No. _____

IN THE

Supreme Court of the United States

JESUS CORONA,

Petitioner,

v.

JAMES HILL, ACTING WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a criminal defendant state a prima facie case of vindictive prosecution, trigging a presumption of vindictiveness, when the day after he succeeds in getting half the prosecution's case dismissed after representing himself in a preliminary hearing, the prosecutor files new charges, based on the same facts, that result in a sentence nearly twice as long as the stayed sentence ultimately imposed on the charges sustained at the preliminary hearing?

2. Does the failure of counsel on state direct appeal to raise the foregoing vindictive prosecution claim establish cause and prejudice to excuse a procedural default when there was no valid reason for failing to raise the claim and the claim was the only one certified for appeal in federal habeas, reflecting that it was petitioner's strongest federal constitutional claim?

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner Jesus Corona and Respondent James Hill, Acting Warden of the California Institution for Men.[1] The California Attorney General represents Respondent.

On May 16, 2014, a San Bernardino County, California jury found Petitioner guilty of three counts of second degree robbery and found true the special allegation that he used a firearm in committing the robberies in *People v. Corona*, case no. FWV1200093. 2 RT 300-302.[2] On May 19, 2014, after a bifurcated trial, San Bernardino County Superior Court Judge Gregory S. Tavill found true that Petitioner had a suffered a prior robbery conviction. 2 RT 308-310. On July 17, 2014, Judge Tavill sentenced Petitioner to 51 years in state prison. 2 RT 317, 319. On November 13, 2014, after the California Department of Corrections noticed an error in the sentence, Judge Tavill re-sentenced Petitioner to a sentence of 37 years, eight months. 11/13/14 RT 1-10.

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[1] Although Neil McDowell is named as Respondent in the Ninth Circuit's memorandum opinion affirming the judgment, the website for the California Department of Corrections and Rehabilitation indicates that Corona is currently held in State custody at the California Institution for Men in Chino, California, and that James Hill is the Acting Warden of that facility. *See* https://www.cdcr.ca.gov/Facility-Locator/CIM/ (last visited, December 3, 2021). Accordingly, Corona names Hill as Respondent in this Petition rather than McDowell. *See* Supreme Court Rule 35.3.

[2] "RT" refers to the reporter's transcript of trial lodged in district court at docket 29, lodgment 19.

The California Court of Appeal, per Justice Jeffrey King, Acting Presiding Justice Art W. McKinster, and Justice Douglas P. Miller, affirmed the judgment on appeal in an unpublished opinion filed September 25, 2015 in *People v. Corona*, case no. E061580. Pet. App. 84-96.[3] The California Supreme Court denied Corona's petition for review on December 9, 2015 in case no. S230367. Pet. App. 83.

On February 6, 2017, Judge Tavill summarily denied Corona's *pro se* habeas petition raising the vindictive prosecution claim that is the subject of this Petition in San Bernardino County Superior Court case no. WHCJS1600208. Pet. App. 80-82. On May 4, 2017, the California Court of Appeal, per Acting Presiding Justice Marsha G. Slough, Justice Manuel A. Ramirez, and Justice Thomas E. Hollenhorst, summarily denied Corona's *pro se* habeas petition reasserting his vindictive prosecution claim in case no. E068080. Pet. App. 78. On September 13, 2017, the California Supreme Court summarily denied Corona's *pro se* petition reasserting his claim in case no. S242936. Pet. App. 77.

On June 12, 2019, United States Magistrate Judge Shashi H. Kewelramani filed a report recommending that Corona's federal habeas petition be dismissed with prejudice in *Corona v. McDowell*, C.D. Cal. case

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[3] "Pet. App." refers to the appendix of documents attached to this Petition. Supreme Court Rule 14(i).

no. ED CV 17-00413-AG (SHK). Pet. App. 44-76. On November 9, 2019, United States District Judge Andrew J. Guilford accepted the Magistrate Judge's recommendation, denied Corona's petition, and dismissed the action with prejudice. Pet. App. 42-43. Judgment was entered against Corona on November 13, 2019. District court docket. The district court granted a certificate of appealability on the issue raised in this Petition. Pet. App. 41.

On July 12, 2021, the Ninth Circuit Court of Appeals, per the Honorable D.M. Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation, Circuit Judge Paul J. Watford, and Circuit Judge Patrick J. Bumatay, affirmed the judgment against Corona in an unpublished memorandum decision in *Corona v. McDowell*, case no. 19-56458. Pet. App. 36-39.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jesus Corona petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals affirming the judgment against him in this habeas corpus action.

OPINIONS BELOW

The Ninth Circuit's memorandum decision affirming the judgment of the district court against Corona is unreported. Pet. App. 36-39. The district court's final judgment dismissing Corona's *pro se* habeas corpus petition with prejudice is unreported. Pet. App. 42. The magistrate judge's report recommending the dismissal of Corona's petition is unreported. Pet. App. 44-76.

The orders by the California Supreme Court, California Court of Appeal, and San Bernardino County Superior Court summarily denying Corona's *pro se* petitions are unreported. Pet. App. 77-82.

JURISDICTION

The Ninth Circuit's unpublished memorandum decision affirming the district court's judgment against Corona was filed and entered on July 12,

2021. Pet. App. 36; Ninth Circuit docket. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This Petition is timely under Supreme Court Rule 13.1 and the Court's orders of March 19, 2020 and July 19, 2021 providing that "in any case in which the relevant lower court judgment . . . was issued prior to July 19, 2021, the deadline to file a petition for writ of certiorari remains extended to 150 days from the date of the judgment" (here, to December 9, 2021).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the U.S. Constitution

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254(a)

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(e)

"(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

STATEMENT OF THE CASE

I. Pre-Trial

On January 8, 2012, an Auto Zone store in Rancho Cucamonga, San Bernardino County, California was robbed. Pet. App. 85. Two days later, Petitioner Jesus Corona was charged in a felony complaint with two counts of second-degree robbery of Auto Zone employees Jonathan Edwardson (Count 1) and Juan Carrillo (Count 2) and two counts of kidnapping (of Edwardson in Count 3 and of Carrillo in Count 4). It was further alleged as to count(s) 1, 2, 3, 4 pursuant to Penal Code section 667(a)(1) that Corona had suffered a prior conviction for a serious felony -- robbery -- in 1991. Corona pleaded not guilty and denied the special allegation and the prior conviction.

A first amended complaint filed on March 26, 2012 added counts of robbery (Count 5) and kidnapping (Count 6) of Auto Zone employee Ricardo Canales. Pet. App. 111-115. The prosecution added a special allegation that Corona personally used a firearm in committing all the charged crimes. Pet. App. 113. Corona again pleaded not guilty and denied the special allegation and prior conviction. 1 clerk's transcript of trial ("CT") 19.[4]

By September 2012, Corona had two cases pending: San Bernardino County Superior Court case number FWV1200093, designated as the lead case, and in which the aforementioned complaints had been filed; and San Bernardino County Superior Court case number FWV1200156, designated as the trailing case. Pet. App. 86.

Corona represented himself *pro se* at the preliminary hearing held on April 24, 2013. Pet. App. 104-110. The prosecution presented Auto Zone employees Edwardson, Carrillo and Caneles and San Bernardino County sheriff's deputy Juan Aguirre. Corona cross-examined each witness at length but did not present any affirmative evidence. Pet. App. 105-106.

The prosecution asked that Corona be held to answer on all charges. Pet. App. 106. The court replied: "Before I hear from Mr. Corona, I would

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[4] Respondent lodged the CT (two volumes) in district court. *See* docket 29, lodgment 20. All references to "docket" are to the district court's docket, unless otherwise noted.

like to ask the DA to establish for me what they believe [they have] introduced that will support Counts 1, 3 and 5, specifically kidnapping to commit another crime, robbery. . . . I cannot find anything that makes this a crime of kidnapping for the purposes of robbery." Pet. App. 106-107. After hearing from the prosecutor, the court ruled that it would not hold Corona to answer on the kidnapping charges because the prosecution did not "show that the movement was to increase the risk of harm" to the store employees. Pet. App. 109. The court found sufficient cause to hold Corona to answer the three counts of robbery and the allegation that he "personally used a firearm, to wit, a handgun," in committing robbery. Pet. App. 110.

The next day, April 25, 2013, the prosecution filed an information replacing the rejected kidnapping charges with charges of assault with a semiautomatic firearm in violation of Penal Code § 245(b): Count 2 regarding Auto Zone employee Edwardson; Count 4 regarding Auto Zone employee Carrillo; and Count 6 regarding Auto Zone employee Canales. Pet. App. 97-103. Corona pleaded not guilty to all counts and denied the special allegation and prior.

II. Trial

Trial began on May 13, 2014 before Judge Gregory S. Tavill. Corona was represented by counsel at trial. Pet. App. 85, 96. The prosecution filed

another amended information and Corona pleaded not guilty to all counts. 2 CT 207-213, 215. The jury was sworn the next day. 1 RT 68-69.

Auto Zone employee Edwardson testified for the prosecution and identified Corona as the person who took money from the store on January 8, 2012. 1 RT 87-89. He testified that he phoned the sheriff's department after he became suspicious of Corona as he walked around the store. 1 RT 89; 2 RT 120. He testified that Corona generally pointed his gun in a downward direction and waved it to get the store employees to move and that Corona never asked for or took anything from him (he had a wallet and keys). 2 RT 122, 130, 134.

Auto Zone manager Carrillo also identified Corona. 2 RT 137-138. Carrillo testified that he took money from the safe, put it in a bag, and gave it to Corona. 2 RT 145, 153. He testified that Corona never asked for or took personal items from him and that Corona did not point his gun at the employees but instead held it in a downward direction. 2 RT 153, 155. He said that Corona never really pointed the gun at anyone. 2 RT 155.

Auto Zone employee Canales also identified Corona. 2 RT 157-158. He testified that Corona said he that he was there to rob Auto Zone, not any employees. 2 RT 184. He nevertheless claimed that Corona asked him and the others to empty their pockets and that he handed Corona his cell phone and whatever else was in his pockets. He acknowledged that he had never

told anyone this before trial. 2 RT 183-184, 191. He also testified that although Corona took his cell phone, wallet and keys, most or all of his property was returned to him. 2 RT 190.

San Bernardino County Deputy Sheriffs Andrew McCoy and Juan Aguirre testified to apprehending Corona soon after Corona left the Auto Zone store. 2 RT 193, 199, 208-210, 219. Aguirre found a plastic bag containing money nearby. 2 RT 219. Aguirre testified that he never learned or heard of Corona trying to take any personal property from any of the three Auto Zone employees, and that this allegation is not reflected in any police reports, either. 2 RT 230-231.

The defense did not present any evidence. 2 RT 235. The court denied the defense motion to dismiss the assault charges. 2 RT 233. The prosecution emphasized in closing that Corona took Auto Zone's money: "Whoever is working at the store is in control of the store's property and they're rightfully in possession of it." 2 RT 267.

Defense counsel conceded in closing that Corona robbed the Auto Zone with a gun but that the case was overcharged. 2 RT 277. Counsel argued that only Carrillo had control over the money and the two other employees were not the victims of a robbery. 2 RT 279. Counsel argued that there was no assault and that Corona did not intend to commit assault; the gun was used only to direct the employees around the store. 2 RT 279-281. Counsel

argued that there was reasonable doubt on the assault charges and urged the jury to find Corona not guilty on those counts (Counts 2, 4 and 6). 2 RT 282-283. The jury found Corona guilty on all counts and found the gun use allegation true. 2 RT 300-302.

On May 19, 2014, in the bifurcated trial on Corona's prior, the court found the March 12, 1991 robbery conviction by guilty plea true. 2 RT 308-310. The court struck the part of the gun enhancement allegation "that makes it a gang case." 2 RT 310-311. The judge said that "[t]his is clearly not a gang case based on the evidence." 2 RT 311.

On July 17, 2014, Judge Tavill denied Corona's motion to dismiss the prior robbery strike and sentenced him to 51 years in state prison. 2 RT 317, 319. The trailing case was dismissed. 2 RT 324.

The probation report filed before sentencing noted that Corona was married with three children; that at the time of the Auto Zone offense he was having family problems, had taken heroin, and was suicidal; that he had used heroin daily since 1989; and that he did not mean to harm the Auto Zone employees and "[i]f he could go back, he would not do it again." 2 CT 290, 293-294 (docket 29-15). This drug history is consistent with the account in Dr. Abdulmumin's competency report before trial, which noted Corona's "extensive history of drug abuse starting at age 16 when he was a Polysubstance abuser" and that "[a]t about age 21 he began using heroin and

became dependent on it." Docket 27-12 at ECF page 91. Dr. Abdulmumin reported that Corona "has been in several substance treatment programs." *Id.* Competency expert Aberra also noted that Corona abused heroin on a daily basis since 1989 and diagnosed him with opioid dependence. Docket 27-12 at ECF page 87.

After the Department of Corrections noted an error in the sentence, Corona was re-sentenced by Judge Tavill on November 13, 2014. 11/13/14 RT 1-2. In resentencing Corona, the court emphasized that Corona "tried not to hurt anybody"; "he was careful to make sure nobody got hurt. In fact, nobody did get hurt." 11/13/14 RT 3. The court resentenced Corona to 37 years, 8 months: 22 years on Count 2 (assault), used as the principle term; 5 years, 4 months consecutive each on Counts 4 and 6 (both assault); plus five years for the prior conviction. 11/13/14 RT 7-9. The court sentenced Corona to a total of 20 years on the robbery convictions (Counts 1, 3, and 5) but stayed that sentence, keeping the total commitment in state prison at 37 years, 8 months. 11/13/14 RT 9-10.

III. State Appeal

Mark Hart represented Corona on direct appeal. Pet. App. 84. On appeal, Corona raised two claims: (1) that the trial court violated the Sixth Amendment by revoking Corona's *pro se* status and forcing him to proceed with counsel; and (2) that the trial court violated the Sixth Amendment by

denying Corona's requests to replace his lawyer based on the irreconcilable breakdown in the attorney-client relationship. Pet. App. 45-46, 85; docket 29, lodgment 16 at 15-38. The California Court of Appeal rejected both claims in an unpublished opinion filed on September 25, 2015. Pet. App. 84-96. Corona reasserted both claims in a petition for review filed in the California Supreme Court. Pet. App. 45-46; docket 29, lodgment 2 at 5-17. The court denied the petition on December 9, 2015. Pet. App. 83. Corona did not file a petition for a writ of certiorari in the United States Supreme Court. Docket 19 at 6.

IV. State and Federal Habeas Corpus Actions

On October 24, 2016, after his conviction was affirmed on appeal, Corona filed a *pro se* habeas corpus petition in Superior Court raising the vindictive prosecution claim certified by the district court and other claims. Pet. App. 45-46; docket 29, lodgment 6 at ECF pages 3, 49-51. On February 6, 2017, the court denied the petition on the merits and on procedural grounds in an order discussed further below. Pet. App. 80-82.

On March 3, 2017, Corona timely filed a federal habeas petition and a motion to stay the federal case pending the exhaustion of state remedies. Pet. App. 46; dockets 1, 3. On March 7, 2017, United States Magistrate Judge Andrew J. Wistrich granted the motion. Pet. App. 46; docket 5.

On April 17, 2017, Corona filed a habeas petition in the California Court of Appeal raising his vindictive prosecution claim and other claims. Docket 29, lodgment 10 at ECF pages 13-14 (vindictive prosecution claim). The court denied relief on May 4, 2017 in an order stating: "The petition for writ of habeas corpus is DENIED." Pet. App. 78.

Corona reasserted, and exhausted, his claims in a habeas petition filed in the California Supreme Court on July 3, 2017. Docket 29, lodgment 12 at ECF pages 13-14 (vindictive prosecution claim). The court summarily denied the petition on September 13, 2017 in an order stating that the petition for writ of habeas corpus is denied. Pet. App. 77.

On September 27, 2017, Corona moved for leave to file an amended federal petition. Docket 16. United States Magistrate Judge Shashi Kewalramani granted the motion and directed the clerk to file the attached first amended petition as of the date it was received. Dockets 18-19.

On June 12, 2019, after Respondent filed an answer and Corona a traverse, Magistrate Judge Kewalramani filed a report recommending that the petition be denied. Pet. App. 62. The report is discussed in more detail below. On November 13, 2019, United States District Judge Andrew J. Guilford entered an order accepting the recommendation and entered judgment denying Corona's petition and dismissing it with prejudice. Pet. App. 40-43. The next day, Judge Guilford entered an order granting a

certificate of appealability on Corona's "claim that the prosecutor committed misconduct by vindictively filing additional charges after the state trial court found that at least one of the state's claims were insufficient to go forward following the preliminary hearing." Pet. App. 41. On July 12, 2021, the Ninth Circuit affirmed the judgment against Corona in an unpublished memorandum decision, without holding oral argument. Pet. App. 36.

REASONS FOR GRANTING THE WRIT

I. Standards of Review and AEDPA Standards

Corona filed his federal habeas petition after the effective date of AEDPA; therefore his petition is governed by AEDPA. *Woodford v. Garceau*, 538 U.S. 202, 204, 210 (2003). To obtain relief under AEDPA, a petitioner must show that his constitutional rights were violated under 28 U.S.C. § 2254(a) and that § 2254(d) does not bar relief on any claim adjudicated on the merits in state court. *Frantz v. Hazey*, 533 F.3d 724, 735-36 (9th Cir. 2008) (en banc).

Under § 2254(d), a habeas petition challenging a state court judgment:

> shall not be granted with respect to *any claim that wasadjudicated 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.

(Emphasis added.) If the claim was not adjudicated on the merits by the state court, § 2254(d) does not apply and the federal court reviews the claim *de novo*. *Amado v. Gonzalez*, 758 F.3d 1119, 1130 (9th Cir. 2014). But "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the sate court to deny relief." *Id.* at 98.

The relevant state court decision for purposes of federal review is "'the last reasoned decision' that finally resolves the claim at issue." *Id.*; *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Federal habeas courts typically "look through" later unexplained state court decisions to analyze "the last related state-court decision that . . . provide[s] a relevant rationale." *Wilson*, 138 S. Ct. at 1192. However, parties may rebut the "look through" presumption by showing that the unexplained affirmance most likely relied on different grounds than the lower court's decision. *Id.*

"'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). "Only Supreme Court holdings clearly establish federal law for the purposes of § 2254(d)(1), but circuit precedent is persuasive authority in assessing what law is 'clearly established' and whether the state court applied the law reasonably." *Smith v. Ryan*, 823 F.3d 1270, 1279 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1091 (2017).

A "'state court decision is "contrary to" clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases *or* if the state court confronts a set of facts materially indistinguishable from those at issue in a decision of the Supreme Court and, nevertheless, arrives at a result different from its precedent.'" *Cudjo v. Ayers*, 698 F.3d 752, 761 (9th Cir. 2012) (original emphasis).

A state court unreasonably applies federal law when it identifies the correct governing legal principle but unreasonably applies it to the facts of the case. *Id.* "That the standard is stated in general terms does not mean the application was reasonable. AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *Wiggins*

v. Smith, 539 U.S. 510, 520 (2003) ("[a] federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'").

A state court unreasonably determines the facts under § 2254(d)(2) when its finding of fact is unsupported or contradicted by the record or when the fact-finding process itself was defective. *Brumfield v. Cain*, 135 S. Ct. 2269, 2278-81 (2015); *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004).

When a federal habeas court concludes that the state court decision is contrary to or an unreasonable application of federal law, or is based on an unreasonable factual determination, it reviews the claim *de novo* in assessing whether the petitioner's constitutional rights were violated. *Panetti*, 551 U.S. at 953; *Maxwell v. Roe*, 628 F.3d 486, 506 (9th Cir. 2010).

II. The District Attorney Engaged in Vindictive Prosecution in Violation of Corona's Right to Due Process by Filing Additional Charges After Three Counts Were Dismissed for Insufficient Evidence at the Preliminary Hearing

Ground Four of Corona's first amended habeas corpus petition alleges that the district attorney engaged in vindictive prosecution by amending the information to add three counts of assault with a firearm the day after three counts of kidnapping to commit robbery were dismissed at the preliminary hearing for insufficient evidence. Docket 19 at ECF pages 7, 29-30.

It is clearly established federal law that a prosecutor violates a defendant's due process rights by filing charges or increasing the severity of charges to punish a defendant for exercising a statutory or constitutional right. *Bordenkircher v. Hayes*, 434 U.S. 357, 362-363 (1978) (28 U.S.C. § 2254 case); *Blackledge v. Perry*, 417 U.S. 21, 25-26 (1974) (same); *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969); *Nunes v. Ramirez-Palmer*, 485 F.3d 432, 441 (9th Cir. 2007) (AEDPA case). This rule applies to a prosecutor's "pretrial decision to modify the charges against the defendant." *United States v. Goodwin*, 457 U.S. 368, 380 (1982).

"'To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant the appearance of such.'" *Nunes*, 485 F.3d at 441. "If the defendant provides 'evidence indicating a realistic or reasonable likelihood of vindictiveness' this 'gives rise to a presumption of vindictiveness on the government's part.'" *Id.* at 441-442. "The burden then shifts to the prosecution to show that 'independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions.'"" *Id.* at 442.

Here, just one day after Corona exercised his right to represent himself and challenge the government's case at his preliminary hearing, and succeeded in having the court dismiss three of the six charges against him -- all of the kidnapping counts -- the prosecutor reloaded and filed three new

counts of assault with a firearm. If the district attorney had probable cause for these counts in the first place he would have filed them before the preliminary hearing. *In re Bower*, 38 Cal. 3d 865, 877 (1985) (applying presumption of prosecutorial vindictiveness where prosecutor offered no new facts to support new charges alleged after petitioner moved for mistrial); *Twiggs v. Superior Court*, 34 Cal. 3d 360, 372 (1983) (similar). These counts became the most contested charges at trial, with the defense moving to dismiss them at the close of the prosecution's case and then arguing at closing that the government failed to prove the charges. Corona's conviction on these counts resulted in his sentence of 37 years, 8 months. The sentence of 20 years on the robbery convictions was stayed. Thus, the added counts resulted in a much longer sentence for Corona.

These circumstances "provide[] 'evidence indicating a realistic or reasonable likelihood of vindictiveness'" and thus "'give[] rise to a presumption of vindictiveness on the government's part.'" The State has not shown that 'independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions.'"'

Corona raised his vindictive prosecution claim in state habeas. The last reasoned state court decision on the claim is by the San Bernardino County Superior Court. Although the court did not mention the claim by name -- it did so with an ineffective assistance of counsel claim -- it stated

that "[a]ssuming the facts alleged in the petition are true, petitioner fails to allege facts establishing a *prima facie* case for habeas relief." Pet. App. 80. The court also said that "Petitioner has failed to explain and justify the significantly delay in seeking habeas relief," citing *In re Clark*, 5 Cal. 4th 750, 765 (1993), and *In re Swain*, 34 Cal. 2d 300, 302 (1949), and that "[t]he petition raises issues that could have been raised on appeal, but were not." Pet. App. 81.

Respondent asserted in district court that the prosecutorial misconduct claim is procedurally defaulted and fails on the merits. Docket 26 at 2. Procedural default is an affirmative defense that the State must plead and prove. *Bennett v. Mueller*, 322 F.3d 573, 585 (9th Cir. 2003); *see also Zapien v. Martel*, 849 F.3d 787, 794 n.3 (9th Cir. 2015); *Ayala v. Chappell*, 829 F.3d 1081, 1095 n.7 (9th Cir. 2016). Corona argued that he could show cause and prejudice to excuse any defaults. Pet. App. 49; docket 37 at ECF pages 14-15. The magistrate judge did not resolve the procedural default issue but instead just denied the claim on the merits. Pet. App. 49, 57-58.

On the merits, the state court's summary denial is unreasonable under 28 U.S.C. § 2254(d)(1) and (d)(2), and therefore the Court reviews this claim *de novo* and may grant fact development and relief. *Supra* at 16. Just one day after Corona exercised his constitutional right to challenge the evidence against him at the preliminary hearing *pro se*, and succeeded in getting half

the case tossed out, the prosecutor filed new charges that resulted in a sentence of 37 years, nearly twice as long as the stayed sentence on the counts sustained at the preliminary hearing. These facts "warrant the appearance" of prosecutorial vindictiveness and therefore establish a prima facie case, one that the State has failed to rebut. *Nunes*, 485 F.3d at 441-442.

The reasons given by the magistrate judge to deny relief do not pass muster. The magistrate judge criticized Corona for "offer[ing] no evidence that the prosecutor" filed the additional assault charges "to punish Petitioner for representing himself at the preliminary hearing." Pet. App. 58. But a petitioner need not show "direct evidence of actual vindictiveness" to establish a prima facie case, but instead can just present "facts that warrant the appearance of such." *Nunes*, 485 F.3d at 441-442; *Perry*, 417 U.S. at 28 ("There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist."). Corona has presented facts showing an appearance of vindictiveness, and the state court's ruling that he did not present a prima facie case is contrary to and an unreasonable application of clearly established federal law and is based on an unreasonable determination of the facts.

The magistrate judge cited *Bordenkircher* for the proposition that "[t]he Supreme Court has stated that if there is probable cause to support the new charges, without more, Petitioner's claim of vindictive prosecution will fail." Pet. App. 58. But the context of the Court's statement in *Bordenkircher* is important, and different from the facts presented here. "The question in" *Bordenkircher* was "whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged." 434 U.S. at 358. *Bordenkircher* concluded that "the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment." *Id.* at 365.

Criminal defendants do not have a constitutional "right to have a guilty plea accepted," *Santobello v. New York*, 404 U.S. 257, 262 (1971), and Corona's claim does not involve plea negotiations. Rather, his claim that the prosecutor added new charges after he exercised his constitutional rights to represent himself and confront and cross-examine prosecution witnesses at his preliminary hearing. Corona is entitled to relief because, as *Bordenkircher* states, "[t]o punish a person because he has done what the law

plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" 434 U.S. at 363.[5] Relief was unavailable in *Bordenkircher*for reasons not present here: because "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation as long as the accused is free to accept or reject the prosecution's offer." 434 U.S. at 363; *Twiggs*, 34 Cal. 3d at 371 (distinguishing the cases governing plea bargaining and noting that they do not preclude a finding of vindictiveness where the added charges were not part of the give-and-take of plea negotiations). Corona had no such freedom in his case, but instead had to defend against the new charges at trial. The Court should grant relief and vacate the assault convictions. *Perry*, 417 U.S. at 31.

Although the Ninth Circuit did not reach the merits of the vindictive prosecution claim, it adopted the arguments relied upon by the magistrate judge in holding that Corona could not establish cause and prejudice to excuse the default on the claim. Pet. App. 37-38. These arguments are insufficient to deny relief for the reasons explained above.

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[5] This rule against vindictive prosecution is also set forth in *Pearce, Perry* and *Goodwin*, and in *Colten v. Kentucky*, 407 U.S. 104 (1972), *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), and *United States v. Jackson*, 390 U.S. 570 (1968), cited in *Bordenkircher*, 434 U.S. at 363.

If the Court is not inclined to grant relief on the current record, it should vacate the judgment of the Ninth Circuit and remand for an evidentiary hearing to allow Corona to further prove his entitlement to relief. Because Corona (1) has presented a colorable claim; (2) has never been afforded a state or federal hearing on his claim; and (3) diligently presented the factual basis of his claim in state court; and because (4) § 2254(d) does not bar relief, he is entitled to an evidentiary hearing if the Court declines to grant relief on the current record. *Earp v. Ornoski*, 431 F.3d 1158, 1166-67 (9th Cir. 2005); *Schriro v. Landrigan*, 550 U.S. 465, 468, 474, 481 (2007).

III. The State Has Not Proven Its Procedural Default Defense, But Even Assuming It Has, Corona Has Established Cause and Prejudice to Excuse the Default

A. Respondent Has Not Proven His Affirmative Defense of Procedural Default

Federal habeas review may be unavailable "if the decision of the [state court] rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Walker v. Martin*, 562 U.S. 307, 315 (2011). A state procedural rule is adequate only if it is "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994). "The question whether a state procedural ruling is adequate is itself a question of federal law." *Beard v. Kindler*, 558 U.S. 53, 60 (2009).

A state procedural default that rests on an ambiguous order does not bar federal merits review and a "state procedural default [is] no bar to federal review where [the] state court's order did not specify which rule applied to which claims." *Washington v. Cambra*, 208 F.3d 832, 834 (9th Cir. 2000); *see also Chambers v. McDaniel*, 549 F.3d 1191, 1197 (9th Cir. 2008) ("unless a court expressly (not implicitly) states that it is relying upon a procedural bar, we must construe an ambiguous state court response as acting on the merits of a claim, if such a construction is plausible").

"[I]t is the actual practice of the state courts, not merely the precedents contained in their published opinions, that determine the adequacy of procedural bars preventing the assertion of federal rights." *Powell v. Lambert*, 357 F.3d 871, 879 (9th Cir. 2004). Because "the California Supreme Court's published decisions explaining its application of the untimeliness bar . . . concern only a tiny percentage of the total number of claims that court has reviewed," "unpublished decisions are a particularly useful means of determining actual practice." *Dennis v. Brown*, 361 F. Supp. 2d 1124, 1134 (N.D. Cal. 2005); *Powell*, 357 F.3d at 879; *see also Dennis*, 361 F. Supp. 2d at 1132 ("it is established that a federal court must review unpublished state-court decisions to determine state-court practice").

Procedural default is an affirmative defense. *Gray v. Netherland*, 518 U.S. 152, 165 (1996). "[T]he state must plead, and it follows, prove the

default." *Bennett v. Mueller*, 322 F.3d 573, 585 (9th Cir. 2003); *see also id.* at 585-586 ("the ultimate burden of proving the adequacy of the California state bar is upon the State of California."). Here, Respondent has not proven his defense.

In district court, Respondent asserted his procedural default defense in his answer. Respondent alleged that Ground Four, containing the vindictive prosecution claim, was "procedurally defaulted as untimely under state law" and also because the claim was "based exclusively on the appellate record" and "could have been but [was] not raised on direct appeal." Docket 26-1 at ECF page 13. In district court and the Ninth Circuit, Respondent cited *Walker v. Martin*, 562 U.S. 307, for the point that "California's timeliness requirement for state habeas petitions is an independent state ground that is 'adequate' to bar habeas corpus relief in federal court." *Id.* Respondent cited *Johnson v. Lee*, 136 S. Ct. 1802, 1804 (2016), for the point that "California's rule barring consideration on habeas corpus review of claims that that could have been, but were not, raised on direct appeal" is also an independent and adequate state bar precluding federal review. *Id.* Respondent did not present or cite any unpublished orders or other evidence establishing that either bar was clear, consistently applied, and well-established at the time of the purported default.

In his traverse in district court, Corona disagreed that his claim was defaulted and argued that the ineffective assistance of his appellate attorney excused any default. Docket 37 at ECF pages 2, 15. He also raised a separate substantive claim in his amended petition alleging that appellate counsel was ineffective in failing to raise issues that were apparent from the trial record. Docket 19 at ECF pages 8, 30-31; docket 37 at ECF page 33; Pet. App. 49.

Based on his filings in district court, Respondent has failed to meet his burden of proving that the asserted bars were consistently applied at the time of the alleged defaults here. He did not show "the actual practice of the state courts" via unpublished orders, but instead relied "merely [on] the precedents contained in their published opinions." *Powell*, 357 F.3d at 879; *see also Dennis*, 361 F. Supp. 2d at 1132.

Even assuming that Respondent has established his defense with respect to the "*Dixon* bar," *i.e.*, the rule of *Ex Parte Dixon*, 41 Cal.2d 756, 758 (1953), that a defendant cannot raise in habeas corpus claims that could have been, but were not raised on appeal, he has not done so with regard to the timeliness bar for habeas petitions. A review of the Superior Court's ruling, the cases it cites, and Respondent's position on procedural bars before that court shows that the court did not clearly rule that Corona's habeas petition, or in particular the vindictive prosecutorial claim, was untimely.

Respondent's procedural default defense rests on two sentences of the Superior Court's order denying habeas relief. The first says: "Petitioner has failed to explain and justify the significant delay in seeking habeas relief. (*In re Clark* (1993) 5 Cal. 4th 750, 765; *In re Swain* (1949) 34 Cal.2d 300, 302.)." 1-ER-40.

The second says: "The petition raises issues that could have been raised on appeal, but were not, and Petitioner has failed to allege facts establishing an exception to the rule barring habeas consideration of claims that could have been raised on appeal. (*In re Reno* (2012) 55 Cal.4th 428, 490-493; *In re Harris* (1993) 5 Cal.4th 813, 825-826; *In re Dixon* (1953) 41 Cal.2d 755, 759; *In re Smith* (1911) 161 Cal. 208.)." *Id.*

Page 765 of *Clark* cites three procedural bars: (1) the timeliness rule that a petitioner must "explain and justify any significant delay in seeking habeas corpus relief"; (2) the *Dixon* bar for raising claims that could have been but were not raised on appeal; and (3) the *Waltreus*[6] bar, which states that issues resolved on appeal will not be reconsidered in habeas. Respondent is not invoking *Waltreus*, and *Waltreus* bars do not preclude federal merits review. *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991); *LaCrosse v. Kernan*, 244 F.3d 702, 705 n.11 (9th Cir. 2001).

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[6] *In re Waltreus*, 62 Cal. 2d 218 (1965).

Page 302 of *Swain* states that "it is the practice of this court to require that one who belatedly presents a collateral attack such as this explain the delay in raising the question. Such an explanation is particularly necessary in the present case, where petitioner did not appeal from the judgment of conviction and [has filed] ten previous attacks on its validity . . . ." (Footnote omitted.)

Given that the order's pincites to *Clark* and *Swain* reference both the timeliness rule for habeas petitions and the rule barring claims that could have been but were not raised on appeal, and that the order does not say which bars apply to which claims, the order does not provide the required clarity to enforce a procedural default based on the habeas time bar.

Moreover, in his informal response to the petition, the district attorney argued that the *Dixon* bar applied to Corona's petition but made no such argument regarding the timeliness bar. Docket 27, lodgment 7. This makes it even more likely that the Superior Court meant to apply the *Dixon* bar, at most, and not the timeliness bar.

Finally, Corona's petition was not untimely under state law. California state courts apply a general reasonableness standard, rather than a specific deadline, to determine whether a habeas petition is timely filed. *Carey v. Saffold*, 536 U.S. 214, 222 (2002). Corona filed the petition at issue here in Superior Court on October 24, 2016, about eight and a half months after his

state court judgment became final on the conclusion of direct review. AOB at 23-24; *Jimenez v. Quarterman*, 555 U.S. 113, 119-120 (2009). California court have found petitions timely that were more delayed than the petition here. *See, e.g.*, *In re Spears*, 157 Cal. App. 3d 1203, 1207-1208 (1984) (habeas petition raising claim of ineffective assistance of appellate counsel filed in Court of Appeal 18 months after Court of Appeal issued opinion affirming judgment on appeal is timely); *In re Burdan*, 169 Cal. App. 4th 18, 30-31 (2008) (habeas petition filed in Court of Appeal 10 months after denial of petition by Superior Court timely, where Superior Court petition was filed one year after ruling challenged by petitioner); *In re Lucero*, 200 Cal. App. 4th 38, 44-45 (2011) (Court of Appeal petition timely when filed 11 days after Superior Court denial, where Superior Court petition was filed 10 months after finality of court decision forming basis of petitioner's claims).

Walker v. Martin doesn't show that Corona's petition was untimely. The petition deemed untimely there was filed nearly five years after petitioner's conviction became final. 562 U.S. at 310-311, 314; *see also* Brief Amicus Curiae of the Habeas Corpus Resource Center in Support of Respondent in *Walker v. Martin*, 2010 WL 4278489 (Oct. 27, 2010), at *23-26 & n.25 (survey shows that sixty-two percent of non-capital habeas petitions filed in the California Supreme Court five to six years after the conviction

became final were denied on the merits and thirty-eight percent were denied as untimely).

And there can be no question that Corona timely filed his habeas petitions in the Court of Appeal and the Supreme Court upon losing in Superior Court. After the Superior Court denied his petition on February 6, 2017, Corona filed his next state petition in the Court of Appeal on April 17, 2017. After the Court of Appeal denied his petition on May 4, 2017, Corona filed a petition in the California Supreme Court on July 3, 2017. These filings were well within the 120-day window to timely file a new petition after the denial of habeas relief in a lower court. *Robinson v. Lewis*, 9 Cal. 5th 883, 891 (2020).

Federal habeas courts should not enforce a state procedural bar that is applied in contravention of state law or which clearly does not apply on the facts of the case. *Sivak v. Hardison*, 658 F.3d 898, 907 (9th Cir. 2011) ("an erroneously applied [state] procedural rule does not bar federal habeas review") (footnote omitted); *see also Melendez v. Pliler*, 288 F.3d 1120, 1125-26 (9th Cir. 2002) (reversing district court and holding that California's contemporaneous objection rule does not preclude review where record shows that habeas petitioner in fact did object at trial); *Kubat v. Thieret*, 867 F.2d 351, 366 & n.11 (7th Cir. 1989) (declining to enforce state court's waiver finding and reviewing claim on merits where record shows habeas petitioner

did in fact raise issue in state court). Corona's Superior Court petition was not untimely; the district attorney did not argue that it was; the court's order denying relief does not clearly state that it was; and Corona's subsequent filings to the appellate courts were timely. Indeed, given that the Superior Court's procedural bar rulings are contrary to state law, it is unreasonable to conclude that the subsequent summary denials by the Court of Appeal and Supreme Court silently adopted those rulings rather than denied Corona's petition solely on the merits, as the language of those rulings suggests. Thus, the *Ylst* look through presumption has been rebutted, and the Court should view the California Supreme Court's habeas denial as being solely on the merits, and not imposing any procedural bars. *Wilson*, 138 S. Ct. at 1196. The Ninth Circuit thus erred in finding Corona's claim procedurally defaulted and barred from review on the merits. Pet. App. 37.

But, as shown above, even assuming the state courts found Corona's claim procedurally barred, Respondent has not established his procedural default defense and the Court should review the merits of the claim.

B. Even if the Claim Is Defaulted, Corona Can Establish Cause and Prejudice to Excuse the Default

If the Court concludes that Respondent has met his burden of proving a procedural default, Corona has established cause and prejudice to excuse the default and allow the Court to reach the merits of his claim. *Coleman v.*

Thompson, 501 U.S. 722, 745-754 (1991). As Respondent noted in the Ninth Circuit, "[i]neffective assistance of appellate counsel can provide cause for a default that occurs on appeal" and "Corona claimed in his First Amended Petition that appellate counsel was ineffective in failing to raise the vindictive prosecution claim on appeal." *See also Murray v. Carrier*, 477 U.S. 478, 488, 492 (1986). Corona also alleged in habeas petitions filed in Superior Court, the Court of Appeal, and the California Supreme Court that his appellate counsel was ineffective in failing to raise the vindictive prosecution claim, including in a stand-alone claim. Docket 27-6 at ECF pages 20-21; docket 27-10 at ECF pages 5, 9; docket 27-12 at ECF pages 5, 20-22.

The Due Process Clause of the Fourteenth Amendment guarantees criminal defendants the effective assistance of counsel on their first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985). The test from *Strickland v. Washington*, 466 U.S. 668 (1984), for claims of ineffective assistance of counsel at trial applies to claims of ineffective assistance of counsel on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Eagle v. Linahan*, 279 F.3d 926, 938 (11th Cir. 2001). Under that test, relief is required when counsel's deficient performance prejudices the defendant. *Strickland*, 466 U.S. at 687. Prejudice exists when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Claims of ineffective assistance of counsel to excuse a procedural default are reviewed *de novo*, not under 28 U.S.C. § 2254(d). *Visciotti v. Martel*, 862 F.3d 749, 769 (9th Cir. 2016).

Corona's appellate counsel provided prejudicially deficient performance by failing to raise the vindictive prosecution claim on direct appeal. Appellate counsel's deficient performance is clear from the record. *Eagle*, 279 F.3d at 943.

As shown above, Corona has a powerful claim that the prosecutor vindictively added charges after Corona exercised his right to self-representation at his preliminary hearing and the judge dismissed half of the prosecution's case after the hearing. It is also the only claim certified for appeal by the district court, reflecting that court's view that it is Corona's strongest claim for federal relief. There is no valid reason for failing to raise the claim on appeal and in a petition for review to the state supreme court. Because, as shown in opening brief, "the omitted claim would have had a reasonable probability of success . . . counsel's performance was necessarily prejudicial because it affected the outcome of the appeal." *Eagle*, 279 F.3d at 943: *see also Tamplin v. Muniz*, 894 F.3d 1076, 1090 (9th Cir. 2018). Counsel's ineffectiveness excuses any procedural default. *Id.*; *Murray*, 477

U.S. at 488, 492. Like the magstrate judge, the Ninth Circuit did not address whether the ineffective assistance of appellate counsel could serve as cause to excuse a default, Pet. App. 37-38, and therefore its unpublished memorandum decision poses no bar to a finding of cause. As shown above, its ruling that Corona cannot show prejudice is plainly incorrect.

If the Court is not inclined to find cause and prejudice on the current record, it should vacate the Ninth Circuit's judgment and remand for an evidentiary hearing on the claim. *Rodney v. Filson*, 916 F.3d 1254, 1261 (9th Cir. 2019).

CONCLUSION

For the reasons set forth above, the Court should grant Corona's petition for a writ of certiorari.

Respectfully submitted,

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DATED: December 3, 2021

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