

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT G. RUSSELL, AK4805,

Petitioner,

v.

RON DAVIS, Warden,

Respondent(s).

Case No. [18-cv-05527-CRB](#) (PR)

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

Petitioner Robert G. Russell, a state prisoner proceeding pro se and currently incarcerated at San Quentin State Prison, seeks a writ of habeas corpus under 28 U.S.C. § 2254 challenging the state courts' denial of his 2013 and 2018 petitions requesting resentencing pursuant to Proposition 36. For the reasons set forth below, the petition for a writ of habeas corpus will be denied.

I. BACKGROUND

A. Three Strikes Reform Act – Proposition 36

Under the Three Strikes Law originally enacted in 1994, a defendant convicted of any felony who had two prior convictions for serious or violent felonies was subject to a twenty-five years to life sentence. People v. Conley, 63 Cal. 4th 646, 651 (2016). On November 7, 2012, Proposition 36, also known as the Three Strikes Reform Act of 2012, which modified California's Three Strikes Law as it applies to certain third-strike indeterminate sentences, became effective. See Cal. Penal Code § 1170.126 (Section 1170.126). In pertinent part, Proposition 36 created a post-conviction release proceeding whereby a prisoner who is serving an indeterminate life sentence imposed pursuant to the Three Strikes Law for a felony conviction that is not a serious or violent felony and who is not otherwise disqualified may have his sentence recalled and be sentenced as a second-strike offender unless the court determines that resentencing would pose an unreasonable risk of danger to public safety. See People v. Yearwood, 213 Cal. App. 4th 161, 168

(2013) (discussing Proposition 36, codified as Section 1170.126). But the resentencing provisions of Proposition 36 “do not apply in cases in which the defendant was previously convicted of certain enumerated offenses, including those involving sexual violence, child sexual abuse, homicide or attempted homicide, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, or any serious or violent felony punishable by life imprisonment or death.” Conley, 63 Cal. 4th at 653 (citation omitted); see also Cal. Pen. Code § 1170.126(e)(3) (limiting resentencing relief to defendants who do not have prior convictions for any offenses listed under Section 1170.12(c)(2)(C)(iv)).

B. Statement of the Case

Petitioner was convicted by a jury in Santa Cruz County Superior Court of various offenses arising from a traffic accident in which, while driving drunk, he struck a pedestrian who was walking on the road with his wife. Following a bench trial, the court found that petitioner had six prior strike convictions and six prior serious felony convictions and, on December 2, 2011, sentenced him to fifty years to life in state prison pursuant to California’s Three Strikes Law. Petitioner appealed.

Among other claims on appeal, petitioner raised a claim under People v. Romero, 13 Cal. 4th 497 (1996),¹ alleging that the trial court erred in denying his motion to strike one or more findings that he suffered a prior conviction for the purposes of the Three Strikes Law. People v. Russell, No. H037744, 2014 WL 1348813, at *1 (Cal. Ct. App. 6th Dist. Apr. 7, 2014) (Resp. Ex. 1 (ECF No. 16-3 at 3-4)). On April 7, 2014, the California Court of Appeal modified the judgment of the trial court to strike two prior-prison-term enhancements, but otherwise affirmed the trial court. Id. at *14. In its rejection of the Romero claim, the state appellate court noted that the trial court had denied the Romero motion upon observing that petitioner’s current crimes were “serious” and that he had “seven Three-Strikes-eligible convictions.” Id. at *10. The state appellate court listed petitioner’s most recent prior offenses as “first degree burglary, attempted murder, assault to commit rape, aggravated assault, and false imprisonment,” which all took place

¹In Romero, the California Supreme Court made clear that sentencing courts may exercise their discretion to strike sentence enhancements based on prior “strike” convictions.

1 during an incident that “involved an 85-year-old neighbor who was lucky to survive his sexual
2 assault and strangulation of her.” Id. Petitioner previously served seventeen years of an eighteen-
3 year prison sentence for those crimes. Id. The state appellate court further noted that petitioner
4 had committed those offenses “three days after completing parole for molesting a six-year-old
5 neighbor in 1977,” for which he had received an indeterminate sentence of three years to life and
6 served the minimum term. Id. at *10 n.6.

7 On June 18, 2014, the Supreme Court of California denied review.

8 From 2013 to 2015, petitioner filed state habeas petitions and was denied relief in the state
9 superior, appellate and supreme courts.

10 On June 5, 2015, petitioner filed his first federal habeas corpus petition challenging his
11 conviction, which the court denied on April 20, 2018. See Russell v. Fox, No. 15-cv-02709-CRB
12 (PR) (N.D. Cal. Apr. 20, 2018) (order denying petition for a writ of habeas corpus).

13 On June 4, 2018, petitioner filed a habeas corpus petition in the Santa Cruz County
14 Superior Court, which the court denied on June 6, 2018. On June 29, 2018, petitioner filed a
15 habeas corpus petition in the California Court of Appeal, which the court denied on July 16, 2018.
16 On July 23, 2018, petitioner filed a habeas corpus petition in the Supreme Court of California,
17 which the court denied on August 29, 2018.

18 On September 10, 2018, petitioner filed the instant federal habeas action under § 2254. On
19 December 11, 2018, the court dismissed the petition with partial leave to amend. On December
20 19, 2018, petitioner filed a First Amended Petitioner (FAP) and, on December 24, 2018, he filed
21 an addendum to the FAP.

22 On June 18, 2019, the court directed respondent to show cause why a writ of habeas corpus
23 should not be granted as to the FAP. On September 30, 2019, respondent filed an answer to the
24 order to show cause. On October 11, 2019, petitioner filed a traverse.

25 **II. DISCUSSION**

26 **A. Standard of Review**

27 This court may entertain a petition for a writ of habeas corpus “in behalf of a person in
28 custody pursuant to the judgment of a State court only on the ground that he is in custody in

1 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

2 The writ may not be granted with respect to any claim that was adjudicated on the merits in
3 state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was
4 contrary to, or involved an unreasonable application of, clearly established Federal law, as
5 determined by the Supreme Court of the United States; or (2) resulted in a decision that was based
6 on an unreasonable determination of the facts in light of the evidence presented in the State court
7 proceeding.” Id. § 2254(d).

8 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court
9 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if
10 the state court decides a case differently than [the] Court has on a set of materially
11 indistinguishable facts.” Williams v. Taylor, 529 U.S. 362, 412-13 (2000). “Under the
12 ‘reasonable application clause,’ a federal habeas court may grant the writ if the state court
13 identifies the correct governing legal principle from [the] Court’s decisions but unreasonably
14 applies that principle to the facts of the prisoner’s case.” Id. at 413.

15 “[A] federal habeas court may not issue the writ simply because that court concludes in its
16 independent judgment that the relevant state-court decision applied clearly established federal law
17 erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411. A
18 federal habeas court making the “unreasonable application” inquiry should ask whether the state
19 court’s application of clearly established federal law was “objectively unreasonable.” Id. at 409.

20 The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is
21 in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court
22 decision. Id. at 412; Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003) overruled on other
23 grounds by Lockyer v. Andrade, 538 U.S. 63 (2003). While circuit law may be “persuasive
24 authority” for purposes of determining whether a state court decision is an unreasonable
25 application of Supreme Court precedent, only the Supreme Court’s holdings are binding on the
26 state courts and only those holdings need be “reasonably” applied. Id.

27 B. **Due Process Claim**

28 Petitioner alleges that in 2013 and in 2018 he filed petitions for resentencing under

1 Proposition 36 based on his having been convicted of a “non-violent offense” and his being a
2 “non-violent third striker,” but that the state courts arbitrarily and without any explanation denied
3 the petitions in violation of his federal due process rights. FAP (ECF No. 7) at 1, 2. Petitioner
4 specifically notes that in March 2013 he “wrote the [state superior] court asking for reasons for
5 [the] denial” and, on or about March 26, 2013, he “received a notice from the court directing the
6 court not to entertain direct communication with petitioner.” Id. at 2. Petitioner attaches as
7 “Exhibit A” to the FAP a “Minute Order” dated March 26, 2013 that lists Santa Cruz County
8 Superior Court case number “M51085,” which is the relevant underlying criminal case, and the
9 “Charges” stemming from the traffic accident where petitioner struck a pedestrian. Id. at 5.
10 Below the list of charges is the following: “Per order of Judge Ariadne J. Symons, Defendant has
11 an appellate attorney who is representing him. The court will not entertain direct communication
12 from the defendant while this matter is on appeal.” Id.

13 Respondent points out that petitioner “did not attach to the present petition what he alleges
14 to be the Proposition 36 resentencing petitions he filed in the superior court in 2013 and 2018.”
15 Memo. of Points and Auth. in Supp. of Ans. (ECF No. 16-1) at 6 n.2. The court confirms that the
16 record does not include any Proposition 36 resentencing petitions filed in the state superior court
17 in 2013 or 2018. But as to the alleged 2013 resentencing petition, petitioner points to a March
18 2013 letter he wrote the state superior court asking for reasons for the denial of his Proposition 36
19 resentencing petition. FAP at 1, 2. And as to the alleged 2018 resentencing petition, the record
20 shows that the June 4, 2018 habeas petition filed in state superior court only challenged the
21 imposition of “an illegal legal mandate 12/20/2011” (Resp. Ex. 7 (ECF No. 16-3 at 162)) but is
22 unclear as to whether petitioner raised his resentencing request in his subsequent petitions to the
23 state appellate and supreme courts. But even if he did, his claim that the state courts arbitrarily
24 denied them in violation of his due process rights is without merit.

25 It is well established that alleged errors in the application of state sentencing law are not
26 cognizable on federal habeas review. See Richmond v. Lewis, 506 U.S. 40, 50 (1992). Petitioner
27 nonetheless argues that the state courts’ allegedly arbitrary and capricious denials of his 2013 and
28 2018 petitions for resentencing under Proposition 36 is cognizable on federal habeas review

1 because they amounted to violations of his federal due process rights. But the state courts' denial
2 of petitioner's requests for resentencing under Proposition 36 was far from arbitrary and
3 capricious because it was correct under the plain language of Proposition 36. Section
4 1170.126(e)(3) makes clear that resentencing relief under Proposition 36 is limited to defendants
5 who do not have a prior conviction for any offenses listed in Section 1170.12(c)(2)(C)(iv); that list
6 includes some of petitioner's prior convictions, including his prior conviction for attempted
7 murder (see Cal. Pen. Code § 1170.12(c)(2)(C)(iv)(IV) (attempted homicide)) and his prior
8 conviction for molestation of a six-year-old child (see Cal. Pen. Code § 1170.12(c)(2)(C)(iv)(III)
9 (lewd or lascivious act involving a child under fourteen)). Consequently, petitioner's prior
10 convictions render him ineligible for resentencing under Proposition 36. See Conley, 63 Cal. 4th
11 at 653. Under the circumstances, it simply cannot be said that the state courts' denial of
12 petitioner's requests for resentencing under Proposition 36 was arbitrary and capricious or, much
13 less, contrary to, or an unreasonable application of, clearly established Supreme Court precedent.
14 See 28 U.S.C. § 2254 (d). Petitioner is not entitled to federal habeas relief.

15 **III. CONCLUSION**

16 For the foregoing reasons, the FAP is DENIED. And pursuant to Rule 11 of the Rules
17 Governing Section 2254 Cases, a certificate of appealability (COA) under 28 U.S.C. § 2253(c) is
18 DENIED because it cannot be said that "reasonable jurists would find the district court's
19 assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473,
20 484 (2000).

21 **IT IS SO ORDERED.**

22 Dated: February 14, 2020

23
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25 CHARLES R. BREYER
26 United States District Judge
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT G. RUSSELL,
Plaintiff,

v.

RON DAVIS,
Defendant.

Case No. 3:18-cv-05527-CRB

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on February 14, 2020, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Robert G. Russell ID: AK4805
San Quentin State Prison
San Quentin, CA 94974

Dated: February 14, 2020

Susan Y. Soong
Clerk, United States District Court

By: 
Lashanda Scott, Deputy Clerk to the
Honorable CHARLES R. BREYER