

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Larry Redic — PETITIONER
(Your Name)

vs.

Ronald Rackley — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United states District Court(Northern District), The 9th Cir.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Larry Redic
(Your Name)

Folsom State Prison P.O. Box 950
(Address)

Folsom, CA, 95763
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Did Failure of the Charging Document to Provide Appellant Adequate notice of Charges Against Him Violated His Due Process Rights
2. Did charging document failed to give appellant notice that the State would seek to enhance his sentence with a mandatory consecutive sentence under the "multiple occasions" theory in California Penal Code § 667.6(d)
3. Did Cleary Establish Federal Law Entitles Redic to Fair Notice of the Prosecution seeking to Enhance His Sentence Under a " Multiple Occasions " Prong of § 667.6
4. Was the California Court of Appeal's Rejection of Redic's Lack of Notice-Due Process Claim Was Objectively Unreasonable
5. Under the 9th cir Court's Independent Standard of Review, was Redic's Due Process Right to Fair Notice of the Charges Violated Because There is a Material Variance Between the Charging Document And the Enhancement Actually Utilized By the Sentencing Court.
6. Should the Court consult any sources other than charging document for evidence of notice.
7. Should this Court assume that Sources Beyond the Charging document can be Consulted, Redic's Due Process Right to Fair Notice was likewise Violated
8. This Question is Whether the Violation of the Due Process Right to Fair Notice of the Charges is Structural is an open Question For the Ninth Circuit, In *Gault*, the 9th cir Court identified a number of factors counseling in favor of interpretation, and a number of Factors supporting Application of " Harmless Error Analysis ", before deciding to leave the issue open Because , *Gault* was entitled to relief even if Harmless Error Review apply, *Gault*, 489 F.3d at 1015-16. This Court should apply Violation of the Due Process Right to Fair Notice of the Charges is a Structural Error, As this Court has Held in *Neder v. United State*, 527 U.S. 1 (1999), at pages 8-9 there is a Limited Class of Errors that Defies Harmless Error Review. Those defects affect the Framework within the Trial Proceeds, rather than simply an Error in the Trial Process itself. They infect the Entire Process and Necessary Render the Entire Trial Fundamentally Unfair. Stated differently, these Errors " Deprive Defendants of Basic Protections without which a Criminal Trial cannot Reliable Service its Function as a Vehicle for Determination of Guilt or Innocence and no Punishment may be regarded as Fundamentally Fair." *Neder*, 527 U.S at 8.
9. If a showing of Prejudice is Required, Did the Notice or Due Process Error Have a Substantial and Injurious Effect on the Imposition of the Mandatory Consecutive Sentence Under the "Separate Occasions" Prong of § 667.6

10. Did Uncharged enhancement resulted in a significant prison term of 15 years
11. If Redic had notice of the prosecution seeking to rely on the separate occasion prong of § 667.6(d) would his trial strategy likely would have been different
12. Was Redic's cross-examination of Jane Doe 1 violated
13. Was there factors that counsel would have likely wished to address at least in some way in the cross-examination of Jane Doe 1 if he had notice of § 667.6(d) enhancement based on crimes committed against Jane Doe 1 on separate occasions
14. Did the court determine whether allege crime against Jane Doe 1 was committed on a separate occasion, the court should consider whether, between the commission of one sex crime and another, that the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior.
15. Does a change of sexual position, in and of itself, demonstrate a reasonable opportunity to reflect.
16. Does a quick change of a position amount to reasonable opportunity for reflection.
17. Is Appellant's Due Process claim's Procedurally Barred, because the California State Court of Appeal did not clearly and expressly rely on the Procedural Bar.
18. Did trial court only mention in charging document based on commission of allege crimes against Jane Doe 1 and Jane Doe 2
19. Was the only time "separate occasions" theory mentioned by the "Prosecutor" was in his sentencing brief.
20. Did the defense counsel fail to object to the imposition of the mandatory consecutive sentence under the lack of notice grounds
21. Was the California court's rejection of Redic's claim "Prejudice"
22. Did the California Court of Appeal addressed, in detail the "Merits" of Redic's constitution claim
23. Did appellant waived his constitutional right or did his court appointed Attorney fail to object at sentencing
24. Did Redic Established Cause and Prejudice for a allege state court Default for not objecting at sentencing
25. Is this Court "powerless" to overturn a state court general invalid alleged adequate and independent state law grounds doctrine.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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1. McMurtly v. Ryan, 539 F.3d 1112, 1118 (9th Cir. 2008); Standard of Review for district court's denial.
2. Harrington v. Richter, 131 S.Ct. 770, 785 (2011); Fair v. Ayers, 650 F.3d 1243, 1251 (9th Cir. 2011); Obtain relief under AEDPA.
3. Williams v. Taylor, 529 U.S. 362, 405 (2000) (O'Connor, J., for the Court); accord Brown v. Payton, 544 U.S. 133, 141 (2005); State court decision may be contrary to clearly established precedent if state court applies a rule that contradicts the governing laws set forth.
4. Rompilla v. Beard, 545 U.S. 374, 380 (2005); State court decision objectively unreasonable.
5. Cole v. Arkansas, 333 U.S. 196 (1949); in In re Oliver, 333 U.S. 257, The Sixth Amendment guarantees Redic the fundamenttal right to be informed, as to permit adegate preparation of his defense, U.S. Const., 6th Amend.,5, 6
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9. Neder v. United States, 527 U.S. 1 (1999), at pages 8-9, Harmless error review defects which affect the framework within which the trial proceeds rather than simply an error in the trial process itself. They infect the entire trial process and necessary render the entire trial fundamentally unfair.
10. Arizona v. Fulminante, 499 U.S. 279, 310 (1991); see also Brecht, 507 at 629-30; How Redic trial strategy might have different, because what additional questions might have been ask on cross examination or what additional witnesses might have been brought.
11. Brecht v. Abrahamsom, 507 U.S. 619; Fry v. Pliler, 551 U.S. 112, 121-22 (2007); Garcia v. Long, 808 F.3d 771, 782 (9th Cir. 2015); Under Brecht the error is not harmless if it has "substantial and injurious effect or influence in determinging the jur's verdict." The state court does not address the issue "Prejudice", there is nothing to defer to. Since the California Court of Appeal did not apply Chapman v. California, 386 U.S. 18 (1967), the 9th Cir. applies the Brecht/O'Neal standard without deference to the state court decision; Cudjo v. Ayer, 698 F.3d 752, 768-69 (9th Cir. 2012).....9

12. Manning v. Foster, 224 F.3d 1129,1132(9th Cir.2000);The 9th Circuit review the question of whether Redic's constitutional claim is barred by procedural default.
13. Wells v. Maass,28 F.3d 1005,1008(9th Cir.1994);Procedural default in state court is a specific application of the general adequate and independent law ground doctrine.
14. Coleman v. Thompson,501 U.S. 722,729(1991);When state court rests on an independent and adequate state law, federal courts would have little power to overturn it and any resolution of any federal issue would be only advisory.
15. Park v. California, 202 F.3d 1146,1151(9th Cir.2000),A procedural bar would preclude consideration of Redic's lack of notice/federal due process claim only if(1)Redic had defaulted on a clearly applicable California procedural bar, and(2) Redic is not able to demonstrate "Cause and Prejudice" for default or a miscarriage of justice, Also citing O'sullivan v. Boerckel,526 U.S. 838(1999) and Coleman v. Thompson,501 U.S. at 729.
16. Harris v. Reed, 489 U.S. 255,263(1989);In order for claim to be procedurally defaulted for habeas corpus purposes,the last reasoned state court opinion must clearly and expressly state that its rest on a state procedural bar.
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CALIFORNIA CONSTITUTION.

Article I, § 17-Cruel or Unusual Punishment: Excessive Fine.

Cruel or unusual punishment may not be inflicted or excessive fine imposed.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 08/14/17.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 10/25/17, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A. Petitioner applied for extension of time on 12/28/17, Petition was sent back, See Exhibit B, of Declaration.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

SIXTH AMENDMENT+TRIAL BY JURY:

The amendment to the U.S. Constitution that entitles the accused in a criminal trial the right to a "speedy trial", by an impartial jury, to be informed of the charges against him or her to be confronted with witnesses against him or her, to have "compulsory process" for obtaining witnesses in his her favor, and to have "effective assistance of counsel. Through the process of selective incorporation, each of these rights has been applied to the states under the "due process clause" of the "Fourteenth Amendment". While these right form the foundation of the accused's right to a fair trial, the accused has been accorded additional rights such as the right to conduct his or her own defense as necessary to a fair trial under the "due process clause".

EIGHTH AMENDMENT:

One of the Bill of Rights passed in 1791 prohibiting "Cruel and Unusual Punishment" and excessive bail and fines. The ban against cruel and unusual punishment has been applied against a state's imposition of a penalty for the status of being addicted to the use of narcotics, but the "supreme Court" has given the state court great deference in terms of sentencing for various crimes. However, the amendment does limit the kinds of punishment that can be impose, proscribe punishment grossly disproportionate to the severity of the crime, and imposes substantive limits on what can be made criminal and punished as such.

FOURTEENTH AMENDMENT:

One of the so called Civil War Amendments to the Constitution in that it was ratified after the Civil War; protects all persons from state laws that attempt to deprive them of "life, liberty, or property, without due process of law" or that attempt to deny them "Equal Protection of the Laws". The amendment has been used to extend the protection of almost all of the provision of the Bill of Rights to citizens of every state.

STATEMENT OF THE CASE

Appellant Larry Redic was sentenced on two counts of Rape, one count of digital penetration to full term consecutive sentences amounting to a 15-year determinate term. Court imposed it as mandatory consecutive terms under California Penal Code § 667.6(d) on the ground those crimes against Jane Doe 1 were committed on separate occasion. However, in the charging document the only theory on which the prosecution gave notice it would seek to impose mandatory consecutive sentences was that there were crimes committed against Jane Doe 1 and Jane Doe 2. The separate occasions prong was not mentioned at all until sentencing. Inexplicably, Redic's trial counsel failed to object to mandatory consecutive sentencing on the grounds of lack of notice. The 9th Cir. Court certified the following issue for appeal:

Whether the failure of the charging document to provide appellant adequate notice of the charges against him violated his due process right, including whether his claim is procedurally defaulted?

Larry Redic, a California state prisoner filed the instant federal habeas corpus petition in the U.S. District Court for the Northern District of California. On December 10, 2014, the district court filed a judgment denying the petition. (2 ER-049). The district court had jurisdiction pursuant to 28 U.S.C. § 2254. On January 30, 2015 appellant filed a timely notice of appeal and requested a certificate of appealability. (2 ER-046). On November 2, 2015, the 9th cir. Court issued a certificate of appealability as to one of the issues raised in the appellant's petition. The district court granted extension of time to file appeal to February 8, 2015.

A state jury convicted appellant Larry Redic of false imprisonment, kidnapping, and sex offences. The state court sentenced appellant to a determinate term of 15 years, to be followed by an indeterminate 40-year-to-life term. (1 ER-011). In a reason unpublishable decision, the California Court of Appeal denied appellant's due process claim on the merits. The California Supreme Court summarily denied appellant's petition for review. (1 ER-011-019). Appellant then filed an instant federal petition, ground two of second amended petition was the due process claim certified for appeal by the 9th cir Court. The district court denied the petition on the merits. (2 ER-082). Redic was convicted of sexual assault crimes committed against Jane Doe 2 on June 2, 2004, and Jane Doe 1 on June 19, 2004. Since this appeal only raises issues pertaining to the mandatory consecutive sentence on the counts pertaining to Jane Doe 1, this recitation of facts will focus on the evidence dealing with those counts.

STATEMENT OF THE CASE CONTINUAL

Appellant can demonstrate "Cause and Prejudice" for procedural default, even if this court were to find that appellant's "Due Process" / lack of notice claim is procedurally defaulted due to "Counsel's Failure to Object", appellant can demonstrate cause and prejudice for the default. Cook v. Schriro, 538 F.3d, 1000, 1027 (9th Cir. 2008). Ineffective assistance of trial counsel in preserving the defaulted claim for review is sufficient to establish both cause and prejudice for the default. Edwards v. Carpenter, 529 U.S. 446, 451 (2000). Appellant has a federal constitutional right to effective assistance of counsel. U.S. Const., 6th Amend.; Strickland v. Washington, 466 U.S. 668, 688 (1984).

To establish that I have suffered from ineffective assistance of trial counsel, appellant must show (1) that his trial attorney's failure to object on due process/notice grounds fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's improper acquiescence, the result would have been more favorable to the appellant. Strickland, 466 U.S. at 687. "Reasonable Probability" does not require appellant to show that "Counsel's conduct more likely than not altered the outcome of the case" Strickland, 466 U.S. at 693-94. Rather appellant must only show a probability sufficient to undermine confidence in the outcome of his trial.

Trial counsel rendered objectively unreasonable performance by failing to object on due process / notice grounds to the trial court's reliance on the "separate occasions" aspect of § 667.6(d).

Trial counsel's failure to object was constitutionally deficient performance. As previously explained, in sentencing Redic to mandatory full-term consecutive sentences on Count 4, 5, and 7, the trial court relied on the separate occasions prong of § 667.6(d), which was not listed in the charging document. Under clearly established "Supreme Court Law", this is a "Violation of Redic's Due Process Right to Fair Notice of the Charges Against Him". Cole, 333 U.S. at 201; see also Gault, 489 F.3d at 1005, 1007-08; Lee, 419 Fed.Appx. at 765. Counsel has a duty to be aware of the applicable law and could have had no rational "Tactical" consideration of his failure to object. It is reasonably likely this objection would have been a clean winner for him. Moreover counsel "Failure to object was Prejudicial". As previously explained the due process / notice violation requires issuance of a conditional writ of habeas corpus without a showing of prejudice. In addition if prejudice is required, the due process / notice "error" had a substantial and injurious effect on Redic's sentence. In light of these facts, if counsel objected on these grounds there is a reasonable probability that his sentence would have been less severe.

REASONS FOR GRANTING THE PETITION

1. Redic Due Process Right To Notice Was Violated

The trial court violated Redic's federal due process right to fair notice that prosecution will seek to subject him to mandatory consecutive sentencing under § 667.6(d) based on the theory that his crime against Jane Doe 1 were committed on "separate occasions" within the meaning of that statute. As to Counts 4, 5, and 7, the charging document only references discretionary consecutive sentencing under § 667.(c) or mandatory consecutive sentencing based on crimes committed against Jane Doe 1 and Jane 2. Both those statutes are materially different from § 667.6.

The California Court Of Appeal's rejection of this claim was objectively unreasonable. That court found no violation of the right to notice of the enhancement so long as the record contains sufficient evidence to support it. This is contrary to clearly established federal law for AEDPA purposes, as well as Circuit law. Because this error affects the framework of the entire trial, it is structural and it requires issuance of the requested writ without a showing of prejudice. But should this Court agree, the error had a substantial and injurious effect on Redic's sentence this Court should reject the "opposition theory".

2. Procedural Default Does Not Bar Consideration of the Merits of the Due Process/Lack of Notice Claim

Procedural default would bar consideration of the merits of Redic's claim only if the California Court of Appeal's decision clearly and unambiguously relied on it. But here, after the state appellate court fully addressed the merits of the claim, it added that if Redic's claim otherwise had merit, it would be barred because his attorney failed to object on notice grounds at sentencing. Respondent's briefing of the forfeiture argument in the state court was, at best, perfunctory. In light of those facts, the California Court of Appeal did not clearly and unambiguously rely on the procedural bar and this Court should consider the merits of the claim. In addition, since the failure to object is a result of ineffective assistance of Redic's trial attorney, such ineffective assistance establishes "cause and prejudice for default."

3. Clearly Established Federal Law Entitles Redic to Fair Notice of the Prosecution Seeking to Enhance His Sentence By Subjecting Him to Mandatory Consecutive Sentence Under the "Multiple Occasions" Prong of § 667.6

Cole v. Arkansas, The Sixth Amendment guarantees Redic the fundamental right to be informed of the nature and cause of the charges made against him so as to permit adequate "preparation" of his defense. U.S. Const., 6th Amend. Other United States Supreme Court decisions clearly establish this right. For example, in *Cole v. Arkansas*, 333 U.S. 196 (1948), at page 201, the high court held:

It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Similarly, in *In re Cliver*, 333 U.S. 257, (1948) at page 273, Supreme Court held that [a] person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense - a right to his day in court-- are basic in our system of jurisprudence. This right made, applicable to the states through the due process clause of the Fourteenth Amendment. *Cole*, U.S. at 201.

In order to determine whether Redic has received fair notice that the state would seek mandatory consecutive sentencing under the "separate occasions" prong of § 667.6(d), Court is required to analyze the contents of the information. In *Cole*, the Supreme Court carefully examined the charging document to determine that the petitioner had not been give fair notice of the charge which he was convicted. *Cole*, 333 U.S. at 198, 201. The statute of conviction had section § 1 and 2 and while the information did not identify the statute, the language used in the information was substantially identical with § 2. *Id.* at 197-98. Such information, held *Cole*, did not get fair notice of the charge under § 1, a charge distinct and substantially different from a charge under § 2. *Id.* at 202.

This is clearly established law for the purpose of AEDPA. This Court has already held, citing *Cole*, that:

For the purposes of AEDPA' clearly established federal law requirement, a criminal defendant has a right guaranteed by the Sixth Amendment, to be informed of any charges against him, and that the mean which such notice is provided. To satisfy this constitutional guarantee, the charging document need not contain a citation to the specific statute at issue; the substance of the information, however must in some appreciable way apprise the defendant of the charges against him so that he may "Prepare" a defense accordingly.

4. *Gaultt* and *Lee*, two Circuit cases, in which AEDPA relief was granted under *Cole*(as clearly established federal law) for failure to provide notice

Two decision of the Circuit, in which relief under AEDPA was granted, are analogous. In *Gaultt*, as here, the defendant's sentence was enhanced under a statutory provision diffendant than the one that was pled in the charging documet. The California Court of Appeal rejected the defendant's fair notice claim, reasoning that the charge omitted from the the information was fully supported by the evidence in the trial court. *Gaultt*, 489 F.3d at 1005-06. However, 9th Cir. Court held that this was an unreasonable application of the Supreme Court authority, reasoning that the state appellate court failed to explain why the discrepancy between the charged and the impose enhancement was constitutionally insignificant. *Gaultt*, 489 F.3d at 1005. Since nothing in the information put the defendant on fair notice regarding the enhancement that was ultimately imposed, the 9th Cir. found that the defendant due process-fair notice right was violated. *Id.* at 1007-08; *Lee v. Small*, 419 Fed. Appx. 763(9th Cir., 10-56038, filed 03/08/11) (unpublished), is also instructive.

5. Under the 9th Cir. Court's Independent Standard of Review, Redic's Due Process Right to Fair Notice of the Charges was Violated Because There is a Material Variance Between the Charging Document And the Enhancement Actually Utilized By the sentencing Court

The charging document fails to provide any notice of the "separate occasions" prong of the §667.6(d) enhancement. Once 9th Cir. determines that 28 U.S.C § 2254 does not bar federal habeas relief in this case it must consider whether, under its independent standard of review, Redic's due process right to fair notice of the charges has been violated. *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (en banc). Here, Redic's right to notice has been violated. As to Counts 4, 5, and 7, there is no mention of the "separate occasions" provision of §667.6(d). Instead, as to each count, the information (1) refers to discretionary consecutive sentencing based on multiple offences committed against Jane Doe (1) and (2) mandatory consecutive sentencing based on the offences committed against Jane Doe 1 and Jane Doe 2. The information does not give fair notice that the State would seek imposition of mandatory consecutive sentence against Redic based on commission of crimes against Jane Doe 1 on separate occasions.

The Court should reject any argument from respondent, because as in *Cole*, the statutory requirements for imposing discretionary consecutive sentence under § 667.6(c) are materially different mandatory consecutive sentence under § 667.6(d), reference to § 667.6(c) do not provide the constitutionally required notice. Indeed, as discussed in the "Prejudice" section of the Redic's argument, imposition of §667.6(d) would hinge on whether a determination is made that the crime against Jane Doe 1 occurred on "separate occasions." This is an issue which, **THOUGH NOT DECIDED BY A JURY, WAS IMPACTED BY TRIAL TESTIMONY OF JANE DOE 1**. As explained in the prejudice section of Redic's argument if the constitutionally required notice had been given the charging document, trial counsel would have had an opportunity to address, **PERHAPS THROUGH CROSS EXAMINATION OF JANE DOE 1**.

In contrast, the court's discretionary authority to impose a full term consecutive sentencing exists if the crime were committed against the same victim on a single occasion, §667.6(c). To determine whether to exercise that authority, the trial court was required to consider the criteria set forth in California Rule of Court 4.425, "which incorporates rules 4.421 [aggravating circumstances], and 4.423 [mitigating circumstances], as well as other reasonably related criteria as provided in rule 4.408 [enumerated criteria not exclusive]." *People v. Quintanilla*, 170 Cal.App.4th 406, 411 (Cal. Ct.App. 2009), citing Cal. R. Court 4.426. This is a determination that is wholly dissociated from trial testimony on the ISSUES OF GUILT OR INNOCENCE.

The Court should not consult any sources other than charging document for evidence of notice. In *Wash v. Runnells*, 2010 WL 56174, * 5 (C 04-04207 JW, filed 01/05/10), the district court described the holding of *Gault* as "declining to decide" whether the error is structural, but "inclined to believe" lack of the actual charge is structural error because it **AFFECTS THE FRAMEWORK WITHIN WHICH THE TRIAL PROCEEDS.**

6. Redic's due process right to fair notice of the "separate occasion" prong of § 667.6(d) was violated even if sources beyond the charging documents are consulted

Should the Court assume that sources beyond the charging document can be consulted, Redic's due process right to fair notice was likewise violated. The first time the mandatory consecutive sentencing enhancement is mentioned is during closing argument, i.e., after the evidentiary portion of the case had been complete. And those remarks by the court concerning the verdict forms, again, only reference the "multiple victims" aspect of section § 667.6(d), not separate occasions. **THE FIRST TIME THE "SEPARATE OCCASIONS" PRONG OF § 667.6(d) WAS ACTUALLY INVOKED WAS IN THE PROSECUTOR'S SENTENCING PAPERS.** Providing notice of a sentencing enhancement during a sentencing hearing, long after the trial is concluded, does not give Redic a fair opportunity to contest the charge during trial. Therefore, this Court should conclude under its independent standard of review that the material variance between the charging document and the sentencing enhancement used at sentencing violate Redic's due process right to fair notice of charges under Cole.

7. If a Showing of Prejudice Required, that the Notice Due Process Error Had a Substantial and Injurious Effect on the Imposition of the Mandatory Consecutive Sentence Under the "Separate Occasion" Prong of § 667.6

Where, as here the state court does not address the issue of "Prejudice" there is nothing to defer to; instead, the 9th Cir. Court conducts its own independent analysis of prejudice under *Brecht v. Abrahamson*, 507 U.S. 619. *Fry v. Pliler*, 551 U.S. 112, 121-22(2007); *Garcia v. Long*, 808 F.3d 771, 782(9th Cir.2015).

Under *Brecht*, the error is not harmless if it has a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637. The courts bears the Risk of doubt in this situation and must provide this Court with a "fair assurance" that lack of notice did not have a substantial and injurious effect on the imposition of mandatory consecutive sentencing under the "separate Occasions" prong of § 667.6(d); *O'Neal v. McAnich*, 513 U.S. 432, 443(1995); *Valerio v. Dir. of the Dept. of Prisons*, 306 F.3d 742, 762(9th Cir.2002). Since the California Court of Appeal did not apply *Chapman v. California*, 386 U.S. 18(1967), the 9th Cir. applies the *Brecht / O'Neal*, standard without deference to the state court decision; *Cudjo v. Ayers*, 698 F.3d 752, 768-69(9th Cir.2012).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Larry Redic

Date: February 27, 2018

APPENDIX A

FILED

NOT FOR PUBLICATION

AUG 14 2017

UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

LARRY REDIC,

Petitioner-Appellant,

v.

TERRI L. GONZALES, Warden,

Respondent-Appellee.

No. 15-15177

D.C. No. 3:08-cv-05010-RS

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Argued and Submitted May 15, 2017
San Francisco, California

Before: KLEINFELD and WARDLAW, Circuit Judges, and MORRIS,** District Judge.

California prisoner Larry Redic appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Redic was charged

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

** The Honorable Brian M. Morris, United States District Judge for the District of Montana, sitting by designation.

and convicted of sex offenses under § 667.6(c) and (d) of the California Penal Code. Section 667.6(c) provides that for certain enumerated crimes a consecutive sentence may be imposed if there are multiple offenses against the same victim on the same occasion. Section 667.6(d) provides that for certain enumerated crimes a consecutive sentence shall be imposed if there are offenses against multiple victims or multiple offenses against the same victim on separate occasion. Redic's principal contention is that his charging document did not give him notice that the State would seek to enhance his sentence with a mandatory consecutive sentence under the multiple occasions theory of § 667.6(d) and that this lack of notice violated his due process rights. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253, and we affirm.

Redic's claim was procedurally defaulted because he did not raise it at his sentencing hearing. Federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991). We have recognized that California's contemporaneous objection rule constitutes a valid basis for procedural default. See Fairbank v. Ayers, 650 F.3d 1243, 1256–57 (9th Cir.

2011). Because the state appellate court found that Redic waived his claim by failing to object at sentencing, Redic's claim is procedurally defaulted.¹

Therefore, for our Court to be able to review his federal claim, Redic must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." Coleman, 501 U.S. at 750. However, Redic can demonstrate neither cause nor prejudice. An ineffective assistance of counsel claim cannot be premised on the failure of counsel to raise a meritless argument. See Shah v. United States, 878 F.2d 1156, 1162 (9th Cir. 1989). Here, given that the trial court expressly found that it believed that the offenses occurred against the same victim on separate occasions, and that the evidence supported that conclusion, Redic's trial counsel could have reasonably concluded that the trial court had every intention of punishing each offense severely, regardless of whether it was required to do so under § 667.6(d) or merely permitted to do so under § 667.6(c). Because the same sentence was available to the trial court under §

¹ Redic argues that the California Court of Appeal's decision did not "clearly and expressly" rest on procedural default and that we are therefore not precluded from reviewing his claim. See Harris v. Reed, 489 U.S. 255, 263 (1989). This is incorrect: Instead, the court expressly concluded that Redic waived his claim by failing to raise it at the sentencing hearing, while holding in the alternative that his claim failed on the merits.

667.6(c), which was expressly referenced in the charging document, Redic's counsel could have reasonably determined that any objection would have been futile. Similarly, Redic cannot demonstrate prejudice because there is no reason to believe the trial court would have given him a more favorable sentence had there been an objection, because § 667.6(c) allows for the exact same sentence that was ultimately imposed. The procedural bar therefore precludes consideration of Redic's claim.

AFFIRMED.

APPENDIX B

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

LARRY REDIC,

Petitioner,

v.

JOHN MARSHALL, Warden,

Respondent.

No. C 08-5010 RS (PR)

JUDGMENT

The petition for writ of habeas corpus having been denied, judgment is entered in favor of respondent. Petitioner shall obtain no relief by way of his petition.

IT IS SO ORDERED.

DATED: December 10, 2014


RICHARD SEEBORG
United States District Judge

No. C 08-5010 RS (PR)
JUDGMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LARRY REDIC,

Petitioner,

v.

TERRI L. GONZALEZ, Warden,

Respondent.

No. C 08-5010 RS (PR)

**ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS**

INTRODUCTION

Petitioner, a state prisoner proceeding pro se, seeks federal habeas relief from his state convictions. For the reasons set forth below, the petition for such relief is DENIED.

BACKGROUND

In 2006, an Alameda County Superior Court jury found petitioner guilty of rape, false imprisonment by violence, attempted sodomy, penetration with a foreign object, and kidnapping. He was sentenced to a term of 15 years plus 40 years-to-life in state prison. The state appellate court modified the judgment to stay the sentence imposed for the kidnapping conviction. (Ans., Ex. C (State Appellate Opinion) at 1.) Other than this modification, petitioner was denied relief on state judicial review. This federal habeas petition followed.

No. C 08-5010 RS (PR)
ORDER DENYING PETITION

1 Evidence presented at trial showed that in 2004 petitioner raped two adult females
2 (Jane Doe 1 and Jane Doe 2) in separate incidents. In June 2004, petitioner met Jane Doe 2,
3 whom he had dated a decade before, by accident in public and invited her to his apartment
4 for a drink. While there, petitioner choked and raped her and held her captive in his
5 apartment for 24 hours. Semen bearing petitioner's DNA signature was taken from Jane Doe
6 2. (Ans., Ex. C at 2-5.)

7 About two weeks later, petitioner ran up behind Jane Doe 1 while she was walking
8 home from a friend's house, pressed an object against her back, and said, "Keep walking
9 bitch . . . [or] I'll kill you." He took her to his apartment. While there, he penetrated her
10 vagina with his fingers and penis. When she escaped from his apartment, she nearly collided
11 in the hallway with a police officer who had responded to a neighbor's report of Jane Doe 1's
12 cries for help. She pointed toward petitioner and identified him as her rapist. When he
13 noticed the policeman, petitioner jumped from his window to the street below and ran off.
14 (*Id.* at 5-7.)

15 As grounds for federal habeas relief, petitioner claims: (1) there was insufficient
16 evidence to support one of his four convictions which resulted in the imposition of a full term
17 consecutive sentence; (2) the charging documents were faulty, in violation of due process;
18 and (3) the state appellate court erred in rejecting his claim that the imposition of consecutive
19 sentences violated his constitutional rights.

20 ✓ STANDARD OF REVIEW

21 This Court may entertain a petition for writ of habeas corpus "in behalf of a person in
22 custody pursuant to the judgment of a State court only on the ground that he is in custody in
23 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).
24 The petition may not be granted with respect to any claim that was adjudicated on the merits
25 in state court unless the state court's adjudication of the claim: "(1) resulted in a decision
26 that was contrary to, or involved an unreasonable application of, clearly established Federal
27 law, as determined by the Supreme Court of the United States; or (2) resulted in a decision
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1 that was based on an unreasonable determination of the facts in light of the evidence
2 presented in the State court proceeding.” 28 U.S.C. § 2254(d).

3 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state
4 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of
5 law or if the state court decides a case differently than [the] Court has on a set of materially
6 indistinguishable facts.” *Williams (Terry) v. Taylor*, 529 U.S. 362, 412–13 (2000).

7 “Under the ‘unreasonable application’ clause, a federal habeas court may grant the
8 writ if the state court identifies the correct governing legal principle from [the] Court’s
9 decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at
10 413. “[A] federal habeas court may not issue the writ simply because that court concludes in
11 its independent judgment that the relevant state-court decision applied clearly established
12 federal law erroneously or incorrectly. Rather, that application must also be unreasonable.”
13 *Id.* at 411. A federal habeas court making the “unreasonable application” inquiry should ask
14 whether the state court’s application of clearly established federal law was “objectively
15 unreasonable.” *Id.* at 409.

16 DISCUSSION

17 I. Sufficiency of the Evidence as to Jane Doe 1 Convictions

18 Petitioner claims that the evidence did not support the imposition of (A) consecutive
19 and (B) full sentences for the three rape convictions and the one conviction for penetration
20 with a foreign object against Jane Doe 1. He asserts that his sentences for those counts
21 violated his due process and Sixth Amendment rights. (Second Am. Pet. at 6.)

22 A. Consecutive Sentences

23 Petitioner claims that the trial court’s imposition of consecutive sentences violated his
24 federal constitutional rights. The relevant facts are as follows. For his attack on Jane Doe 1,
25 petitioner was convicted of three counts of rape (counts three, four and five) and one count of
26 penetration with a foreign object (count seven), the sentences for which were imposed
27 consecutively. Such a sentence was warranted, the trial court stated, because “[t]he evidence
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1 clearly supports it, that prior to the commission of this offense, [petitioner] had a reasonable
2 opportunity to reflect upon his actions, and nevertheless resumed sexually assaultive
3 behavior.” (Ans., Ex. C at 12.) The state appellate court agreed that substantial evidence
4 supported the convictions and sentence:

5 In this case, there was substantial evidence before the jury — in Jane Doe 1’s
6 recorded statement to Officer Karsseboom — that [petitioner] penetrated Jane
7 Doe 1’s vagina with his penis three times, the first time for 30 minutes, the
8 second for 20 to 25 minutes, and the final time for 15 minutes. Jane Doe 1
9 further stated that between the second and third penetrations [petitioner] struck
10 her in the face to stop her from screaming. There was also substantial evidence
11 on the tape that he stopped between acts of penile penetration and committed a
12 separate act of digital penetration that lasted for two or three minutes. On this
13 record, a reasonable trier of fact could well have found that [petitioner] had a
14 reasonable opportunity for reflection between each of the sexual offenses he
15 committed against Jane Doe 1, but nonetheless chose to resume his assaultive
16 behavior.

17 (*Id.* at 14.) The trial court imposed consecutive sentences pursuant to Cal. Penal Code
18 § 667.6(d), which reads:

19 A full, separate, and consecutive term shall be imposed for each violation of an
20 offense specified in subdivision (e) if the crimes involve separate victims or
21 involve the same victim on separate occasions. [¶] In determining whether
22 crimes against a single victim were committed on separate occasions under this
23 subdivision, the court shall consider whether, between the commission of one
24 sex crime and another, the defendant had a reasonable opportunity to reflect
25 upon his or her actions and nevertheless resumed sexually assaultive behavior.
26 Neither the duration of time between crimes, nor whether or not the defendant
27 lost or abandoned his or her opportunity to attack, shall be, in and of itself,
28 determinative on the issue of whether the crimes in question occurred on
separate occasions.

Petitioner’s claim that the trial court violated his federal rights by imposing
consecutive sentences does not warrant habeas relief. First, whether the offenses qualified as
separate crimes under Cal. Penal Code § 667.6(d) is a matter of state, not federal, law and
therefore is not cognizable on federal habeas review. *Swarthout v. Cooke*, 131 S. Ct. 859,
861–62 (2011). The state appellate court’s ruling that the evidence supported a finding of
separate crimes under state law binds this federal habeas court, *Bradshaw v. Richey*, 546 U.S.
74, 76 (2005), even if state law were erroneously applied or interpreted, *Cooke*, 131 S. Ct. at
863.

1 Second, even if such claim were reviewable here, habeas relief would still be
2 unwarranted. The state court's determination that there were four separate crimes was not
3 unreasonable. The jury convicted petitioner of four separate crimes: three counts of rape and
4 a count of penetration with a foreign object. When reviewing a state court conviction, a
5 federal court must determine only whether "after viewing the evidence in the light most
6 favorable to the prosecution, any rational trier of fact could have found the essential elements
7 of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).
8 Only if no rational trier of fact could have found proof of guilt beyond a reasonable doubt
9 may the writ be granted. *Id.* at 324. "[T]he only question under *Jackson* is whether [the
10 jury's] finding was so insupportable as to fall below the threshold of bare rationality."
11 *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012).

12 A review of the trial transcript supports the trial court's decision that petitioner
13 committed four separate sexual offenses against Jane Doe 2. In her statement to the police,
14 an audiorecording of which was played for the jury at petitioner's trial, Jane Doe 2 discussed
15 in detail three separate incidents of rape, and an incident of penetration with a foreign object.
16 (Ans., Ex. J, Vol. 3 at 484-508.) Such evidence shows that the jury's finding as to each
17 charge was not so insupportable as to fall below the threshold of bare rationality. The trial
18 court's reliance on the jury finding that there were four separate crimes, and its reliance on
19 the evidence presented at trial, was not unreasonable. The state appellate court's rejection of
20 petitioner's claim was reasonable, and is entitled to AEDPA deference. This claim is
21 DENIED.

22 B. Full Terms

23 Petitioner claims that the trial court's imposition of "full" terms for counts four, five,
24 and seven violated his Sixth Amendment jury trial rights. (Second Am. Pet. at 6; Trav. at 5.)
25 The Sixth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that
26 increases the penalty for a crime beyond the prescribed statutory maximum must be
27 submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530
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1 U.S. 466, 490 (2000). The Supreme Court later clarified “the ‘statutory maximum’ for
2 *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the
3 facts reflected in the jury verdict or admitted by the defendant. . . . In other words, the
4 relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding
5 additional facts, but the maximum he may impose without any additional facts.” *Blakely v.*
6 *Washington*, 542 U.S. 296, 303–04 (2004). In California, this means “the middle term
7 prescribed in California’s statutes, not the upper term, is the relevant statutory maximum.”
8 *Cunningham*, 549 U.S. 270, 288 (2007). In *Cunningham*, the Supreme Court, citing
9 *Apprendi* and *Blakely*, held California’s Determinate Sentencing Law violates the Sixth
10 Amendment right to a jury trial to the extent it “authorizes the judge, not the jury, to find the
11 facts permitting an upper term sentence” beyond the middle term. *Id.* at 293.¹

12 Petitioner is under two misapprehensions. First, he mistakenly equates “full” with
13 *Cunningham*’s “upper term.”² This first misapprehension gives rise to the second, that he
14 received upper term sentences. He did not. The record shows that the trial court imposed the
15 midterm, not the upper term, for counts four and five. (Ans., Ex. J, Vol. 8 at 1982.) For
16 count seven, the trial court imposed the “mitigated, or low, term.” (*Id.* at 1893.)³
17 *Cunningham* applies only when an upper term is imposed. Because the court imposed the
18 middle and low terms, *Cunningham* is not implicated. The state court’s rejection of this
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20 ¹ Petitioner was sentenced in 2006. In 2007, the law changed. “[F]ollowing
21 *Cunningham*, the California legislature amended its statutes such that imposition of
22 the lower, middle, or upper term is discretionary, and does not depend on . . .
23 aggravating factors.” *Butler v. Curry*, 528 F.3d 624, n. 20 (9th Cir. 2008). Under this
24 March 30, 2007 amendment, California Penal Code § 1170(b) provides that “when a
25 judgment of imprisonment is to be imposed and the statute specifies three possible
26 terms, the choice of the appropriate term shall rest within the sound discretion of the
27 court.”

28 ² This *Cunningham* claim is also denied because petitioner failed to raise it in
his petition. It appeared in his traverse only. *See Cacoperdo v. Demosthenes*, 37 F.3d
504, 507 (9th Cir. 1994).

³ Count three was calculated under California’s indeterminate sentencing
scheme. (Ans., Ex. J, Vol. 8 at 1888–89.) *Cunningham*, which addressed concerns
about sentences imposed under California’s Determinate Sentencing Law, does not
apply to count three.

1 claim was reasonable, and is entitled to AEDPA deference. Accordingly, the claim is
2 DENIED.

3 II. Due Process

4 Petitioner claims that his right to due process was violated because the charging
5 instrument led him to believe that the Jane Doe 1 rape and digital penetration charges (counts
6 four, five and seven) were subject to sentencing under subsection (c) of Cal. Penal Code
7 § 667.6,⁴ rather than subsection (d), under which he was sentenced. The statutes differ in that
8 (c) applies to multiple crimes committed against *one* person on one occasion, while (d)
9 applies to crimes involving *separate* victims (or the same victim on different occasions).

10 Under each charge at issue here, the allegations said in part "SEX OFFENSES —
11 SEPARATE VICTIMS OR OCCASIONS CLAUSE." (Ans., Ex. 1, Vol. 1 at 15, 17, 20.)

12 The state appellate court rejected petitioner's claim on two grounds:

13 We agree that these allegations failed to invoke the separate occasions portion
14 of section 667.6, subdivision (d) that the trial court ultimately relied on in
15 sentencing [petitioner] under counts four, five, and seven. However, in our
16 view, as long as the evidence supports the application of that provision there is
no due process requirement that it be noticed with particularity in the
information . . .

17 Even if due process did require a specific separate occasions allegation under
18 section 667.6, subdivision (d), [petitioner's] pleading claim would still fail. He
waived any such claim by failing to raise it at the sentencing hearing.

19 (Ans., Ex. C at 15.)

20 It is clearly established federal law that a criminal defendant has a Sixth Amendment
21 right to be informed of any charges against him, and that a charging document, such as an
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23 ⁴ Cal. Penal Code § 667.6(c) reads: "In lieu of the term provided in Section
24 1170.1, a full, separate, and consecutive term may be imposed for each violation of an
25 offense specified in subdivision (e) if the crimes involve the same victim on the same
26 occasion. A term may be imposed consecutively pursuant to this subdivision if a
27 person is convicted of at least one offense specified in subdivision (e). If the term is
28 imposed consecutively pursuant to this subdivision, it shall be served consecutively to
any other term of imprisonment, and shall commence from the time the person
otherwise would have been released from imprisonment. The term shall not be
included in any determination pursuant to Section 1170.1. Any other term imposed
subsequent to that term shall not be merged therein but shall commence at the time the
person otherwise would have been released from prison."

1 information, is the means by which such notice is provided. *Gautt v. Lewis*, 489 F.3d 993,
2 1004 (9th Cir. 2007) (citing *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)). The principal
3 purpose of the information is to provide the defendant with a description of the charges
4 against him in sufficient detail to enable him to prepare a defense. See *James v. Borg*, 24
5 F.3d 20, 24 (9th Cir. 1994). An information is not constitutionally defective if it states “the
6 elements of an offense charged with sufficient clarity to apprise a defendant of what to
7 defend against.” *Miller v. Stagner*, 757 F.2d 988, 994 (9th Cir. 1985) (quoting *Russell v.*
8 *United States*, 369 U.S. 749, 763–64 (1962)).

9 Habeas relief is not warranted here. Petitioner was not deprived of his right to notice
10 of the charges, but of sentencing enhancements. While such notice is significant, petitioner
11 has not shown how this lack of notice injured his defense to the charges, or deprived him of a
12 reason to argue for a sentencing reduction. Also, however defective the information, it did
13 provide petitioner notice that his sentence would be affected if he was found guilty of crimes
14 against more than one victim. The sentencing information was entitled “SEX OFFENSES —
15 SEPARATE VICTIMS OR OCCASIONS CLAUSE.” On this record, the state appellate
16 court’s rejection of his claim was reasonable and is entitled to AEDPA deference.
17 Accordingly, this claim is DENIED.

18 **III. Imposition of Consecutive Sentences**

19 Petitioner claims that the imposition of consecutive sentences violated his Sixth
20 Amendment right to have a sentencing enhancement submitted to a jury and proved beyond a
21 reasonable doubt. This claim is foreclosed by Ninth Circuit precedent. “The decision
22 whether to impose sentences concurrently or consecutively is a matter of state criminal
23 procedure and is not within the purview of federal habeas corpus.” *Cacoperdo v.*
24 *Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994). More specifically, Sixth Amendment jury
25 trial protections do not apply to a trial court’s decision to impose concurrent or consecutive
26 sentences, see *Oregon v. Ice*, 129 S. Ct. 711, 714–15 (2009). The state appellate court’s
27 rejection of this claim was reasonable. This claim is DENIED.
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CONCLUSION

The state court's adjudication of the claims did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, the petition is DENIED.

A certificate of appealability will not issue. Reasonable jurists would not "find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner may seek a certificate of appealability from the Ninth Circuit. The Clerk shall enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.

DATED: December 10, 2014


RICHARD SEEBORG
United States District Judge