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

_____

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDICES

Appendix A

NOT FOR PUBLICATION

FILED

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDUARDO CHE RODRIGUEZ, Petitioner-Appellant, v. JARED LOZANO, Respondent-Appellee.	No. 21-55051 D.C. No. 5:19-cv-02127-GW-JDE MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Submitted February 8, 2022**
Pasadena, California

Before: SCHROEDER, TALLMAN, and MILLER, Circuit Judges.

Eduardo Che Rodriguez is serving a California prison sentence enhanced under the State's three-strikes law. Cal. Penal Code §§ 667(a), 667.6(b). Rodriguez alleges that trial counsel provided ineffective assistance by advising him to concede that his 1993 New York rape conviction qualified as a strike. The

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

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

California courts denied Rodriguez's petition for a writ of habeas corpus, and the district court likewise denied his petition for federal habeas relief. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Ineffective assistance of counsel requires both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 688–93 (1984). We review de novo the district court's denial of habeas corpus relief. *Bemore v. Chappell*, 788 F.3d 1151, 1160 (9th Cir. 2015). But federal review of the California courts is constrained by the Antiterrorism and Effective Death Penalty Act (AEDPA): "Under AEDPA, habeas relief is proper only if the state court's adjudication of the merits of the habeas claim 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Ramirez v. Castro*, 365 F.3d 755, 762 (9th Cir. 2004) (quoting 28 U.S.C. § 2254(d)(1)).

The parties disagree about whether the California courts' rejection of Rodriguez's claim reflected a resolution of the underlying state-law question, thereby foreclosing review under AEDPA. We find it unnecessary to address that issue because the claim fails on the merits: Rodriguez's New York conviction for first-degree rape by forcible compulsion qualifies as a strike under California law, so trial counsel's failure to challenge it did not constitute deficient performance.

A conviction in another State qualifies as a strike in California only if the

offense "includes all of the elements of a particular . . . serious felony as defined in subdivision (c) of Section 1192.7." Cal. Penal Code §§ 667(d)(2), 1170.12(b)(2); *see People v. Navarette*, 4 Cal. App. 5th 829, 844–46 (2016). Rape is a serious felony under California law. *See* Cal. Penal Code § 1192.7(c)(3).

The New York statute under which Rodriguez was convicted contains all of the elements of the California felony of rape and is therefore a qualifying conviction. California defines rape as sexual intercourse "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. Penal Code § 261(a)(2). And at the time, the relevant provision of New York's penal code provided, in relevant part, that "[a] male is guilty of rape in the first degree when he engages in sexual intercourse with a female . . . [b]y forcible compulsion." N.Y. Penal Law § 130.35 (1992). Rodriguez argues that the statutes differ in two ways: First, he says that New York does not require lack of consent and, second, he says that New York criminalizes a wider range of force than California. We disagree.

First, the New York statute requires proof of lack of consent. Although lack of consent does not explicitly appear as a separate element, "forcible compulsion," which is an element of the statute, necessarily entails a lack of consent. N.Y. Penal Law § 130.00(8) (1992); *see People v. Williams*, 614 N.E.2d 730, 736–37 (N.Y. 1993) ("The People must also establish the victim's lack of consent, but lack of

consent results from forcible compulsion." (citations omitted)). And New York law provides that "[w]hether or not specifically stated, it is an element of every offense defined in this article . . . that the sexual act was committed without consent of the victim." N.Y. Penal Law § 130.05(1) (1992).

Second, the New York and California statutes do not meaningfully differ as to the type of force required. While "forcible compulsion" in New York was defined as either "a. use of physical force; or b. a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped," N.Y. Penal Law § 130.00(8) (1992), the California offense may be "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. Penal Code § 261(a)(2). Whether by means of physical force or threat, the conduct encompassed by the New York statute would likewise constitute a serious felony under California law.

Because any motion asking the sentencing court not to treat the New York conviction as a strike would have been futile, trial counsel's decision not to file such a motion cannot have amounted to deficient performance. *See Martinez v. Ryan*, 926 F.3d 1215, 1226 (9th Cir. 2019). Rodriguez's claim therefore fails.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

EDUARDO CHE RODRIGUEZ, Petitioner, v. JARED D. LOZANO, Respondent.	Case No. 5:19-cv-02127-GW (JDE) ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the records and files herein, including the Petition (Dkt. 1), the Answer to the Petition filed by Respondent (Dkt. 10), the Opposition to the Answer filed by Petitioner (Dkt. 12), the Report and Recommendation of the United States Magistrate Judge (Dkt. 14, "R&R"), and the Objection to the R&R filed by Petitioner (Dkt. 17).

Having engaged in a de novo review of those portions of the R&R to which objections have been made, the Court concurs with and accepts the findings and recommendation of the Magistrate Judge. With respect to Petitioner's objections to the R&R's findings as to the co-extensiveness, or lack thereof, of New York and California rape laws on the issue of consent, while it

is true that under New York Penal Law 130.05(2)(a), "[l]ack of consent results from: . . . [f]orcible compulsion . . . ," California courts recognize that "[i]n the context of rape, 'against the victim's will' is synonymous with 'without the victim's consent.'" People v. Giardino, 82 Cal. App. 4th 454, 460 (2000) (citations omitted). "Therefore, by specifically referring to intercourse accomplished against the victim's will, [California Penal Code § 261] subdivision[] (a)(2) (force or duress) . . . describe[s] instances in which the victim has not actually consented." Id. Thus, the Court agrees with the R&R's conclusion that, on the issue of consent in rape convictions, the law of New York is coextensive with the law of California for purposes of imposition of a "strike" enhancement for a prior serious or violent felony conviction. See People v. Jenkins, 140 Cal. App. 4th 805, 810 (2006) (as modified); Cal. Pen. Code §§ 667 & 1170.12. However, the Court will grant Petitioner a Certificate of Appealability on the issue by separate Order.

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

Dated: January 11, 2021

GEORGE H. WU
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

EDUARDO CHE RODRIGUEZ, Petitioner, v. JARED D. LOZANO, Respondent.	No. 5:19-cv-02127-GW-JDE REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable George H. Wu, United States District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On November 6, 2019, Petitioner Eduardo Che Rodriguez, through counsel, filed a Petition for Writ of Habeas Corpus by a Person in State Custody (Dkt. 1, "Petition" or "Pet."), together with a supporting Memorandum of Points and Authorities ("Pet. Mem."). On January 17, 2020, Respondent filed an Answer. Dkt. 10. Petitioner filed his Reply on February 20, 2020. Dkt. 12 ("Reply").

For the reasons discussed hereafter, the Court recommends that the Petition be denied and the action be dismissed with prejudice.

II.

PROCEDURAL HISTORY

On August 2, 2017, a Riverside County Superior Court jury found Petitioner guilty of elder abuse and assault with a deadly weapon. The jury also found true the allegation that Petitioner personally used a deadly and dangerous weapon. 1 Clerk's Transcript on Appeal ("CT") 233-35. Petitioner admitted that he suffered two prior convictions. Reporter's Transcript on Appeal ("RT") 194-96. On June 8, 2018, the trial court sentenced Petitioner to ten years in state prison. 2 CT 355-56.

Petitioner initially filed a notice of appeal, but later requested that it be withdrawn. Pet. at 3; 2 CT 357; Appellate Courts Case Information ("Appellate Courts") at https://appellatecases.courtinfo.ca.gov.[1] Accordingly, on November 13, 2018, the appeal was dismissed. Appellate Courts.

On November 27, 2018, Petitioner filed a habeas petition in the Riverside County Superior Court. Respondent's Notice of Lodgment

[1] Pursuant to Rule 201 of the Federal Rules of Evidence, the Court takes judicial notice of relevant state court records available electronically. See Holder v. Holder, 305 F.3d 854, 866 (9th Cir. 2002) (taking judicial notice of opinion and briefs filed in another proceeding); United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (courts "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" (citation omitted)). Petitioner also requests that the Court take judicial notice of the decisional, constitutional, and statutory law of New York and California. Pet. Mem. at 2 n.2. The Court has considered this legal authority, and it is unnecessary to request judicial notice of legal authority. See, e.g., Lucero v. Wong, 2011 WL 5834963, at *5 (N.D. Cal. Nov. 21, 2011) ("It is unnecessary to request that the court judicially notice published cases from California and federal courts as legal precedent; the court routinely considers such legal authorities in doing its legal analysis without a party requesting that they be judicially noticed.").

("Lodgment") 3. The superior court denied the petition on January 10, 2019 in a reasoned decision. Lodgment 4. Petitioner then filed a habeas petition in the California Court of Appeal, which was summarily denied on June 14, 2019. Lodgments 5-6. Finally, Petitioner filed a habeas petition in the California Supreme Court, which was denied without comment or citation to authority on August 14, 2019. Lodgments 7-8.

III.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL

In August 2015, Petitioner was living with his mother, Jane Doe, in Moreno Valley. RT 43-44. The evidence at trial showed that on August 19, 2015, Jane Doe went to her neighbor's house to call the police because her son had struck her with a cane. RT 82-86. She had visible injuries to her head, legs, and arm. RT 85, 93-97. When she arrived at the neighbor's home, she told her neighbor that Petitioner was out of control and hit her. RT 89. Deputy Jerssy Toscano responded to the 911 call, and Jane Doe reported to him that Petitioner assaulted her the night before, hitting her in the knees, face, and forearms. RT 90-92. She told the deputy that Petitioner was acting out of control, breaking items in the house, and she feared for her life. RT 98-99. According to Deputy Toscano, Jane Doe reported that she did not feel safe to return home and wanted Petitioner removed. RT 99.

At trial, Jane Doe denied that Petitioner hit her, and instead claimed that she went to the neighbor's house to call 911 because Petitioner was acting suicidal and she wanted the police to take him for a "5150."[2] RT 44-45, 50-56, 133. The defense also presented the testimony of Dr. Marvin Pietruszka, who testified that, in his opinion, Jane Doe's injuries were more consistent with a fall, not with being hit with a cane. RT 107, 109, 112, 118, 121, 123.

[2] Presumably she was referring to Cal. Welf. & Inst. Code § 5150.

IV.

PETITIONER'S CLAIMS HEREIN

Trial counsel rendered ineffective assistance by: conceding a prior New York conviction qualified as a "strike" (Ground One); failing to request a unanimity instruction (Ground Two); and aiding the prosecution in establishing an element of the elder abuse charge and failing to move for a dismissal pursuant to Cal. Penal Code § 1118.1 (Ground Three). Further, the cumulative effect of these errors violated Petitioner's due process rights (Ground Four). Pet. at 5-6; Pet. Mem. at 17.

V.

STANDARD OF REVIEW

The Petition is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (the "AEDPA") under which federal courts may grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court proceedings" only if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000).

Although a particular state court decision may be "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 391, 413. A state court decision

is "contrary to" clearly established federal law if it either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Brown v. Payton, 544 U.S. 133, 141 (2005); Williams, 529 U.S. at 405-06. When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by [Section] 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam).

State court decisions that are not "contrary to" Supreme Court law may only be set aside on federal habeas review "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts.'" Packer, 537 U.S. at 11 (quoting 28 U.S.C. § 2254(d)). A state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. See Williams, 529 U.S. at 406-10, 413; Woodford v. Visciotti, 537 U.S. 19, 24-27 (2002) (per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Visciotti, 537 U.S. at 24-27. An "unreasonable application" is different from an erroneous or incorrect one. See Williams, 529 U.S. at 409-11; see also Visciotti, 537 U.S. at 25; Bell v. Cone, 535 U.S. 685, 694 (2002). "To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on 'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Metrish v. Lancaster, 569 U.S. 351, 358 (2013) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)). Moreover, as the Supreme

Court held in Cullen v. Pinholster, 563 U.S. 170, 181, 185 n.7 (2011), review of state court decisions under § 2254(d) is limited to the record that was before the state court that adjudicated the claim on the merits.

Here, Petitioner raised all of his claims in the Riverside County Superior Court on collateral review. The superior court rejected these claims in a reasoned decision on January 10, 2019, concluding: (1) the petition failed to state a prima facie factual case supporting Petitioner's release because the petition made assertions regarding the applicable law that were contrary to established California case decisions; (2) the petition failed to state a prima facie factual case supporting Petitioner's release because the petition's broad factual conclusions were not backed up with specific details and/or not supported by the record in the case; and (3) Petitioner failed to show that but for counsel's allegedly deficient performance, there was a reasonable probability that a more favorable outcome would have resulted. With respect to the last finding, the superior court explained that it was "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.)" Lodgment 4. The California Court of Appeal and California Supreme Court denied Petitioner's subsequent habeas petitions without comment or citation to authority. Lodgments 6, 8. In such circumstances, the Court will "look through" the unexplained decisions to the last reasoned decision as the basis for the state court's judgment, in this case, the superior court's decision. See Wilson v. Sellers, 584 U.S. –, 138 S. Ct. 1188, 1192 (2018) ("[T]he federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning."); Ylst v. Nunnemaker, 501

U.S. 797, 803-04 (1991). In reviewing that decision, the Court has independently reviewed the relevant portions of the record. Nasby v. McDaniel, 853 F.3d 1049, 1052-53 (9th Cir. 2017).

VI.

DISCUSSION

A. Petitioner is Not Entitled to Habeas Relief on his Ineffective Assistance of Trial Counsel Claims

A petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, the petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690. The court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively "show that 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." Strickland, 466 U.S. at 694; see also Richter, 562 U.S. at 111 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a

reasonable doubt might have been established if counsel acted differently."). A court deciding an ineffective assistance of counsel claim need not address both components of the inquiry if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

In Richter, the Supreme Court reiterated that the AEDPA requires an additional level of deference to a state-court decision rejecting an ineffective-assistance-of-counsel claim: "The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard." 562 U.S. at 101. The Supreme Court further explained (id. at 105 (internal citations omitted)):

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

1. Prior Strike Conviction

In Ground One, Petitioner contends that trial counsel rendered ineffective assistance by admitting Petitioner's 1993 New York conviction for rape and conceding it qualified as a strike under California's Three Strikes Law. Pet. at 5; Pet. Mem. at 9, 12-13. He claims that trial counsel was constitutionally deficient in failing to investigate the law and argue that the

particular provision of the New York Penal Law that he was charged with violating did not contain all elements of a California "strike" crime. Pet. Mem. at 1. Petitioner claims that the New York and California rape laws have significant differences, which "make it far easier for a New York prosecutor to prove the elements of rape in New York than his or her counterpart in California." As such, the prosecution could not prove that Petitioner's prior conviction for first degree rape under New York law qualified as a strike in California. Id. at 10-13.

In California, a trial court may enhance a defendant's sentence if the defendant has a prior "serious" or "violent" felony conviction. See People v. Jenkins, 140 Cal. App. 4th 805, 810 (2006) (as modified); see also Cal. Penal Code §§ 667 & 1170.12. Under California's Three Strikes Law, a prior felony conviction from another jurisdiction may qualify as a "strike" for enhancement purposes provided that the offense includes all of the elements of the particular serious or violent felony in California. Jenkins, 140 Cal. App. 4th at 810; People v. Avery, 27 Cal. 4th 49, 53 (2002). Thus, the prior conviction "must involve conduct that would qualify as a serious [or violent] felony in California." Jenkins, 140 Cal. App. 4th at 810 (alteration in original) (citation omitted). In making this determination, "the court may consider the entire record of the prior conviction as well as the elements of the crime." Avery, 27 Cal. 4th at 53. "[W]hen the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law." People v. Guerrero, 44 Cal. 3d 343, 354-55 (1988).

In 1993, Petitioner pleaded guilty to first degree rape under New York Penal Law § 130.35(1). RT 194; 1 CT 73, 79-80. Rape constitutes a serious felony under California law. See Cal. Penal Code § 1192.7(c)(3). However, because Petitioner admitted the prior rape conviction and the only evidence of

his offense consisted of records that merely established the existence, date, and statutory authority for the conviction (see 1 CT 79-80), the determination of whether this offense would constitute a serious felony if committed in California must be made from an analysis of the elements of rape under New York law and a comparison of New York and California laws. See Jenkins, 140 Cal. App. 4th at 810.

At the time of Petitioner's conviction, N.Y. Penal Law § 130.35(1) provided: "A male is guilty of rape in the first degree when he engages in sexual intercourse with a female: [¶] 1. By forcible compulsion." "[F]orcible compulsion" was defined as either "use of physical force" or "a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped." N.Y. Penal Law § 130.00(8). Lack of consent is an element of first degree rape under New York law, which results from "[f]orcible compulsion" or "[i]ncapacity to consent." N.Y. Penal Law § 130.05(2).

Petitioner does not dispute this prior conviction. Rather, Petitioner argues that his prior conviction for rape does not qualify as a "strike" under California law because the New York definitions of "rape" and "forcible compulsion" are far broader than California's rape law. Pet. Mem. at 11. Specifically, Petitioner contends that under California law, lack of consent is a separate element of the offense, while in New York, the requirement is "rolled" into the forcible compulsion element of the offense. Thus, according to Petitioner, if the defendant in New York uses force or threats, the lack of consent is "presumed" where "the victim testifies that she was subjectively afraid of the defendant based upon his conduct." Id. Petitioner further claims that in California, the prosecution also must prove that any "duress" directed at the victim is such that "a reasonable person would have felt afraid," as

opposed to New York law, which focuses on the subjective state of mind of the victim. Id. at 11-12. Petitioner maintains that in California, if the defendant had a reasonable good faith belief in consent, that belief would shield the defendant from liability, while the defendant would still be liable in New York because the focus is on the subjective state of mind of the victim. Id. at 12.

Under California law, rape includes "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: . . . Where 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. Penal Code § 261(a)(2). Lack of consent is an element of the crime of rape. People v. Ireland, 188 Cal. App. 4th 328, 336 (2010). The element of fear has a subjective and objective component. Subjectively, the question is "whether the victim genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will." People v. Iniguez, 7 Cal. 4th 847, 856 (1994). The prosecution also must 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." Id.

Contrary to Petitioner's contentions, prosecutors in New York must establish similar elements to prove the crime of first degree rape. Under New York law, the prosecution is required to establish both the victim's lack of consent and the defendant's forcible compulsion. People v. McClain, 250 A.D.2d 871, 872 (N.Y. App. Div. 1998). Although the forcible compulsion element must be examined through the victim's state of mind (People v. Melendez, 138 A.D.3d 1159, 1160 (N.Y. App. Div. 2016)), the State must establish that the defendant intended to forcibly compel the victim to engage in sexual intercourse. Miloro v. Artus, 2009 WL 1146448, at *4 (E.D.N.Y. Apr.

28, 2009) (intent to forcibly compel the victim to engage in sexual intercourse is a required element of the offense of first degree rape); People v. Velcher, 116 A.D.3d 799, 800 (N.Y. App. Div. 2014) (intent is an element of criminal sexual act in the first degree); People v. Williams, 81 N.Y.2d 303, 316-17 (1993) (explaining that intent is implicitly an element of first degree rape and the intent required is the intent to perform the prohibited act, i.e., the intent to forcibly compel another to engage in intercourse). Although this element may be interwoven with a finding of forcible compulsion, Petitioner has cited no authority suggesting that lack of consent is "presumed" merely because a victim testifies that she was subjectively afraid of the defendant based upon his conduct. See Pet. Mem. at 11. Rather, the prosecution must still prove that the defendant intended to forcibly compel the victim, which may be negated where the defendant presents evidence of a reasonable good faith belief in consent. The Court finds that Petitioner's prior conviction for rape qualified as serious felony if committed in California.

Because Petitioner's 1993 New York conviction qualified as a serious felony, trial counsel could have reasonably decided to admit this prior conviction, rather than raising a meritless argument, and instead, pursue a motion to strike Petitioner's prior convictions pursuant to People v. Superior Court (Romero), 13 Cal. 4th 497 (1996). See 1 CT 71-76 (Romero Motion); see also Sciosciole v. Gower, 2016 WL 4161132, at *5 (E.D. Cal. Aug. 5, 2016) (counsel's strategy of admitting petitioner's prior convictions instead of trying them, bolstering the chance that the Romero motion would be granted by conveying "contrition instead of recalcitrance by admitting his prior convictions," was sound trial strategy and objectively reasonable).

The state court's rejection of Ground One was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Nor was it based on an

unreasonable determination of the facts in light of the evidence presented. Petitioner is not entitled to habeas relief on this claim.

2. Unanimity Instruction

In Ground Two, Petitioner contends trial counsel rendered ineffective assistance by failing to request a unanimity instruction regarding the multiple alleged blows with the cane. Pet. at 5; Pet. Mem. at 15. Petitioner maintains that under California law, a jury verdict must be unanimous, and where the evidence suggests more than one discrete crime, the prosecution must either elect among the crimes or the court must require the jury to agree on the same criminal act. Id. at 14. According to Petitioner, based on the testimony of defense witness, Dr. Pietruszka, who opined that the photographs of the victim's knees were not consistent with having been struck with a cane or stick, some of the jurors may have believed Ms. Doe was struck on the knees, while others believed she was struck on another part of her body, such as the shins or arms, resulting in the jurors amalgamating their verdict. Id. at 15.

In California, "if one criminal act is charged, but the evidence tends to show the commission of more than one such act, 'either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act.'" People v. Jo, 15 Cal. App. 5th 1128, 1178 (2017) (citations omitted); People v. Carlin, 150 Cal. App. 4th 322, 347 (2007) (explaining that a unanimity instruction is required "if the evidence shows that several criminal acts may have been committed, but the defendant was not charged with a separate violation for each act; there must be a unanimous verdict regarding each specific act for which the defendant is convicted"). However, "[n]either an election nor a unanimity instruction is required when the crime falls within the 'continuous conduct' exception." Jo, 15 Cal. App. 5th at 1178 (citation omitted). A unanimity instruction is not

required when the acts alleged are so closely connected as to form part of "the same transaction." Id. The "continuous conduct" exception applies when the defendant offers essentially the same defense to each act and there is no reasonable basis for the jury to distinguish between them. People v. Williams, 56 Cal. 4th 630, 682 (2013).

Here, there is no basis for distinguishing between the strikes to Ms. Doe. Petitioner offered essentially the same defense at trial, namely, that he did not attack his mother and her injuries were either preexisting or caused from a fall. Jane Doe testified that he did not strike her with a cane and that she had prior scars and preexisting conditions that caused bruising and swelling. RT 55-56, 58, 66, 133. Dr. Pietruszka opined that any bruises to Ms. Doe's face, arms, or knees were from a fall, and/or were old injuries. RT 107, 111-12, 117-18, 121, 123. Consistent with this defense, trial counsel emphasized in closing argument that the victim stated that she was never struck or even touched by Petitioner, and that Dr. Pietruszka "stated that it was not reasonable to conclude that strikes from a cane caused the injury sustained by the alleged victim." Counsel further argued that the "the injury sustained" was "not conclusive, or even convincing to be caused by a cane" and it was "entirely possible that they [were] preexisting and/or caused by falling, as testified to by Mr. Pietruszka." RT 148-49. In these circumstances, Petitioner has failed to show that he was entitled to a unanimity instruction as a matter of state law.

Moreover, there is no clearly established Supreme Court law recognizing a right to a unanimous jury verdict in a state criminal case. See Richardson v. United States, 526 U.S. 813, 817 (1999) (federal jury need not unanimously decide which set of underlying facts make up a particular element of a crime); Schad v. Arizona, 501 U.S. 624, 632 (1991) (plurality opinion) ("there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict" (citation omitted)); McKoy v. North

Carolina, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring) ("[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict" (internal footnote omitted)); Johnson v. Louisiana, 406 U.S. 356, 359 (1972) (recognizing "[i]n criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict" (alterations in original) (citation omitted); Smith v. Swarthout, 742 F.3d 885, 895 n.4 (9th Cir. 2014) ("The Supreme Court has instructed that the Sixth and Fourteenth Amendments do not require a unanimous verdict in state criminal prosecutions."); Sullivan v. Borg, 1 F.3d 926, 927 (9th Cir. 1993) (holding that Schad was dispositive of petitioner's claim that a jury instruction allowing the jury to convict him of first degree murder without unanimity as to whether he committed felony murder or premeditated murder violated his rights to due process and equal protection). To the contrary, "a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict." Schad, 501 U.S. at 634 n.5; Orozco v. Frauenheim, 2018 WL 2144186, at *12 (C.D. Cal. Mar. 26, 2018) ("no clearly established Supreme Court law recognizes a right to a unanimous jury verdict under the federal Constitution"), report and recommendation accepted by 2018 WL 2146374 (C.D. Cal. May 8, 2018).

Because Petitioner was not entitled to a unanimity instruction, he has failed to show that his trial counsel rendered ineffective assistance by failing to request a unanimity instruction. The state court's rejection of Ground Two was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. Petitioner is not entitled to habeas relief on this claim.

3. Aiding the Prosecution

In Ground Three, Petitioner contends trial counsel rendered ineffective assistance by aiding the prosecution by establishing an element of the elder abuse charge and failing to move for a dismissal pursuant to Cal. Penal Code § 1118.1. In particular, Petitioner argues that the prosecutor failed to elicit testimony on direct examination regarding Jane Doe's age, which was an element of the elder abuse charge. But on cross-examination, Petitioner's trial counsel asked Ms. Doe her age, which was seventy-four, thereby allowing the prosecution to prove this element. Pet. at 6; Pet. Mem. at 15-17.

Even were it to be found that defense counsel's elicitation of testimony on cross-examination regarding Ms. Doe's age constitutes ineffective assistance, Petitioner was not prejudiced since the prosecutor elicited the information redirect examination. See RT 76. Thus, even if trial counsel erred in eliciting testimony, Petitioner was not prejudiced. Relatedly, because the prosecutor established this element of elder abuse, any motion to dismiss on this basis would have been denied.

In his Reply, Petitioner argues that the prosecutor's questioning on redirect examination did not vitiate the claim of ineffective assistance of counsel, and in fact, it further advances Petitioner's claim. Reply at 4. Petitioner contends that defense counsel "opened the door" regarding the issue of age, allowing the prosecutor, under Cal. Evid. Code § 774, to correct the deficiency on redirect examination. Id. However, even if trial counsel had not eliciting the testimony on cross-examination, the evidence may still have come in, either through redirect (see People v. Cleveland, 32 Cal. 4th 704, 745 (2005) (explaining that the extent of redirect examination "is largely within the discretion of the trial court" (citation omitted))), or through another witness or exhibit, which may have been the prosecutor's initial strategic plan. In addition, even if the prosecutor failed to present evidence of this element of the

crime in his case-in-chief and defense counsel had moved for a judgment of acquittal, the prosecutor could have requested leave to reopen the evidence. The trial court has broad discretion to reopen a case and allow the introduction of additional evidence. People v. Riley, 185 Cal. App. 4th 754, 764 (2010).

The state court reasonably concluded that Petitioner's speculative claim of prejudice was insufficient to demonstrate that, but for counsel's allegedly deficient performance, there was a reasonable probability that a more favorable outcome would have resulted. The state court's rejection of Ground Three was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. Petitioner is not entitled to habeas relief on this claim.

B. Petitioner is Not Entitled to Relief on his Cumulative Error Claim

In Ground Four, Petitioner contends the cumulative effect of the errors alleged in Grounds One through Three rendered his trial fundamentally unfair, thereby denying him his right to due process. Pet. at 6; Pet. Mem. at 17-18.

"[T]he Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." Parle v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Chambers v. Mississippi, 410 U.S. 284, 290 n.3 (1973)). Cumulative error does not merit relief unless the errors "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. at 927 (citation omitted). "[T]he fundamental question in determining whether the combined effect of trial errors violated a defendant's due process rights is whether the errors rendered the criminal defense 'far less persuasive,' and thereby had a 'substantial and injurious effect or influence' on the jury's verdict." Id. at 928 (internal citations omitted).

Here, however, none of Petitioner's claims has merit. Thus, the collective impact of the purported errors underlying those claims could not have rendered Petitioner's trial fundamentally unfair. See Hayes v. Ayers, 632 F.3d 500, 524 (9th Cir. 2011) ("Because we conclude that no error of constitutional magnitude occurred, no cumulative prejudice is possible.").

Accordingly, the state court's rejection of Ground Four was neither contrary to, nor involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. Petitioner is not entitled to habeas relief on this claim.

VII.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

Dated: March 02, 2020

JOHN D. EARLY
United States Magistrate Judge

Appendix D

FILED

MAR 29 2022

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDUARDO CHE RODRIGUEZ,

Petitioner-Appellant,

v.

JARED LOZANO,

Respondent-Appellee.

No. 21-55051

D.C. No.
5:19-cv-02127-GW-JDE
Central District of California,
Riverside

ORDER

Before: SCHROEDER, TALLMAN, and MILLER, Circuit Judges.

The Petition for Panel Rehearing is DENIED.

Appendix E

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

☐ **BANNING** 311 E. Ramsey St., Banning, CA 92220
☐ **BLYTHE** 265 N. Broadway, Blythe, CA 92225
☐ **INDIO** 46-200 Oasis St., Indio, CA 92201
☒ **RIVERSIDE** 4100 Main St., Riverside, CA 92501
☐ **MURRIETA** 30755-D Auld Rd., Suite 1226, Murrieta, CA 92563

HC001

JAN 17 2019 BY

In the Matter of the Petition of	FOR COURT USE ONLY FILED SUPERIOR COURT OF CALIFORNIA COUNTY OF RIVERSIDE JAN 10 2019 E. Carrasco
PETITIONER: Eduardo Rodriguez	HABEAS CASE NUMBER: ~~RC1825188~~ RIC 1825188
For Writ of Habeas Corpus	CRIMINAL CASE NUMBER: RIF1504036

Hearing Date:	Time:	Department:
N/A	N/A	43

ORDER RE: PETITION FOR WRIT OF HABEAS CORPUS - DENIAL

The Court, having read and considered the Petition for Writ of Habeas Corpus filed on 11/27/18, hereby **RULES** as follows:

1. ☒ The petition is denied because it fails to state a prima facie factual case supporting the petitioner's release. (Cal. Rules of Court, rule 4.551 (c).) The petition makes assertions regarding the applicable law that are contrary to established California case decisions.

2. ☒ The petition is denied because it fails to state a prima facie factual case supporting the petitioner's release. (Cal. Rules of Court, rule 4.551 (c).) While the petition states a number of factual conclusions, these broad conclusions are not backed up with specific details, and/or are not supported by the record in the case.

3. ☐ The petition is denied with prejudice because the issues were raised and considered in a prior appeal. "[I]ssues resolved on appeal will not be reconsidered on habeas corpus..." (*In re Clark* (1993) 5 Cal. 4th 750, 765.)

4. ☐ The petition is denied because it fails to raise any new issue that has not previously been addressed in an earlier writ petition. (*In re Clark* (1993) 5 Cal. 4th 750, 767.)

5. ☐ The petition is denied because the issues could have been raised in an appeal but were not and no excuse for failing to do so has been demonstrated. (*In re Clark* (1993) 5 Cal. 4th 750, 765.)

6. ☐ The petition is denied because the petitioner unreasonably delayed filing the petition after the facts occurred that allegedly justifies relief, and he or she has failed to adequately explain the reason for the delay. A petitioner must justify any substantial delay in presenting a claim by, inter alia, stating when he or she became aware of the legal and factual bases for his or her claims and explaining the reason for any delay since that time. (*In re Clark* (1993) 5 Cal. 4th 750, 783, 786-787.)

7. ☐ The petition is denied without prejudice because the petitioner has brought prior petitions arising from the same detention or restraint and fails to describe the nature and disposition of the claims made in the prior petitions. (Pen. Code § 1475.)

8. ☐ The petition is denied without prejudice because the petitioner is represented by counsel.

9. ☐ The petition is denied because the petition fails to establish that the petitioner has exhausted available administrative remedies. (*In re Muszalski* (1975) 52 Cal. App. 3d 500.)

PETITIONER:	CASE NUMBER:
Eduardo Rodriguez	~~RC1825188~~ RIC1825188

10. ☐ The petition is denied as moot due to changed conditions: _____

11. ☐ The petition is denied because it is incomplete, unintelligible, and/or unclear.

12. ☐ The petition is denied without prejudice because it is not made on Judicial Council form MC-275, and there is no showing of good cause for failing to do so. (Cal. Rules of Court, rule 4.551 (a)(1)&(2).)

13. ☐ No order to show cause having been issued, the request for appointment of counsel is denied. (Cal. Rules of Court, rule 4.551 (c)(2).)

14. ☒ Other:

The petitioner makes a number of assertions that his trial counsel provided ineffective assistance by failing to investigate the New York law pertaining to his prior conviction, failing to request a unanimity instruction to the jurors and by assisting the People in proving an element of his offense. 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.)

IT IS SO ORDERED.

Date: 01/10/19

SUPERIOR COURT OF CALIFORNIA EUREKA COUNTY OF RIVERSIDE

Judge Steven Counelis
(JUDGE OF THE SUPERIOR COURT)

(SIGNATURE)

Approved for Optional Use
Riverside Superior Court
HC001 [Rev. 06/13/16]

ORDER RE: PETITION FOR WRIT OF HABEAS CORPUS - DENIAL

Appendix F

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

In re EDUARDO CHE RODRIGUEZ

on Habeas Corpus.

E072549

(Super.Ct.No. RIC1825188)

The County of Riverside

THE COURT

The petition for writ of habeas corpus is DENIED.

RAPHAEL
Acting P. J.

Panel: Raphael
McKinster
Codrington

cc: See attached list

Appendix G

CTE

RECEIVED IN CRIMINAL DOCKETING
8/16/19

SUPREME COURT
FILED

AUG 14 2019

Jorge Navarrete Clerk

Deputy

Court of Appeal, Fourth Appellate District, Division Two - No. E072549

S256501

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re EDUARDO CHE RODRIGUEZ on Habeas Corpus.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice