No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

EDUARDO CHE RODRIGUEZ,

Petitioner-Appellant,

v.

GENA JONES, ACTING WARDEN,

Respondent-Appellee.

_____

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

_____

PETITION FOR WRIT OF CERTIORARI

TARIK S. ADLAI
LAW OFFICES OF TARIK S. ADLAI
65 No. Raymond Avenue
Suite 320
Pasadena, California 91103
(626) 578-7294

Counsel for Petitioner

QUESTION PRESENTED

A year after he was discharged from the Army with a disability pension following brain, spinal, and psychological injuries from a scud missel attack while serving in Operations Desert Shield and Desert Storm, Eduardo Rodriguez suffered a criminal conviction in New York which the California trial court treated as a prior "strike" conviction, resulting in the doubling of his base prison sentence and excluding him from the Veteran's Court program. The trial court declined to exercise its discretion to disregard the prior conviction before trial, predicted it was unlikely to do so at sentencing if Rodriguez were convicted, but expressly acknowledged he would be required to disregard the prior conviction if the New York conviction did not contain all the same elements as its California counterpart. Although California and New York courts diverge in their interpretations of the two different statutes, trial counsel never objected on the ground that they were not categorical matches.

Where the state courts did not adjudicate whether trial counsel's performance was deficient (which was concededly deficient if there was a viable objection) and the state courts applied an erroneous (and more rigorous) standard when assessing prejudice, the question presented is:

When a State uses a categorical approach for comparing the elements of the two criminal provisions before using the prior conviction of a foreign State

as the basis for a sentencing enhancement, whether due process requires that the comparison encompass not just the names applied to the elements but also the respective judicial interpretation of those elements?

LIST OF PARTIES

The caption of the case on the cover page contains the names of all the parties.

RELATED PROCEEDINGS

Superior Court of California, Riverside:

People v. Rodriguez, No. RIF1504036 (Jun. 11, 2018)

In re Rodriguez, No. RIC1825188 (Jan. 10, 2019)

California Court of Appeal, Fourth District, Division Two:

People v. Rodriguez, No. E070679 (Nov. 13, 2018)

In re Rodriguez, No. E072549 (Jun. 14, 2019)

California Supreme Court:

In re Rodriguez, No. S256501 (Aug. 24, 2019)

U.S. District for the Central District of California:

Rodriguez v. Lozano, No. 5:19-CV-02127-GW-JDE (Jan. 11, 2021)

U.S. Court of Appeals for the Ninth Circuit

Rodriguez v. Lozano, No. 21-55051 (Feb. 10, 2022)

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INTRODUCTION

Eduardo Rodriguez was excluded from Veteran's Court, and his sentence eventually doubled, based on a 24-year-old New York conviction with fewer, and less exacting, elements than those required by California's statutory analogue. A California conviction would have required the prosecutor to prove both force and lack of consent, and that the defendant did not act under a reasonable mistake of fact. Since New York does not recognize a mistake of fact defense, a conviction was sustainable in New York solely by evidence of force alone, which New York treats as categorically negating consent as a matter of law. Moreover, the "force" required by California is proof of "physical force" while New York's "forcible compulsion" element encompasses verbal bullying without physical force.

Despite the manifold definitional differences between the quarter century old New York conviction and the California crime that was its alleged counterpart, Mr. Rodriguez's trial attorney did not move to strike the prior conviction as categorically ineligible to exclude Mr. Rodriguez from Veteran's Court and doubling his sentence. Trial counsel's failure to move to strike the prior conviction on these grounds was not the product of a reasonable trial or sentencing strategy. Trial counsel had asked the pretrial judge to exercise its discretion to strike the prior conviction based on Mr. Rodriguez's battle trauma, physical disabilities, and the circumstances of the pending charges so

Mr. Rodriguez could participate in Veteran's Court. 1 C.T. 71.[1]

Thereafter, even though the trial judge announced that he was disinclined to exercise his discretion to strike the New York conviction if Mr. Rodriguez were convicted, R.T. 22, trial counsel renewed the same motion after trial, appealing only to the trial judge's discretion that Mr. Rodriguez was "outside the spirit of the Three Strikes Law," and made no attempt to argue that the prior conviction was categorically ineligible for treatment as a prior strike. 1 C.T. 272.

The current charges are a direct result of the trauma Mr. Rodriguez suffered in service of our country. Mr. Rodriguez's life was on a positive trajectory until he suffered brain, spinal and psychological injuries during scud missile attacks while serving in Operations Desert Shield and Desert Storm. He graduated high school with A's and B's and no history of disciplinary problems. 1 C.T. 64- 65. He planned to, and eventually did, graduate from college. 1 C.T. 97-98. But, before enrolling in university, following in the footsteps of his father who earned a Purple Heart in Vietnam and his uncle who served two tours of duty in Vietnam, Mr. Rodriguez "wanted to serve my country." 1 C.T. 93. He was awarded the Army Service

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1. C.T. and R.T. citations reference the clerk's and reporter's transcript that comprise the state court record. C.R. refers to the clerk's record in the federal habeas proceedings and L.D. are documents lodged in the United States District Court habeas proceeding.

Medal, a National Defense Service Medal, and a Certificate of Achievement for his role in Desert Shield and Desert Storm, recognizing his "personal commitment and professionalism … while on duty in a hostile environment." 1 C.T. 85, 87.

His life was irrevocably changed by a Scud Missile attack while on deployment in Saudi Arabia. Although honorably discharged with a disability pension as a result of his war time injuries, he was unable to obtain treatment from the V.A. for over a decade. 1 C.T. 60, 77, 87.

The throes of a psychotic episode prompted his mother to call for assistance expecting him to be temporarily institutionalized for his own safety. Instead, he was arrested, charged with assault, precluded from Veteran's Court and the trial court doubled his sentence for a quarter-century old New York conviction for an incident that occurred almost immediately after returning to the United States from Operation Desert Storm. Although California allows for the enhancement of sentences based on foreign convictions that are contain all the elements of a California crime, Mr. Rodriguez's trial attorney never objected to the enhancement despite New York judicial opinions confirming that New York permits conviction based on different and lesser conduct than required to sustain a conviction in California.

PETITION FOR WRIT OF CERTIORARI

Petitioner Rodriguez respectfully asks that this Court grant his request for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, App. 1a, is unpublished but available at *Rodriguez v. Lozano*, No. 21-55051, 2022 WL 414663 (9th Cir. Feb. 10, 2022). The Magistrate Judge's Report and Recommendation, App. 7a, is unpublished but available at *Rodriguez v. Lozano*, 2020 WL 8084165 (C.D. Cal. Mar. 2, 2020) (No. 5:19-CV-02127-GW-JDE). The United States District Court's order adopting the report and recommendation, App. 5a, is unpublished but available at *Rodriguez v. Lozano*, 2021 WL 90505 (C.D. Cal. Jan. 11, 2021) (No. 5:19-CV-02127-GW-JDE).

The orders of the Riverside County Superior Court, App. 26a, the California Court of Appeal, App. 28a, and the California Supreme Court, App. 29a, denying habeas corpus relief are all unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered February 10 2022.

App. 1a. A timely petition for rehearing was denied March 29, 2022.

App.25a. This Court has jurisdiction. 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Section 2254(d) of Title 28, U.S.C., provides:

> 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

A. Mr. Rodriguez's Wartime Psychological Injuries

After graduating from high school in 1986, Rodriguez enlisted in the Army. 1 C.T. 65. After four years of active service, he transferred to the Army reserves. C.T. 87. Barely two months later, 100,000 Iraqi troops invaded Kuwait in August 1990, causing the Kuwaiti king to flee to Saudi Arabia with his family and ministers in tow, and prompting Iraq to install its own officials and declare Kuwait the 19th Governorate of Iraq. JANET MCDONNELL, AFTER DESERT STORM: THE US ARMY AND THE RECONSTRUCTION OF KUWAIT 9 (Def. Tech. Info. Ctr. 1999), available at *https://apps.dtic.mil/sti/citations/-ADA531941*. President George H.W. Bush announced that "the policies and actions of the Government of Iraq constituted a threat to the national security and foreign policy of the United States." *Clancy v. Office of Foreign Assets Control*, 559 F.3d 595, 597 (7th Cir. 2009). The United Nations Security Council condemned the invasion and the United States launched Operation Desert Shield in an attempt to resolve the conflict through peaceful means, backed by military force. S.C. Res. 660, 661, U.N. Doc. S/RES/660, 661 (Aug. 2 & 6, 1990).

When Iraq responded to the buildup of American and coalition troops by tripling their own number of troops in Kuwait, and the United Nations Security Council ordered Iraq to withdraw from Kuwait or face military

action, the United States started preparation for Operation Desert Storm. S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990); JOHN T. FISHEL, LIBERATION, OCCUPATION, AND RESCUE: WAR TERMINATION AND DESERT STORM 13-14 (Def. Tech. Info. Ctr. 1992), available at *https://apps.dtic.mil/sti/-citations/ADA533493*.

On the same day America's Secretary of State James Baker met with Iraq's Foreign Minister Tariq Aziz, David Hoffman and William Drozdiak, Baker and Aziz Arrive in Geneva, WASH. POST, Jan. 9, 1991, available at *https://www.washingtonpost.com/archive/politics/1991/01/09/baker-and-aziz-arrive-in-geneva/585e554f-ffb9-4576-9bb7-86ec42640575/*, Mr. Rodriguez was called back to active duty. 1 C.T. 73, 87. Less than two weeks later, Rodriguez was in the Arabian desert, protecting American interests at the Saudi Arabian Port of Dhahran. 1 C.T. 88.

During Rodriguez's second week in theater, Dhahran was bombarded with Iraqi Scud missiles on five separate days. 1 C.T. 88. Rodriguez suffered traumatic brain injury, spinal injury, and two injuries to his inner ear. 1 C.T. 65, 73, 87. The repeated missile strikes compounded by the many casualties contributed to the onset of PTSD. 1 C.T. 63, 68, 73-74, 149, 273-74, 287.

With Kuwait liberated, 500,000 Iraqi troops taken as prisoners of war, and half of all Iraqi divisions destroyed, President Bush declared a cease fire at the end of February. John M. Goshko, *Iraq Accepts U.N. Terms to End*

Gulf War, WASH. POST, Apr. 7, 1991, available at *https://www.washingtonpost.com/archive/politics/1991/04/07/iraq-accepts-un-terms-to-end-gulf-war/9800a4ea-62c1-4215-8119-f21cf4630b78/*.

Rodriguez was discharged from active duty and returned to reserve status in May 1991. 1 C.T. 87, 93.

He was diagnosed with service-related Post Traumatic Stress Disorder (PTSD). Shortly after discharge, he developed multiple sclerosis, which was also deemed service related. 1 C.T. 65, 67, 90-91, 149-50. Despite suffering flashbacks, PTSD, anxiety clinical depression and sleep difficulties, Rodriguez described his overall experience in the Army as "Good." 1 C.T. 60, 93.

B. Mr. Rodriguez Experienced a Psychotic Break

Upon returning home from the Gulf War, Mr. Rodriguez moved back in with his mother, Dr. Esther Bonafoux. Having been found disabled as a result of Anxiety, Depression, PTSD and service-related multiple sclerosis, for more than two decades after returning home from war, when he was not institutionalized at a mental health facility or elsewhere, he continued living at home, with his mother as his caretaker.[2] He was sufficiently gravely

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[2] He was institutionalized in a V.A. lockdown mental health unit in 2013 and at the California state mental hospital in Atascadero in 2014. 1 C.T. 61; 2 C.T. 321, 331.

Despite his disabilities, he earned a Bachelor's of Arts Degree in American History with a minor in Puerto Rican Studies in 2000. 1 C.T. 60,

disabled to be considered for placement in a conservatorship under his mother's guardianship. 1 C.T. 76.[3]

In August 2018, he experienced a psychotic episode that lasted 12 to 14 hours. Rodriguez's mother noted that he was up "the whole evening. The whole night." R.T. 68. He was delusional. Secluding himself upstairs, he was "throw[ing] stuff around the house," including throwing old cell phones and other items downstairs. R.T. 68-69.[4]

Rodriguez's medical team had warned his mother to be alert for potential behavioral side effects due to a change in medication. R.T. 49-50, 68-69. Concerned his behavior was an adverse reaction to his new medications and "afraid [he] might commit suicide," Rodriguez's mother reached out for help, hoping he would be detained for his own safety. R.T. 44-45, 49-50, 58, 63, 68.

At 6 a.m., police arrived at the home Rodriguez shared with his mother. His mother opened the front door and let the police inside.

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98. Although starting with a 3.0 GPA and earning 3.4 and 3.5 GPA's his last three semesters, he ended with a cumulative 2.9 GPA because mental decompensation during his sophomore year resulted in GPA's of 1.15 and 0.66. 1 C.T. 97.

3. His mother considered his PTSD as "the least of his problems" in light of his traumatic brain injury and multiple sclerosis. 1 C.T. 149.

4. The prosecution represented to bench officers that Mr. Rodriguez had been "yelling to himself regarding conspiracy theories" and "accusing [his mother] of poisoning his food." 1 C.T. 102-03.

The officers went upstairs, talked to Rodriguez, calmed him down and, after confirming that everything was alright with his mother, they left. R.T. 60.

Rodriguez continued having problems even after the officers left. About "12 to 14 hours" after the outbreak, Rodriguez's mother went to her next-door neighbor, asking her to call 911[5] to "take my son on a 5150."[6] R.T. 44, 46, 49-50, 68.

When a second set of officers arrived between 8 and 10 a.m., she told them Rodriguez "had a new medication" that "he seemed to have a negative reaction to." R.T. 68. Her neighbor and the responding officer both recalled Rodriguez's mother mentioning having been struck by a cane. She had bruising she attributed to aging, sensitive skin, and medications; the officer thought they were caused by her having been struck. His mother insisted she only wanted to obtain psychiatric intervention. She declined medical intervention. R.T. 75. Instead of a mental health hold, Rodriguez was arrested and charged with felony assault.

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5. Rodriguez remained upstairs. His mother was still downstairs. Rodriguez threw several old, inoperative mobile phones downstairs. Her only operative cell phone was upstairs. All the extensions for the landline were also upstairs. R.T. 58-59.

6. "5150" is the section of California's Welfare & Institution Code that authorizes the involuntary detention of an individual who is gravely disabled "as a result of a mental health disorder." CAL. WELF. & INST. CODE § 5150(a).

C. Mr. Rodriguez Was Excluded from Veteran's Court and His Sentence Eventually Doubled Based on a New York Conviction That Was Not Congruent with California Law

Rodriguez's mother hired an attorney to represent Rodriguez. She also posted bail to secure Rodriguez's release. 1 C.T. 77, 277. Rodriguez's first three court appearances were cancelled or postponed because he was "unfit" or "unsuitable" for court. 1 C.T. 12-14. When he was arraigned, he arrived in a wheelchair and the arraignment court referred the case to Veteran's Court. 1 C.T. 15-16.

The Veteran's Court therapist recorded that, while in the Army, Rodriguez had recalled seeing "dead bodies everywhere. They call it the Valley of Death." 1 C.T. 93. The Veteran's Court judge elicited that Rodriguez "was in like temporary housing areas, like warehouses, and they got hit," and he witnessed the aftermath of the devastating rocket attacks. R.T. 9/18/15, at 3. See *War in the Gulf – War Summary*, N.Y. TIMES, Feb. 26, 1991, at A1.

The clinician's review of Rodriguez's medical records revealed "evidence of psychosis and paranoia." 1 C.T. 94. She noted he was "guarded, defensive and evasive," and "seems to have poor impulse control." 1 C.T. 94.

Rodriguez was diagnosed with a mood disorder and possible PTSD. 1 C.T. 95. The clinician noted that Rodriguez suffered from anxiety and depression. 1 C.T. 94. His Global Assessment of Functioning (GAF) was only

35. 1 C.T. 95.[7]

Ultimately, however, Rodriguez was found ineligible for Veteran's Court. "It's for a prior conviction that excludes him." R.T. 10/2/15, at 5.

Rodriguez's first encounter with the criminal justice system occurred a year after he was discharged from the Army. In 1992, around the same time he was developing the debilitating effects of multiple sclerosis, placed on disability, and diagnosed with PTSD, 1 C.T. 65, Rodriguez had an interaction that led to his being convicted of rape in the first degree and misdemeanor second degree unlawful imprisonment under N.Y. Penal Law 130.35, 135.05 in Kings County, New York. 1 C.T. 11, 79.[8] The Kings County court sealed the records relating to the 1993 conviction; they were not even available to the Riverside County prosecutor. 1 C.T. 103. It was this prior conviction that disqualified him from Veteran's Court. R.T. 10/2/15, at 5.

Before the preliminary hearing, defense counsel asked the pretrial judge to strike his New York conviction, exercising its inherent discretion,

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7. The GAF disability score is a clinical tool used to rate the level of mental disability exclusive of any physical disability, based on a standard of 100. While GAF scores between 41 and 50 reflect serious symptoms or serious impairment, Mr. Rodriguez's score of 35 indicates either "major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood" or "some impairment in reality testing or communication." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC STATISTICAL AND MANUAL OF MENTAL DISORDERS 34 (4th ed. 2000).

8. Mr. Rodriguez had never before, and has never again, been convicted of a crime involving any sexual misconduct.

because it precluded Rodriguez from participating in Veteran's Court. 1 C.T. 71-100. Trial counsel appealed to "the interests of justice" based on the circumstances of the current offense, Mr. Rodriguez's physical and psychological disabilities, and his service during wartime. *Id*. Trial counsel did not suggest that the New York conviction was not equivalent to a California crime or that it was categorically ineligible for treatment as a strike under California law. *Id*

At the conclusion of the preliminary hearing, the trial court denied the motion to strike the prior conviction without prejudice to the motion being renewed later. 1 C.T. 126, 159.

In the course of a pre-trial conference, the trial judge acknowledged having "the authority under *Romero*[9] to strike the strike, but given the client's rap sheet, which I'm reviewing in the in limines that are submitted, it's not likely I would grant that." R.T. 22.[10]

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9. *People v. Superior Court (Romero)*, 13 Cal.4th 497, 917 P.2d 628 (1996).

10. Mr. Rodriguez had no other felony convictions until, 20 years later, Rodriguez was convicted of assaulting a psychiatric technician while in a lockdown psychiatric V.A. facility. 2 C.T. 319-22. While experiencing a violent flashback, Mr. Rodriguez struck a male nurse who was apparently trying to calm him. 1 C.T. 94. Mr. Rodriguez was reportedly "heavily medicated" at the time. 1 C.T. 274. He recalled having served a year in the county jail. 1 C.T. 94. In fact, less than two months after being received into the California prison system, he was released on parole to the Department of Mental Health where he was designated to serve his sentence at a psychiatric facility. 2 C.T. 331, 343.

After a brief trial, R.T. 43-134, her protestations notwithstanding, Rodriguez was convicted of a felony assault on his mother. 1 C.T. 217-19, 233-35.

During a post-trial conference addressing trial counsel's expressed intention to renew the motion to strike the prior convictions, while acknowledging that New York did not have a three strikes law, the trial judge specifically noted that the 1993 conviction was out of New York, not California, R.T. 181, and emphasized that "it's got to be a strike [] had [it occurred] in California. It has to have all the elements of one of our strikes." R.T. 186.

Mr. Rodriguez's attorney filed a renewed motion to strike the New York conviction. 1 C.T. 272-77. The renewed motion, once again, appealed only to the court's discretion.[11] Noting Mr. Rodriguez's "degenerative illnesses" and "psychological disorders as a victim and veteran of war," and that the prior conviction was from 24 years earlier, trial counsel's motion urged the trial court to "give more weight to the current charges . . . than the prior conviction" and find Mr. Rodriguez "outside the spirit of the Three Strikes Law." 1 C.T. 274-76. Despite the trial judge's explicit reminder, trial counsel's motion did not question whether the New York offense "has . . . all

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[11.] It was, in fact, the exact same document, compare 1 C.T. 71 with 272, except for interlineated changes and new page breaks following the elimination of some exhibit references.

the elements of one of [California's] strikes." R.T. 186.

At the time for trial on the prior conviction, his lawyer advised the trial court that Mr. Rodriguez intended to admit that he suffered the prior conviction and that it qualified as a strike. R.T. 194.

The trial judge advised Rodriguez that, unless it was stricken, admitting that the New York conviction was a strike "would result in double the prison penalty, and also reduce credits that you would receive in prison." R.T. 195.[12] On the advice of his attorney, Mr. Rodriguez admitted having suffered the prior New York conviction and that it qualified as a strike under California law. 1 C.T. 310; R.T. 195-96.

At sentencing, in the exercise of its discretion, the trial court declined to strike the prior New York strike. R.T. 202.

Noting Rodriguez's "mental and physical disability" and "the comments of the mother" as mitigating factors, the trial judge sentenced Rodriguez to the low term of 2 years that was "doubled by the strike for a total of four years." R.T. 207. Including additional enhancements, Rodriguez was sentenced to a total term of 10 years. R.T. 207.

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12. In addition to enhancing sentences, California's Three Strikes Law also limits the amount of credit an inmate can earn while in prison. *People v. Buckhalter*, 26 Cal.4th 20, 32, 25 P.3d 1103 (2001); CAL. PEN. CODE §§ 667(c)(5), 1170.12(a)(5); *cf. Id.* §§ 2930, *et seq.*

D. Post-Conviction Habeas Proceedings

The ineffective assistance of counsel claim raised herein – that "trial counsel provided ineffective assistance by failing to investigate the New York law pertaining to his prior conviction" – was presented to the Riverside superior court in a habeas petition. C.R. 11-4 [L.D. 3]. The superior court denied the petition by checking two boxes on a form that the petition failed to state a prima facie case because the facts "are not backed up with specific details, and/or are not supported by the record," and the "assertions regarding the applicable law [] are contrary to established California case decisions." C.R. 11-5, at 1. In checking a third box for "other" reasons, the state habeas judge explained:

> Petitioner has failed to show that but for counsel's allegedly deficient performance, there is a reasonable probability that a more favorable outcome would have resulted. It is not enough to speculate about possible prejudice to be accorded relief. Petitioner has failed to show that the prejudicial effect of counsel's errors was a "demonstrable reality." *In re Cox* (2003) 30 Cal.4th 974, 1016; *In re Clark* (1993) 5 Cal.4th 750, 766; *Strickland v. Washington* (1984) 466 U.S. 668, 697.)

C.R. 11-5, at 2.

Habeas petitions raising the same claims in the court of appeal and California Supreme Court were summarily denied. C.R. 11-7, 11-9.

Rodriguez filed a petition for writ of habeas corpus in federal court. C.R. 1. After an answer and reply, C.R. 10, 12, the magistrate judge recommended denying Rodriguez's petition. C.R. 14. The magistrate judge

opined the New York conviction qualified as a strike because its elements were "similar" to those required by California. C.R. 14, at 11. The district court adopted the magistrate's report and recommendation, concluding that "the law of New York is coextensive with the law of California" in their definitions of rape but found the issue sufficiently debatable to warrant a certificate of appealability. C.R. 18. The district judge granted a certificate of appealability as to "whether trial counsel provided ineffective assistance of counsel in conceding Petitioner's New York rape conviction constituted a qualifying 'strike.'" C.R. 20, at 2.

On appeal, a three-judge panel of the Ninth Circuit affirmed the denial of Rodriguez's habeas petition. App. 1a.

REASONS FOR GRANTING THE WRIT

I. Despite their Similar Titles, New York's Penal Law § 130.35 is Distinct from California's Penal Code § 261

Absent counsel's recommendation that Rodriguez admit the New York conviction qualified as a strike, the trial court would have presumed the New York conviction was for "the least offense punishable" under New York law. *People v. Carothers*, 13 Cal.App.5th 459, 470, 220 Cal.Rptr.3d 672 (2017).

California law criminalizes sexual intercourse when it is "accomplished against a person's will by means of force, violence, duress, menace, or fear of

immediate and unlawful bodily injury on the person or another." CAL. PEN. CODE § 261.

New York criminalizes sexual intercourse accomplished "By forcible compulsion." N.Y. PENAL LAW § 130.35 ¶ 1.

The texts of these two criminal statutes hint at how they are fundamentally different in operation.

While, in New York, "forcible compulsion" establishes the commission of a crime, N.Y. PENAL LAW § 130.35, California requires not only that the sexual intercourse be accomplished "by means of force," etc., but also that it "is accomplished against a person's will." CAL. PEN. CODE § 261.

New York and California courts do not treat these as mere semantic differences.

1. The district court recognized that, in New York law, a lack of consent is "interwoven with a finding of forcible compulsion." C.R. 14, at 12. They are more than just interwoven. In New York, force negates consent. *People v. Carlson*, 184 A.D.3d 1139, 1140-41, 125 N.Y.S.3d 803, 805 (2020) (where there is evidence of physical force, the prosecution need not additionally prove lack of consent); *People v. Williams*, 81 N.Y.2d 303, 317, 598 N.Y.S.2d 167, 173 (1993) ("lack of consent results from forcible compulsion"), citing N.Y. PENAL LAW § 130.05(2)(a). Because the former negates the latter, force and consent can never co-exist in New York.

New York's "forcible compulsion" which precludes consent whenever any type of force is used stands in stark contrast to California that "require[s] force, fear, *and* nonconsent to convict." *People v. Griffin*, 33 Cal.4th 1015, 1025, 94 P.3d 1089 (2004) (emphasis added), quoting *People v. Barnes*, 42 Cal.3d 284, 302, 721 P.2d 110 (1986). Because lack of consent is an *additional* element, independent of the element of force, "[w]hen two adults engage in *consensual* sexual intercourse, *whether with or without physical force* . . . , the forcible rape statute is not implicated." *Griffin*, 33 Cal.4th at 1027 (first emphasis original; second emphasis added).

2. This is exemplified in the two jurisdictions' different treatment of situations where the complaining witness has not consented but the defendant claims to have acted on a mistaken belief in consent. California courts have long recognized that a mistake of fact as to consent precludes criminal liability. "If believed by the fact finder, a defendant's honest and reasonable, albeit mistaken, belief in the victim's consent is a complete defense to a charge of . . . rape." *People v. Brooks*, 3 Cal.5th 1, 74, 396 P.3d 480, 534 (2017).[13] Indeed, a defendant is "only required to raise a reasonable

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[13] If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite under Penal Code section 20 to a conviction of . . . rape by means of force or threat (§ 261, subds. 2 & 3).

People v. Mayberry, 15 Cal.3d 143, 155, 542 P.2d 1337 (1975).

doubt as to whether he had such a belief." *Mayberry*, 15 Cal.3d at 157. *Mayberry* itself is a quintessential example because, although there was evidence of physical force and a jury's verdicts "impliedly found that the victim did not consent" to intercourse, the California Supreme Court nonetheless held the trial court's failure to instruct on whether the defendant acted on a mistake of fact as to whether she consented was reversible error. *Mayberry*, 15 Cal.3d at 158. In other words, even though force was used and the complaining witness did not consent, the defendant was nonetheless entitled to an acquittal if the jury found "he believed reasonably and in good faith that she had so consented." *Mayberry*, 15 Cal.3d at 158.

New York, by contrast, rejects a mistake of fact as to consent as a possible defense. *Williams*, 81 N.Y.2d at 317, 614 N.E.2d at 736-37, 598 N.Y.S.2d at 173-74. Once jurors find the defendant used force, jurors are foreclosed from finding the defendant mistakenly believed sexual contact was consensual. *Id.* ("the jury, by finding that defendants used forcible compulsion to coerce the victim to engage in sodomy and intercourse, necessarily found that defendants believed the victim did not consent."); *People v. Gilmore*, 252 A.D.2d 742, 743, 677 N.Y.S.2d 806, 807 (1998) (jury finding that witness voluntarily submitted to sexual conduct does not foreclose finding of forcible compulsion).

3. The two jurisdictions have conflicting principles by which to

assess whether the prosecution has demonstrated a lack of consent. As the district court observed, under New York law, "forcible compulsion element must be examined through the victim's state of mind." C.R. 14, at 11, citing *People v. Melendez*, 138 A.D.3d 1159, 1160, 29 N.Y.S.3d 618, 620 (2016) ("forcible compulsion is examined through the state of mind produced in the victim").

In California, by contrast, the complaining witness's subjective state of mind is not alone enough to establish a lack of consent. Rather, beyond proving that "a victim genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will," "*in addition*, the prosecution must [also] satisfy the objective component, which asks whether the victim's fear was reasonable under the circumstances, or, if unreasonable, whether the perpetrator knew of the victim's subjective fear and took advantage of it." *People v. Iniguez*, 7 Cal.4th 847, 856-57 (1994) (emphasis added).

4. The two jurisdictions also disagree as to the type and nature of force required to satisfy the "forcible compulsion" or "by means of force" elements. California demands that the defendant employed "physical force" "to achieve or win by strength in struggle or violence," "of a degree sufficient to support a finding that the act of sexual intercourse was against the [victim's] will." *Griffin*, 33 Cal.4th at 1023-24; *People v. Elam*, 91 Cal.App.4th

298, 306, 110 Cal.Rptr.2d 185 (2001).

In New York, by contrast, it is not clear that physical force at all is required so long as the prosecution establishes "the nonconsensual nature of the act." *People v. Sullivan*, 159 A.D.2d 738, 739, 553 N.Y.S.2d 447, 447 (1990). In New York, a defendant's bullying or "controlling behavior" alone may be sufficient to "establish[] the element of forcible compulsion." *People v. King*, 56 A.D.3d 1193, 1194, 867 N.Y.S.2d 598, 600 (2008). Despite the absence of any physical force whatsoever, although the prosecution "conceded that [the] complainant was not overcome by physical force and she herself admitted that there were no express threats of physical harm, serious or otherwise," New York's highest court nonetheless upheld the conviction because the defendant "shouted at her." *People v. Coleman*, 42 N.Y.2d 500, 505, 399 N.Y.S.2d 185, 187 (1977).

5. In contrast to California's focus on whether the *defendant* acted with "wrongful intent," *Mayberry*, 15 Cal.3d at 154, "forcible compulsion" under New York law focuses not on the defendant's intention, "but rather what the *victim*, observing their conduct, feared they would or might do if she did not comply with their demands." *Coleman*, 42 N.Y.2d at 505, 399 N.Y.S.2d at 187 (emphasis added). Rather than focusing on the defendant's intentions, the "forcible compulsion" inquiry " focuses on "the state of mind produced in the victim by the defendant's conduct." *People v. Jenkins*, 282

A.D.2d 926, 928, 726 N.Y.S.2d 468, 470 (2001). Accord *People v. Thompson*, 72 N.Y.2d 410, 416, 534 N.Y.S.2d 132, 134 (1988) ("The proper focus is on the state of mind produced in the victim by the defendant's conduct."); *People v. Richardson*, 284 A.D.2d 920, 920, 728 N.Y.S.2d 605, 606 (2001) (same).

* * * * *

In sum, Mr. Rodriguez's 24 year old New York conviction did not require the prosecutor to separately prove both force and a lack of consent but only some amalgam along a continuum where varying degrees of one or the other might be present. The New York prosecutor would not have been required to prove that Mr. Rodriguez used "physical force," let alone that it be such force as would overcome the will of a reasonable person, but only some degree of bullying and barking that a complaining witness asserted spooked her, regardless of whether it would have overcome the will of a reasonable person. Unlike in California, a New York prosecutor could have dismissed any possibility Mr. Rodriguez had acted under a mistaken belief of consent because, under New York law, any use of force forecloses any possibility of consent.

If Mr. Rodriguez's attorney had provided effective assistance by objecting to the New York conviction as being ineligible for treatment as a foreign strike, there is a reasonable probability that, given the differences between what each statute criminalizes, a trial court judge would have found

the New York conviction did not qualify as a California strike. *E.g. Carothers*, 13 Cal.App.5th at 470 (prior Texas murder conviction not a qualifying strike because "the record of the 1978 Texas murder does not establish each element of a California murder"); *People v. Roberts*, 195 Cal.App.4th 1106, 1117-19, 125 Cal.Rptr.3d 810 (2011) ("None of the California crimes claimed to be comparable to the [Washington] second degree assault conviction constitutes a serious felony under section 1192.7."); *People v. Rodriguez*, 122 Cal.App.4th 121, 131-37, 18 Cal.Rptr.3d 550 (2004) (Texas robbery, burglary, and attempted burglary convictions); *People v. Jenkins*, 140 Cal.App.4th 805, 811-13, 44 Cal.Rptr.3d 788, 792-94 (2006) (Utah aggravated robbery not a strike).

II. The Lower Courts Erroneously Focused on the Labels Assigned to Elements Without Considering How the State Courts Interpreted those Elements

In concluding that the "New York statute under which Rodriguez was convicted contains all of the elements of the California felony of rape," App., at 3a, the lower court overlooked the States' judicial interpretations and applications of those elements.

1. The lower court considered only the statutory language of the New York and California statutory descriptions of the two States' force elements. App. 4a. Notwithstanding any similarity between California's

statutory element of "force" and New York's "forcible compulsion," the lower court overlooked that the courts of New York allow a conviction to be obtained without "physical force" that overpowers the victim through "strength in struggle or violence," *Griffin*, 33 Cal.4th at 1024; *Elam*, 91 Cal.App.4th at 306, and countenances a finding of "forcible compulsion" if the defendant does no more than "shout[]" or exhibit "controlling behavior" toward the complaining witness. *King*, 56 A.D.3d at 1194, 867 N.Y.S.2d at 600 ("controlling behavior"); *Coleman*, 42 N.Y.2d at 506, 399 N.Y.S.2d at 187 (1977) (although prosecution "concede[d] that complainant was not overcome by physical force and she herself admitted that there were no express threats of physical harm, serious or otherwise," forcible compulsion satisfied where defendant "shouted at her").

2. Although that the New York statute "requires proof of lack of consent," App. 3a-4a, the lower court overlooked that New York and California courts have interpreted their statutes so that what qualifies as nonconsent in New York is much expansive than is required to support a California conviction.

First and foremost, under New York case law, the element of "forcible compulsion is examined through [subjective] state of mind produced in the victim." *Melendez*, 138 A.D.3d at 1160, 29 N.Y.S3d at 620; *Coleman*, 42 N.Y.2d at 505, 399 N.Y.2d at 187; *Jenkins*, 282 A.D.2d at 928, 726 N.Y.S.2d at

470; *Thompson*, 72 N.Y.2d at 416, 534 N.Y.S.2d at 134; *Richardson*, 284 A.D.2d at 920, 728 N.Y.S.2d at 606. By contrast, California requires the prosecution to establish not only that the complaining witness "genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will," but, "*in addition*, the prosecution must [also] satisfy the objective component, which asks whether the victim's fear was reasonable under the circumstances, or, if unreasonable, whether the perpetrator knew of the victim's subjective fear and took advantage of it." *Iniguez*, 7 Cal.4th at 856-67, 872 P.2d at 1188 (1994) (emphasis added). The difference is exemplified by the fact that California courts recognize that "a defendant's honest and reasonable, albeit mistaken, belief in the victim's consent is a complete defense," *Brooks*, 3 Cal.5th at 74, 396 P.3d at 534; *Mayberry*, 15 Cal.3d at 155, 542 P.2d at 1345, whereas New York courts have declared mistake of fact irrelevant to forcible compulsion. *Williams*, 81 N.Y.2d at 317, 598 N.Y.S.2d at 173-47.

Second, the panel overlooked that, while "forcible compulsion" and lack of consent both play a role in the New York and California statutes, they are independent elements under California law that "require[s] force, fear *and* nonconsent," *Griffin*, 33 Cal.4th at 1025 (emphasis added); *Barnes*, 42 Cal.3d at 302, 721 P.2d at 120, such that "the forcible rape statute is *not* implicated" by sexual intercourse accomplished by force so long as it is consensual.

Griffin, 33 Cal.4th at 1027 (emphasis added). By contrast, in New York, evidence of force relieves the prosecutor of any need to separately or additionally prove lack of consent. *Carlson*, 184 A.D.3d at 1140-41, 125 N.Y.S.3d at 805; *Williams*, 81 N.Y.2d at 317, 598 N.Y.S.2d at 173.

3. By focusing exclusively on the statutory language and ignoring the judicial interpretations, the panel misapprehended the significant differences between the California and New York laws. Because there is a meaningful difference in the states' interpretations of their respective statutes, reasonably competent counsel would have raised the issue, *Tilcock v. Budge*, 538 F.3d 1138, 1146 (9th Cir. 2008), and there is a reasonable probability the trial court would have sustained the legal objection to the prior conviction.

III. This Case is a Good Vehicle for the Questions Presented

The approach to comparing the two jurisdictions' criminal provisions is squarely presented because the question of prejudice controls the outcome of this case. The State has never contended that trial counsel had – or even could have had – any reasonable strategic or tactical justification for foregoing an objection to the prior conviction other than its contention that an objection would have been futile, conceding that if there was a viable objection, trial counsel had no reason to withhold it and was deficient in not

advancing it. He did, after all, ask the trial court to disregard the prior conviction, albeit on discretionary grounds, not legal ones. Thus, the deficient performance inquiry collapses back into whether there was a reasonable probability a trial judge would have found the New York prior not identical to a California crime.[14]

Furthermore, 28 U.S.C. § 2254(d) does not limit review of the prejudice inquiry because the state courts applied a legal standard for establishing prejudice that was contrary to this Court's clearly established precedent.

After identifying the general *Strickland* standard for assessing prejudice, the state habeas court superimposed an additional gloss that a petitioner must "show that the prejudicial effect of counsel's errors was a 'demonstrable reality.'" C.R. 11-5, at 2. This Court's jurisprudence has never demanded that prejudice be established to a "demonstrable reality." Quite the contrary. From the outset it made clear that a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693.

Rather, this Court has consistently and repeatedly held that prejudice exists when, but for counsel's errors, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Williams v. Taylor*,

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[14] Because the state court did not adjudicate the deficient performance prong, if it were contested, it would be resolved de novo. *Porter v. McCollum*, 558 U.S. 30, 39 (2009).

529 U.S. 362, 391 (2000), quoting *Strickland*, 466 U.S. at 694. Applying the same prejudice standard in another context, the Supreme Court emphasized that the "touchstone" is "a 'reasonable probability' of a different result, and the adjective is important." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The "reasonable probability" necessary to establish prejudice is simply "a probability sufficient to undermine confidence in the outcome." *Williams*, 529 U.S. at 391, quoting *Strickland*, 466 U.S. at 694.

Because the state court applied unduly strict prejudice standard, this Court's review is not constrained by 28 U.S.C. § 2254(d). *Williams*, 529 U.S. at 397-98.

If there was a reasonable probability that an objection would have been meritorious, trial counsel's failure to object was inherently prejudicial. Had he not been sentenced under the Three Strikes Law, his mitigated 2 years low term sentence would not have been doubled and earned credit on his sentence at a much higher rate. That is more than sufficient to establish prejudice. *Glover v. United States*, 531 U.S. 198, 203 (2001) (a reasonable probability of any additional incarceration time constitutes prejudice).[15]

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[15] In addition, the prior conviction resulted in *both* an increase in the sentence and a reduction in credits eligibility, the state courts were manifestly unreasonable in finding no possibility Mr. Rodriguez had been prejudiced. The state court was unreasonable both in demanding Rodriguez establish more than a "reasonable probability . . . of a different result" but convincing a "demonstrable reality," *Williams*, 529 U.S. at 397 (unreasonable to apply incorrect legal standard), and "either did not consider or

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully Submitted,

LAW OFFICES OF TARIK S. ADLAI

Tarik S. Adlai
Counsel of Record
Attorney for Petitioner

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unreasonably discounted" the differences between the California and New York definitions of their respective crimes, *Porter*, 558 U.S. at 42.