proscribed conduct, describe the number of acts committed and the general time period based on age or location.])

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[1]This from the prosecution trial brief at 2 ER 105: Location of Offenses:
1.South Drexel Avenue, National City, San Diego County
2. Wintergrass Court, Winchester, Riverside County
3. Alvarado Road, San Diego, San Diego, CA

Where count 7, asserted appellant touched Jane Doe 2's buttocks at the house on Alvarado, and counts 9 and 10 were based on appellant touching Jane Doe 2's vagina at the Wintergrass residence, her testimony did not support those allegations as far as where and what actually occurred.

Jane Doe 2 never testified appellant touched her buttocks at all, at any time. (Count 7.)

She never testified at any time that appellant touched her vagina, skin to skin. (Count 9.)

She never testified at any time that appellant touched her vagina over her clothes at Winchester California in Riverside. (Count 10.)

Her testimony, including cross examination, appears in its entirety at 3 ER 445-463 and it does not support the jury's finding of guilt on counts 7, 9 and 10.

E. The Corpus Delicti Rule is a California State Rule and This Federal Court is Bound By the CCA Interpretation of this Rule Unless Its Interpretation is So Arbitrary or Capricious That it Violates Due Process. The CCA Interpretation is Just That and Violates Due Process Requiring the Granting of the Writ Due to Insufficiency of the Evidence

At 1 ER 53 the CCA agreed there was no testimony from Jane Doe 2 to support the acts described in counts 7, 9, and 10.

The charging allegations in counts 7, 9 and 10 appear in the verdicts for those counts which appear at 2 ER 244-248.

In compliance with *People v. Jones, supra,* of the California Supreme Court, at page 315-316 the prosecution drafted charges in the information which described "*the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged in the information (e.g., 'twice a month' or 'every time we went camping'.) Finally the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." (*People v. Jones, supra,* 51 Cal.3d at p. 316) [Italics original.]

1. There was A Clear Failure to Show A Corpus Delicti With Respect to Jane Doe 2

At 2 ER 324 the minutes of trial show a judgment of acquittal under section 1118.1[2] was made as to all counts. Defense counsel pointed out at 4 ER 572 that

[2] Section 1118.1 states in relevant part, "In a case tried before a jury, the court on motion of the defendant … , at the close of the evidence on either side … shall order the entry of a judgment of acquittal of one or more of the

there was no evidence at all from Jane Doe 2 about "touching butt" other than from appellant's statement to the police. (4 ER 572.) At 4 ER 573 defense counsel pointed out the incontrovertible truth that for count 9, "the child specifically denied that that ever happened", "other than my client's statement" and for 10, at line 26 of 4 ER 573, defense counsel points out the same problem, the "over the clothes" touching, "again, the child mentions nothing of that, that it never occurred. It again refers to Winchester. And so therefore, the court should deny or grant the motion and dismiss that particular count under 1118.1." At 4 ER 575, defense counsel zeros in on the corpus delicti and anticipates the prosecutor's argument "and I think that my argument is that the district attorney's logic is that, well, it happened over here, so him admitting it happened over there is enough corpus delicti that it happened in this other place except that's not what the law says. The law says that each count is to be considered separate and distinct, a trial on each one." (4 ER 575.)

A recent published opinion in the CCA agrees with appellant's position.

On June 26, 2020 the case of *People v. Benjamin Ramirez Ruiz,* 51 Cal.App

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offenses charged … if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

5th 369 (2020) (*Ruiz*) was published. The issue before the CCA was Ruiz's contention that there was no proof of the corpus delicti of crime of oral copulation or sexual intercourse with a child of 10 years old or younger other than the statement made by Ruiz to an investigator pre-trial.

As in the case of Amezcua, this issue of insufficient evidence was raised in a motion for judgment of acquittal at the close of the People's case. The CCA in *Ruiz* emphasized the necessity at pages 390-391 of the prosecution proving the "the fact of injury, loss, or harm and the existence of a criminal agency as its cause, and "cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant"; "some independent proof of the corpus delicti"is required. (Citing *People v. Alvarez,* 27 Cal. 4th 1161, 1168-69 (2002).) The court in *Ruiz* went on to point out that CALCRIM 359 requires only """[a] slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient""" to satisfy the corpus delicti rule. (Citations.)

The *Ruiz* court went on to determine if for the three charges of which Ruiz was convicted, this "slight or prima facie standard" had been met. Count 3 was continuous sexual abuse of a minor under 14 years old; Count 5 was forcible rape of a child under 14 years old. In the *Ruiz* case, the minor did not testify and was

declared unavailable but the investigator told the jury that the minor had told her that Ruiz had put his "private part" in her "private part" the previous Friday and then three months earlier. A medical exam of the minor found a "deep notch" in the minor's hymen, the presence of which was consistent with sexual abuse. Also Ruiz's seminal fluid ws found on the minor's bra. This evidence was sufficient to establish the corpus delicti regarding both counts 3 and 5. Therefore the trial court did not err in denying the motion to dismiss those two counts. (*Ruiz* at 393.)

But the CCA agreed with Ruiz that there was insufficient corpus delicti evidence to support count 2 which alleged that Ruiz had engaged with oral copulation or sexual penetration with a child 10 years old or younger. The minor had turned 11 on January 21, 2016 and in September 2016 she told the investigator that her father had penetrated her "three months" before meaning sometime around June 20, 2016. Neither the minor's testimony nor any other evidence independent of Ruiz's confession indicates that Ruiz engaged in any sex act with the minor before her 11th birthday. The court stated:

> Although, as we have discussed, corpus delicti evidence can be quite slight, we think it a bridge too far to hold that corpus delicti evidence of sexual abuse identified by the victim as beginning around a particular time supports the inference that sexual assault of different kind occurred more than five months earlier. None of the cases cited by the People support such a holding. (Citations).

Ruiz at p. 393-394.

As in *Ruiz, supra,* satisfying corpus delicti in the instant case for counts 7, 9 and 10 is even more tenuous than the "bridge too far" analogy set forth above.

In summary, what did this rational jury think when they heard Jane Doe 2 testify to facts which were entirely different from the charges? And then in deliberation when they did not fit the verdict forms at all?

The jury was obviously troubled by this case when they asked for a readback of Jane Doe 2's testimony, two readbacks of appellant's testimony (2 ER 227, 229, 2330 and was unable to reach a verdict on three of the counts involving Jane Doe 2 (5 ER 712; 2 ER 238.)

In argument, the prosecutor relied *exclusively* on the extrajudicial statements of the appellant as to count 7, reminding the jury appellant had told the detectives he "rubbed her butt." (4 ER 603.)

Likewise as to counts 9 and 10, the prosecutor reminded the jury of appellant's extrajudicial statement that he touched Jane Doe 2 at the Wintergrass Court (Riverside County) residence. (4 ER 603-604.)

But Jane Doe 2 never testified to any touchings of her buttocks (count 7).

Jane Doe 2 never testified to any touchings at the Wintergrass Court house (counts 9 & 10), and she testified appellant never touched her vagina again after

the one time at the Alvarado house. (3 ER 449, 452, 460, 461.)

But the prosecutor was faced with the instruction given to the jury on corpus delicti, CALCRIM 359, in pertinent part it states:

> The defendant may not be convicted of any crime based on his out-of-court statements alone. You may rely on the defendant's out-of-court statements to convict him only if you first conclude that the other evidence shows that the charged crime was committed.

.....

There is more to the instruction but there is no way the prosecutor could get by the first paragraph as to Jane Doe 2 because her in court testimony did not match up at all with what was charged in counts 7, 9 and 10. That first paragraph was a road block which, under the law as set forth in *Jackson v. Virginia*[3], he could not surmount.

2. The Federal Courts Are Bound By the CCA's Interpretation of California Law Unless Its Interpretation is So Arbitrary or Capricious That it Violates Due Process and That is Exactly What Happened Here

In *Richmond v. Lewis*, 506 U.S. 40, 50 (1992) the Supreme Court of the United States held that a state court's application of state law does not raise a cognizable federal question unless it was so arbitrary or capricious as to constitute an independent due process violation. It is submitted that the CCA's application

[3]443 U.S. 307 (1979)

of the corpus delicti rule is arbitrary and capricious in this case and denies federal due process.

The CCA was faced with a very detailed set of charges in counts 7, 9 & 10. The District Court decision at 1 ER 26 concluded correctly that Jane Doe 2's testimony provided no direct evidence to support those three counts and that should have been the end of it under the corpus delicti rule. But it was not because of the prosecution misconduct in argument, later to be discussed.

As to the CCA, that court relied on the same cases ruled inapposite by the *Ruiz* court at p. 393[4] to basically make an unreasonable end run around the corpus delicti jury instruction and law of the state.

Although a federal habeas petitioner generally may not bring a cognizable federal habeas claim based merely on an erroneous application of state law, there is a well-recognized exception providing that a Fourteenth Amendment violation can arise from a state court decision involving an arbitrary application of state law or an erroneous factual finding amounting to fundamental unfairness.

Already pointed out above is *Richmond v. Lewis*, *supra,* at p. 50 holding that a state court's application of state law does not rise to the level of a federal

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[4] *People v. Tompkins,* 185 Cal.App. 4th 1253, 1260 (2010); *People v. Culton* 11 Cal.App.4th 363, 372-373 (1992).

due process violation unless it was so arbitrary or capricious as to constitute an independent due process violation); *Fetterly v. Paskett*, 997 F.2d 1295, 1300 (9th Cir. 1993) ("[T]he failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state."); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (holding that a state statute which vested sentencing discretion in a jury created "a substantial and legitimate expectation that [a defendant] will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.") (citation omitted).

Here, both the trial court and the CCA erred under state law by, in the case of the trial court, giving no effect to the corpus delicti jury instruction when a motion for judgment of acquittal was filed and the CCA when, except for a dissenting justice, made the same error of affirming convictions on insufficient evidence and in violation of the corpus delicti law as exemplified by the jury instruction. CALCRIM 359.

CONCLUSION

The petition for certiorari should issue for the convictions of counts 7, 9 and 10 of appellant.

Respectfully submitted,
/s/Charles R. Khoury Jr.

CERTIFICATE OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel hereby certifies that he is unaware of any related cases.

Date: September 22, 2021

Respectfully submitted
/s/Charles R. Khoury Jr.
By Appointment of the Court of Appeals

CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULE 32-1

This brief complies with the length limits permitted by Rule 32-1. The brief is under 40 pages excluding exempted portions. The brief's type size and type face comply with FRAP 32 (a) 5and (6).

/s/ Charles R. Khoury Jr. September 22, 2021

IN THE

SUPREME COURT OF THE UNITED STATES

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AMEZCUA v. LIZARRAGA

PROOF OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and not a party to this action and that on this 22ND Day of SEPTEMBER 2021 a petition for In Forma Pauperis Status and petition for Certiorari with volume of exhibits, were e- mailed to the email of counsel for the Respondent jennifer.jadovitz@doj.ca.gov
I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,
/s/CHARLES R. KHOURY JR.

Executed on September 22, 2021

Charles R. Khoury Jr.
By: _____
/S/CHARLES R. KHOURY JR.
Attorney for PETITIONER